No. 22-956

In the United States Court of Appeals for the Second Circuit

David P. Demarest,

Plaintiff-Appellant,

-v-

Town of Underhill, a municipality and charter town,
Daniel Steinabauer, as an individual and in official capacity as Selectboard Chair, Bob Stone, as an individual and in official capacity, Peter Duvall, in official capacity, Dick Albertini, as an individual and in official capacity, Judy Bond, in official capacity, Peter Brooks, in official capacity, Seth Friedman, in official capacity, Marcy Gibson, as an individual and in official capacity, Barbara Greene, in official capacity, Carolyn Gregson, in official capacity, Stan Hamlet, as an individual and in official capacity, Rick Heh, as an individual and in official capacity, Brad Holden, as an individual and in official capacity, Faith Ingulsrud, in official capacity, Kurt Johnson, in official capacity, Karen McKnight, as an individual and in official capacity, Nancy McRae, as an individual and in official capacity, Michael Oman, in official capacity, Steve Owens, as an individual and in official capacity, Mary Pacifici, in official capacity, Clifford Peterson, as an individual and in official capacity, Patricia Sabalis, as an individual and in official capacity, Cynthia Seybolt, as an individual and in official capacity, Trevor Squirrell, as an individual and in official capacity, Rita St. Germain, as an individual and in official capacity, Daphne Tanis, as an individual and in official capacity, Walter Ted Tedford, as an individual and in official capacity, Steve Walkerman, as an individual and in official capacity, Mike Weisel, as an individual and in official capacity, Barbara Yerrick, in official capacity, Anton Kelsey, in official capacity,

Defendants-Appellees,

{ DEFENDANTS CONTINUED ON THE INSIDE COVER }

On Appeal from the United States District Court for the
District of Vermont (Burlington), No. 21-cv-167

Plaintiff-Appellant's Brief

DAVID DEMAREST
PLAINTIFF-APPELLANT PRO SE
P.O. BOX 144
UNDERHILL, VT 05489
TELEPHONE: (802) 363-9962
DAVID@VERMONTMUSHROOMS.COM

Front Porch Forum, as a Public Benefit 15 Corporation fairly treated as acting under color of law due to past and present 16 factual considerations while serving the traditional governmental role of providing 17 “Essential Civic Infrastructure” ranging from the di, Jericho Underhill Land Trust, as NonProfit 21 Corporation fairly treated as acting under color of law due to past and present 22 factual considerations and a special relationship willfully participating in and 23 actively directing acquisition of municipal property by the Town of Und,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from the final Order of March 29, 2022 (A-226), by Judge William J. Sessions III from the U.S. District Court for the District of Vermont, granting Municipal Defendant-Appellees' motion to dismiss (A-111) under Fed.R.Civ.P. Rule 12(b)(6) which dismissed all of Plaintiff-Appellant's § 1983 causes of action under the First, Fifth, Ninth and Fourteenth Amendments of the U.S. Constitution and *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

The district court jurisdiction is based upon 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Plaintiff filed a timely notice of appeal on April 27, 2022 (A-259) involving claims against Defendant Town of Underhill and the town officials named in the Notice of Appeal ("Municipal Defendants"). This Court has appellate jurisdiction court under 28 U.S.C. § 1291 to review the final decision the district court made dismissing Counts 1-6 and 11-12, which included all Takings and Due Process Claims against Municipal Defendants, with prejudice and without leave to amend on March 29, 2021.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Rooker-Feldman preclude District Court jurisdiction on independent Causes of Action alleging injuries *caused by Defendant decisions* if a State court has ratified narrowly defined Defendant decisions under a deferential standard of review, akin to a *writ of certiorari*?
2. Does Rooker-Feldman preclude District Court jurisdiction over a challenge to an unconstitutionally vague State statute?
3. Does *res judicata* or the statute of limitations preclude Plaintiff from standing to bring present 42 U.S.C. § 1983 takings and due process Causes of Action against Municipal Defendants which were never litigated and did not accrue until *Knick v. Township of Scott* wisely overturned *Williamson County*?

PRELIMINARY STATEMENT

This appeal involves the Municipal Defendants individually stated on the Notice of Appeal; dismissal of other Defendants is not at issue due to the *Ashcroft v. Iqbal* plausibility pleading standard.

Present 42 U.S.C. § 1983 takings and due process causes of action against Municipal Defendants were not and never could have been raised during Vermont state court review of municipal decisions involving the Town Highway 26 (TH26) corridor under the Vt.R.Civ.P. Rule 75 deferential standard of administrative review, akin to a *writ of certiorari*.

Despite 19 V.S.A. § 740 (AD-1) clearly stating:

> When a person owning or interested in lands through which a highway is laid out, altered, or resurveyed by selectboard members, objects to the necessity of taking the land, or is dissatisfied with the laying out, altering or resurveying of the highway, or with the compensation for damages, he or she may appeal, in accordance with [Vt.R.Civ.P.]Rule 74 of the Vermont Rules of Civil Procedure, to the superior court…

The 19 V.S.A. § 701(2) (AD-1) definition of "altered" as interpreted by *Ketchum v. Town of Dorset , No. 10–165.,* 22 A.3d 500, 2011 VT 49, (¶12-14 of the Order) limited Vermont courts' review of Municipal Defendants' action to a deferential Vt.R.Civ.R. Rule 75 review of a

municipal decision, instead of the ability to apply the proper non-deferential Vt.R.Civ.P. Rule 74 standard of review to Municipal Defendant decisions to make significant alterations to TH26.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

On June 21, 2021, David Demarest brought this action, pursuant to 42 U.S.C. § 1983 against Municipal Defendant Town of Underhill and individual town officials alleging:

> In violation of the Fifth Amendment, Defendants the Town of Underhill and a clique of Defendant individual town officials, acting both individually and in collusion under color of law, have recently succeeded in their long-term goal of maliciously rescinding all prior implicit and explicit promises made by The Town of Underhill to Plaintiff for reasonable access to and use of his domicile and over 50 acres of surrounding private property.
>
> …
>
> [Municipal Defendants] have also acted under color of law to discriminate against Plaintiff in multiple ways including: censoring and misrepresenting protected speech (including preventing factual evidence from ever being incorporated into the legal record in prior state litigation), intentionally and relentlessly retaliating against protected speech, obstructing the right to petition multiple times, *willfully*

> acting with *deliberate indifference* to necessary structural and procedural due process legal protections, and violating Plaintiff's substantive due process rights in *flagrant* violation of the First, Ninth, and Fourteenth Amendments.

Presently at issue, and properly alleged in both the Original and First-Amended Complaint (A-32 ¶60-67), is Defendants' conduct (not a state court's *ratification* of the Defendants' conduct):

> Approximately 12 years of preceding Vermont state court proceedings document Defendant Town of Underhill, and Defendant town officials sued in their individual capacity, decision to willfully deceive the Vermont state courts by misrepresenting or censoring relevant facts and creating frivolous debates of clearly known facts or interjecting immaterial facts."

Table 1 of Amended Complaint (A-39) partially quantifies the dramatic financial differences between parcels abutting TH26, the proximate cause of which being Municipal Defendant decisions.

B. COURSE OF PROCEEDINGS AND DISPOSITION

Plaintiff commenced this litigation by filing a *pro se*[1] Complaint on June 21, 2021. Proceedings relevant in present appeal are:

On August 2, 2021, in accordance with Fed.R.Civ.P. 15 (a)(1)(B), Plaintiff filed an amended complaint as a matter of course (A-14). On August 23, 2021, Municipal Defendants filed a Motion to Dismiss the Complaint under Fed.R.Civ.P. Rule 12(b)(6) (A-111); on September 17, 2021, Plaintiff filed Response Memorandum in Opposition together with an index to describe attachments, and eight exhibits (A-151 to A-214); on October 1, 2021, Municipal Defendants filed Reply to Response (A-216). On January 25, 2022, the Stipulated Motion to Stay Filing a Discovery Schedule was both filed and granted (D-61 and D-62 from The District Docket Report).

On March 29, 2022, The Vermont District Court issued Opinion and Order dismissing the Complaint (A-226).

Plaintiff timely filed the Notice of Appeal on April 27, 2022. (A-259).

[1] Plaintiff and co-parties had counsel in prior state court proceedings.

CHRONOLOGICAL STATEMENT OF FACTS

In 2001, Municipal Defendant-Appellee Town of Underhill ordered a central segment of TH26 to be reclassified from a Class III/Class IV town highway to a "Legal Trail" classification, but the Selectboard Reclassification Order was not filed in the town land records.

The Underhill Selectboard also adopted a Trail Ordinance (AD-3) which *inter alia*, stated:

> Permits shall be issued only to persons who, in the judgment of the Selectboard, have a legitimate need to operate a vehicle on the Crane Brook Trail. For the purposes of this ordinance, 'legitimate need' shall mean a compelling personal or business purpose.

In 2002, after both meeting with the Underhill Selectboard and hiring an attorney to review the land records, Plaintiff-Appellant David Demarest purchased parcel NR-144, "parcel of land containing 51.64 acres, more or less, located on New Road" and built his domicile under new dwelling permit B02-41.

Prior to any litigation, Defendant Town of Underhill shared general correspondence with Plaintiff, which was dated October 8, 2009 involving "whether a Selectboard grant of access [to Demarest] over the Trail is valid and if there is any way the Town could rescind the access."

Plaintiff and two neighbors retained legal counsel and submitted a Notice of Insufficiency to the Selectboard on February 17, 2010 because New Road was legally still a Class III/Class IV town highway connecting Pleasant Valley Road and Irish Settlement Road.

The 2010 Vermont Agency of Transportation Map depicted New Road as Town Highway 26 (TH26) and the Town of Underhill received Vermont AOT funding to maintain the Class III segment of TH26 located between the Town Highway Department garage and Plaintiff's parcel.

In June of 2010, a segment of TH26 heading northerly from New Road was discontinued and reclassified by the Town as a legal trail to a point where it meets what is now known as Fuller Road. That segment of legal trail is now known as the Crane Brook Trail.

Plaintiff was not a party to the Vermont Supreme Court precedent *Ketchum v. Town of Dorset* which determined, in relation to reclassification of a town highway:

> 14. Therefore, because the statute in this case was "silent on the mode of review" and did not affirmatively indicate that the selectboard's decision is final, review by certiorari through [Vt.R.Civ.P. Rule 75] provided the proper procedure for appeal to the superior court. Hunt, 159 Vt. at 440, 620 A.2d at 1266. In this posture, the court's jurisdiction is usually confined to

> reviewing questions of law and consideration of evidentiary questions is limited to determining "whether there is any competent evidence to justify the adjudication." Id. at 441, 620 A.2d at 1267 (quotation omitted). [(¶14 of the decision not in the record)]

On May 5, 2016, the Town of Underhill Selectboard denied Demarest's preliminary access permit application to a proposed 9-lot subdivision of his property with access from the current and former Town Highway 26 (TH26) corridor.

On December 1, 2016, the Vermont Agency of Natural Resources (ANR) granted Demarest's application for a wastewater systems and potable water supply permit for the subdivision plan.

Prior State Court Administrative Review of Municipal Action Pursuant to Vt.R.Civ.P. Rule 75 did not involve Causes of Action alleging § 1983 Takings or Due Process violations (or any direct Vermont constitutional analogues).

Plaintiff presented the 2020 Petition on Public Accountability to the Underhill Town Clerk with sufficient voter signatures to place advisory articles on the next ballot; the Underhill Selectboard declined to place the advisory articles on the ballot.

Prior State Court Review of Municipal Action Pursuant to Vt.R.Civ.P. Rule 75 did not involve causes of action alleging § 1983 First Amendment violations (alleging censorship, retaliation for protected speech, and violation of the right to petition), or any direct Vermont constitutional analogues.

CHRONOLOGICAL REVIEW OF MUNICIPAL ACTIONS

On February 17, 2010 counsel for Petitioner Demarest and two co-petitioners submitted a Notice of Insufficiency (A-178) to the Town of Underhill pursuant to 19 V.S.A. § 971 which petitioned:

> the Town simply acknowledge its statutory obligations and begin maintaining the entire length of TH26 as a Class 3 and Class 4 town highway — i.e., in the manner that it should have been maintained over the last several years, consistent with 19 V.S.A. § 302(a)(3)(B) and the Map on file with VTrans. (A-180).

Defendant Town of Underhill responded to the petitioners' Notice of Insufficiency within the 72 hours required by 19 V.S.A. § 302(a)(3)(B)) (A-182).

After receiving this Notice of Insufficiency, the Town of Underhill initiated the 2010 New Road Reclassification to administratively change the classification of a central segment of TH26 from

a Class 3/Class 4 town highway to a 49.5 foot wide "Legal Trail" after the requisite site visit and public hearing.

Legal counsel for Demarest and one co-party timely appealed the Municipal Defendants' June 2010 New Road Reclassification order after both the order and survey were filed in the land records.

On May 31, 2011, the Vermont Superior Court Ruling Seeking Review of Notice of Insufficiency (A-183) issued order:

> The court concludes that the Town's 2001 attempt to reclassify TH26 was not valid because the Town did not comply with the requirement that the Selectboard's order be recorded in the Town's land records. However, given the pendency of *Demarest v. Town of Underhill, No. S0937-10 CnC*, which addresses whether the Town has more recently reclassified the road properly, the court will stay any further action in this case pending resolution of that matter.

On June 26, 2012, in reference to the Municipal Defendant reclassification decision, a Superior Court decision (A-197) stated:

> This is a direct appeal to the Superior Court of the most recent reclassification decision. This case does not require referral to the Road Commissioners. It is an on the record review pursuant to [Vt.R.Civ.P. Rule 75] See Ketchum • Town of Dorset, 2011 VT 49 (mem). The court's role is to determine if there is adequate evidence to support the selectboard's decision. The court reviews only the record below without new

> evidence. There is no fact-finding. It is an appellate-style review of an administrative decision. With the [Vt.R.Civ.P. Rule 75] standard in mind, it is clear that there is no longer any reason to postpone consideration of the reclassification decision. There is no legal requirement that the road be brought back to its condition in 2001 before the court considers the issue of reclassification. This was the plan previously, but with the Ketchum decision in hand, it becomes clear that the only evidence to be considered by the court is the record of the selectboard decision making which is already complete.
>
> …
>
> Although there is no Statement of Undisputed Facts, the Town has provided a detailed account of the evidence it believes was before the selectboard when it voted for reclassification. The plaintiffs should have an opportunity to provide any supplemental information or to dispute whether the materials described were placed before the selectboard and formed a basis for its decision.
>
> (A-200 middle of page to A-201)

On September 11, 2012, the Vermont Superior Court ratified the municipal defendant's 2010 New Road reclassification under Vt.R.Civ.P. Rule 75; counsel for Demarest and one co-party timely appealed the case to the Vermont Supreme Court.

On June 26, 2013, County Road Commissioners issued Decision, (A-202) "Repairs are to consist of those repairs recommended by petitioners…" (A-207)

On September 27, 2013, the Vermont Supreme Court ratified the 2010 New Road Reclassification in accordance with the limitations of the Vermont statutory definition of "altered" given by 19 V.S.A. § 701(2) stating:

> ¶ 9. Also while petitioners' appeal was pending, this Court issued *Ketchum v. Town of Dorset,* 2011 VT 49, 190 Vt. 507, 22 A.3d 500 (mem.). In *Ketchum*, we rejected the argument that reclassification constitutes an "alteration" under *19 V.S.A. § 740*, and consequently, rejected the argument that an appeal of a reclassification decision requires the appointment of a panel of commissioners to review a town's reclassification decision. We held that "review by certiorari through [Vt.R.Civ.P. Rule 75] provided the proper procedure for appeal to the superior court." In such cases, the superior court conducts an on-the-record review to determine if there was adequate evidence to support the town's decision. (noting that in [Vt.R.Civ.P. Rule 75] appeals "jurisdiction is usually confined to reviewing questions of law, and consideration of evidentiary questions is limited to determining whether there is any competent evidence to justify the adjudication"

On May 1, 2015, the February 2010 Notice of Insufficiency involving Class 3 and Class 4 segments of TH26 converted into a "Legal Trail" was dismissed as moot:

> we note that a town has wide discretion in determining the extent to which to maintain a Class 4[2] road, 19 V.S.A. § 310(b). We reject the notion that petitioners acquired some type of right to an undefined level of maintenance by filing a lawsuit, and that they should consequently be allowed to avoid basic subject matter jurisdiction requirements, including the requirement that a controversy remain "live" throughout the course of a legal proceeding. This segment has been deemed a trail, and there is no legal basis on which to order the Town to maintain a trail. (SA-76)

On January 15, 2016, the Vermont Supreme Court ratified Defendant Town of Underhill's discretion in relation to the second Notice of Insufficiency submitted by Demarest and two co-petitioners involving the segment of TH26 which had retained a Class IV town highway classification after the 2010 New Road Reclassification, stating:

> Although the Town's road policy establishes less

[2] The first-filed Notice of Insufficiency involved segments of TH26 which were Class 3 and Class 4 prior to Municipal Defendant's 2010 New Road Reclassification. A second Notice involved the still unmaintained Class 4 segment remaining after the reclassification.

> town responsibility for Class 4 highway repair and maintenance than appellees desire, or even than the Commissioners recommend, it is fully consistent with the discretion accorded by § 310(b). Both appellees and the Commissioners are bound to respect the Town's discretion, and cannot "trump the selectboard's decision through their own view of what the public requires." Id. at 622, 795 A.2d at 1269. [(from decision not in the record)]

On May 26, 2016, Demarest appealed the Underhill Selectboard's May 5, 2016 denial of a preliminary access permit to the Vermont Superior court under Vt.R.Civ.P. Rule 75.

On April 10, 2019, the Vermont Superior Court declined to issue a declaratory judgment that Demarest has a 19 V.S.A. § 717(c) right of access to his property on the former TH26 segment which Municipal Defendants had ordered reclassified as a Legal Trail in 2010, and granted the Defendant Motion for Partial Summary Judgement based upon *res judicata*:

> The trial court's ruling on Demarest's [Vt.R.Civ.P. Rule 75] appeal regarding reclassification was a final judgment on the merits between the same parties, and the claim for declaratory relief regarding Demarest's right of access to what is now Crane Brook Trail could have been fully litigated in that proceeding.

On April 30, 2020, Demarest's Appellant brief to the Vermont Supreme Court, still under the Vt.R.Civ.P. Rule 75 standard of review, did not argue any Takings or Due Process claims.

On February 26, 2021, the Vermont Supreme Court decision affirmed the lower court's application of *res judicata* to the last Vt.R.Civ.P. Rule 75 Appeal of a Municipal Decision, due to the wording of the Underhill Trail Ordinance:

> As explained above, the Selectboard did not reach the question of whether to grant plaintiff an access permit to a town highway under [19 V.S.A. § 1111]. The Selectboard denied plaintiff's request to allow vehicular access across Crane Brook Trail pursuant to its discretion under the Town ordinance. [(¶33 of decision not in the record)]

SUMMARY OF THE ARGUMENT

> Deferential: showing or expressing respect and high regard due a superior or an elder: showing or expressing deference
>
> ["Deferential." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/deferential. Accessed 26 Jun. 2022]

Plaintiff-Appellant was not and could not have been a party to the Vermont Supreme Court's *Ketchum* interpretation of "altered" (¶12 of decision not in the record) and presently has standing to challenge the

Constitutional validity of 19 V.S.A. §701(2) as Vermont court *stare decis* has caused this statute to be applied. In matters which *may* implicate a town's eminent domain powers, such as whether or not the town "altered" TH26 (according to the §701(2) definition, as opposed *any* other definition of the word), the Vt.R.Civ.P. Rule 74 appeal process would provide structural due process, but a deferential Vt.R.Civ. P. Rule 75 appeal process merely forced Vermont courts to ratify Municipal Defendants' record and municipal "discretion."

This Court's decision in *Cho ex rel. Situated v. City of N.Y.*, Docket No. 18-337-cv (910 F.3d 639) perfectly describes the error of applying Rooker-Feldman Doctrine to present Causes of Action:

> On appeal here, plaintiffs allege, inter alia, that the state courts merely ratified rather than produced their injuries, and that therefore, the district court erred when it dismissed their suit for lack of jurisdiction. We thus begin by analyzing Rooker-Feldman's "core" substantive requirement: are the injuries of which plaintiffs complain produced by the state-court judgments at question or merely ratified by such judgments? We conclude that they are merely ratified…

Res judicata does not preclude present Causes of Action which are timely filed after the legal ambiguities built into an otherwise unenforced Trail Ordinance were finally decided, and exactly two years after *Knick v. Township of Scott* corrected the error of *Williamson County* precedent.

ARGUMENT

A. STANDARD OF REVIEW FOR Fed.R.Civ.P. Rule 12(b)(6)

This Court reviews the granting of a motion to dismiss on the pleadings *de novo*. *See Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005) ("We apply a *de novo* standard of review to the grant of a motion to dismiss on the pleadings, accepting as true the complaint's factual allegations and drawing all inferences in the plaintiff's favor.")

B. PRIOR DEFERENTIAL STANDARD OF REVIEW DOES NOT APPLY TO § 1983 CAUSES OF ACTION

Vermont statute constrained all prior Vermont Supreme Court appeals in which Plaintiff (and former co-parties) challenged municipal decisions to *fully deferential* Vt.R.Civ.P. Rule 75 *ratification* of a Municipal Defendant record, akin to a *writ of certiorari.*

Present claims require a non-deferential standard of review after discovery which conforms to Federal evidentiary standards.

The Opinion and Order under appeal correctly states:

> To allege a violation pursuant to § 1983, a plaintiff must plausibly plead "(1) actions taken under color of [state] law; (2) deprivation of a constitutional or statutory right; (3) causation; [and] (4) damages." *Roe v. City of Waterbury*, 542 F.3d 31, 36 (2d Cir. 2008).

The Opinion and Order under appeal also correctly states:

> The accrual date of a § 1983 cause of action, however, is a "question of federal law that is not resolved by reference to state law." *Wallace*, 549 U.S. at 388; see also *Spak v. Phillips*, 857 F.3d 458, 462–63 (2d Cir. 2017). Under federal law, accrual occurs "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief[.]" *Wallace*, 549 U.S. at 388

C. STATUTE OF LIMITATIONS AND ACCRUAL DATE

The Statute of Limitations for a § 1983 Takings claim in Vermont is six years (12 V.S.A. § 511) and the earliest potential takings and due process accrual date occurred on June 21, 2019, when *Knick v. Township of Scott* corrected the legal error of *Williamson Country.* Vermont statutory changes delayed the ability to raise claims of a taking of a reversionary property right because "*reclassifications"* no longer meet the vague statutory definition of "*altered*."

For the purposes of deciding a Fed.R.Civ.P. Rule 12(b)(6) motion if the Court does not presently "accept as true all of the allegations contained in a complaint," Plaintiff should be granted leave to correct the unartfully pleaded portions of the complaint involving Municipal Defendants named in the Notice of Appeal after a limited discovery period to reach the higher "plausibility standard" created by *Ashcroft v. Iqbal, 556 U.S. 662, 678.* (2009).

D. ROOKER-FELDMAN & *RES JUDICATA* INAPPLICABLE

Rooker-Feldman Doctrine is purely a jurisdictional bar to District Court *appellate review* of State court decisions between parties in privity, it does not eliminate a District Court jurisdiction on Takings and Due Process causes of action complaining of harm *caused by* municipal defendants' actions and inactions or standing to challenge an unconstitutionally vague statute which granted unbridled discretion to the municipal defendants.

Despite years of knowing Municipal Defendants *intention* to rescind Plaintiff's personal use of a significant portion of TH26, the denial of Plaintiff's *preliminary* access permit on May 5, 2016 was the first instance of his personal access right and reasonable investment backed

returns being irrefutably impacted (despite still requiring exhaustion of potential State remedies under the error of Williamson County's *stare decis*). Municipal Defendants' circular arguments are now undeniable.

Despite a common dictionary definition of "altered" being "Made different in some way,[3]" Municipal Defendant discretion to rescind Plaintiff's 19 V.S.A. § 717(c) (AD-1) self-executing private right of access over a former town highway ***still*** cannot meet the 19 V.S.A. § 701(2) definition of "altered" as precedentially applied.

State court ratification of municipal defendants' discretion during Vt.R.Civ.P. Rule 75 appeals simply cannot be extrapolated into a Rooker-Feldman or *res judicata* preclusion since present Federal Causes of Action had not yet accrued and were never previously litigated. In accordance with the Full Faith and Credit Clause of 28 U.S.C. § 1738, Plaintiff adds emphasis to "Response in Opposition" section III(D) (A-171), which refers to ¶50 A, B and C of the First Amended Complaint

[3] "Altered." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/altered. Accessed 26 Jun. 2022.

listing the very few independent findings of fact made throughout State court review of Municipal Defendant decisions (A-28).

> [T]he ordinary and expected outcome of many a meritorious §1983 suit is to declare unenforceable (whether on its face or as applied) a state statute as currently written. See, e.g., *Cedar Point Nursery v.Hassid*, 594 U. S. ___ (2021). And in turn, the unsurprising effect of such a judgment may be to send state legislators back to the drawing board. See, e.g., *Kolender v. Lawson*, 461 U. S. 352, 358 (1983).
>
> [(As cited in *Nance v. Ward*, No. 21–439 (2022))]

Given both "reclassification" and a history of refusing to maintain the central Class III/Class IV segment did not statutorily quality as "altered" it was impossible for a personal damages element of a takings claim to accrue;

> [A person] raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws…does not state an Article III Case or Controversy. (*Lujan v. Defenders of Wildlife* 504 U.S. 555, 112 S.Ct. 2130 , 119 L.Ed.2d 351 *No. 90-1424*)

E. VAGUE STATUTORY DEFINITION OF "ALTERED"

None of the Municipal Defendants' ongoing decisions involving the segment of TH26 which was *discontinued as a town highway and reclassified by the Town as a legal trail* (or the sustained refusal to

provide *any* maintenance to a portion of the remaining Class IV segment of TH26) met the vague definition of "altered" statutorily stated by 19 V.S.A. § 701(2) as:

> a major physical change in the highway such as a change in width from a single lane to two lanes.

Municipal Defendants irrationally continue to claim:

> Nothing has been taken from Plaintiff that was not already taken from his predecessors in title…."[D]owngrading a road does not involve a taking." *Ketchum v. Town of Dorset, 2011 VT 49, ¶13, 190 Vt. 507, 510.*
>
> The only practical change is that Plaintiff can no longer drive a vehicle over the Southern Access Route… (middle of page A-129)

Plaintiff presently has standing to challenge the unconstitutionally vague statutory definition of "altered" given by 19 V.S.A. § 701(2) as precedentially interpreted in the *Ketchum v. Town of Dorset* because Plaintiff was not a party in privity to the *Ketchum decision*;; Vermont courts no longer have Vt.R.Civ.P. Rule 74 jurisdiction to overrule Selectboard discretion on much beyond widening a town highway from one lane to two because of *Ketchum's stare decis*. The affidavits (A-13 and A-194 to A-196) of former Underhill Road Foremen increase the plausibility of present Causes of Action against Municipal Defendants.

Once the Vermont legislature's grant of unconstitutionally broad discretion to municipal selectboards was set by *Ketchum's stare decis* all the prior Vermont Supreme Court administrative reviews and *mere ratification* of narrowly defined present Municipal Defendant actions involving Plaintiff did little more than demonstrate the vital statewide importance of Plaintiff's present standing to challenge to the constitutional validity of statutorily conferring such a broad level of discretion to town selectboards due to a unconstitutionally vague statute.

F. TRAIL ABUTTERS *MAY* LOSE PRIOR ACCESS RIGHTS

Plaintiff-Appellant's self-executing private right of access for 'compelling personal or business purposes' was recognized on the former TH26 segment by the Underhill Trail Ordinance and plausibly preserved by *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 207, 762 A.2d 1219, 1224-25 (2000) ***until*** the ratification of Municipal Defendants' *ipse dixit* Underhill Trail Ordinance's "discretion" to *rescind* Plaintiff's self-executing rights of access on the former TH26 segment.

Municipal Defendants have gone to extreme taxpayer expense to *rescind* Plaintiff's self-executing common law private

right of access instead of simply discontinuing the segment and allowing Plaintiff and other abutters to privately maintain it.

Vermont Statute 19 V.S.A. § 717(c) states:

> A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way.

Vermont statute 19 V.S.A. § 302(a)(5) states "Legal Trails" are not town highways and the law *at the time TH26 was laid out* unequivocally established abutting property owner's reversionary property rights in the event the town highway was discontinued (Vermont Statutes of 1906, Chapter 107 Sec. 3904). More recent statutory ambiguities delayed accrual of plausible Takings claims in Vermont courts but as already argued:

> Clearly established Federal case law, such as *Caquelin v. United States (2015)*, recognizes converting the use of a Railroad Right of Way (which unlike a town highway generally provides little if any utility or right to vehicular access to an abutting landowner) into use as a Recreational Trail constitutes a categorical taking. (A-159 lines 7-11)

Caquelin v. United States, 2019-1385, 959 F.3d 1360 is demonstrative of many of the constitutional problems with certain types of efforts to develop recreational trails under color of law at the expense of individual private property owners instead of the public as a whole.

Municipal Defendants' deliberate indifference to both the rights of landowners and rights of voters at the polls (as indicated by multiple refusals to present voters with ballots to vote upon duly submitted petition articles) has converted a once publicly maintained and functional segment of TH26 usable by all into an *unmaintained* public trail which *rescinds* self-executing landowner access rights. The Kafkaesque maze of deferential State court Vt.R.Civ.P. Rule 75 administrative review of municipal actions which did not meet the 19 V.S.A. § 701(2) statutory definition of "altered" were diligently pursued in accordance with *Williamson Country.* As of February 2021, there are no longer any ambiguities remaining involving the unenforced Underhill Trail Ordinance impacts on an abutting landowners' 19 V.S.A. § 717(c) access rights.

Plaintiff timely filed present § 1983 Takings and Due Process Causes of Action two years after *Knick v. Township of Scott*.

> The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). See also *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 318–319, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) ; *Penn Central Transp.* Co. v. New York City, 438 U.S. 104, 123–125, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).
>
> *(as cited in Ark. Game & Fish Comm'n v. United States, No. 11–597. 568 U.S. 23, 133 S.Ct. 511 , 184 L.Ed.2d 417)*

CONCLUSION

The district court should apply the higher "plausibility standard" being applied to the initial pleadings equally to Municipal Defendants' motion to dismiss. For the purposes of deciding a Fed.R.Civ.P. Rule 12(b)(6) motion, Plaintiff should have been granted an opportunity to conduct preliminary discovery (given the complexity of claims alleged against Municipal Defendants) followed by leave to file a more artfully pleaded complaint able to reference evidence which meets Federal evidentiary standards.

For the reasons set forth above, the Order (A-226) granting Municipal Defendants' motion to dismiss involving parties on the Notice of Appeal (A-259) should be REVERSED in part, and the case should be REMANDED to the Vermont District Court for further proceedings consistent with the findings of this Court involving Municipal Defendants named on the Notice of Appeal.

Date: June 29, 2022

Respectfully submitted,

s/ David Demarest

David Demarest, *pro se*
P.O. Box 144
Underhill, VT 05489
(802) 363-9962

Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify pursuant to Fed.R.App.P. 32(a) that the attached brief is proportionally spaced, has a typeface (Century) of 14 points, and contains 5169 words (excluding, as permitted by Fed.R.App.P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Date: June 29, 2022

Respectfully submitted,

s/ David Demarest

David Demarest, *pro se*
P.O. Box 144
Underhill, VT 05489
(802) 363-9962

Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CERTIFICATE OF SERVICE

CAPTION: **Demarest v. Underhill** DOCKET NUMBER **22-956**

I, David Demarest, hereby certify under penalty of perjury:

On June 29, 2022, I served on all parties or their counsel of record through electronic delivery by the CM/ECF system a copy of:

Plaintiff-Appellant's Brief and Plaintiff-Appellant's Appendix

by using the appellate CM/ECF system with consent.

All the participants in this case or their counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: June 29, 2022

Respectfully submitted,

/s/ David Demarest

David Demarest, *pro se*
P.O. Box 144
Underhill, VT 05489
(802)363-9962
david@vermontmushrooms.com

Plaintiff-Appellant

ADDENDUM OF STATUTES AND ORDINANCES

STATUTES

19 V.S.A. § 302(a)(3)(B): The minimum standards for class 3 highways are a highway negotiable under normal conditions all seasons of the year by a standard manufactured pleasure car. This would include but not be limited to…

19 V.S.A. § 302(a)(5): Trails shall not be considered highways and the town shall not be responsible for any maintenance, including culverts and bridges.

19 V.S.A. § 701(2): "Altered" means a major physical change in the highway such as a change in width from a single lane to two lanes

19 V.S.A § 717(c): A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way. (Added 1999, No. 156 (Adj. Sess.), § 25, eff. May 29, 2000; amended 2005, No. 178 (Adj. Sess.), § 4.)

19 V.S.A. § 740(a): When a person owning or interested in lands through which a highway is laid out, altered, or resurveyed by selectboard members objects to the necessity of taking the land, or is dissatisfied with the laying out, altering, or resurveying of the highway, or with the compensation for damages, he or she may appeal, in accordance with Rule 74 of the Vermont Rules of Civil Procedure, to the Superior Court in the same county, or in either county when the highway or bridge is in two counties. Any number of aggrieved persons may join in the appeal. The appeal shall be filed within 30 days after the order of the selectboard members on the highway is recorded. If the appeal is taken from the appraisal of damages only, the selectboard members may proceed with the work as though no appeal had been taken. Each of the appellants shall be entitled to a trial by jury on the question of damages.

the county, except one laid out by order of the supreme court; and the supreme court may discontinue a highway laid out under the order of such court or which extends into or through two or more counties; and such roads may be discontinued whether they have been made or not. The commissioners appointed to discontinue a highway shall be disinterested freeholders, other than those appointed to lay out the highway. A decree or order made under the provisions of this section may be reviewed by the county or supreme court under the same conditions and the same proceedings shall be had thereon as are provided for the laying out of highways.

SEC. **3901. Notice; costs.** When application by petition is made to the county or supreme court, to discontinue a highway laid by commissioners appointed by either of such courts, which has not been built agreeably to the orders of such court, the petition shall be served on one or more of the original petitioners for the laying of such road, as well as on one or more of the selectmen of the town or towns through which the road is laid, or the same, on motion, shall be dismissed; and, if commissioners are appointed who report adversely to the prayer of the petition, the original petitioners shall, in the discretion of the court, be entitled to costs. V. S. § 3380. R. L. § 2992. 1868, No. 10.

SEC. **3902. County highways.** The selectmen may discontinue such portions of the old county highways laid out by county or county court commissioners as the public good requires, when such highways have not been in use for one year, or have been abandoned by reason of new highways. V. S. § 3381. R. L. § 2993. 1870, No. 53.

SEC. **3903. Highways ordered by general assembly.** Selectmen may alter or discontinue a highway laid out by a committee appointed by the general assembly; but if the highway is laid through two or more towns, the same proceedings shall be had as in laying, altering or discontinuing highways through two or more towns. V. S. § 3382. R. L. § 2994. G. S. 24, § 74. 1842, No. 10.

SEC. **3904. Title to discontinued highway.** When a highway is discontinued, it shall be set and belong to the owners of the adjoining lands; if it is located between the lands of two different owners, it shall be set to the lots to which it originally belonged, if they can be ascertained; if not, it shall be equally divided between the owners of the lands on each side. V. S. § 3383. R. L. § 2995. G. S. 24, § 75. R. S. 20, § 50. 1813, p. 165. 7 Vt. 514.

SEC. **3905. Assessment of damages void.** When a public highway is laid out, and the damages are assessed to the owners of the land, and the highway is legally discontinued before being worked or opened, the assessment of damages shall become void, and no action shall be maintained thereon. V. S. § 3384. R. L. § 2996. G. S. 24, § 82.

SEC. **3906. Recovery of actual damages.** The owner of the land over which such discontinued highway was laid may recover of the town the actual damages sustained by him in consequence of laying out the highway, in an action on the case founded on this statute. Such damages shall be fixed and allowed by the board discontinuing the road, at the time of discontinuance; and the same proceedings may be had in fixing the V. S. § 3385. R. L. § 2997. G. S. 24, § 82.

UNDERHILL TRAIL ORDINANCE

TRAVEL ON TRAILS

SECTION 1. AUTHORITY. This is a civil ordinance adopted under authority of 24 V.S.A. §§ 1971 and 2291(14), and 19 V.S.A. § 304(5).

SECTION 2. PURPOSE. The purpose of this ordinance is to prevent environmental damage and pollution caused by vehicular traffic on the trail. Such damage and pollution are hereby deemed to be a public nuisance.

SECTION 3. DEFINITIONS. For purposes of this ordinance, the following definitions shall apply:

a. *Motor Vehicle* shall include all vehicles propelled or drawn by power other than muscular power, except tractors used entirely for work on the farm, vehicles running only upon stationary rails or tracks, motorized highway building equipment, road making appliances or snowmobiles, or implements of husbandry.
b. *Operate, operating* or *operated* as applied to motor vehicles shall include *drive, driving* and *driven* and shall also include an attempt to operate, and shall be construed to cover all matters and things connected with the presence and use of motor vehicles, whether they be in motion or at rest.
c. *Owner* shall include any person, corporation, co-partnership or association, holding legal title to a motor vehicle, or having exclusive right to the use or control thereof.
d. Crane Brook Trail shall mean the Legal Trail on New Road (Town Highway #26).

SECTION 4. ACTIVITY PROHIBITED. The operation of a motor vehicle is prohibited on the Crane Brook Trail from November 1st until May 1st unless the operator of the vehicle has a valid permit issued by the Underhill Selectboard.

SECTION 5. PERMITS.

a. Permits shall be issued only to persons who, in the judgment of the Selectboard, have a legitimate need to operate a vehicle on the Crane Brook Trail. For the purposes of this ordinance, 'legitimate need' shall mean a compelling personal or business purpose.
b. The only acceptable permit shall be one entitled "TOWN OF UNDERHILL PERMIT TO OPERATE A MOTOR VEHICLE ON THE CRANE BROOK TRAIL" and signed by the members of the Underhill Selectboard. One copy of the permit shall be issued to the permittee and one copy shall be filed with the Underhill Town Clerk.
c. Permits shall be valid for residents and property owners so long as they continue to be residents or property owners. All other permits shall be renewed annually.

SECTION 6. PENALTIES. Any person who operates a motor vehicle on the Crane Brook Trail from November 1st to May 1st or who allows another person to operate their motor vehicle on Crane Brook Trail without a permit shall be fined $50.00, with a waiver fee of $35.00. If the owner and the operator of a vehicle being operated without a permit are not the same person, the owner and the operator shall each be liable for the fine of $50.00 or the waiver fee of $35.00.

SECTION 7. ENFORCEMENT OFFICERS. Enforcement shall be performed by the Underhill Town Constable or by any officer of the Chittenden County Sheriff's Department or by any other Vermont law enforcement officer.

SECTION 8. SEVERABILITY. If any portion of this ordinance is held unconstitutional or invalid by a court of competent jurisdiction, the remainder of the ordinance shall not be affected.

SECTION 9. EFFECTIVE DATE: This ordinance shall become effective 60 days after its adoption by the Underhill Selectboard. If a petition is filed under 24 V.S.A. § 1973, that statute shall govern the taking effect of this ordinance.

Stanton Hamlet, Chair
Walter 'Ted' Tedford
Peter T. Brooks

Wednesday, January 30, 2002 at 11:45 AM

Received for record: February 6. 2002

Attest: Nancy C. Bradford
Nancy C. Bradford, Town Clerk

ADOPTION HISTORY:

1. Agenda item at regular Selectboard meeting held on Wednesday, January 30, 2002.
2. Read and approved at regular Selectboard meeting on Wednesday, January 30, 2002 and entered in the minutes of that meeting which were approved on February 12th 2002
3. Posted on Friday, February 1st, 2002.
   Underhill Town Hall
   Underhill Country Store
   Jacob's IGA
   Underhill Center Post Office 05490
   Underhill Flats Post Office 05489
4. Notice of adoption published in the Burlington Free Press on Saturday, February 2, 2002 with a notice of the right to petition.

TOWN OF UNDERHILL
PERMIT TO OPERATE A MOTOR VEHICLE
ON CRANE BROOK TRAIL

PURSUANT TO THE ORDINANCE REGULATING TRAVEL ON THE CRANE BROOK TRAIL, as defined in the ordinance, the Underhill Selectboard hereby issues this permit to operate a motor vehicle on the trail to:

A. _____ (landowner/resident of the trail) and his/her invited guests); such permit to be valid so long as he/she is an owner/resident; or

B. _____, a person determined by the Underhill Selectboard to have a legitimate need to operate a motor vehicle on the trail, such permit to expire one year from this date.

_____ _____
Date For the Selectboard

22-956

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

David P. Demarest,

Plaintiff-Appellant,

v.

Town of Underhill, a municipality and charter town, Daniel Steinabauer, as an individual and in official capacity as Selectboard Chair, Bob Stone, as an individual and in official capacity, Peter Duvall, in official capacity, Dick Albertini, as an individual and in official capacity, Judy Bond, in official capacity, Peter Brooks, in official capacity, Seth Friedman, in official capacity, Marcy Gibson, as an individual and in official capacity, Barbara Greene, in official capacity, Carolyn Gregson, in official capacity, Stan Hamlet, as an individual and in official capacity, Rick Heh, as an individual and in official capacity, Brad Holden, as an individual and in official capacity, Faith Ingulsrud, in official capacity, Kurt Johnson, in official capacity, Karen McKnight, as an individual and in official capacity, Nancy McRae, as an individual and in official capacity, Michael Oman, in official capacity, Steve Owens, as an individual and in official capacity, Mary Pacifici, in official capacity, Clifford Peterson, as an individual and in official capacity, Patricia Sabalis, as an individual and in official capacity, Cynthia Seybolt, as an individual and in official capacity, Trevor Squirrell, as an individual and in official capacity, Rita St. Germain, as an individual and in official capacity, Daphne Tanis, as an individual and in official capacity, Walter Ted Tedford, as an individual and in official capacity, Steve Walkerman, as an individual and in official capacity, Mike Weisel, as an individual and in official capacity, Barbara Yerrick, in official capacity, Anton Kelsey, in official capacity,

Defendants-Appellees,

(DEFENDANTS CONTINUED ON INSIDE COVER)

On appeal from the United States District Court, District of Vermont, No. 21-cv-167

BRIEF OF APPELLEES

Kevin L. Kite, Esq.
James F. Carroll, Esq.
Carroll, Boe, Pell & Kite, P.C.
64 Court Street, Middlebury, VT 05753
(802) 388-6711; kkite@64court.com
jcarroll@64court.com

Front Porch Forum, as a Public Benefit 15 Corporation fairly treated as acting under color of law due to past and present 16 factual considerations while serving the traditional governmental role of providing 17 “Essential Civic Infrastructure” ranging from the di, Jericho Underhill Land Trust, as NonProfit 21 Corporation fairly treated as acting under color of law due to past and present 22 factual considerations and a special relationship willfully participating in and 23 actively directing acquisitions of municipal property by the Town of Und,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

Cases

Statutes

Rules

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should Appellant's Amended Complaint be dismissed because the Appellant's Brief is nearly incomprehensible and fails to comply with Fed. R. App. P. 28(a) and Local Rule 28.1(a)?

2. Should Appellant's Amended Complaint be dismissed because the Appellant's Brief expressly abandons many of the claims asserted in the Amended Complaint and abandons the remaining claims by failing to address the district court's dispositive and independent bases for dismissal?

3. Has Appellant demonstrated any error in the District Court's decision?

4. Does *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) provide a basis for extending the accrual date of Appellant's Fifth Amendment takings claims or tolling the applicable statute of limitations?

5. Does the *Rooker-Feldman* doctrine bar Plaintiff's Causes of Action 1 and 2 because those claims seek review and rejection of previous state court orders in which Plaintiff was the losing party?

STATEMENT OF THE CASE

This is an appeal from the March 29, 2022 order of the Hon. William K. Sessions, III of the United States District Court for the District of Vermont (the "Order"). The Order resolved three separate motions to dismiss filed by (1) Defendant Front Porch Forum, (2) Defendant Jericho-Underhill Land Trust ("JULT"), and (3) Defendants Town of Underhill ("Town") and 31 individual defendants who were either elected or appointed Town officials (the Town and the individual defendants, collectively, the "Municipal Defendants"). The Order dismissed Appellant/Plaintiff's Amended Complaint on multiple independent grounds, including *res judicata*, A-243-251 (Order), failure to file within applicable statutes of limitations, A-251-252 (Order), and failure to state a cause of action upon which relief may be granted, A-253-256 (Order).

The facts at issue stretch back to 2001. At that time, the Town conducted reclassification proceedings to downgrade a portion of Town Highway 26 ("TH 26") from a "Class 3" and "Class 4" road to a "trail" and named the new trail Crane Brook Trail. A-26-27 (Am. Compl.) at ¶ 47-48. The initial classification of TH 26 as a "Class 3" and "Class 4" road and the reclassification of a portion of TH 26 to a "trail" is significant because, under Vermont law, a town has a statutory duty to maintain Class 3 and Class 4 roads and preserve vehicular traffic along them. 19 V.S.A. § 310(a) and (b). In contrast, a town is "not liable for construction,

maintenance, repair, or safety of trails" and does not have a statutory duty to preserve vehicular traffic on a trail. 19 V.S.A. § 310(c). Nonetheless, a "trail" is still a public "right of way." 19 V.S.A. § 301(8). The portion of TH 26 that Underhill attempted to reclassify would only cease to be a public right of way if the Selectboard discontinued the segment entirely. 19 V.S.A. § 771 *et seq.*

In attempting to reclassify TH 26 in 2001, Underhill followed all the statutory procedures but one: it "failed to formally record the reclassification order in the land records." *Demarest v. Town of Underhill*, 2013 VT 72, ¶2, 195 Vt. 204, 206. As the discussion below will show, a Vermont superior court subsequently held that the 2001 reclassification was invalid, based on the Town's failure to record the reclassification order. *Demarest v. Town of Underhill*, 2013 VT 72, ¶3 and ¶8, 195 Vt. 204, 206 and 208; *also* A-28 (Am. Compl.) at ¶ 50.A. However, believing that the portion of TH 26 had been successfully reclassified, the Town stopped maintaining the trail and adopted an ordinance that barred vehicular traffic over the trail. *Demarest v. Town of Underhill*, 2013 VT 72, ¶30, 195 Vt. 204, 217.

In 2002, Appellant purchased property located on TH 26. The property abuts both the portion of TH 26 that Underhill attempted to reclassify in 2001 and the portion of TH 26 that remained a Class 4 road in 2001. A-27 (Am. Compl.) at ¶ 48 and accompanying schematic. As a result, even if the 2001 reclassification effort

had been successful, Appellant would have had vehicular access to his property along the Class 4 segment of TH 26.

Over the next ten years, conditions along the purported trail portion of TH 26 deteriorated. *See Demarest v. Town of Underhill*, 2013 VT 72, ¶3, ¶28 - ¶31, 195 Vt. 204, 206, 216-217 (discussing condition of TH 26 in 2011).

In February 2010, Plaintiff and others filed suit, seeking an order directing the Town to maintain Crane Brook Trail in accordance with the Class 3/Class 4 maintenance standards (the "2010 Maintenance Case").[1]

In response to this suit, the Town held new municipal proceedings in 2010 to reclassify the middle portion of TH 26 as a trail. Am. Compl. at ¶ 59. Following these proceedings, the Selectboard issued a June 2010 order reclassifying the disputed portion as a trail. *Demarest v. Town of Underhill*, 2013 VT 72, ¶5, 195 Vt. 204, 207. Plaintiff and others appealed this 2010 reclassification decision in a second action (the "2010 Reclassification Case") via Vermont Rule of Civil Procedure (V.R.C.P.) 75.[2]

---

[1] The 2010 Maintenance Case was filed in February 2010 in Vermont Superior Court under Docket No. 234-2-10 Cncv. The Vermont Supreme Court issued a final decision in connection with the case on May 14, 2015 in *In re Town Highway 26*, 2015 Vt. Unpub. LEXIS 87, 199 Vt. 648, 114 A.3d 505, 2015 WL 2383677.

[2] The 2010 Reclassification Case was filed in 2010 in Vermont Superior Court. The Vermont Supreme Court issued a final decision in connection with the

At first, the 2010 Maintenance Case and the 2010 Reclassification Case proceeded simultaneously. However, the trial court in the 2010 Maintenance Case stayed that action while the 2010 Reclassification Case was pending because the trial court recognized that a decision in the 2010 Reclassification Case might render the 2010 Maintenance Case moot. *Demarest v. Town of Underhill*, 2013 VT 72, ¶19, 195 Vt. 204, 213.

On September 27, 2013, the Vermont Supreme Court affirmed the 2010 reclassification, concluding "there is competent evidence to support the Town's decision to reclassify the road." *Demarest v. Town of Underhill*, 2013 VT 72, ¶28, 195 Vt. 204, 216. The Vermont Supreme Court confirmed that the Town's 2010 reclassification effort had succeeded, that the disputed portion of TH 26 was a legal trail, and that the Town of Underhill's Trail Ordinance prohibited vehicular access over the trail. *Demarest v. Town of Underhill*, 2013 VT 72, ¶28 - ¶33, 195 Vt. 204, 216-218.

Following the 2013 decision resolving the 2010 Reclassification Case, the trial court in the 2010 Maintenance Case dismissed the action on the ground that it was now moot, because the disputed portion had been successfully reclassified as a trail. Plaintiff appealed this ruling.

---

case on September 27, 2013 in *Demarest v. Town of Underhill*, 2013 VT 72, 195 Vt. 204.

On May 14, 2015, a three-Justice panel of the Vermont Supreme Court held that, given the Court's 2013 decision in the 2010 Reclassification Case, the 2010 Trail Case was "moot" because the case no longer presented

> an actual live, controversy. The ultimate fact remains, as explained by the trial court, that the disputed segment of TH 26 is a trail, and the town has no legal obligation to maintain a trail.

In re Town Highway 26, 2015 Vt. Unpub. LEXIS 87, *9, 199 Vt. 648, 114 A.3d 505. This decision confirmed the Town was not required to maintain Crane Brook Trail.

Taken together, the September 27, 2013 and May 14, 2015 Vermont Supreme Court decisions clarified that Crane Brook Trail is a legal trail and that the Town may prohibit vehicular traffic on the trail.

In August 2015—three months *after* the Vermont Supreme Court decided the 2010 Maintenance Case decision—Appellant filed a subdivision application with the Town of Underhill, asking to subdivide his property and create driveway access on Crane Brook Trail to proposed subdivided lots. The Town denied the application. Appellant "filed . . . suit, seeking a declaration that he had a right of vehicle access over Crane Brook Trail and appealing the denial of the permit." *Demarest v. Town of Underhill*, 2021 VT 14, ¶ 6, 256 A.3d 554, 557.

On February 26, 2021, the Vermont Supreme Court held that *res judicata* barred the Appellant's effort to obtain a declaration that he was entitled to

vehicular access over Crane Brook Trail. In reaching this conclusion, the Court expressly noted that Appellant could have brought his declaratory judgment action in the 2010 Maintenance Case or the 2010 Reclassification Case:

> Plaintiff does not dispute that he could have included a claim for declaratory relief in the reclassification appeal in 2010 or that both suits involve a similar set of facts. Instead, plaintiff argues that claim preclusion cannot apply in this case because (1) his right-of-access claim did not accrue until there was a final determination in the Rule 75 case regarding the Town's reclassification; and (2) the prior action was a Rule 75 complaint for review of governmental action involving other parties and therefore his personal need for an injunction would have been inappropriately presented.
>
> We reject plaintiff's argument that there was no justiciable controversy in 2010 and therefore the request for a declaratory judgment could not have been brought at that time. The Selectboard's July 2010 reclassification decision created a live controversy regarding plaintiff's right of access over the portion of TH 26 that was now classified as a trail. There was no need to wait until the challenges to the reclassification decision were fully litigated. For this reason, this situation is distinguishable from *Kellogg v. Shushereba*, 2013 VT 76, ¶ 31, 194 Vt. 446, 82 A.3d 1121, in which this Court concluded that claim preclusion did not bar defendant's unjust-enrichment claim because it did not accrue until after resolution of the first case. Plaintiff had all information necessary to bring his declaratory-judgment action at the time he challenged the Town's reclassification decision.

Demarest v. Town of Underhill, 2021 VT 14, ¶17-¶18, 256 A.3d 554, 560.

On June 21, 2021, Plaintiff filed the present complaint in the United States District Court for the District of Vermont. The initial Complaint was 90 pages long and included 270 numbered paragraphs. *Demarest v. Underhill, et al.*, Case No. 2:21-cv-00167-wks, Doc. 1. The Municipal Defendants filed a Motion to Dismiss,

arguing, in part, that the initial Complaint was long, vague, and prolix, and failed to comply with Fed. R. Civ. P. 8(a)(2). *Id.*, Doc. 5. Plaintiff filed the Amended Complaint, which was even longer, clocking in at 96 pages long with 284 numbered paragraphs.

The Municipal Defendants filed a Motion to Dismiss the Amended Complaint. The district court took up this motion, along with Motions to Dismiss filed by Defendant Front Porch Forum and Defendant JULT, and ultimately dismissed the entire Amended Complaint, with prejudice, in its March 29, 2022 Order. The district court granted Plaintiff leave to amend the Amended Complaint for purposes of curing the pleading difficulties in Causes of Action 7 and 8. A-257 (Order). Plaintiff chose not to avail himself of the district court's leave to amend Causes of Action 7 and 8 and instead filed the present appeal to this Court on April 27, 2022.

STANDARD OF REVIEW

This Court will review de novo the dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and will accept as true all the plaintiff's factual allegations, drawing reasonable inferences in the plaintiff's favor. *Teichmann v. New York*, 769 F.3d 821, 825 (2d Cir. 2014). In addition, a court may consider those matters of which judicial notice may be taken, including documents and decisions filed in prior litigation, which are particularly

important in the *res judicata* context, where the court must consider what claims were possible in the prior litigation. *E.g., Simmons v. Trans Express Inc.*, 16 F.4th 357, 360 (2d Cir. 2021); *Dixon v. Blanckensee*, 994 F.3d 95, 103 (2d Cir. 2021); *Williams v. N.Y. City Hous. Auth.*, 816 Fed. Appx. 532, 534 (2d Cir. 2020).

To avoid dismissal, the complaint must allege "enough facts to state a claim to relief that is plausible on its face" and those allegations must "nudge" the plaintiff's claims "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007). Further, "the tenet that a court must accept as true all the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court "may affirm on any basis supported by the record." *Brock v. Zuckerberg*, 2022 U.S. App. LEXIS 11368, *2, 2022 WL 1231044 (2d Cir. 2022) (citing *Coulter v. Morgan Stanley & Co.*, 753 F.3d 361, 366 (2d Cir. 2014)).

This Court will "review a pro se complaint with 'special solicitude,' interpreting it 'to raise the strongest claims that it suggests.'" *Marvin v. Peldunas*, 2022 U.S. App. LEXIS 16345, *2, 2022 WL 2125851 (2d Cir. 2022) (quoting *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011)). However, even with this solicitude, a *pro se* complaint must nonetheless "state a plausible claim for relief." *Brock v.*

Zuckerberg, 2022 U.S. App. LEXIS 11368, *2-3, 2022 WL 1231044 (2d Cir. 2022).

Although the court will "accord filings from pro se litigants a high degree of solicitude, even a litigant representing himself is obliged to set out 'identifiable arguments' in his principal brief." *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632-633 (2d Cir. 2016). Accordingly, "a pro se litigant abandons an issue by failing to address it in the appellate brief." *Green v. Dep't of Educ. of N.Y.*, 16 F.4th 1070, 1074 (2d Cir. 2021) (citing *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995)). Therefore, if a *pro se* appellant's "opening brief on appeal fails to challenge [a court's] additional holdings . . . each of which constitutes an independent reason to dismiss," then the appellant "forfeit[s] any challenges to those holdings." *Taneja v. Preuss (In re Taneja)*, 789 Fed. Appx. 907, 909-910 (2d Cir. 2019).

SUMMARY OF THE ARGUMENT

Responding adequately to Appellant's Brief is difficult, perhaps impossible, because the Brief does *not* clearly identify which Causes of Action Plaintiff seeks to preserve, what legal arguments Appellant advances to preserve those claims, how the Appellant believes the district court erred, or even which portions of the district court's order Appellant seeks to have reversed. Responding to the argument in the Appellant's Brief is therefore an exercise in guesswork and anticipation—

one attempts to divine what the Appellant *might* mean and respond accordingly. Due to the solicitude to which *pro se* litigants are entitled, the Appellees have made their best effort to discern and respond to the arguments asserted in the Appellant's Brief. Nonetheless, the shortcomings of the Appellant's Brief are so great that the Appellees urge this Court to take those shortcomings into account in resolving this appeal.

Accordingly, the Appellees argue the following:

First, this Court should dismiss the appeal in toto and affirm the district court order because the Appellant's Brief is nearly incomprehensible and fails to comply with Fed. R. App. P. 28(a) and Local Rule 28.1(a).

Second, if the Court is unwilling to dismiss the entire appeal on this basis, then the Court should dismiss Causes of Action 7-10 of the Amended Complaint and all claims brought against the defendants not named in the Notice of Appeal on the ground that Plaintiff has expressly abandoned them. In addition, this Court should affirm the district court's dismissal of the remaining claims in the Amended Complaint because Appellant has failed to address the district court's separate and independent bases for dismissing those claims.

Third, if the Court is unwilling to dismiss all claims on either of the bases discussed above, and considers the Appellant's substantive arguments, then this Court should hold that the United States Supreme Court's decision in *Knick v.*

Twp. of Scott, 139 S. Ct. 2162, 2167 (2019) does not extend or toll the accrual date on Plaintiff's claims to June 21, 2019 and that Appellant's taking claims are therefore barred by 12 V.S.A. § 511. Furthermore, this Court should affirm the district court's conclusion that the *Rooker-Feldman* doctrine bars consideration of Causes of Action 1 and 2 because Appellant seeks to have a federal court review and reject a state court judgment under which Plaintiff lost in state court. The Brief will consider each of these arguments in turn.

ARGUMENT

I. This Court should affirm the district court's dismissal of the Amended Complaint because the Appellant's Brief is incomprehensible and fails to comply with Fed. R. App. P. 28(a) and L.R. 28.1(a).

Fed. R. App. P. 28(a) provides that an appellant's argument must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Furthermore, Local Rule 28.1(a) provides

> A brief must be concise, logically arranged with proper headings, and free of irrelevant matter. The court may disregard a brief that does not comply with this rule.

"An appellant's failure to comply with Rule 28 invites dismissal of the appeal." *Taylor v. Harbour Pointe Homeowners Ass'n*, 690 F.3d 44, 48 (2d Cir. 2012); *also Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 111-112 (2d Cir. 1999); *Murray v. Mitsubishi Motors of N. Am., Inc.*, 462 Fed. Appx. 88, 91 (2d Cir. 2012);

Sioson v. Knights of Columbus, 303 F.3d 458, 459-460 (2d Cir. 2002). *Pro se* appellants are bound by these rules, and their appeals may be dismissed if their briefs do not comply with them. *Williams v. R.R.*, 2022 U.S. App. LEXIS 9451, *3-5, 2022 WL 1053265 (2d Cir. 2022).

Appellant's Brief does not comply with Fed. R. App. P. 28(a) or Local Rule 28.1. The Brief does not "present a coherent legal theory, even one unsupported by citation to authority, that would sustain the complaint." *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 111, (2d Cir. 1999). In the Brief's Argument, case quotations and legal phrases are glued together in an abstract collage that provides no clear picture of what Appellant argues, upon what caselaw the Appellant relies, or how the relevant caselaw should be applied to the allegations in the Complaint to show that the district court erred or that Plaintiff's claims can survive dismissal. The Appellant's "brief borders on the incomprehensible." *Murray v. Mitsubishi Motors of N. Am., Inc.*, 462 Fed. Appx. 88, 91 (2 Cir. 2012).

For example, Argument Section C is labelled "Statute of Limitations and Accrual Date" and is comprised of three sentences. Appellant's Brief at 20-21. [3]

[3] The Section, in its entirety, reads:

> The Statute of Limitations for a § 1983 Takings claim in Vermont is six years (12 V.S.A. § 511) and the earliest potential takings and due process accrual date occurred on June 21, 2019, when *Knick v. Township of Scott* corrected the legal error of *Williamson Country* [sic]. Vermont statutory changes delayed the ability to raise claims of

The first sentence appears to argue that the accrual date for Plaintiff's claims should be the date of the United States Supreme Court's decision in *Knick v. Twp. of Scott*. Appellant's Brief at 19. However, the second sentence states, without explanation or citation, that unspecified "statutory changes in Vermont" somehow "delayed the ability to raise claims of a taking." *Id.* The third sentence of the Section ends by asserting, without legal support, that

> Plaintiff should be granted leave to correct the unartfully pleaded portions of [his] complaint . . . after a limited discovery period to reach the higher 'plausibility standard' created by *Ashcroft v. Iqbal*, 556 U.S. 6662, 678 (2009).

Id. at 20.

The sentences in this Section do not provide a coherent legal theory concerning the relevant statute of limitations or the relevant accrual date. "A reasonable reader of [this Section] is left without a hint of the legal theory proposed as a basis for reversal" on these issues. *Ernst Haas Studio, Inc. v. Palm*

> a taking of a reversionary property right because "reclassifications" no longer meet the vague statutory definition of "altered."
>
> For the purposes of deciding a Fed.R.Civ.P. Rule 12(b)(6) motion if the Court does not presently "accept as true all of the allegations contained in a complaint," Plaintiff should be granted leave to correct the unartfully pleaded portions of the complaint involving Municipal Defendants named in the Notice of Appeal after a limited discovery period to reach the higher "plausibility standard" created by *Ashcroft v. Iqbal*, 556 U.S. 662, 678. (2009).

Appellant's Br. at 20-21.

Press, Inc., 164 F.3d 110, 112 (2d 1999). Section C is just a small, manageable sample of the confusion that reigns in the rest of the Appellant's Brief.

Sections D, E, and F of the Argument are longer and contain more words, but they are no clearer than Section C. In each section of the Argument, the reader struggles repeatedly to grasp a sustained sense of meaning. The reader may latch hopefully onto one sentence as a glimmering source of understanding, only to have the next sentence douse the light by plunging off in another direction. When an appellant's brief "contains no argument identifying any claim of error on the District Court's part" the court "'need not manufacture' such an argument [itself]." *Williams v. R.R.*, 2022 U.S. App. LEXIS 9451, *4, 2022 WL 1053265 (2d Cir. 2022).

In addition to not providing a proposed "legal theory . . . as a basis for reversal," *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999), the Appellant's Brief provides no sustained discussion applying relevant caselaw to the allegations in Plaintiff's Amendment Complaint. The Appellant's Argument provides few citations to the record, and the citations that do appear are not part of a contextual discussion.

For example, Section E of the Argument, which bears the heading "Vague statutory definition of 'altered'", states:

> The affidavits (A-13 and A-194 to A-196) of former Underhill Road Foreman increase the plausibility of present Causes of Action against Municipal Defendants.

Appellant's Brief at 23. However, the discussion in Section E does not explain why these Affidavits may be considered on a Motion to Dismiss, given that review of such a motion considers *only* the allegations in the complaint and those matters of which judicial notice may be taken and given that factual matters outside the pleadings are irrelevant on a 12(b)(6) motion. *See* Fed. R. Civ. P. 12(d) (stating that consideration of matters outside the pleadings converts a 12(b)(6) motion to a summary judgment motion under Fed. R. Civ. P. 56).[4]

Even if Appellant had made the effort to explain why these Affidavits may be considered in this appeal, the Argument in the Appellant's Brief does not explain which "Causes of Action" the Affidavits make more plausible, how the Affidavits "increase the plausibility" of those claims, or how those Affidavits impact the "Vague statutory definition of 'altered'" referenced in the Section heading. In sum, although the cited passage contains a reference to the record, it is

[4] These Affidavits were not referenced, cited, or relied on in the Amended Complaint. They are therefore matters outside the pleadings under Rule 12(d). *See, e.g., Singh v. Wells*, 445 Fed. Appx. 373, 375 (2d Cir. 2011) ("In adjudicating a motion to dismiss, a court may consider only the complaint, written instruments attached to the complaint as exhibits, statements or documents incorporated by reference, and documents on which the complaint heavily relies'). Because the Affidavits are matters outside the pleadings, the Municipal Defendants respectfully request this Court exclude those Affidavits from consideration in this appeal.

not part of a contextualized argument that targets whether the claims—as alleged in the Amended Complaint—can survive a Motion to Dismiss.

Similarly, Section D, which bears the heading "Rooker-Feldman & *Res Judicata* Inapplicable," states:

> In accordance with the Full Faith and Credit Clause of 28 U.S.C. § 1738, Plaintiff adds emphasis to "Response in Opposition" section III(D) (A-171), which refers to ¶50 A, B and C of the First Amended Complaint listing the very few independent findings of fact made throughout State court review of Municipal Defendant decisions (A-28).

Appellant's Brief at 21-22. Setting aside the question of whether the meaning of this sentence can be discerned, the Brief provides no further explanation of how the referenced portion of the "Response in Opposition" applies in the context of this appeal. Moreover, although this passage makes an express reference to the Plaintiff's "Response in Opposition" and to the Amended Complaint, [5] Appellant has made no effort to provide a sustained or cohesive argument as to why ¶ 50 of the Amended Complaint supports Appellant's contention that his Complaint should not be dismissed.

[5] Notably, the Argument in Appellant's Brief specifically cites allegations in the Amended Complaint only twice. One occurrence is the reference discussed *supra* in the text; the other occurrence references Table 1 of the Amended Complaint but the reference does not link the citation to any specific argument in the brief. *See* Appellant's Br. at 5 (citing "Table 1 of Amended Complaint (A-39)").

"Appellants do not preserve questions for appellate review by '[m]erely incorporating an argument made to the district court' by reference in their brief." *Lederman v. N.Y. City Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013) (citing *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996), vacated on other grounds, 521 U.S. 1114, 117 S. Ct. 2501, 138 L. Ed. 2d 1007 (1997) (mem.). This Court has said, "[We] will [not] take the absence of an argument on appeal as an invitation to dig up and scrutinize anew the memorandum in opposition to summary judgment that Appellant submitted to the court below." *Sioson v. Knights of Columbus*, 303 F.3d 458, 460 (2d Cir. 2002).

The two examples discussed above are the only substantive references to the record—Amended Complaint or otherwise—that appear in the Appellant's Argument. *See* Appellant's Brief at 18-27. The Appellant has failed to provide any sustained contextual discussion of the record, the applicable caselaw, or the allegations in the Amended Complaint. This failure to provide contextual references to the Amended Complaint is particularly egregious when the complaint is 99 pages long and includes over 283 paragraphs. *See* A-15-114 (Amended Complaint). In failing to provide this contextual discussion, the Appellant invites this Court "to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant." *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999). This Court should "decline the

invitation" and affirm the district court's dismissal of the Complaint. *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999).

For all these reasons, the Municipal Defendants respectfully request this Court dismiss the appeal in its entirety and affirm the district court Order on the ground that the Appellant's Brief fails to comply with Fed. R. App. P. 28(a)(1) and L.R. 28.1(a).

II. This appeal should be dismissed because Appellant has failed to address the district court's separate and independent grounds for dismissal.

Although the Town respectfully asks this Court to dismiss the Appellant's appeal and affirm the district court ruling based on the Appellant's failure to comply with Fed. R. App. P. 28(a)(1) and L.R. 28.1(a), the Town is aware that this Court treats *pro se* parties with "solicitude." *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632-633 (2d Cir. 2016). The Court may therefore be reluctant to dismiss Appellant's appeal without more substantive consideration.

However, even when the substance of the Appellant's Brief is considered, the Court should affirm the district court ruling and dismiss the Amended Complaint because, *first*, Appellant has expressly abandoned *some* of his causes of action in their entirety and *all* his causes of action with respect to certain defendants, and, *second*, for the remaining causes of action, the Appellant fails to address the separate and independent grounds upon which the district court

dismissed the claims. *E.g.*, *Taneja v. Preuss (In re Taneja)*, 789 Fed. Appx. 907, 909-910 (2d Cir. 2019).

A. Appellant expressly abandoned Counts 7 through 10 of his Amended Complaint and all the claims brought against certain defendants.

Appellant expressly and voluntarily narrowed his appeal before this Court to the dismissal of Counts 1-6 and 11-12 of his Amended Complaint as those claims were brought against the twenty defendants specifically named in his Notice of Appeal. A-259 (Notice of Appeal); Appellant's Brief at 1, 3, 20, and 28. Appellant thereby abandons all other claims asserted in the Amended Complaint (i.e., Causes of Action 7 through 10) and all other claims asserted against the individual defendants who are *not* named in the Notice of Appeal. *E.g., Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632-633 (2d Cir. 2016); *Cooke v. U.S. Bank Nat'l Ass'n*, 749 Fed. Appx. 69, 71 (2d Cir. 2019); *McCarthy v. DeJoy*, 2022 U.S. App. LEXIS 4613, *2, 2022 WL 519180 (2d Cir. 2022); *Gachette v. Metro-North Commuter R.R. Co.*, 804 Fed. Appx. 65, 67, 2020 U.S. App. LEXIS 8776, *4, 2020 WL 1289097 (2d Cir. 2020).

Therefore, the Municipal Defendants respectfully request this Court affirm the district court's dismissal of Causes of Action 7 through 10 of the Amended Complaint and affirm dismissal of all claims against the defendants *not* named in

the Appellant's Notice of Appeal on the ground that Appellant has abandoned these claims.

B. Appellant has abandoned or waived the remainder of his causes of action by failing to address the district court's separate and independent bases for dismissing them.

With the claims discussed in the preceding section abandoned and dismissed, the only claims nominally subject to consideration in this appeal are Counts 1-6 and 11-12 as those causes of action are brought against the Town and the twenty individual defendants named in the Notice of Appeal. Those Causes of Action are:

- Causes of Action 1 and 2: Fourteenth Amendment procedural due process claims;
- Causes of Action 3 and 4: Ninth and Fourteenth Amendment substantive due process claims;
- Causes of Action 5 and 6: Fifth Amendment taking claims;
- Causes of Action 11 and 12: First Amendment petition clause claims.

The district court dismissed these eight causes of action on a variety of grounds.

First, the district court dismissed Causes of Action 1 through 6 on *res judicata* grounds, determining that the issues asserted in Causes of Action 1 through 6 could have been asserted in the parties' prior Vermont litigation and

therefore, under Vermont law, the claims are barred by *res judicata*. A-245-251 (Order).

Second, as a separate and independent ground for dismissal, the district court held that Causes of Action 1 through 6 were barred by applicable statutes of limitation because these Causes of Action were supported only by conduct that is alleged to have occurred more than six years prior to the filing of the present action (i.e., conduct occurring before June 21, 2015). A-251-252 (Order).

Third, as a separate and independent ground for dismissal of Counts 1 and 2, the district court determined that the *Rooker-Feldman* doctrine would bar Plaintiff's efforts to challenge *Ketchum*. A-247-248 (Order).

Fourth, the district court dismissed Causes of Action 11 and 12 because the Amended Complaint failed to state a claim upon which relief could be granted. A-255-256 (Order). This ruling was based on the ground that merely failing to grant a request contained in a petition does not constitute a constitutional injury. *Id*.

The Appellant's Brief does not address all the grounds for dismissing these claims that appear in the district court's ruling. After attempting a good faith and solicitous reading of the Appellant's Brief, the Appellees believe the Appellant to be making the following three primary arguments: [6]

---

[6] Appellant also states

> Plaintiff should be granted leave to correct the unartfully pleaded portions of the complaint involving Municipal Defendants named in

1. The *Rooker-Feldman* doctrine does not apply to Plaintiff's taking claims because the conduct of which Plaintiff complains was merely *ratified* by the previous Vermont court decisions, not *produced* by them.[7]

2. The *Rooker-Feldman* doctrine should not be applied to Plaintiff's challenge to *Ketchum* because Plaintiff was not a party in privity to the *Ketchum* decision.[8]

3. Until the United States Supreme Court overturned *Williamson* in *Knick*, Plaintiff was required to exhaust his state court litigation efforts before filing his takings claims in federal Court, therefore, the accrual date for purposes of applying the statute of limitations to his taking claims should be June 21, 2019, the decision date of the *Knick* decision.[9]

---

the Notice of Appeal after a limited discovery period to reach the higher "plausibility standard" created by *Ashcroft v. Iqbal*, 556 U.S. 662, 678. (2009).

Appellant's Br. at 25; *see also* Appellant's Br. at 27 (repeating suggestion).

Appellant cites no legal basis for this assertion and does not provide any legal argument in support of it, beyond the conclusory statements cited here. The suggestion is contrary to ordinary review of a motion to dismiss, in which a complaint is dismissed if a plaintiff fails to state a plausible claim in the complaint.

[7] Appellees believe Appellant intended to make this argument based on Appellant's Statement of Issues Presented No. 1, Appellant's Br. at 2, the Brief's reference to "*Cho ex rel. Situated v. City of N.Y.*, Docket No. 18-337-cv (910 F.3d 629)," Appellant's Br. at 17, and the Brief's repeated characterization of the Vermont court decisions as "ratifications," Appellant's Br. at 5, 12, 13, 14, 17, 18, 21, 24.

[8] The Appellees believe the Appellant to be making this argument based on the Appellant's Statement of Issues Presented No. 2, Appellant's Br. at 2, Appellant's express assertion that he has "standing to challenge" *Ketchum's* interpretation of 19 V.S.A. § 701(2) because he was "not a party in privity to the *Ketchum* decision." Appellant's Br. at 23; *also id.* at 8, 16.

[9] The Appellees believe the Appellant to be making this argument based on the Appellant's Statement of the Issues Presented No. 3, Appellant's specific assertion of June 21, 2019 as the appropriate accrual date, Appellant's Br. at 19,

These three arguments do *not* address the district court's dismissal of Causes of Action 11 and 12 (violations of First Amendment Petition Clause) for failure to state a claim.[10] Nor do these arguments directly address the district's ruling that Causes of Action 1 through 6 are barred by *res judicata* under Vermont law. With respect to the district court's determination that Causes of Action 1 through 6 are also independently barred by applicable statutes of limitations, the Brief's sole argument is that the accrual date should be the date *Knick* was decided.

Setting aside for the moment the merits of the argument, the *Knick* argument could only address Plaintiff's *takings* claims because *Knick* was expressly focused on takings claims, separate and apart from other constitutional claims. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2169 (2019) (observing that *Williamson*'s "state litigation requirement relegates the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights" and overruling the requirement to

---

and Appellant's assertion that he filed the present action within "two years" of the *Knick* decision, Appellant's Br. at 18 at 27.

[10] The Appellant makes only a single reference to the First Amendment in his Brief, in connection with stating that the prior litigation did not consider his First Amendment Claims. Appellant's Br. At 10. This is an argument best directed to *res judicata*, but the district court dismissed the First Amendment claims based on grounds of failure to state a claim, not on *res judicata* grounds. *See* A-253-256 (Order) (dismissing Causes of Action 7, 8, 11, and 12 for failure to state claim). Nowhere in the Appellant's Brief does the Appellant explain how the Amended Complaint alleges a plausible First Amendment violation or how the district court erred in concluding that the Amended Complaint failed to state a First Amendment claim.

"restor[e] takings claims to the full-fledged constitutional status the Framers envisioned . . . ."). Thus, whatever impact *Knick* may have had on Plaintiff's claims, that impact could only apply to Plaintiff's takings claims, *not* his due process claims. The Appellant's Brief offers no argument directly addressing the due process claims or explaining why they should be handled differently because of *Knick*.

In sum, Appellant has spent the bulk of his Argument addressing the district court's decision to apply *Rooker-Feldman* to Causes of Action 1 and 2 and trying to establish that the date of the *Knick* decision should be the accrual date for his taking claims under Causes of Action 5 and 6. The Brief ignores the other separate and independent bases for dismissal in the district court's opinion, i.e., the fact that Vermont's statute of limitation *and* res judicata doctrine independently and separately bar Causes of Action 1 through 6 and the fact that Plaintiff has failed to state a claim in Causes of Action 11 and 12 for violation of the First Amendment's Petition Clause.

When an appellant—even a *pro se* appellant—fails to address a district court's grounds for dismissing one or more claims, the appeal with respect to those claims is properly dismissed. *E.g., Diaz v. Pelo*, 2022 U.S. App. LEXIS 2843, *5, 2022 WL 288070 ("[W]hile 'appellate courts generally do not hold *pro se* litigants rigidly to the formal briefing standards[,] . . . we need not manufacture claims of

error for an appellant proceeding *pro se*, especially when he has raised an issue below and elected not to pursue it on appeal.'") (citing *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995)); *Green v. Dep't of Educ. of N.Y.*, 16 F.4th 1070, 1074 (2d Cir. 2021) ("[A] a pro se litigant abandons an issue by failing to address it in the appellate brief."); *Adams v. City of New York*, 756 Fed. Appx. 85, 87, 2019 U.S. App. LEXIS 6949, *4, 2019 WL 1057406 ("Because Adams has failed to challenge the bases for the district court's dismissal of his complaint in his brief on appeal, he has abandoned any such challenges."); *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632-633 (2d Cir. 2016); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."); *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995) ("[Appellant] did not raise this issue in his appellate brief. Consequently, he has abandoned it.").

Because Plaintiff fails to provide adequate legal argument, supported by citation to the record, addressing the district court's separate and independent grounds for dismissing Causes of Action 1 through 6 and 11 and 12, the appeal with respect to those claims should be dismissed. Similarly, because Plaintiff has failed to provide *any* response to the district court's reasons for dismissing Plaintiff's other claims (i.e., Causes of Action 7 through 10), those claims should be dismissed as well.

For these reasons, the Municipal Defendants respectfully request this Court affirm in its entirety the district court's Order dismissing Plaintiff's Amended Complaint and dismiss *all* Plaintiff's claims—both those he expressly and specifically abandoned and those he abandoned by failing to address—all with prejudice.

III. The Appellant's Brief does not demonstrate that the Amended Complaint should not be dismissed.

As argued in the preceding sections, the Plaintiff's Amended Complaint should be dismissed either (1) because the Appellant's Brief fails to comply with Fed. R. App. P. 28(a) and L.R. 28.1(a) or (2) because the Appellant has expressly and specifically abandoned many of his claims and, with respect to the remaining claims, has failed to address the district court's separate and independent bases for dismissing them. However, in the event this Court is unwilling to dismiss the Amended Complaint on these grounds, dismissal is nonetheless appropriate because the arguments presented in the Appellant's Brief do not demonstrate that the district court erred or that the Amended Complaint states plausible causes of action against the Municipal Defendants.

A. The *Knick* decision does not save Plaintiff's takings claim from the applicable statute of limitations.

The Appellant acknowledges his Fifth Amendment takings claims are subject to a six-year statute of limitations under 12 V.S.A. § 511. Appellant's Brief

at 19; *Dep't of Forests, Parks & Rec. v. Town of Ludlow Zoning Bd.*, 2004 VT 104, ¶6, 177 Vt. 623, 625-626, 869 A.2d 603, 606-607. Although the Appellant's Brief does not address the issue, Appellant's § 1983 due process claims are subject to Vermont's shorter, three-year statute of limitations for personal injury actions under 12 V.S.A. § 512(4). *See* 12 V.S.A. § 512(4); *Shields v. Gerhart*, 155 Vt. 141, 144 n.2 and 145, 582 A.2d 153, 155 n.2 and 156 (1990) (applying 12 V.S.A. § 512(4) to due process claims). The district court noted that the "statute of limitations for a § 1983 claim brought in federal court in Vermont is three years," but the court reasoned that, even if the longer six-year statute of limitations for takings claims is applied to all claims, Plaintiff's Causes of Action 1 through 6 would still be time-barred. A-251 (Order).

Appellant does not dispute the length of the limitations periods; instead, he appears to argue that his takings and due process claims did not *accrue* until the date the United States Supreme Court decided *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019):

> The Statute of Limitations for a § 1983 Takings claim in Vermont is six years (12 V.S.A. § 511) and the earliest potential takings and due process accrual date occurred on June 21, 2019, when *Knick v. Township of Scott* corrected the legal error of *Williamson Country*.

Appellant's Brief at 19; *see also id*. at 18 (arguing that Appellant's claims were "timely filed . . . exactly two years after *Knick*") and 27 ("Plaintiff timely filed the

present § 1983 Takings and Due Process Causes of Action two years after *Knick*.").

Appellant provides no legal argument in support of this contention. Nor does he explain how *Knick*'s date of decision would provide the relevant factual basis for the *accrual* date of his claims. Nor does the Appellant's Brief offer any argument in the alternative, identifying any other potential accrual date. For good or for ill, Appellant has chosen to offer *Knick*'s June 21, 2019 decision date as the accrual date for his claims.

This choice is unsupported by law or fact.

Knick v. Twp. of Scott, ____ U.S. ____, 139 S. Ct. 2162 (2019) overturned a portion of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985). *Williamson* held that a person pursuing a takings claim needed to meet two distinct and independent requirements: First, the plaintiff must demonstrate that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3116. Second, the plaintiff must demonstrate he or she has sought "compensation through the procedures the State has provided for doing so." *Williamson*, 473 U.S. at 194, 105 S. Ct. at 3120. *Williamson* also held that any attendant due process claims must also meet the final decision test that is applied to

takings claims. *Williamson*, 473 U.S. at 199-200, 105 S. Ct. at 3123. *Knick* did *not* overturn *Williamson*'s final decision requirement with respect to either takings claims *or* due process claims. *Knick*, ____ U.S. at ____, 139 S. Ct. at 2169.

Knick did, however, expressly overturn *Williamson*'s state-litigation exhaustion requirement for takings claims. In doing so, the Court emphasized—repeatedly—that a takings claim accrues "at the time" property is taken by a local government without compensation:

> The state-litigation requirement of *Williamson County* is overruled. A property owner may bring a takings claim under §1983 upon the taking of his property without just compensation by a local government.

Knick, ____ U.S. at ____, 139 S. Ct. at 2179 (2019); *also Knick*, ____ U.S. at ____, 139 S. Ct. at 2170, 2172, 2175, and 2177 (emphasizing "at the time").

Accordingly, a plaintiff may bring a takings claim at the time the governmental agency responsible for interpreting a regulation makes a final decision with respect to the plaintiff's property. The Supreme Court subsequently explained

> The finality requirement is relatively modest. All a plaintiff must show is that "there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'"

Pakdel v. City & Cty. of San Francisco, ____ U.S. ____, 141 S. Ct. 2226, 2230 (citing *Suitum*, 520 U.S., at 739, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (brackets omitted)). The *finality* requirement does not require litigation to proceed all the

way to a full and final judgment handed down by the highest court in a state—that is the province of the *state litigation* requirement. Thus, a plaintiff may bring a taking claims based on a zoning issue when "the initial decisionmaker has arrived at a definitive position on the issue." *Pakdel v. City & Cty. of San Francisco*, 141 S. Ct. 2226, 2229 (2021).

Importantly, constitutional decisions like *Knick* are usually applied retroactively:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993). Indeed, courts have applied *Knick* retroactively in the takings context, "even if it makes a previously timely action untimely." *4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810, 819 n.9 (Ky. E.D. 2019) (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995)); *also Evans v. City of Ann Arbor*, 2022 U.S. Dist. LEXIS 34603, *23, 2022 WL 586753 (E.D. Mich. 2022); *Stensrud v. Rochester Genesee Reg'l Transp. Auth.*, 507 F. Supp. 3d 444, 452, 2020 U.S. Dist. LEXIS 236602, *12 (W.D.N.Y. 2020) (same). Because *Knick* is applied retroactively, Plaintiff's takings claim was ripe when the Town allegedly took the Plaintiff's property without compensation,

i.e., when the Town made a final decision regarding Plaintiff's right to use vehicles on TH 26.

However, if one applies the *Knick* rule, the Amended Complaint shows on its face that Plaintiff's takings claim expired long before he filed the present action. The Amended Complaint alleges that—in 2010—the Town took Plaintiff's "prior reasonable access" and "reversionary property rights" by reclassifying a portion of TH 26. A-34 (Amended Compl.) at ¶ 70 and ¶ 71 and A-103 (Amended Compl.) at ¶ G. The reclassification of a portion of TH 26, and the attendant loss of vehicular access, is the key injury alleged in the Amended Complaint.[11] Accepting as true the allegations asserted in Plaintiff's Amended Complaint, and applying the accrual rules announced in *Knick*, Plaintiff's takings claim expired in June 2016—six years *after* the Town issued the June 2010 order reclassifying a portion of TH 26 as a trail. Far from extending the accrual date for Plaintiff's claims, *Knick* demonstrates that Plaintiff's claims expired long before he filed the present action.

Even if one imagines that *Knick* had not overturned *Williamson*'s state litigation requirement, the relevant accrual date on Plaintiff's takings claim would be September 27, 2013, the date the Vermont Supreme Court conclusively affirmed that the Town properly reclassified a portion of TH 26 as a legal trail in

[11] *E.g.*, A-16 (Amended Compl.) at ¶ 1, A-65 (*Id.*) at ¶ 168, A-73 (*Id.*) at ¶ 195, and A-74 (*Id.*) at ¶ 195.

2010 and therefore prohibited vehicular access on the trail. *Demarest v. Town of Underhill*, 2013 VT 72, ¶28, 195 Vt. 204, 216; *see also* Appellant's Brief at 18 ("On September 27, 2013, the Vermont Supreme Court ratified the 2010 New Road Reclassification . . . ."). This accrual date—September 27, 2013—also puts Plaintiff's present action—filed on June 21, 2021, nearly eight years later—out of time.

Therefore, regardless of whether one applies *Knick*'s "ripeness" test or *Williamson*'s "ripeness" test, Plaintiff's takings claims are time-barred. Appellant's Brief offers no authority or argument—other than citing *Knick*—to explain why the accrual date for Plaintiff's claims should be June 21, 2019. Although the Amended Complaint is awash with allegations of official conduct occurring between 2001 and the 2010 reclassification of Crane Brook Trail, other than references to the ongoing state litigation, the Amended Complaint makes *no* factual allegation of conduct occurring after 2010 related to terminating Plaintiff's vehicular access over Crane Brook Trail.[12] The Town prohibited vehicular access over Crane Brook

[12] *See* A-18, 28 (Amended Compl.) at ¶ 4, ¶ 50.A (referencing May 31, 2011 Vermont Superior Court Ruling); A-74 (*Id.*) at ¶ 50.B (referencing June 26, 2013 road commissioners findings reported to Vermont Superior Court); A-74 (*Id.*) at ¶ 196 (referencing April 2013 communication between Plaintiff's Counsel and Town Counsel); A-76 (*Id.*) at ¶ 200 (alleging October 24, 2013 meeting minutes defame Plaintiff's character by referring to "the litigious nature of the appellants"); A-86 (*Id.*) at ¶ 232 (alleging that, on April 29, 2014, JULT's interests "completely outweighed" other voices in an unspecified context); A-65 (*Id.*) at ¶ 169 (alleging Defendant Sabalis "willfully misrepresented" Plaintiff's speech during a May 18,

Trail in 2010 and has maintained that prohibition continuously since that date. Therefore, Plaintiff's takings claim based on that decision accrued in June 2010, and the statute of limitations on any takings claim related to that conduct long since expired.

Perhaps Appellant means to argue, not that *Knick* provided a new *accrual* date, but rather that the statute of limitations governing his takings claims should somehow be *tolled* because of the *Knick* decision. Appellant does not expressly make this argument in his Brief or provide any case law in support of it, but, nonetheless, perhaps this is what he meant.

Appellant's Brief provides no basis for concluding *Knick* would toll the statute of limitations applied to Plaintiff's taking claims. Appellant's Brief cites *Knick,* but *Knick* does not discuss tolling, so *Knick* cannot be the authority for tolling the limitations period. In the district court, Plaintiff asserted *Dixon v. United States*, 1999 U.S. App. LEXIS 13215 (10th Cir. 1999) as a basis for tolling the accrual date, but the district court concluded that *Dixon* "provides no analysis or explanation of how or when equitable tolling would apply." A-222. Appellant does not rebut the district court's analysis or conclusion here, indeed, Plaintiff offers no

---

2018 Selectboard Meeting); A-66 (*Id.*) at ¶ 172 - ¶ 173 (alleging 2019 misrepresentations by Town officials); A-68 (*Id.*) at ¶ 177 - ¶ 179 (alleging disputes and misrepresentations in meeting minutes in 2019).

authority on tolling at all. Appellant has therefore failed to demonstrate that he is entitled to tolling.

In any event, it appears that there is no basis for tolling the accrual date in this case. In § 1983 actions, federal law provides the accrual date for a claim, but *state* law provides both the statutes of limitation and any applicable tolling principles. *E.g., Bd. of Regents v. Tomanio*, 446 U.S. 478, 484-486, 100 S. Ct. 1790, 1795-1796 (1980); *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002). Therefore, any basis for tolling must be found in Vermont law.

None of Vermont's statutory tolling provisions apply in this case. *See* 12 V.S.A., Chapter 23, Subchapter 3, § 551 *et seq*., and Appellant has not claimed that they do.

Dixon referenced "equitable tolling" so perhaps Appellant means to assert equitable tolling. However, Vermont courts apply the doctrine of equitable tolling

> only when the defendant actively misled the plaintiff or prevented the plaintiff in some extraordinary way from filing a timely lawsuit, or the plaintiff timely raised the precise claim in the wrong forum.

Town of Victory v. State, 174 Vt. 539, 541, 814 A.2d 369, 372 (2002). The Amended Complaint alleges neither circumstance. Appellant's Brief does not identify any allegations in the Amended Complaint—or elsewhere in the record—that would provide a basis for equitable tolling. The Appellant's Brief also does not identify any cases in which a takings claim was equitably tolled based on

Knick.[13] As a result, assuming Appellant meant to argue for equitable tolling based on the *Knick* decision, the Appellant's Brief has failed to provide any legal or factual basis for such tolling.

The district court reached the correct result. Plaintiff's Causes of Action 1 through 6 are barred by applicable statutes of limitation imposed by Vermont law. These Causes of Action are based solely on allegations related to the 2010 reclassification of Crane Brook Trail and rely solely on allegations occurring prior to June 21, 2015, which is six years prior to the filing of the Amended Complaint. (A-251 to A-252.) Appellant's reliance on *Knick* as a basis for extending the accrual date or equitably tolling the limitations period is unsupported by law or by facts in the record. Therefore, the Municipal Defendants respectfully request this Court affirm the District Court's dismissal of Causes of Action 1 through 6 on the ground those claims are time-barred.

---

[13] Counsel for the Municipal Defendants could find only two cases applying equitable tolling to a takings claim based on *Knick*'s reversal of *Williamson*, and these cases were expressly based on tolling provisions provided by non-Vermont state law. *See 4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810, 820-821, 2019 U.S. Dist. LEXIS 200449, *15-17, 2019 WL 6135041 (E.D. Ky. 2019) (finding equitable tolling because Kentucky "allows equitable tolling 'in limited circumstances where a plaintiff was diligent in pursuing his rights but factors beyond his control prevented the action from being commenced within the limitation period.'"); *Wireman v. City of Orange Beach*, 2020 U.S. Dist. LEXIS 170947, *15, 2020 WL 5523403 (S.D. Ala. 2020) (denying tolling argument based on Alabama law).

B. Vermont's Claim Preclusion doctrine applies to Plaintiff's Causes of Action 1 through 6.

Before turning to Appellant's *Rooker-Feldman* arguments, it should be noted that, although Appellant suggests he is addressing the district court's application of *res judicata* to his claims, Appellant's argument does not directly address *res judicata* in any cohesive or substantive manner. Appellant briefly references "*res judicata*" in connection with both the statute of limitations[14] and *Rooker-Feldman*[15] but Appellant provides no differentiated argument with respect to *res judicata*. As mentioned above, the Appellant should be deemed to have abandoned any argument on *res judicata* due to the failure to address substantively the district court's ruling on the issue.

However, even if the issue is considered, Appellant cannot prevail. Under Vermont law,

> claim preclusion will preclude a claim from being litigated if "(1) a previous final judgment on the merits exists, (2) the case was between the same parties or parties in privity, and (3) the claim has been or could have been fully litigated in the prior proceeding."

Iannarone v. Limoggio, 2011 VT 91, ¶15, 190 Vt. 272, 279 (citing *In re St. Mary's Church Cell Tower*, 2006 VT 103, ¶ 3, 180 Vt. 638, 910 A.2d 925 (mem.)).

---

[14] *See* Appellant's Br. at 2 and 8 (suggesting *res judicata* cannot bar a filing made two years after *Knick*).

[15] Appellant's Br. at 20 and 21.

At no point in the Appellant's Brief does appellant discuss the requirements of *res judicata* or claim preclusion. Although Appellant mentions three prior Vermont state court decisions between the parties in his statement of the case,[16] Appellant does not discuss whether these decisions constitute a final judgment on the merits and thereby meet the first required element of Vermont's claim preclusion doctrine. Despite the Appellant's failure to consider this issue, these decisions, each of which was litigated all the way to the Vermont Supreme Court, clearly constitute "previous final judgments on the merits."

Similarly, Appellant provides no relevant discussion of the second element, i.e., whether the parties in the present action are the same parties or in privity with the same parties who were involved in the three Vermont State Court actions.[17]

---

[16] *See* Appellant's Br. at 12 ("On September 27, 2013, the Vermont Supreme Court ratified the 2010 New Road Reclassification in accordance with the limitations of the Vermont statutory definition of "altered" given by 19 V.S.A. § 701(2)," quoting without citation, *Demarest v. Town of Underhill*, 2013 VT 72, ¶9, 195 Vt. 204, 208-209); Appellant's Br. at 14 ("On January 15, 2016, the Vermont Supreme Court ratified Defendant Town of Underhill's discretion in relation to the second Notice of Insufficiency submitted by Demarest," quoting without citation *Demarest v. Town of Underhill*, 2016 VT 10, ¶12, 201 Vt. 185, 190, 138 A.3d 206, 209); Appellant's Br. at 16 ("On February 26, 2021, the Vermont Supreme Court decision affirmed the lower court's application of res judicata," quoting without citation *Demarest v. Town of Underhill*, 2021 VT 14, ¶33, 256 A.3d 554, 564-565).

[17] Appellant mentions privity twice in his Brief. Appellant's Br. at 20 and 23. In these references, Appellant argues that he

> presently has standing to challenge the unconstitutionally vague statutory definition of "altered" given by 19 V.S.A. § 701(2) as

The Appellant was the plaintiff in all the actions and the Town of Underhill was the defendant, so clearly the requirement is met for the Town. The individual defendants named in the appeal on this action are all elected or appointed town officials, sued in their official capacities.[18] Moreover, the specific conduct of the individual defendants alleged in the Amended Complaint is related entirely to their *official* actions as elected and appointed officers. Accordingly, under Vermont law, all the individual defendants, including the targets of this appeal, are in privity with the Town for *res judicata* purposes. *Cornelius v. State*, 2021 Vt. Unpub. LEXIS 49, *5, 2021 WL 1853674 (Vt. 2021); *Deyo v. Pallito*, 2013 Vt. Unpub. LEXIS 115, *8, 193 Vt. 683, 69 A.3d 291 (Vt. 2013). Therefore, the second required element of claim preclusion is present here.

> precedentially interpreted in the *Ketchum v. Town of Dorset* because Plaintiff was not a party in privity to the *Ketchum* decision.

Appellant's Br. at 23. This argument misunderstands and misapplies Vermont's claim preclusion doctrine. Privity between the parties is analyzed by reference to the previous judgments that are offered as a basis for preclusion, not by reference to any caselaw that may have been applied in those judgments.

[18] A-21-25 (Amended Compl.) at ¶ 12 - ¶ 42 (naming all individual defendants in their official capacities, including the subjects of the appeal Defendants Steinbauer (¶ 12); Stone (¶ 13), Albertini (¶ 15), Friedman (¶ 18), Gibson (¶20); Heh (¶ 23), Holden (¶ 24), Kelsey (¶ 27), McKnight (¶ 28), McRae (¶ 29), Owens (¶31), Petersen (¶33), Sabalis (¶34), Seybolt (¶ 35), Squirrell (¶ 36), St. Germain (¶ 37), Tanis (¶38), Tedford (¶ 39), Walkerman (¶ 40), and Weisel (¶ 41).

With reference to the third required element—i.e., whether "the claim has been or could have been fully litigated in the prior proceeding," *Iannarone*, 2011 VT 91, ¶15, 190 Vt. At 279—the Appellant argues that *res judicata* should not apply because the "present Federal Causes of Action had not yet accrued and were never previously litigated." Appellant's Brief at 21; *see also* Appellant's Brief at 18 (arguing *res judicata* should not apply because Plaintiff's federal complaint was filed two years after *Knick*). This argument relies on Appellant's *Knick* argument, which, as discussed extensively in the previous section, does not extend the accrual date or toll the limitations period for Plaintiff's claims. The argument therefore fails because *Knick* does not extend or toll the accrual date on Plaintiff's claims.

The argument also suggests (again, without any authority) that claim preclusion does not apply to federal claims that "were never previously litigated." However, Vermont claim preclusion bars *all* claims that "could" or "should" have been brought in a previous action between the parties. *E.g., Demarest v. Town of Underhill*, 2021 VT 14, ¶19, 256 A.3d 554, 561; *Iannarone v. Limoggio*, 2011 VT 91, ¶22, 190 Vt. 272, 282; *Faulkner v. Caledonia County Fair Ass'n*, 2004 VT 123, ¶8, 178 Vt. 51, 54. Actual litigation of the issues is not required.

Plaintiff could have brought Causes of Action 1 through 6 in the 2010 Reclassification Case or the 2010 Maintenance Case. Plaintiff was the master of his own Complaint in both actions, and he was fully aware of all the defendants'

conduct that formed the basis of his claims when he began to litigate them. He could have brought these federal claims—just as he could have brought, but failed to bring, a declaratory judgment action—in the 2010 Reclassification Case or the 2010 Maintenance Case. *See Demarest v. Town of Underhill*, 2021 VT 14, ¶20, 256 A.3d 554, 561 ("[P]laintiff could have sought declaratory relief in that case [the 2010 Reclassification Case], and having failed to do so, is barred from now relitigating the issue."). That Plaintiff could have brought these federal claims in those 2010 cases is further demonstrated by the proffered basis for these claims in this appeal, namely, official Town actions dating exclusively from before 2010. *See* Appellant's Brief at 7-8 (highlighting events dating from 2001 through June 2010).

All the required elements of claim preclusion under Vermont law are present here with respect to Causes of Action 1 through 6. The district court reached the same conclusion. A-245-251. Appellant offers no persuasive rebuttal to this conclusion. Therefore, the Municipal Defendants respectfully request this Court reject Appellant's arguments with respect to *res judicata* and affirm the district court's dismissal of Causes of Action 1 through 6 on the ground that these claims are barred under Vermont's claim preclusion doctrine.

C. *Rooker-Feldman* applies to Plaintiff's claims.

Strangely, Plaintiff spends most of his argument contesting application of the *Rooker-Feldman* doctrine to his claims. This topic is identified in two of the Appellant's three Questions Presented and appears to consume about six pages of Appellant's eight-page argument. *See* Appellant's Brief at 20-26. The special attention Appellant gives *Rooker-Feldman* is curious, considering the district court discussed *Rooker-Feldman* only in connection with Causes of Action 1 and 2 and only "to the extent Plaintiff seeks review of the VSC's ruling in *Ketchum*." A-247 (Order).

In any event, the district court properly resolved this issue. Here, Plaintiff seeks to have a federal district court overrule the Vermont Supreme Court and tell the Vermont Supreme Court how to interpret Vermont highway law, to the point of dictating state procedures. To this end, Plaintiff seeks:

> Injunctive relief finding the current Vermont Supreme Court Precedent set in *Ketchum* creates an unconstitutional interpretation of Vermont law which results in *de facto* structural due process violation; a *constitutionally valid interpretation* of Vermont law requires road maintenance and reclassification decisions be appealable in accordance with the procedural due process protections of 19 V.S.A. § 740 and that this process shall be *competently* conducted in a *timely* manner, as was the case due to well-established law prior to the Vermont Supreme Court's *Ketchum* decision.

Amended Complaint, A-101 (emphases in original). Plaintiff also seeks to have a federal court "remand[] a *new* Notice of Insufficiency appeal in Vermont courts,"

to be administered under 2010 law. Amended Complaint, A-102 (emphasis in original).

In sum, Plaintiff asks the federal courts to overrule the *Ketchum* decision, and, based on that overruling, to reopen and reverse the 2010 Reclassification Case and the 2010 Maintenance Case, and then to direct the Vermont courts to give Plaintiff a do-over in these two cases, this time based on a *federal* court interpretation of *Vermont* law. Such direct federal interference in state adjudication begs for application of the *Rooker-Feldman* doctrine. Plaintiff's claims are an express "invitation" to the district court to "review and reject" the Vermont Supreme Court rulings in the 2010 Reclassification Case and the 2010 Maintenance Case. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 1521-1522 (2005) (*Rooker-Feldman* bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."); *also Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 85, 2005 U.S. App. LEXIS 19071, *15 (for *Rooker-Feldman* to apply, "the plaintiff must 'invite district court review and rejection of [that] judgment[].'") (citing *Exxon Mobil*).

For these reasons, the district court correctly applied *Rooker-Feldman*

And properly explained that the district court "does not sit as a court of appeals for the state courts" and "does not remand cases to the state court." A-247 (Order).

Appellant, relying on *Sung Cho v. City of New York*, 910 F.3d 639, 641 (2d Cir. 2018) appears to argue that the Vermont court decisions in the 2010 Reclassification Case and the 2010 Maintenance Case are not the *cause* of Plaintiff's injuries but rather "merely ratified" the Municipal Defendant's injurious conduct. *See* Appellant's Brief at 12, 13, 14, 17, 18, 21, and 24 (characterizing Vermont court decisions as "ratif[ications]"). Under *Sung Cho*, Appellant argues, such mere ratification should not trigger the *Rooker-Feldman* doctrine. Appellant's Brief at 21.

Sung Cho does not support Appellant's argument. In *Sung Cho*, and the cases upon which *Sung Cho* relied, the parties presented previously-signed settlement agreements to the Court, which incorporated the agreements by reference into "so-ordered judgements," and the plaintiff claimed that the agreements themselves were injurious. *Sung Cho*, 910 F.3d at 646-647. The Court agreed that under those circumstances, and where the plaintiff did not seek to reverse court action beyond ratification, the court decisions could not be said to have "caused" the injuries of which the plaintiff complained:

> The instant case thus does not entail the evil *Rooker-Feldman* was designed to prevent. Plaintiffs are attempting to remedy an alleged injury caused when, prior to any judicial action, they were coerced to settle, not an injury that flows from a state-court judgment. By

> allowing an action such as this to go forward, we do not risk turning our federal district courts into quasi-appellate courts sitting in review of state-court decisions.

Sung Cho, 910 F.3d at 649.

Sung Cho is nothing like the present case. Here, the parties never reached a settlement agreement, and no Vermont state court simply "ratified" a Town action. The issues in this case have been vigorously litigated and disputed by the parties for over a decade, and the Vermont court decisions have sided with the Town after making thoroughly reasoned rulings based on substantive interpretations of Vermont law. Plaintiff now asks the federal courts to give him what the Vermont courts say he did not deserve. The federal court cannot do that without reversing the fully litigated, fully-reasoned decisions in the 2010 Reclassification Case and the 2010 Maintenance Case. Attempting to describe the Vermont Supreme Court decisions as mere "ratification" is a gross mischaracterization of the facts, and a misapplication of *Sung Cho*.

For these reasons, the Municipal Defendants respectfully request the Court affirm the district court's dismissal of Causes of Action 1 and 2 based on the alternate and independent ground that the federal courts lack jurisdiction over them based on the *Rooker-Feldman* doctrine.

CONCLUSION

For the foregoing reasons, the Municipal Defendants respectfully request that the Court affirm the District Court's March 29, 2022 Order dismissing Plaintiff's Amended Complaint in its entirety.

Respectfully submitted on this 1st day of August, 2022.

CARROLL, BOE, PELL & KITE, P.C.

BY: /s/ Kevin L. Kite, Esq.

Kevin L. Kite, Esquire
64 Court Street
Middlebury, VT 05753
(802) 388-6711
kkite@64court.com

Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

Counsel for Appellees hereby certifies that the foregoing brief complies with the type-volume set forth in Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4). Based on the word count tool in Microsoft Word, the number of words in the foregoing brief, excluding the sections excludable under Fed. R. App. P. 32(f), is 11,246.

Respectfully submitted on this 1st day of August, 2022.

CARROLL, BOE, PELL & KITE, P.C.

BY: /s/ Kevin L. Kite, Esq._____

Kevin L. Kite, Esquire
(802) 388-6711
kkite@64court.com

No. 22-956

In the United States Court of Appeals for the Second Circuit

David P. Demarest,

Plaintiff-Appellant,

-v-

Town of Underhill, a municipality and charter town,
Daniel Steinbauer, as an individual and in official capacity as Selectboard Chair, Bob Stone, as an individual and in official capacity, Peter Duvall, in official capacity, Dick Albertini, as an individual and in official capacity, Judy Bond, in official capacity, Peter Brooks, in official capacity, Seth Friedman, in official capacity, Marcy Gibson, as an individual and in official capacity, Barbara Greene, in official capacity, Carolyn Gregson, in official capacity, Stan Hamlet, as an individual and in official capacity, Rick Heh, as an individual and in official capacity, Brad Holden, as an individual and in official capacity, Faith Ingulsrud, in official capacity, Kurt Johnson, in official capacity, Karen McKnight, as an individual and in official capacity, Nancy McRae, as an individual and in official capacity, Michael Oman, in official capacity, Steve Owens, as an individual and in official capacity, Mary Pacifici, in official capacity, Clifford Peterson, as an individual and in official capacity, Patricia Sabalis, as an individual and in official capacity, Cynthia Seybolt, as an individual and in official capacity, Trevor Squirrell, as an individual and in official capacity, Rita St. Germain, as an individual and in official capacity, Daphne Tanis, as an individual and in official capacity, Walter Ted Tedford, as an individual and in official capacity, Steve Walkerman, as an individual and in official capacity, Mike Weisel, as an individual and in official capacity, Barbara Yerrick, in official capacity, Anton Kelsey, in official capacity,

Defendants-Appellees,

{ DEFENDANTS CONTINUED ON THE INSIDE COVER }

On Appeal from the United States District Court for the
District of Vermont (Burlington), No. 21-cv-167

Plaintiff-Appellant's Reply Brief

DAVID DEMAREST
PLAINTIFF-APPELLANT PRO SE
P.O. BOX 144
UNDERHILL, VT 05489
TELEPHONE: (802) 363-9962
DAVID@VERMONTMUSHROOMS.COM

Front Porch Forum, as a Public Benefit 15 Corporation fairly treated as acting under color of law due to past and present 16 factual considerations while serving the traditional governmental role of providing 17 "Essential Civic Infrastructure" ranging from the di, Jericho Underhill Land Trust, as NonProfit 21 Corporation fairly treated as acting under color of law due to past and present 22 factual considerations and a special relationship willfully participating in and 23 actively directing acquisition of municipal property by the Town of Und,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

Local Ordinance

INTRODUCTION

Claims subject to this appeal require a full and fair opportunity to litigate under a non-deferential standard of review. Claim preclusion does not apply to present Fifth Amendment takings or associated due process causes of action because these claims had not yet accrued and could not have been properly brought during Vt.R.Civ.P. Rule 75 proceedings involving Municipal Defendants' "reclassification" of a Class III and Class IV segment of TH26, town highway maintenance decisions, or even the Rule 75 proceedings involving a denial of a proposed subdivision's *preliminary* access permit. The Response Brief made no attempt to explain *why* a state court's *deferential* ratification of Municipal Defendants' decisions on narrowly defined administrative issues, with judicial review statutorily limited to Vt.R.Civ.P. Rule 75 and akin to a *writ of certiorari*, can now be extrapolated into decisions *on the merits* involving causes of action which were not previously at issue.

19 V.S.A. § 701(2), *as precedentially applied* after *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500, delayed accrual of present causes of action because alleging TH26 had been "altered" in state court was beyond "implausible," it was statutorily impossible.

CLARIFICATION OF ISSUES UNDER APPEAL

The facts as alleged and answers to the questions Plaintiff-Appellant has brought before this Court for review demonstrate the District Court erred by dismissing *with prejudice* takings and associated due process causes of action based upon Rooker-Feldman Doctrine, *res judicata,* the Statute of Limitations, or a combination of these defenses. Present causes of action were never raised in state or Federal court *and could not have been* fully and fairly litigated *until* Plaintiff had a full and complete 42 U.S.C. § 1983 cause of action which was plausible on its face.

Plaintiff is fully agreeable to seeking leave of the Court to plead First Amendment censorship and retaliation causes of action with additional specificity; despite this *very* early stage of present proceedings, First Amendment retaliation pleadings made in the Amended Complaint (A-96 ¶268) have already been partially substantiated by Exhibits 7 and 8 of Plaintiff's Opposition to Motion to Dismiss (A-211 to A-215).

Plaintiff stipulates to the dismissal of the Ninth and Tenth causes of action as they relate to the Jericho Underhill Land Trust and Front Porch Forum. For the purposes of preservation, causes of action involving

the alleged conspiring of town officials from within either legal entity is either preserved by naming the culpable town official on the Notice of Appeal or is presently unknowable to Plaintiff prior to *any* discovery.

If Federal pursuit of Municipal Defendants' January 12, 2021 violation of the First Amendment 'Right to Petition' *voters* of his town on a ballot is not possible; at a minimum Claims 11 and 12 should have been dismissed *without prejudice* to preserve Plaintiff's right to pursue a state court remedy for claims stemming from Municipal Defendants' refusal to place the *purely advisory* articles of the 2020 Petition On Public Accountability on a ballot, despite being duly submitted by Plaintiff with the required number of voter signatures according to Vermont statute.

Individuals named on the Notice of Appeal are proper to sue in their individual capacities for deliberate indifference, or worse, towards Plaintiff's constitutional rights.

TAKINGS CLAIM IMPLAUSIBLE IF TH26 WAS NOT "ALTERED"

A § 1983 challenge to Municipal Defendants' perfidious efforts to take Plaintiff's private property rights and to circumvent due process rights simply could not as a matter of law accrue if nothing was "altered" (according to the presently challenged statute *as applied*) or while the

requisite personal damages element to a recognized private property right or interest remained unduly speculative.

The Municipal Defendants' Underhill Trail Ordinance strategically maintained plausible recognition of Plaintiff's private rights to continued vehicular access over the former TH26 corridor; granting permits to operate a motor vehicle is *mandatory* based upon the verbiage "*shall be issued" for* any "compelling personal and business purpose" (AD-3). As a result, this makes it impossible for a private takings claim or associated due process claim to accrue *until* the Municipal Defendants caused more than a speculative harm to Plaintiff's private rights by actually rescinding a clearly established and self-executing private right of vehicular access over the former TH26 corridor.

Although the Underhill Trail Ordinance has *never* been enforced for over 21 years, Municipal Defendants' knowledge of Plaintiff's continued motor vehicle[1] use on the TH26 segment which was

---

[1] Municipal Defendants' sustained refusal to provide *any* maintenance to portions of both Class IV and "Legal Trail" segments of TH26 (*and refusal to permit Plaintiff to maintain the "Legal Trail" segment at his own expense*) now physically constrains Plaintiff's motor vehicle access to very cautious use of "off-road" capable motor vehicles.

"discontinued as a town highway and reclassified as the "Crane Brook Trail" is confirmed by sworn testimony by Municipal Defendant Mike Wiesel on August 2, 2021 during the peripheral matter of the construction of a new bridge and associated public trail extension with a new entrance onto the northern Class IV segment of TH26 without any required permits, safe sight lines, or constructive notice to interested parties (Underhill Development Review Board Docket No. DRB-21-12).

The plausible personal damages element required for accrual of a takings claim was also delayed by Municipal Defendants strategic decision to only place boulders in the way of the current and former TH26 corridor *temporarily.* They were consistently and timely moved out of Plaintiff's way when requested, *until* Municipal Defendants' "written promise to move boulders placed in the way of Plaintiff's right of way was first broken on November 13, 2019." [as alleged, A-60 ¶153]

Municipal Defendants' willful disregard for the rights of private property owners abutting the central segment of TH26 is plainly evident in selectboard meeting minutes dated October 18, 2001 (excerpt on A-186) and a plethora of other public meeting minutes not yet in the record at the Motion to Dismiss stage of present proceedings.

The strategic failure to file a reclassification order in 2001 undeniably eliminated the standing of all interested parties to exercise their right to appeal the claimed 2001 reclassification "effort" and resulted in the Vermont State Agency of Transportation continuing to fund maintenance of the Class III portion of TH26 between the Town Highway Department garage and Plaintiff's domicile, despite Municipal Defendants' refusal to properly maintain the central Class III or Class IV segments of TH26.

The Municipal Defendants appeared to avoid any plausible claim of interference with personal property rights by the following acts: (1) promises made to Plaintiff prior to purchasing his property, (2) the issuance of a permit to build a domicile with a permit issued to New Road, and (3) passing of the willfully vague Underhill Trail Ordinance, which initially referenced a non-existent trail. Municipal Defendants have continued to treat Plaintiff dramatically differently than other similarly situated residents (for example, as alleged A-66 ¶171) and presently have continued to refuse to provide ***any*** maintenance to Plaintiff's limited remaining Class IV public road frontage.

Twenty-one years ago, it was unbelievable that a town would try to *rescind* landowners' self-executing private right of access on a road which

had been continuously used since the 1800's. Plaintiff could not plausibly plead a personal "injury in fact" to establish Article III standing until Municipal Defendants' decision[2] to actually exercise the *ipse dixit* discretion they now claim in an otherwise unenforced Trail Ordinance, which did not occur until the May 5, 2016 (Opening Brief, Chronological Statement of Facts, page 9).

> The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—**or has instead restricted a property owner's ability to use his own property**. See *Tahoe-Sierra*, 535 U.S. at 321–323, 122 S.Ct. 1465. Whenever a regulation results in a physical appropriation of property, a per se taking has occurred
> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021)

RETROACTIVE APPLICATION OF *KNICK* INCLUDED TOLLING

Municipal Defendants' Response acknowledges that the *retroactive application of Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) *included*

---

[2] The Vermont Supreme Court ratified this decision February 26, 2021 under the Vt.R.Civ.P. Rule 75 deferential standard of review and "discretion" in the Trail Ordinance (Opening Brief, page 16)

equitable tolling for Plaintiffs, which had been dutifully attempted to exhaust potential state remedies, but failed to expand upon the rationale of applying state tolling laws in *4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810 (E.D. Ky. 2019) :

> Because Kentucky's tolling laws are consistent with the federal policy underling section 1983, see *infra*, Kentucky's tolling laws apply here.
> *4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810 (E.D. Ky. 2019)

It is precisely because the state's tolling laws were consistent with Federal policy that accrual was dictated by Federal law with tolling being applied in accordance with the state law. Federal law is controlling if a state's tolling provisions (or lack thereof) conflict with Federal policy; Federal law requires equitable tolling of takings and associated due process violations, when necessary, under the unique combination of fact and law leading up to the filing of present causes of action.

If *Knick* were to be applied retroactively without tolling for claims which as a matter of fact and law undeniably could not previously accrue under the Federal precedent of *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), this could easily result in a travesty of justice. Equitable tolling of Federal takings and

associated due process claims is proper for any similarly situated Vermont resident documented to have exercised Plaintiff's timely diligence through a maze of Kafkaesque Vt.R.Civ.P. Rule 75 proceedings caused by statutory denial of a Vt.R.Civ.P. Rule 74 appeal process due to 19 V.S.A. § 701(2) as precedentially applied after *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500. In short, Municipal Defendants' hope that *Knick* can create a retroactive accrual date without equitable tolling would constitute a dramatic departure from Federal policy.

In addition, *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014) succinctly summarized the error of a retroactive application of the Statute of Limitations when a town uses Municipal Defendants' strategy:

> But that argument would mean that a government entity could engage in conduct that would constitute a taking when viewed in its entirety, so long as no taking occurred over any three[3]-year period. We do not accept this. **The Town used extreme delay to effect a taking. It would be perverse to allow the Town to use that same delay to escape liability.**
> …
> A claim based on such a "death by a thousand cuts"

---

[3] In Vermont, six years is clearly the appropriate Statute of Limitations after takings cause of action accrual according to 12 V.S.A. § 511

> theory requires a court to consider the entirety of the government entity's conduct, not just a slice of it.
> *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014)

PUBLIC ISSUES ARE DISTINCT FROM A TAKINGS CLAIM

Even if Vermont statute recognized the central segment of TH26 had been "altered" in some way by Municipal Defendant decisions, the Causes of Action subject to this appeal are separate and distinct from proceedings to which Plaintiff was a *co-party* involving a general public interest in what level of maintenance or highway classification is appropriate for a town road. Plaintiff never *could or should have* attempted to interject present non-deferential § 1983 takings or associated due process causes of action prior to their accrual into any of the prior deferential Vt.R.Civ.P. Rule 75 appeal proceedings.

The requisite personal damages element necessary for a plausible § 1983 claim was unduly speculative during TH26 maintenance and reclassification administrative proceedings. Since no segment of TH26 was "altered" according to 19 V.S.A. § 701(2) *as applied*, Plaintiff could not plausibly challenge the decision to indefinitely block abutters'

reversionary[4] property rights. Even if, *en arguendo*, *Knick* were to be applied retroactively without *any* tolling, as Municipal Defendants hope, takings or associated due process cause of action would have been unripe. At that time, Municipal Defendants' had not yet plausibly acted to sufficiently interfere with either Plaintiff's personal investment-backed returns, or the self-executing *and exercised* rights to continued vehicular access to Plaintiff's domicile and surrounding land conferred by both common law and 19 V.S.A. § 717(c) to plausibly allege *non-speculative* personal harm. Plaintiff incorporates by reference the chronology provided in the Opening Brief and the below reply given to the third question posed by Municipal Defendants' Response Brief.

CLAIM PRECLUSION DURING VT.R.CIV.P. RULE 75 APPEAL

Claim preclusion involving causes of action statutorily subject to an identical standard of review, which is akin to a *writ of certiorari,* is fundamentally different than the misapplication of *res judicata* on appeal. Unlike *all* prior Vt.R.Civ.P. Rule 75 proceedings, the Standard of Review involving the present causes of action requires fact-finding with

---

[4] "Recovery of lands" in Vermont has a 15 year statute of limitations (12 V.S.A. § 501).

proper evidentiary support and is not deferential to unsubstantiated Municipal Defendant narratives.

The deferential Rule 75 ratification of Municipal Defendant discretion under the Underhill Trail Ordinance, and the application of *res judicata,* in *Demarest v. Town of Underhill*, 2021 VT 14, 214 Vt. 250, 256 A.3d 554, demonstrates that Plaintiff's private access rights on the former TH26 segment has been "altered" by Municipal Defendants from a functional publicly maintained Class III and Class IV town highway according to every common definition of the word "altered" (other than the vague definition given by 19 V.S.A. § 701(2) as applied under the *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500 precedent).

It is undisputed that causes of action on appeal were never litigated in state court. Therefore, issue preclusion does not apply. Since non-deferential causes of action require *facts* there is no nexus in common with a prior ratification of the "reclassification" in Demarest v. Town of Underhill, 2013 VT 72, 195 Vt. 204, 87 A.3d 439 which involved, "no fact-finding. It is an appellate-style review of an administrative decision." (A-200).

Claim preclusion requires a "common nucleus of operative facts," this essential element is elaborated upon by *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589 (2020):

> Put simply, the two suits here were grounded on different conduct, involving different marks, occurring at different times. They thus did not share a "common nucleus of operative facts."
> …
> Claim preclusion generally "does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Whole Woman's Health* v. *Hellerstedt* , 579 U.S. ——, ——, 136 S.Ct. 2292, 2305, 195 L.Ed.2d 665 (2016) (internal quotation marks omitted); *Lawlor v. National Screen Service Corp.* , 349 U.S. 322, 327–328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) (holding that two suits were not "based on the same cause of action," because "[t]he conduct presently complained of was all subsequent to" the prior judgment and it "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case").

The Response Brief notably fails to even mention *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500 *a single time* or explain *how* Plaintiff could have "fully and fairly" litigated claims on appeal, which require a non-deferential review of genuine facts, if according to current Vermont law *as applied* nothing has been "altered."

As alleged in the Amended Complaint:

> Numerous portions of the legal record contained in preceding state litigation are so severely prejudiced by misconduct of Defendant Town of Underhill, and town officials presently sued in their individual capacity, so as to serve as little more than a very compelling reason to issue Declaratory relief involving the precedent Vermont courts set in *Ketchum*… (A-36 ¶76).

As already quoted in the Opening Brief (Doc. 43), but not responded to in Municipal Defendants' Response Brief (Doc. 62), *Nance v. Ward*, 142 S. Ct. 2214 (2022) clearly recognizes:

> [T]he ordinary and expected outcome of many a meritorious § 1983 suit is to declare unenforceable (whether on its face or as applied) a state statute as currently written.
> (Opening Brief, page 27)
> *Nance v. Ward*, 142 S. Ct. 2214 (2022)

REPLIES TO DEFENDANT-APPELLEE QUESTIONS RAISED

Reply To Defendant-Appellee Question #1:

> Should Appellant's Amended Complaint be dismissed because the Appellant's Brief is nearly incomprehensible and fails to comply with Fed. R. App. P. 28(a) and Local Rule 28.1(a)?

As required by Fed.R.App.P. 28(a) and Local Rule 28.1(a) Plaintiff-Appellant's Brief (Doc. 43) strived to be both concise and free of irrelevant matter by only presenting questions necessary to correct the premature dismissal *with prejudice* of meritorious claims. The primary arguments against the application of Rooker-Feldman Doctrine (A-156, III(A)), *Res judicata (A-153)*, or the Statute of Limitations (A-169, IIIC) were already made in Opposition to Municipal Defendants' Motion to Dismiss; Plaintiff-Appellant's Brief (Doc. 43, pages 7-16) and elaborated on in the chronology which demonstrates the absolute earliest date Plaintiff-Appellant *could* have filed the claims subject to this appeal.

Even now, the original Class III and Class IV segments of TH26, which were "discontinued and reclassified by the Town as a legal trail" and which Municipal Defendants now have the discretion to rescind Plaintiff's self-executing private property right of access ***still*** has not been "altered" according to *Ketchum* since TH26 was not "widened from

one lane to two lanes." Plaintiff incorporates by reference the reply to Question #3 below and the chronology on pages 7-16 of the Opening Brief.

Municipal Defendants' Response Brief has dramatically departed from prior arguments in their Motion to Dismiss which claimed, "Plaintiff enjoys a common law right of access to Crane Brook Trail as an abutting landowner." (top of A-130) and the quoting of the presently challenged *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500 precedent, "[D]owngrading a road does not involve a taking." (A-129).

The Response Brief has completely failed to respond to the Opening Brief's quote of *Nance v. Ward*, 142 S. Ct. 2214 (2022), Federal policy does not support a *retroactive* claim preclusion argument, given that *Knick* expressly corrected the error of *Williamson County* delay (or potential complete denial) of meritorious takings and associated due process claims. Also, even the denial of a *preliminary* access permit application to a proposed subdivision of Plaintiff's property did not yet create a personal damages claim plausible on its face if nothing had been "altered," explained on pages 22 through 27 of Plaintiff's Opening Brief and elaborated upon on page 3 and page 23 of this Reply.

Reply To Defendant-Appellee Question #2:

> Should Appellant's Amended Complaint be dismissed because the Appellant's Brief expressly abandons many of the claims asserted in the Amended Complaint and abandons the remaining claims by failing to address the district court's dispositive and independent bases for dismissal?

The preliminary statement (Opening Brief, page 8) and issues presented for review (Opening Brief, page 2) clarified the parties and issues on appeal, further elaborated under the heading "Clarification Of Issues Under Appeal" (page 2). The District Court erred by dismissing Causes of Action 1 through 6 *with prejudice* based upon Rooker-Feldman Doctrine, *res judicata*, the Statute of Limitations, Failure to State a Claim, or a combination of these defenses. After a limited discovery period, leave to amend should be feely granted on all claims against the Municipal Defendants named on the Notice of Appeal.

Reply To Defendant-Appellee Question #3:

> Has Appellant demonstrated any error in the District Court's decision?

Appellant has demonstrated the dismissal *with prejudice* of takings and associated due process causes of action was in error because present causes of action were not *and could not have* been fully and fairly litigated in preceding deferential state court Vt.R.Civ.P. Rule 75 appeal

proceedings, which ratified narrowly defined issues. Present takings and due process causes of action could not accrue until *Knick* wisely overturned the prior *Williamson County* precedent. A retroactive application of *Knick* in accordance with a Federal law accrual determination requires the simultaneous application of equitable tolling in accordance with the Federal policy underlying § 1983 takings and associated due process claims. In addition, these claims were timely filed because they did not accrue until Plaintiff was harmed, when the personal damages element of these claims was plausible on its face. Accordingly, these claims are not barred by *res judicata.* Plaintiff did not *and could not have* properly brought any present causes of action during any of the prior deferential Vt.R.Civ.P. Rule 75 proceedings, including the May 26, 2016, appeal of Municipal Defendants' discretionary denial of a *preliminary* access permit application to Plaintiff's proposed subdivision. A permit application denial does not, *in and of itself*, create a cause of action for the taking of a protected property right.

Reply To Defendant-Appellee Question #4:

> Does *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) provide a basis for extending the accrual date of Appellant's Fifth Amendment takings claims or tolling the applicable statute of limitations?

It has never been argued that *Knick* extends an accrual date; the error of *Williamson County* precedent is what requires equitable tolling of the claims subject to this appeal. The error would occur if *Knick* were to be applied retroactively after Plaintiff dutifully followed established Federal precedent while subjected to Vermont statute 19 V.S.A. § 701(2), which presently grants local municipalities unconstitutionally broad discretion to reclassify, convert, or substantially change a town highway according to this statute in any number of ways which do not meet the vague statutory definition of "altered" as precedentially applied due to *Ketchum*. Without the impartial determination of "necessity" required under Vermont eminent domain laws (10 V.S.A. § 958), under *Ketchum* significant changes to a town highway *may or may not* eventually result in the taking of private property rights for public use without compensation or a meaningful time and manner to oppose a likely taking,

Plaintiff incorporates by reference reply to Appellee Question #3 and adds emphasis to the impossibility of a successful takings claim (or indeed *any* claim), if nothing was "altered" according to the challenged statute, 19 V.S.A. § 701(2), as applied after the *Ketchum* precedent.

In addition to equitable tolling, equitable estoppel, and promissory estoppel arguments already raised (A-169) in relation to tolling of the Statue of Limitations, tolling due to the State of Emergency caused by COVID (A-171) must be taken into account when determining the timeliness of present causes of action. *En arguendo*, solely factoring in tolling due to COVID and no other tolling arguments, all claims which would have otherwise expired between March 13, 2020 and the filing date of the original complaint are timely filed according to Vermont law.[5]

Reply To Defendant-Appellee Question #5:

> Does the Rooker-Feldman doctrine bar Plaintiff's Causes of Action 1 and 2 because those claims seek review and rejection of previous state court orders in which Plaintiff was the losing party?

Rooker-Feldman does not bar causes of Action 1 and 2 because these causes of action explicitly attack Municipal Defendants' willful

---

[5] Section 6 of Act No. 95 (S.114), signed into law April 28, 2020, states, in part, "all statutes of limitations or statutes of repose for commencing a civil action in Vermont that would otherwise expire during the duration of any state of emergency declared by the Governor arising from the spread of COVID-19 are tolled until 60 days after the Governor terminates the state of emergency by declaration."
Vermont Governor Phil Scott's Executive Order 06-21, confirms the statewide COVID-19 Declaration of State of Emergency was "issued March 13, 2020 as amended and restated, and which expired by its terms June 15, 2021." Claims at issue were filed June 21, 2021.

actions and inactions. The partial ratification of Municipal Defendants' decisions in accordance with their own narrative and associated record under a deferential Vt.R.Civ.P. Rule 75 standard of administrative review of a municipal decision, akin to a *writ of certiorari*, does not undermine District Court jurisdiction over present causes of action. Critical to analysis of the Rooker-Feldman's jurisdictional bar, Plaintiff does not complain of any damages *caused by* a state court judgement on the merits *to which he was or could have been a party*.

Notably, Defendants" Response Brief (Doc. 62) blatantly ignored[6] the precedent set in *Ketchum* which jurisdictionally forced the Vermont Supreme Court to ratify Municipal Defendants' Order of Reclassification, and also Municipal Defendants' discretion in the maintenance case of *Demarest v. Town of Underhill*, 2016 VT 10, 201 Vt. 185, 138 A.3d 206:

> It is not for this Court to consider the merits of the Town's justification or reasoning…
> …
> ¶ 15. We note appellees' concern that the broad discretion under § 310(b) binds the Commissioners

---

[6] The Response Brief Table of Authorities does not include the *Ketchum* precedent *at all* despite Municipal Defendants *complete* reliance on this precedent in *all* Vermont Supreme Court *ratifications* of a town's *ipse dixit* discretion. The 12(b)(6) motion to dismiss (including A-126 ¶A and A-129) also heavily relied on *Ketchum's stare decis*.

> and the trial court, leaving them virtually powerless to reach a differing conclusion absent a showing of arbitrary and discriminatory decision making. This argument was raised, and addressed by this Court, in Town of Calais. We again note, as we did in that case, that although "it is difficult to imagine a circumstance under which any class 4 road would ever be repaired," even when required by the public good, that is not "the policy adopted by the Legislature, and we must implement the Legislature's policy choice rather than the court's." *Town of Calais v. Cnty. Rd. comm'rs*, 173 Vt. 620, 795 A.2d 1267 (2002) Nearly fifteen years have passed since that decision, but the Legislature has yet to amend either § 971 et seq. or § 310(b) to clarify the Commissioners' role, or lack thereof, as it relates to repairs and maintenance of Class 4 highways. We are left to restate our conclusion from *Town of Calais*.
>
> *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500

Plaintiff has standing to challenge the constitutionality of 19 V.S.A. § 701(2) *as applied* and to finally receive a full and fair opportunity to litigate present causes of action under a non-deferential standard of review. Municipal Defendants' Response Brief also fails to address the implications of *Sung Cho v. City of N.Y.*, 910 F.3d 639 (2d Cir. 2018) as it relates to the prior *deferential ratifications* of Municipal Defendants' *ipse dixit* record and narratives while simultaneously ignoring the clear implications of the Opening Brief's quote of *Nance v.*

Ward, 142 S. Ct. 2214 (2022) (Opening Brief, page 22).

ACCRUAL OF TAKINGS & DUE PROCESS CAUSES OF ACTION REQUIRES *NON-SPECULATIVE* PERSONAL HARM

> Each element of standing "must be supported ... with the manner and degree of evidence required at the successive stages of the litigation," and at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." (Lujan , 504 U.S. at 561, 112 S.Ct. 2130)
> …
> Injury in fact consists of "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical."
> (Spokeo, 136 S.Ct. at 1548)
> As cited in *John v. Whole Foods Mkt. Grp., Inc.,* 858 F.3d 732 (2d Cir. 2017)

Under a deferential standard of review akin to a *writ of certiorari,* a state court's inquiry into plausible accrual of a never before litigated takings claim and associated due process claims, or any substantial alteration to TH26 which fails to meet the statutory definition of altered such as the findings of fact made in the report of the County Road Commissioners (A-202), would have been circumvented by Municipal Defendants' unbridled statutory discretion and ability to create their own narrative as a substitute for genuine facts.

Judicial estoppel requires Municipal Defendants to somehow

manage to keep their consistently changing narrative consistent. Municipal Defendants' response brief dramatically departed from the original arguments presented in their Motion to Dismiss claiming, "Nothing has been taken from Plaintiff that was not already taken from his predecessors in title…" (middle of page A-129) or Municipal Defendants' *new* arguments which no longer argue "[Plaintiff] had the opportunity to present his claims to the County Road Commissioners…" (A-133) as a *meaningful time and manner to be heard* for the purposes of a procedural due process analysis simply because the County Road Commissioner's Decision found "Repairs are to consist of those repairs recommended by petitioners…" (A-207). Comity dictates *Full Faith* be extended to *findings of fact* in prior state proceedings *but not to deferential ratifications* of a defendant-created record. Judicial notice should be taken that Municipal Defendants' original response and defenses raised to the first-filed Notice of Insufficiency (A-182) have been found *as a matter of law and fact* to be without *any* merit (A-193, Court Ruling the "2001 attempt to reclassify TH26 was not valid") and (A-202 to A-210, Report of County Road Commissioners) *at a non-deferential standard of review.*

Despite only being at the initial pleadings, Plaintiff has also submitted credible support (affidavit A-13 and table A-39) of factual allegations made in the Amended Complaint ¶79-84 of A-37 to A-38.

The Response Brief's dramatic departure from prior arguments now concedes "reclassification of a portion of TH26 to a 'trail' is significant…" (Response Brief, page 2), while still ignoring the reversionary property rights guaranteed TH26 abutters at the time the town highway was established by Vermont Statutes of 1906, Chapter 107, Sec. 3904 (AD-2); this new concession does not create a retroactive accrual date for takings or associated due process claims. No matter how "significant" Municipal Defendants' may presently concede the willful changes to the central segment of TH26 have been, these changes still do not statutorily meet the vague statutory definition of "altered" given by 19 V.S.A. § 701(2) as applied after the precedent set in *Ketchum v. Town of Dorset*.

> In adjudicating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) , the court must "accept as true all of the allegations contained in a complaint" and decide whether the complaint states a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009) (internal quotation marks omitted). (A-233)

The more egregious any defendant's conduct, the greater a burden any plaintiff faces to file plausible pleadings before the opportunity to conduct ***any*** discovery. The facts alleged and the answers to the questions raised on appeal demonstrate Plaintiff has plausible takings and associated due process claims against Municipal Defendants named on the Notice of Appeal, granting Plaintiff a limited period for discovery followed by Leave of the Court to file a Second Amended Complaint on Claims 1 through 8 (and claims 9 and 10, but only to the extent claims 9 and 10 implicate individual town officials either named on the Notice of Appeal or presently unknowable to Plaintiff) properly balances the judicial efficiency created by the plausibility standard with a grave risk of premature dismissal of meritorious civil rights claims absent any discovery. From 2001 until the present day, it is profoundly implausible Municipal Defendants could have been unaware of the implications of *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) or that 10 V.S.A. § 958 limits Vermont municipalities legal exercise of eminent domain authority to "necessity" as defined by that statue.

A recent overt act in furtherance of Municipal Defendants' conspiracy to take Plaintiff's *private* property rights and associated

appurtenances over the current and former TH26 corridor without just compensation or a meaningful time and manner to oppose the taking of a private property right occurred on January 21, 2021 when "money was pulled out of the budget for a bridge on the Crane Brook Trail abutting Mr. Demerest's [sic] property." (A-214)

Reasonable conclusions from facts alleged underscores to Justice Thomas' reasoning in *Knick*:

> This "sue me" approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. *Arrigoni Enterprises, LLC v. Durham*, *[578 U.S. 951, 136 S. Ct. 1409 (2016)]* (THOMAS, J., dissenting from denial of certiorari). Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." Ibid. A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking." Id. , at ——, 136 S.Ct., at 1410.
> *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019)

CONCLUSION

Causes of action subject to this appeal could not accrue until (1) *Knick* overturned the state-litigation requirement of the *Williamson County* precedent, and (2) harm to Plaintiff's private property rights was no longer unduly speculative. Plaintiff presently has standing to challenge the constitutionality of the vague statutory definition of "altered" provided by 19 V.S.A. § 701(2), *as precedentially applied* due to *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500.

Plaintiff respectfully requests the opportunity to conduct discovery followed by leave to file an amended complaint in accordance with Fed. R. Civ. P. 15(a)(2) involving all claims against the Municipal Defendants named on the Notice of Appeal. Takings and associated due process causes of action are timely filed and require a non-deferential standard of review. Rooker-Feldman Doctrine, Claim Preclusion, the Statute of Limitations, Failure to State a Claim, or a combination these defenses, do not bar claims on appeal. The District Court's Order dismissing Causes of Action 1-6 and 11-12 *with prejudice* and Causes of Action 7-10 *without prejudice* should be **reversed, in part**, and the case should be **remanded** to the Vermont District Court for further proceedings

consistent with the findings of this Court's well-reasoned answers to the three questions Plaintiff has raised on appeal. Upon remand, and after a limited discovery period, leave to amend should be feely granted on all claims against the Municipal Defendants named on the Notice of Appeal.

Dated: August 15, 2022

Respectfully submitted,

/s/ David Demarest

David Demarest, pro se
P.O. Box 144
Underhill, VT 05489
(802)363-9962

Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify pursuant to Fed.R.App.P. 32(a) that the attached brief is proportionally spaced, has a typeface (Century) of 14 points, and contains 5710 words (excluding, as permitted by Fed.R.App.P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Dated: August 15, 2022

Respectfully submitted,

/s/ David Demarest

David Demarest, *pro se*
P.O. Box 144
Underhill, VT 05489
(802)363-9962
david@vermontmushrooms.com

Plaintiff-Appellant

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CERTIFICATE OF SERVICE

CAPTION: Demarest v. Underhill DOCKET NUMBER 22-956

I, David Demarest, hereby certify under penalty of perjury:

On August 15, 2022, I served on all parties or their counsel of record through electronic delivery by the CM/ECF system a copy of:

Plaintiff-Appellant's Reply Brief

by using the appellate CM/ECF system with consent.

All participants in this case or their counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: August 15, 2022

Respectfully submitted,

/s/ David Demarest

David Demarest, *pro se*
P.O. Box 144
Underhill, VT 05489
(802)363-9962
david@vermontmushrooms.com

Plaintiff-Appellant

No. 22-956

In the United States Court of Appeals for the Second Circuit

David P. Demarest,

Plaintiff-Appellant,

v.

Town of Underhill, a municipality and charter town,
Daniel Steinabauer, as an individual and in official capacity as Selectboard Chair, Bob Stone, as an individual and in official capacity, Peter Duvall, in official capacity, Dick Albertini, as an individual and in official capacity, Judy Bond, in official capacity, Peter Brooks, in official capacity, Seth Friedman, in official capacity, Marcy Gibson, as an individual and in official capacity, Barbara Greene, in official capacity, Carolyn Gregson, in official capacity, Stan Hamlet, as an individual and in official capacity, Rick Heh, as an individual and in official capacity, Brad Holden, as an individual and in official capacity, Faith Ingulsrud, in official capacity, Kurt Johnson, in official capacity, Karen McKnight, as an individual and in official capacity, Nancy McRae, as an individual and in official capacity, Michael Oman, in official capacity, Steve Owens, as an individual and in official capacity, Mary Pacifici, in official capacity, Clifford Peterson, as an individual and in official capacity, Patricia Sabalis, as an individual and in official capacity, Cynthia Seybolt, as an individual and in official capacity, Trevor Squirrell, as an individual and in official capacity, Rita St. Germain, as an individual and in official capacity, Daphne Tanis, as an individual and in official capacity, Walter Ted Tedford, as an individual and in official capacity, Steve Walkerman, as an individual and in official capacity, Mike Weisel, as an individual and in official capacity, Barbara Yerrick, in official capacity, Anton Kelsey, in official capacity,

Defendants-Appellees,

{ DEFENDANTS CONTINUED ON THE INSIDE COVER }

On Appeal from the United States District Court for the
District of Vermont (Burlington), No. 21-cv-167

Plaintiff-Appellant's Appendix — A-1 to A-259

DAVID DEMAREST
PLAINTIFF-APPELLANT PRO SE
P.O. BOX 144
UNDERHILL, VT 05489
TELEPHONE: (802) 363-9962
DAVID@VERMONTMUSHROOMS.COM

Front Porch Forum, as a Public Benefit 15 Corporation fairly treated as acting under color of law due to past and present 16 factual considerations while serving the traditional governmental role of providing 17 “Essential Civic Infrastructure” ranging from the di, Jericho Underhill Land Trust, as NonProfit 21 Corporation fairly treated as acting under color of law due to past and present 22 factual considerations and a special relationship willfully participating in and 23 actively directing acquisition of municipal property by the Town of Und,

Defendants.

'PLAINTIFF-APPELLANT'S APPENDIX TABLE OF CONTENTS

APPENDIX

APPEAL,ENE0

U.S. District Court
District of Vermont (Burlington)
CIVIL DOCKET FOR CASE #: 2:21-cv-00167-wks

Demarest v. Underhill et al
Assigned to: Judge William K. Sessions III
Cause: 42:1983 Civil Rights Act

Date Filed: 06/21/2021
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

David P. Demarest

represented by **David P. Demarest**
P.O. Box 144
Underhill, VT 05489
802-363-9962
Email: david@vermontmushrooms.com
PRO SE

V.

Defendant

Town of Underhill
a municipality and charter town

represented by **James F. Carroll , Esq.**
Carroll, Boe, Pell & Kite, P.C.
64 Court Street
Middlebury, VT 05753
802-388-6711
Fax: 802-388-2111
Email: jcarroll@64Court.com
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
Carroll, Boe, Pell & Kite, P.C.
64 Court Street
Middlebury, VT 05753
802-388-6711
Email: kkite@64court.com
ATTORNEY TO BE NOTICED

Defendant

Daniel Steinabauer
as an individual and in official capacity as Selectboard Chair

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Bob Stone
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Peter Duval
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Dick Albertini
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Judy Bond
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Peter Brooks
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Seth Friedman
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Marcy Gibson
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Barbara Greene
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Carolyn Gregson
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Stan Hamlet
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Rick Heh
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Brad Holden
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Faith Ingulsrud
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Kurt Johnson
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Karen McKnight
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Nancy McRae
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Michael Oman
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Steve Owens
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.

(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Mary Pacifici
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Clifford Peterson
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Patricia Sabalis
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Cynthia Seybolt
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Trevor Squirrell
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Rita St. Germain
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Daphne Tanis
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Walter Ted Tedford
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Steve Walkerman
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Mike Weisel
as an individual and in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Barbara Yerrick
in official capacity

represented by **James F. Carroll , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Kevin L. Kite , Esq.
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Front Porch Forum
as a Public Benefit 15 Corporation fairly treated as acting under color of law due to

represented by **Christopher H. Boyle , Esq.**
Lynn, Lynn, Blackman & Manitsky, P.C.
76 St. Paul Street, Suite 400

past and present 16 factual considerations while serving the traditional governmental role of providing 17 "Essential Civic Infrastructure" ranging from the di

Burlington, VT 05401
(802) 860-1500
Fax: (802) 860-1580
Email: cboyle@lynnlawvt.com
ATTORNEY TO BE NOTICED

Pietro J. Lynn , Esq.
Lynn, Lynn, Blackman & Manitsky, P.C.
76 St. Paul Street, Suite 400
Burlington, VT 05401
(802) 860-1500
Fax: (802) 860-1580
Email: plynn@lynnlawvt.com
TERMINATED: 09/17/2021
ATTORNEY TO BE NOTICED

William A. O'Rourke, III , Esq.
Ryan Smith & Carbine, Ltd.
98 Merchants Row
P.O. Box 310
Rutland, VT 05702-0310
(802) 786-1000
Email: wor@rsclaw.com
ATTORNEY TO BE NOTICED

Defendant

Jericho Underhill Land Trust
as Non-Profit 21 Corporation fairly treated as acting under color of law due to past and present 22 factual considerations and a special relationship willfully participating in and 23 actively directing acquisition of municipal property by the Town of Und

represented by **Elizabeth A. Conolly , Esq.**
Stackpole & French
255 Maple Street
P.O. Box 819
Stowe, VT 05672-0819
(802) 253-7339
Fax: (802) 253-7330
Email: econolly@stackpolefrench.com
ATTORNEY TO BE NOTICED

Defendant

Anton Kelsey
in official capacity

represented by **Kevin L. Kite , Esq.**
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/21/2021	1	COMPLAINT against Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth Friedman, Front Porch Forum, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Jericho Underhill Land Trust, Kurt Johnson, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of Underhill, Steve Walkerman filed by David P. Demarest. Summonses issued. (Attachments: # 1 Notice of Pro Se Appearance, # 2 Civil Cover Sheet)(law) (Entered: 06/22/2021)
06/30/2021	2	REISSUED Summons(es) as to Town of Underhill.(law) (Entered: 06/30/2021)

07/13/2021	3	NOTICE OF APPEARANCE by Kevin L. Kite, Esq on behalf of Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of Underhill, Steve Walkerman, Mike Weisel, Barbara Yerrick. (Attachments: # 1 Certificate of Service)(Kite, Kevin) (Entered: 07/13/2021)
07/13/2021	4	NOTICE OF APPEARANCE by James F. Carroll, Esq on behalf of Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of Underhill, Steve Walkerman, Mike Weisel, Barbara Yerrick. (Attachments: # 1 Certificate of Service)(Carroll, James) (Entered: 07/13/2021)
07/13/2021	5	MOTION to Dismiss *Complaint* filed by Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of Underhill, Steve Walkerman, Mike Weisel, Barbara Yerrick. (Kite, Kevin) (Entered: 07/13/2021)
07/13/2021	6	MOTION for Extension of Time to File Answer re 1 Complaint filed by Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of Underhill, Steve Walkerman, Mike Weisel, Barbara Yerrick.(Kite, Kevin) (Entered: 07/13/2021)
07/14/2021	7	NOTICE OF APPEARANCE by Pietro J. Lynn, Esq on behalf of Front Porch Forum. (Lynn, Pietro) (Entered: 07/14/2021)
07/14/2021	8	MOTION to Dismiss for Failure to State a Claim filed by Front Porch Forum. (Attachments: # 1 Certificate of Service)(Lynn, Pietro) (Entered: 07/14/2021)
07/14/2021	9	NOTICE OF APPEARANCE by Christopher H. Boyle, Esq on behalf of Front Porch Forum.(Boyle, Christopher) (Entered: 07/14/2021)
07/14/2021	10	SUMMONS RETURNED Executed. Town of Underhill served on 7/1/2021, answer due 7/22/2021.(law) (Entered: 07/15/2021)
07/14/2021	11	SUMMONS RETURNED Executed. Daniel Steinabauer served on 6/29/2021, answer due 7/20/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	12	SUMMONS RETURNED Executed. Bob Stone served on 6/30/2021, answer due 7/21/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	13	SUMMONS RETURNED Executed. Peter Duval (official capacity) served on 6/30/2021, answer due 7/21/2021. (law) (Entered: 07/15/2021)
07/14/2021	14	SUMMONS RETURNED Executed. Dick Albertini served on 6/28/2021, answer due

		7/19/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	15	SUMMONS RETURNED Executed. Marcy Gibson served on 6/29/2021, answer due 7/20/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	16	SUMMONS RETURNED Executed. Judy Bond (official capacity) served on 6/30/2021, answer due 7/21/2021.(law) (Entered: 07/15/2021)
07/14/2021	17	SUMMONS RETURNED Executed. Peter Brooks (official capacity only) served on 7/1/2021, answer due 7/22/2021.(law) (Entered: 07/15/2021)
07/14/2021	18	SUMMONS RETURNED Executed. Seth Friedman (official capacity) served on 6/29/2021, answer due 7/20/2021.(law) (Entered: 07/15/2021)
07/14/2021	19	SUMMONS RETURNED Executed. Barbara Greene (official capacity) served on 6/30/2021, answer due 7/21/2021.(law) (Entered: 07/15/2021)
07/14/2021	20	SUMMONS RETURNED Executed. Carolyn Gregson (official capacity) served on 6/29/2021, answer due 7/20/2021.(law) (Entered: 07/15/2021)
07/14/2021	21	SUMMONS RETURNED Executed. Rick Heh served on 6/30/2021, answer due 7/21/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	22	SUMMONS RETURNED Executed. Brad Holden served on 6/29/2021, answer due 7/20/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	23	SUMMONS RETURNED Executed. Faith Ingulsrud (official capacity) served on 6/23/2021, answer due 7/14/2021.(law) (Entered: 07/15/2021)
07/14/2021	24	SUMMONS RETURNED Executed. Kurt Johnson (official capacity) served on 6/30/2021, answer due 7/21/2021.(law) (Entered: 07/15/2021)
07/14/2021	25	SUMMONS RETURNED Executed. Anton Kelsey (official capacity) served on 6/30/2021, answer due 7/21/2021.(law) (Entered: 07/15/2021)
07/14/2021	26	SUMMONS RETURNED Executed. Karen McKnight served on 6/29/2021, answer due 7/20/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	27	SUMMONS RETURNED Executed. Nancy McRae served on 6/29/2021, answer due 7/20/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	28	SUMMONS RETURNED Executed. Michael Oman (official capacity) served on 6/29/2021, answer due 7/20/2021.(law) (Entered: 07/15/2021)
07/14/2021	29	SUMMONS RETURNED Executed. Patricia Sabalis served on 6/29/2021, answer due 7/20/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	30	SUMMONS RETURNED Executed. Cynthia Seybolt served on 7/2/2021, answer due 7/23/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	31	SUMMONS RETURNED Executed. Trevor Squirrell served on 7/1/2021, answer due 7/22/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)

07/14/2021	32	SUMMONS RETURNED Executed. Rita St. Germain served on 6/30/2021, answer due 7/21/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	33	SUMMONS RETURNED Executed. Daphne Tanis served on 6/29/2021, answer due 7/20/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	34	SUMMONS RETURNED Executed. Walter Ted Tedford served on 6/29/2021, answer due 7/20/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	35	SUMMONS RETURNED Executed. Steve Walkerman served on 6/30/2021, answer due 7/21/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	36	SUMMONS RETURNED Executed. Mike Weisel served on 6/29/2021, answer due 7/20/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/15/2021)
07/14/2021	37	SUMMONS RETURNED Executed. Barbara Yerrick (official capacity) served on 6/30/2021, answer due 7/21/2021.(law) (Entered: 07/15/2021)
07/14/2021	38	SUMMONS RETURNED Executed. Front Porch Forum served on 6/23/2021, answer due 7/14/2021.(law) (Entered: 07/15/2021)
07/14/2021	39	SUMMONS RETURNED Executed. Jericho Underhill Land Trust served on 7/1/2021, answer due 7/22/2021. (Attachments: # 1 Certificate of Service)(law) (Entered: 07/15/2021)
07/16/2021	40	SUMMONS RETURNED Executed. Steve Owens served on 7/6/2021, answer due 7/27/2021. (Attachments: # 1 Summons as to Individual Capacity)(law) (Entered: 07/18/2021)
07/20/2021	41	NOTICE OF APPEARANCE by Elizabeth A. Conolly, Esq on behalf of Jericho Underhill Land Trust.(Conolly, Elizabeth) (Entered: 07/20/2021)
07/20/2021	42	STIPULATED MOTION for Extension of Time to File Answer filed by Jericho Underhill Land Trust.(Conolly, Elizabeth) (Entered: 07/20/2021)
07/20/2021	43	ORDER: granting 6 MOTION for Extension of Time to File Answer re 1 Complaint and 42 STIPULATED MOTION for Extension of Time to File Answer. All Defendants' time to respond to the Plaintiff's Complaint is extended to August 22, 2021. (This is a text-only Order.)Signed by Judge William K. Sessions III on 7/20/2021. (eae) (Entered: 07/20/2021)
08/02/2021	44	RESPONSE in Opposition to 5 MOTION to Dismiss *Complaint* filed by David P. Demarest. (Attachments: # 1 Exhibit A, # 2 Certificate of Service)(law) (Entered: 08/03/2021)
08/02/2021	45	RESPONSE in Opposition re 8 MOTION to Dismiss for Failure to State a Claim filed by David P. Demarest. (Attachments: # 1 Exhibit A, # 2 Certificate of Service)(law) (Entered: 08/03/2021)
08/02/2021	46	AMENDED COMPLAINT against Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth Friedman, Front Porch Forum, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Jericho Underhill Land Trust, Kurt Johnson, Anton Kelsey, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of

		Underhill, Steve Walkerman, Mike Weisel, Barbara Yerrick filed by David P. Demarest. (Attachments: # 1 Certificate of Service)(law) (Additional attachment(s) added on 8/10/2021: # 2 Red-line First Amended Complaint) (law). (Entered: 08/03/2021)
08/10/2021	47	NOTICE OF DOCKET ENTRY CORRECTION re: 46 First Amended Complaint filed by David P. Demarest. The red-lined version having been received, it is now attached to 46 and this entry. (law) (Entered: 08/10/2021)
08/12/2021	48	STIPULATED MOTION for Leave to Exceed Page Limit re Motion to Dismiss 46 Amended Complaint filed by Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Anton Kelsey, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of Underhill, Steve Walkerman, Mike Weisel, Barbara Yerrick. (Attachments: # 1 Certificate of Service)(Kite, Kevin) (Entered: 08/12/2021)
08/16/2021	49	ORDER granting 48 Stipulated Motion to Exceed Dispositive Page Limit re Motion to Dismiss 46 Amended Complaint . Signed by Judge William K. Sessions III on 8/16/2021. (This is a text-only Order.) (eae) (Entered: 08/16/2021)
08/17/2021	50	REPLY to Response to 8 MOTION to Dismiss for Failure to State a Claim filed by Front Porch Forum. (Lynn, Pietro) (Entered: 08/17/2021)
08/20/2021	51	MOTION to Dismiss for Failure to State a Claim filed by Jericho Underhill Land Trust. (Attachments: # 1 Exhibit 1)(Conolly, Elizabeth) Attachment description clarified on 8/20/2021 (law). (Entered: 08/20/2021)
08/23/2021	52	MOTION to Dismiss 46 Amended Complaint for Failure to State a Claim filed by Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Anton Kelsey, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of Underhill, Steve Walkerman, Mike Weisel, Barbara Yerrick. (Attachments: # 1 Certificate of Service)(Kite, Kevin) (Entered: 08/23/2021)
09/14/2021	53	RESPONSE in Opposition re 8 MOTION to Dismiss for Failure to State a Claim filed by David P. Demarest. (Attachments: # 1 Certificate of Service)(Demarest, David) (Entered: 09/14/2021)
09/17/2021	54	NOTICE of Attorney Substitution by William A. O'Rourke as to Front Porch Forum. (O'Rourke, William) Text clarified on 9/20/2021 (law). (Entered: 09/17/2021)
09/17/2021	55	RESPONSE in Opposition re 52 MOTION to Dismiss 46 Amended Complaint for Failure to State a Claim filed by David P. Demarest. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 11, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Certificate of Service)(Demarest, David) Attachment descriptions clarified on 9/20/2021 (law). (Entered: 09/17/2021)
09/17/2021	56	RESPONSE in Opposition re 51 MOTION to Dismiss for Failure to State a Claim *Memorandum in Opposition* filed by David P. Demarest. (Attachments: # 1 Certificate of Service)(Demarest, David) (Entered: 09/17/2021)
09/21/2021	57	REPLY to Response to 8 MOTION to Dismiss for Failure to State a Claim filed by Front Porch Forum. (O'Rourke, William) (Entered: 09/21/2021)
10/01/2021	58	REPLY to Response to 52 MOTION to Dismiss 46 Amended Complaint for Failure to State a Claim filed by Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth

		Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Anton Kelsey, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of Underhill, Steve Walkerman, Mike Weisel, Barbara Yerrick. (Attachments: # 1 Certificate of Service)(Kite, Kevin) (Entered: 10/01/2021)
10/01/2021	59	REPLY to Response to 51 MOTION to Dismiss for Failure to State a Claim filed by Jericho Underhill Land Trust. (Conolly, Elizabeth) (Entered: 10/01/2021)
01/11/2022	60	STIPULATED DISCOVERY LETTER SENT re: no stipulated discovery schedule filed; case will be set for a scheduling conference unless stipulated schedule is filed. (law) (Entered: 01/11/2022)
01/25/2022	61	STIPULATED MOTION to Stay Filing of Discovery Schedule filed by Dick Albertini, Judy Bond, Peter Brooks, Peter Duval, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Anton Kelsey, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daniel Steinabauer, Bob Stone, Daphne Tanis, Walter Ted Tedford, Town of Underhill, Steve Walkerman, Mike Weisel, Barbara Yerrick. (Attachments: # 1 Certificate of Service)(Kite, Kevin) Link removed on 1/25/2022 (law). Modified on 1/25/2022 (law). (Entered: 01/25/2022)
01/25/2022	62	ORDER granting 61 Stipulated Motion to Stay Filing of Discovery Schedule. Signed by Judge William K. Sessions III on 1/25/2022. (This is a text-only Order.) (eae) (Entered: 01/25/2022)
03/29/2022	63	OPINION AND ORDER denying as moot 5 Motion to Dismiss *Complaint*; granting 8 Motion to Dismiss for Failure to State a Claim; granting 51 Motion to Dismiss for Failure to State a Claim; granting 52 Motion to Dismiss 46 Amended Complaint for Failure to State a Claim. Plaintiff's motion for leave to amend with a proposed Second Amended Complaint is due on or before 4/29/2022; failure to do so shall result in closure of the case. Signed by Judge William K. Sessions III on 3/29/2022. (law) (Entered: 03/29/2022)
04/27/2022	64	NOTICE OF APPEAL *(interlocutory)* as to 63 Opinion and Order by David P. Demarest. (Attachments: # 1 Certificate of Service)(Demarest, David) (Entered: 04/27/2022)
04/28/2022	65	LETTER to Plaintiff/Appellant as to filing fee re: 64 Notice of Appeal (interlocatory). (gmg) Text clarified on 4/28/2022 (law). (Entered: 04/28/2022)
04/29/2022	66	USCA Appeal Fees received $ 505.00 Paid. Receipt number 1398 re 64 Notice of Appeal filed by David P. Demarest. (gmg) (Entered: 05/02/2022)
05/02/2022	67	TRANSMITTED Index on Appeal Circuit No. 22-956 re: 64 Notice of Appeal. (gmg) (Entered: 05/02/2022)
05/05/2022	68	USCA Forms C and D by David P. Demarest re 64 Notice of Appeal (Attachments: # 1 Certificate of Service)(Demarest, David) (Entered: 05/05/2022)
05/13/2022	69	TRANSMITTED Supplemental Index Circuit No. 22-956 on Appeal to US Court of Appeals re 64 Notice of Appeal. (gmg) (Entered: 05/13/2022)

Exhibit A

AFFIDAVIT OF JEFF SPROUT

1. My name is Jeff Sprout and I have continued to reside in the Town of Underhill since around 1992.

2. I was employed as Road Foreman for the Town of Underhill Highway Department ("Department") from 1997 until 2007.

3. I am making this Affidavit based upon my personal knowledge, information and belief. So far as this Affidavit is based upon information and belief, I believe such information to be true.

4. I am personally familiar with Town Highway 26 ("TH26"), which is now known as New Road to the South and Fuller Road to the North, with a central segment which was reclassified into a Trail by the Underhill Selectboard in 2010 despite considerable public opposition.

5. During my ~10 years working for the Department I was never made aware of any compelling justification for the Town of Underhill to stop maintaining any segment of TH26 between Pleasant Valley Road and Irish Settlement Road.

6. I did not agree with the Underhill Selectboard decision to no longer allow the Department to conduct reasonable and necessary maintenance to the central segment of TH26.

7. As a practical matter, the location of the Department's garage made the entire length of TH26 very reasonable to maintain.

8. Maintaining the northern segment of TH26 could have also benefited the Town of Underhill by providing a much shorter route for town trucks maintaining Irish Settlement Road.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on June 12, 2021.

Jeff Sprout

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

DAVID P. DEMAREST, an individual, PLAINTIFF	CASE NO: 2:21-cv-167-wks (42 U.S.C. § 1983) (42 U.S.C. § 1983 Monell) Jury Trial Demanded
v.	
TOWN OF UNDERHILL, a municipality and charter town, SELECTBOARD CHAIR DANIEL STEINBAUER, as an individual and in official capacity, et al.	

AMENDING AS A MATTER OF COURSE

Plaintiff respectfully submits the attached Amended Complaint *as a Matter of Course* in accordance with Federal Rules of Civil Procedure Rule 15 (a)(1)(B).

In compliance with Local Rule 7(a)7, Plaintiff attempted to contact opposing counsel; counsel for Defendant Town of Underhill and co-defendant town officials was unresponsive, counsel for Defendant Front Porch Forum did not consent to the filing of an Amended Complaint, and counsel for Defendant Jericho Underhill Land Trust requested Plaintiff file an amended complaint before their response.

Respectfully submitted this 2nd day of August, 2021.

By: /s/: David Demarest
David P Demarest, *Pro Se*
P.O. Box 144
Underhill, VT 05489
(802)363-9962
david@vermontmushrooms.com

Complaint for Violation of Civil Rights (Non-Prisoner)

David P. Demarest
P.O. Box 144
Underhill, VT 05489
(802)363-9962
david@vermontmushrooms.com

Pro Se Plaintiff DAVID P DEMAREST

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

DAVID P. DEMAREST, an individual,	CASE NO: 2:21-cv-167
PLAINTIFF	(42 U.S.C. § 1983)
	(42 U.S.C. § 1983 Monell)
	Jury Trial Demanded

v.

DEFENDANT TOWN OF UNDERHILL, a municipality and charter town,
DEFENDANT SELECTBOARD CHAIR DANIEL STEINBAUER,
as an individual and in official capacity,
DEFENDANT BOB STONE, as an individual and in official capacity,
DEFENDANT PETER DUVAL, in official capacity,
DEFENDANT DICK ALBERTINI, as an individual and in official capacity,
DEFENDANT JUDY BOND, in official capacity.
DEFENDANT PETER BROOKS, in official capacity.
DEFENDANT SETH FRIEDMAN, in official capacity.
DEFENDANT MARCY GIBSON, as an individual and in official capacity,
DEFENDANT BARBARA GREENE, in official capacity,
DEFENDANT CAROLYN GREGSON, in official capacity,
DEFENDANT STAN HAMLET, as an individual and in official capacity,
DEFENDANT RICK HEH, as an individual and in official capacity,
DEFENDANT BRAD HOLDEN, as an individual and in official capacity,
DEFENDANT FAITH INGULSRUD, in official capacity,
DEFENDANT KURT JOHNSON, in official capacity,
DEFENDANT ANTON KELSEY, in official capacity,
DEFENDANT KAREN MCKNIGHT, as an individual and in official capacity,
DEFENDANT NANCY MCRAE, as an individual and in official capacity,
DEFENDANT MICHAEL OMAN, in official capacity,
DEFENDANT STEVE OWENS, as an individual and in official capacity,

Complaint for Violation of Civil Rights (Non-Prisoner)

DEFENDANT MARY PACIFICI, in official capacity,
DEFENDANT CLIFFORD PETERSON, as an individual and in official capacity,
DEFENDANT PATRICIA SABALIS, as an individual and in official capacity,
DEFENDANT CYNTHIA SEYBOLT, as an individual and in official capacity,
DEFENDANT TREVOR SQUIRRELL, as an individual and in official capacity,
DEFENDANT RITA ST GERMAIN, as an individual and in official capacity,
DEFENDANT DAPHNE TANIS, as an individual and in official capacity,
DEFENDANT WALTER "TED" TEDFORD, as an individual and in official capacity,
DEFENDANT STEVE WALKERMAN, as an individual and in official capacity,
DEFENDANT MIKE WEISEL, as an individual and in official capacity,
DEFENDANT BARBARA YERRICK, in official capacity,

DEFENDANT FRONT PORCH FORUM, INC, ("FPF") as a Public Benefit Corporation fairly treated as acting under color of law due to past and present factual considerations while serving the traditional governmental role of providing "*Essential Civic Infrastructure*" ranging from the distribution of public meeting agendas to the coordination of civilian natural disaster relief efforts

DEFENDANT JERICHO UNDERHILL LAND TRUST, ("JULT") as Non-Profit Corporation fairly treated as acting under color of law due to past and present factual considerations and a special relationship willfully participating in and actively directing acquisition of municipal property by the Town of Underhill

FIRST AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

(Non-Prisoner Complaint)

1. In violation of the Fifth Amendment, Defendants the Town of Underhill and a clique of Defendant individual town officials, acting both individually and in collusion under color of law, have recently succeeded in their long-term goal of maliciously rescinding all prior implicit and explicit promises made by The Town of Underhill to Plaintiff for reasonable access to and use of his domicile and over 50 acres of surrounding private property.

2. In the furtherance of the above goal, Defendant Town of Underhill and town officials named in the present complaint have also acted under color of law to discriminate against Plaintiff in multiple ways including: censoring and misrepresenting protected speech (including preventing factual evidence from ever being incorporated into the legal record in prior state litigation), intentionally and relentlessly retaliating against protected speech, obstructing the right to petition multiple times, *willfully* acting with *deliberate indifference* to necessary structural and procedural due process legal protections, and violating Plaintiff's substantive due process rights in *flagrant* violation of the First, Ninth, and Fourteenth Amendments.
3. The degree of deceit, fraud, and obstruction above named Town of Underhill officials have *willfully* perpetuated in a Kafkaesque maze of non-chronological appellate-style reviews of Defendants Town of Underhill' administrative decisions over the span of 12 years of Vermont state court litigation emphasizes allegations against the Town of Underhill and Town of Underhill officials presently named.
4. Most notably to present claims, the Town of Underhill and Town of Underhill officials have obstinately continued to falsely claim the Town of Underhill reclassified a segment of TH26 in 2001; this assertion was originally a contentious claim due to well established law, but Defendant Town of

Underhill and Town of Underhill officials have continued to *willfully* make this *false claim* in court for over a decade despite the Vermont Superior Court's ruling dated May 31, 2011, which was not appealed (Docket No S0234-10 CnC), and persistently remained willfully indifferent to County Road Commissioner findings of fact.

5. The above stated civil rights violations have been exasperated by the special self-dealing relationship and decision-making authority the Jericho Underhill Land Trust has in the Town of Underhill's determination which properties the Town of Underhill will acquire from willing sellers and which property, such as Plaintiff's, the Town of Underhill will take without compensation.

6. The above stated civil rights violations have also been exasperated by Defendant Front Porch Forum Inc. willingly participating in the censorship of Plaintiff's protected speech from their *Essential Civic Infrastructure* which is presently used for traditional governmental functions ranging from the posting of public meeting agendas to the coordination of citizens involved in disaster relief efforts.

Table of Contents

JURISDICTION

7. The federal rights asserted by Plaintiff are enforceable under 42 U.S.C. § 1983.

8. This Court has jurisdiction over these claims under 28 U.S.C. §§ 1331, 1343(a)(3) and has the authority to grant declaratory and injunctive relief under 28 U.S.C. § 2201-2202 and Fed. R. Civ. P. 57 and 65.

VENUE

9. Venue is proper in the District of Vermont under 28 U.S.C. § 1391(b) since Plaintiff and majority of Defendants are residents of this judicial district.

10. All the actions and inactions by Defendants giving rise to all causes of action occurred within this judicial district.

PARTIES

11. THE TOWN OF UNDERHILL, P.O. Box 120, Underhill, VT 05489, a municipality and charter town of The State of Vermont.

12. DANIEL STEINBAUER, 52 Range Road, Underhill VT 05489. Current Underhill Selectboard Chair and Justice of the Peace (and former Underhill Conservation Commission Member), as an individual and in official capacity.

13. BOB STONE, 54 River Road #A, Underhill VT 05489, current Underhill Selectboard Member, as an individual and in official capacity.

14. PETER DUVAL, 25 Pine Ridge Rd, Underhill VT 05489, current Underhill Selectboard Member, in official capacity.

(The following Defendants are listed alphabetically by last name)

15. DICK ALBERTINI, 66 Kiln Rd, Essex Junction, VT 05452, former Underhill Conservation Commission Member and former Underhill Planning Commission Chair, as an individual and in official capacity.

16. JUDY BOND, 435 Cilley Hill Rd, Underhill, VT 05489, former Underhill Conservation Commission Member and former Underhill Planning Commission Member, in official capacity.

17. PETER BROOKS, 71 Beacon St #2, Somerville, MA 02143, former Underhill Selectboard Member, in official capacity.

18. SETH FRIEDMAN, 139 Pleasant Valley Rd, Underhill VT 05489, former Underhill Selectboard Member (and current Underhill Recreation Committee Member), in official capacity.

19. MARCY GIBSON, 50 New Rd, Underhill, VT 05489, former Jericho Underhill Park District member, as an individual and in official capacity.

20. BARBARA GREENE, 80 Commons Rd, Williston, VT 05495, former Underhill Conservation Commission Member, in official capacity.

21. CAROLYN GREGSON, 99 Pleasant Valley Rd, Underhill, VT 05489, former Underhill Town Administrator, in official capacity.

22. STAN HAMLET (deceased), former Underhill Selectboard Member, as an individual and in official capacity.

23. RICK HEH, 52 Kelley Rd, Underhill, VT 05489, former Underhill Selectboard Member and former Highways Infrastructure and Equipment Committee (HIEC) member, as an individual and in official capacity.

24. BRAD HOLDEN, 60 Covey Rd, Underhill, VT 05489, Interim Underhill Town Administrator and former Underhill Selectboard Member and professional surveyor for the Town, as an individual and in official capacity.

25. FAITH INGULSRUD, 50 Clymer St, Burlington VT 05401, former Underhill Conservation Commission Member, in official capacity.

26. KURT JOHNSON, 45 Mt Vista Rd, Underhill, VT 05489, former Underhill Selectboard Member and current Chair of Infrastructure Committee (synonymous with HIEC), in official capacity.

27. ANTON KELSEY, 200 Pleasant Valley Rd, Underhill, VT 05489, Underhill Recreation Committee Chair, in official capacity.

28. KAREN MCKNIGHT, 164 Beartown Rd, Underhill, VT 05489 Underhill Conservation Commission Chair and Development Review Board, and former Trails Committee Member, as an individual and in official capacity.

29. NANCY MCRAE, 599 Pleasant Valley Rd, Underhill, VT 05489, Underhill Conservation Commission member and former Trails Committee Member, as an individual and in official capacity.

30. MICHAEL OMAN, 191 Pleasant Valley Road, Underhill, VT 05489, former Underhill Planning Commission Member, in official capacity.

31. STEVE OWENS, 180 River Road, Underhill VT 05489, former Underhill Selectboard Member, as an individual and in official capacity.

32. MARY PACIFICI, (deceased), former Underhill Conservation Commission Member, in official capacity.

33. CLIFFORD PETERSON, 1226 E Hyde Park Blvd Apt 1, Chicago, IL 60615, former Underhill Selectboard Member, as an individual and in official capacity

34. PATRICIA SABALIS, 609 Irish Settlement Rd Apt A, Underhill, VT 05489, former Underhill Selectboard Member and current Justice of the Peace, as an individual and in official capacity.

35. CYNTHIA SEYBOLT, 150 Hawthorn Dr, Shelburne, VT 05482, former Underhill Conservation Commission Member and former Underhill Planning Commission Member, as an individual and in official capacity.

36. TREVOR SQUIRRELL, 15 Snyder Rd, Underhill, VT 05489, former Underhill Conservation Commission Chair and former Underhill Planning Commission Member, as an individual and in official capacity.

37. RITA ST GERMAIN, 18 Tupper Rd, Underhill, VT 05489, former Underhill Conservation Commission Member, as an individual and in official capacity.

38. DAPHNE TANIS, 359 Irish Settlement Rd, Underhill, VT 05489, Underhill Conservation Commission Member, as an individual and in official capacity.

39. WALTER "TED" TEDFORD, 20 Beartown Rd, Underhill, VT 05489, former Underhill Selectboard Member, as an individual and in official capacity.

40. STEVE WALKERMAN, 5631 Dorset St, Shelburne, VT 05482, former Underhill Selectboard Member, as an individual and in official capacity.

41. MIKE WEISEL, 626 Irish Settlement Rd, Underhill, VT 05489, Underhill Infrastructure Committee Member, as an individual and in official capacity.

42. BARBARA YERRICK, 64 Krug Rd, Underhill, VT 05489, former Underhill Conservation Commission Member, in official capacity.

43. FRONT PORCH FORUM, INC ("FPF"), P.O. Box 73, Westford, VT 05494, a publicly funded Public Benefit Organization which provides the traditional governmental function of "Essential Civic Infrastructure in Vermont."

44. JERICHO UNDERHILL LAND TRUST ("JULT"), P.O. Box 80, Jericho, VT 05465, an organization which currently claims 501(C)(3) status and receives substantial support and legal authority from a special relationship with the Towns of Underhill and Jericho; trustees, donors, members and family

members of JULT include Defendants named in paragraphs 12, 15, 18, 19, 20, 22, 25, 28, 29, 32, 35, 36, 40, 41 above.

45. Due to a lack of transparency within the governance of Defendant Town of Underhill, discovery is necessary to determine if individual capacity claims should be added to Defendant town officials presently only named in their official capacity and to potentially substantiate addition of other parties.

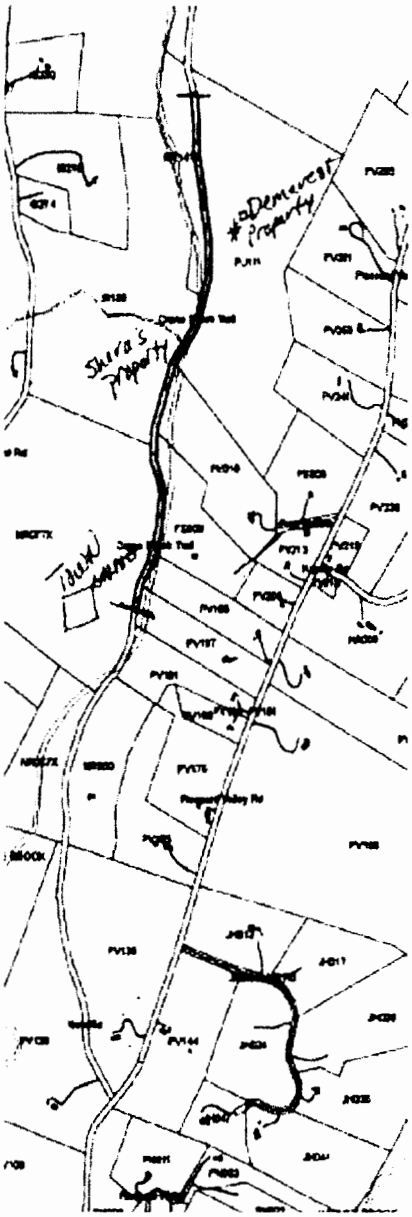
GENERAL ALLEGATIONS

46. Defendants Town of Underhill, Stan Hamlet, Peter Brooks and former Underhill selectboard member Bob Pasco (not presently named as a Defendant) changed Plaintiff's property code from "NR-144" to "FU-111" ***after*** Plaintiff purchased NR-144 in reliance upon an attorney's review of the land records ***and*** built his domicile trusting the explicit promises made by Defendants Town of Underhill and Stan Hamlet for reasonable ongoing future access to NR-144.

47. After years of *willfully* refusing to provide *any* reasonable maintenance to the central segment of Town Highway 26 (TH26) under the guise of budgetary constraints (even though the Town was receiving state funding to maintain the entire class III segment), Defendants Town of Underhill, Daniel Steinbauer, Steve Owens, Trevor Squirrell, Steve Walkerman and others acting under color

of law and outside of public awareness officially sought legal advice in a letter dated October 8, 2009 to determine "if there is any way the Town could rescind the access" which Plaintiff was previously promised *and* actively utilizing for access to Plaintiff's domicile and surrounding private property.

48. The schematic to the right shows the general spatial layout of Plaintiff's property and surrounding properties; the segment of TH26 between the two hand-drawn lines is the segment which an October 8, 2009 letter expressed the desire to *rescind* Plaintiff's access, and the small mark on the road next to "Shera's property" was the factual transition between Class III and Class IV road prior to the 2010 New Road Reclassification.



49. Plaintiff has engaged in protected speech advocating Selectboard members and other Town Officials recuse themselves when they have a Conflict of Interest, and explicitly stated observations of problems within Underhill's governance for over 16 years; publishing the above-mentioned

October 8, 2009 letter, with Plaintiff's factual commentary, in the February 20, 2014 edition of the Mountain Gazette is one example of Plaintiff's protected speech which inspired further malicious and gratuitous retaliation in violation of Plaintiff's First Amendment rights.

50. The past Vermont court decisions based upon an appropriate standard of judicial review for issues presently raised *and* genuine facts (as opposed to the portions of the prior state litigation legal record riddled with intrinsic and extrinsic fraud) are:

A. The un-appealed Vermont court decision May 31, 2011 (Docket No S0234-10, which found Defendants' claim that a 2001 New Road Reclassification had occurred was in fact entirely *invalid*),

B. The findings of Chittenden County Road Commissioners for Docket No 234-10 CnC (Dated June 26, 2013, "Repairs are to consist of those repairs recommended by petitioner, consulting engineer, John P. Pitrowski, P.E., as set forth in a letter to petitioners' counsel dated November 21, 2012...").

C. Despite the Road Commissioners finding *entirely* in favor of Plaintiff, they still did not take into account all relevant historical facts, such as a prior Town of Underhill Road Foreman's factual knowledge and the *malicious* intentions of a clique of Town Officials which is self-

evident from over 20 years of public meeting minutes, which were never allowed into the record.

51. Plaintiff has credible knowledge, belief, and personal experience that individually named Defendants acted with *willful indifference* or *malicious* intentions, or both, towards Plaintiff's civil rights; factual documentation and recordings of public meetings and hearings in which town officials presently sued in their individual capacity demonstrated demeanor characteristic of outright animosity towards Plaintiff while choosing to make specific actions and inactions which were reasonably knowable to cause harm to Plaintiff.

52. Due to Defendant Town of Underhill violations of Vermont Open Meeting Law, discovery it is essential to determine if town officials either only named in their official capacities or not presently named were acting primarily due to Defendant Town of Underhill official policies and practices, or if the addition of individual capacity claims is warranted due to a deliberate indifference to Plaintiff's civil rights, or acting with malicious intentions, or both.

General Chronology of Facts Relevant to The Present Claims

53. Defendant Town of Underhill and town officials involved in the Selectboard and Underhill Conservation Commission in Spring of 2002 wanted the prior owner of Plaintiff's property to *donate* parcel NR-144 to the Town, as the prior owner (the Shakespeare's) had already done with parcel NR-141x.

54. The preceding statement is based in part by the Selectboard meeting minutes submitted by Defendant Peter Brooks dated April 11, 2002, which state:

> The UCC would like to have town buy the Shakespeare land. There is no penalty for them to give it to the town.

55. Plaintiff met with Defendants Town of Underhill, Stan Hamlet, and Carolyn Gregson *prior to* the purchase of NR-144; meeting minutes failed to record the entirety of the promises officially made to Plaintiff by Defendants Town of Underhill and Stan Hamlet.

56. As a matter of incontestable fact, Plaintiff had already built a domicile,[1] and the Defendant Town of Underhill presently continues to retain the property code "NR-141x" for the property opposite a *northern* portion of Plaintiff's property despite changing Plaintiff's lot code from NR-144 to FU-111.

---

[1] Plaintiff personally built a domicile under a New Dwelling Permit (B02-41) which was approved for property code "NR-144" on July 1, 2002 with the inherent municipal promise of reasonable access combined with the reasonable expectations of privacy living in the middle of over 50 acres of *private* property.

57. On October 8, 2009, after years of refusing to conduct reasonable and necessary maintenance to the central segment of TH26, Defendants Town of Underhill, Daniel Steinbauer, Steve Owens, Trevor Squirrell, Steve Walkerman and others acting under color of law but outside of public awareness officially responded to Plaintiff's good-faith efforts to find solutions to their *willful* creation of access problems (which even included the inconsistent placement of boulders in the way of Plaintiff's access), and environmental problems, by seeking legal advice on how to "*rescind*" Plaintiff's previously promised access, instead of considering a grant which Plaintiff suggested to preserve *all* reasonable public uses *and* private uses *while* protecting the environment for approximately $1,600.

58. Plaintiff retained legal counsel in a timely-manner, in order to protect what was once a clearly recognized legal property right; what followed should have been a very straightforward legal process under Rule 74 since the claimed 2001 New Road reclassification was *invalid,* and the Road Commissioners agreed with all the recommendations made by the engineers retained by Plaintiff and two former co-litigants in the past Notice of Road Insufficiency appeals *and* officially opposed the use of a *sua sponte* 2010 New Reclassification to circumvent a first-filed notice of insufficiency.

59. Plaintiff asserts the documented actions of Defendants Town of Underhill, Daniel Steinbauer, Steve Owens, Trevor Squirrell, Steve Walkerman, Marcy Gibson, Karen McKnight, Stan Hamlet, and others acting under color of law but outside of public awareness demonstrates knowledge, that Town Highway 26 (also known to as "TH26" / "New Road" / Fuller Road / "Crane Brook Trail" / "Old Dump Road"), *in accordance with clearly established law*, was a Class III / Class IV Town Highway connecting Irish Settlement Road to the North with Pleasant Valley Road to the South until the 2010 New Road reclassification; the entire impetus behind the 2010 New Road reclassification was a willful intent of the Town of Underhill, and Defendant town officials which held positions of governmental authority at that time, to violate Plaintiff's procedural due process rights.

60. Approximately 12 years of preceding Vermont state court proceedings document Defendant Town of Underhill, and Defendant town officials sued in their individual capacity, decision to willfully deceive the Vermont state courts by misrepresenting or censoring relevant facts and creating frivolous debates of clearly known facts or interjecting immaterial facts.

61. Five examples of the preceding statement in the state court records involving Plaintiff (and former co-litigants) against Defendant Town of Underhill are:

62. The persistence of references to a 2001 New Road reclassification for about a decade after the final ruling which stated 2001 reclassification effort was invalid,

63. Stating the portion of New Road between Pleasant Valley Road and the Town Garage was paved as an uncontested fact,

64. Frivolously denying of the Town of Underhill had previously installed culverts and provided general maintenance of the central segment of TH26, despite the *entire town* once using TH26 to access public landfills,

65. Censorship of a factual lack of any legitimate justification for the sustained refusal to spend a mere $1,600 to replace a failed culvert along Plaintiff's prior road frontage, or help to remove litter and illegally dumped items from the Town right of way, and

66. Prior Vermont Supreme Court Oral Arguments emphasis on Plaintiff's home being "off-grid" as a rationale for Defendant's actions and inactions.

67. As of February 26, 2021, after ~12 years of litigation in Vermont state courts, Defendant Town of Underhill succeeded in officially rescinding the vast majority of the past, present, and prospective future uses and enjoyment of Plaintiff's property.

Supreme Court of Vermont Decision: 22 A.3d 500 (Vt. 2011), 10-165,

Ketchum v. Town of Dorset

Results in an Unconstitutional Interpretation of Vermont Law and *de facto* Structural Due Process Violation and is Contrary to Federal Precedent

68. The Ketchum decision states,

> We also reject plaintiffs' argument that we must read the requirement into the statute to avoid an absurd and irrational result. We cannot say that it is wholly irrational for the Legislature to choose to have a different standard of review for the selectboard's decision to reclassify a town highway than for the altering, laying out or resurveying of a highway. All of the latter decisions implicate a town's eminent domain power because they may require a taking of land abutting the town highway. In contrast, downgrading a road does not involve a taking.

69. Plaintiff asserts it would be difficult to imagine a set of factual circumstances better able to conclusively prove the *Ketchum* decision results in clear legal error, and an unconstitutional judicial interpretation of Vermont law, than the reclassification (more accurately defined as a conversion) of a Class III or Class IV Town Highway into an unmaintained Legal trail.

70. The Town of Underhill has *altered and subsequent taken* Plaintiff's prior reasonable access and the 2010 New Road Reclassification constituted a categorical taking of Plaintiff's reversionary property rights.

71. The Town of Underhill has willfully achieved a taking of the vast majority of Plaintiff's previously clearly recognized bundle of private property rights above the categorical taking of reversionary rights. [As this Court deems just

and proper, other property owners abutting the 49.5 foot wide "Legal Trail" portion of the TH26 corridor should be permitted to join the relevant cause of action for compensation of their lost reversionary property rights.]

72. Plaintiff asserts, due to *Ketchum*, interested persons in Vermont are now denied the procedural due process afforded a Rule 74 appeal when a municipality refuses to conduct reasonable levels of road maintenance (even if it is to the extreme degree of *altering* a Town Highway by refusing to replace failed bridges or culverts), or when *converting* a Town Highway usable by all into a recreational trail which *rescinds* prior landowner access and property rights by *reclassifying* a segment of Class III or Class IV Town Highway into a 49.5 foot wide "Legal Trail."

73. Plaintiff asserts Rule 75 appeals are so heavily deferential to municipal administrative decisions that, as a matter of law, a structural due process violation occurred when Defendants Town of Underhill, Daniel Steinbauer, Steve Owens, and Steve Walkerman committed intrinsic and extrinsic fraud in Vermont courts.

74. Plaintiff asserts Defendants Town of Underhill, Daniel Steinbauer, Steve Owens, and Steve Walkerman violated the procedural due process right to an *impartial* decision of Plaintiff and numerous other interested persons by conducting the 2010 New Road Reclassification *willfully* ignoring both the

option to *discontinue* the segment and the *significant* opposition of interested persons *and* the public at large.

75. Plaintiff asserts Defendant Town of Underhill was able to create its own legal record to undergo administrative review for the 2010 New Road Reclassification; numerous glaring facts indicative of municipal actions and inactions which could reasonably be considered evidence of the Town of Underhill acting arbitrarily, capriciously, maliciously, and outright vindictively, were never incorporated into preceding state court legal records.

76. Numerous portions of the legal record contained in preceding state litigation are so severely prejudiced by misconduct of Defendant Town of Underhill, and town officials presently sued in their individual capacity, so as to serve as little more than a very compelling reason to issue Declaratory relief involving the precedent Vermont courts set in *Ketchum*, since as was succinctly stated:

> The court's role is to determine if there is adequate evidence to support the Selectboard's decision. The court reviews only the record below without new evidence. There is no fact-finding. It is an appellate-style review of an administrative decision.

77. Defendant Town of Underhill and town officials presently sued in their individual capacities have received a windfall level of unchecked governmental authority to use executive actions and concurrent willful extrinsic and intrinsic fraud to violate Plaintiff's procedural due process rights.

78. The Ketchum interpretation of Vermont law has already inspired Defendants Town of Underhill, Dan Steinbauer, Bob Stone, and Peter Duval, to begin prospecting the development of other recreational destinations at the cost of other local landowners and it is still to be determined if a landowner supported *discontinuance* of an unmaintained Class IV segment of Butler Road which has not been maintained for decades will ever occur, or if it will eventually be reclassified into a trail against the will of over 15% of Underhill's voters.

Enrichment of Town Officials by Taking of Other's Property Value

79. Plaintiff asserts as an uncontestable fact that the location of the Town's Highway Department's garage on TH26 made it very reasonable to maintain the entire length of TH26 between Pleasant Valley Road and Irish Settlement Road.

80. Plaintiff has credible evidence there was *never* a compelling justification for Defendant Town of Underhill to stop maintaining any segment of TH26 between Pleasant Valley Road and Irish Settlement Road.

81. Plaintiff asserts knowledge and belief the *willful refusal* to replace culverts on the central section of TH26 *created* environmental problems.

82. As depicted in Table 1, The Town of Underhill's appraisals of properties on and near TH-26 demonstrate the disproportionate negative financial impact of

the taking of Plaintiff's property compared to nearby real estate values and the elimination of a reasonable investment backed return and appreciation in comparison to surrounding properties.

83. Named Defendants financially benefiting from being an optimal proximity to a free public trail (the converted segment of TH26) and the "Crane Brook Conservation Area" are underlined in Table 1.

84. Defendants Dick Albertini and Marcy Gibson are two of the most notable examples of Underhill Officials which significantly profited from a completed subdivision process which was dramatically easier than the Town of Underhill's response to Plaintiff's efforts to obtain a *preliminary* access permit.

Table 1	**2019 Assessment[2] Exclusive Of Improvements**			(Named Defendants Are Underlined) (Properties Are Listed North To South)
Parcel ID	**Acres**	**Parcel $**	**$ Acre**	**Ownership**
IS-359	10.02	$117,800	$11,756	Walter and Daphne (UCC Member) Tanis[3]
FU-11	3.4	$87,400	$25,705	Jessica Butler and Jeremy Rector
FU-12x	0.33	$23,000	$69,697	Town of Underhill
FU-23	7.5	$100,000	$13,333	John and Tammy Viggato
FU-49	49.5	$162,900	$3,291	Trust for Jeff and Angela Moulton (formerly co-litigant with plaintiff)
FU-54X	17	$127,300	$7,488	Town of Underhill
FU-57	122.4	$267,600	$2,186	Jonathan and Lisa Fuller (formerly co-litigant with plaintiff)
FU-111	51.64	$108,000	**$2,091**	**David Demarest**
NR-141x	10.19	$122,100	**$11,982**	**Town of Underhill[4]**
NR-50	8.98	$114,600	$12,762	Marcy Gibson (JUPD and JULT member)
NR-48	3.77	$98,600	$26,154	Kevin Gibson (Marcy Gibson's son)
NR-3	30.3	$163,100	$5,383	John and Denise Angelino
PV-200	24	$170,000	$7,083	Anton (Recreation Committee Chair) and Amy Kelsey
PV-139 (with frontage opposite NR-3)	30	$207,100	$6,903	Trust of Seth Friedman (current Recreation Committee and former Selectboard member) and Allison Friedman (JULT member)
PV-109[5]	25.02	$526,000[6]	$21,023	Dick (former UCC and Planning Commission member) and Barbara Albertini (JULT members)

[2] Plaintiff has knowledge and belief the assessment process is not always accurate, fair, *or* impartial; there are multiple intentional errors in many Town of Underhill public records (such as listing Plaintiff's home as a "camp," as opposed to Plaintiff's domicile, and previously deleting records of the culvert inventory on a segment of TH26/New Road/Fuller Road/Crane Brook Trail). Despite this caveat, Defendant Town of Underhill assessments recognize the dramatic devaluation of Plaintiff's property compared to nearby properties that are similarly situated.

[3] With a home located near northern terminus of TH26, Plaintiff asserts both Daphne and Walter Tanis have previously trespassed on Plaintiff's posted property. Defendant Daphne Tanis, while acting in her official capacity, has stated that "you need to be more open-minded" in reference to the public use of Plaintiff's property for free.

[4] Opposite Plaintiff's property and donated to Town by the prior owner of NR-144 less than 5 years before prior landowners opposed the unappealable and therefore entirely fictional 2001 New Road Reclassification. Opposition was summarized in Selectboard meeting minutes simply as a "Rehash of past arguments."

[5] PV-109 is now a 5-lot subdivision which provided substantial personal profit for Dick and Barbara Albertini.

[6] Due to presumed typo in assessment, this is the "Full" value since there were no structures at time of assessment.

Accrual Date of February 26, 2021

85. An accrual date of February 26, 2021 for present claims is supported by Justice Robinson's well-reasoned dissenting opinion of the most recent prior state court proceeding:

> Moreover, the claims in this case and the challenge to the 2010 reclassification decision in no way form a convenient "trial unit." Restatement (Second) of Judgments § 24(2). This is due both to the distinct procedural postures of the claims, and the divergent legal and factual predicates. With respect to the first point, because Demarest I was a Rule 75 appeal of a municipal 18 decision, the trial court reviewed the Town's reclassification decision on the record. It did not hold an evidentiary hearing to determine whether the Town's decision comported with the applicable law. And its standard of review was accordingly deferential to the Town. For purposes of analyzing claim preclusion, a Rule 75 appeal is thus very different from a freestanding claim initiated in court by a plaintiff. Plaintiff could not have litigated the claims at issue in this case in the context of the 2010 municipal reclassification proceeding. And on appeal to the trial court, if plaintiff had sought to interject a claim asserting a private right of access to future subdivided lots, the court's analysis would have been effectively, if not formally, bifurcated: the court would have decided the reclassification issue based on a previously established municipal record, and it would have evaluated the private-access claims on the basis of a record developed during the superior court proceeding and presented through summary-judgment motions or an evidentiary hearing. Procedurally, there would have been virtually no overlap in the trial court's resolution of the Rule 75 appeal on the one hand, and plaintiff's individual claims on the other.

86. Plaintiff asserts Defendant Town of Underhill and Defendant Town Officials' pattern of invidious delays, obstruction, and discriminatory decision-making has been strategically perpetuated precisely because they *knew* there was a

lack of any legally permissible justification for their intentions, or their subsequent actions and inactions.

Substantiation of Monell claims against Town of Underhill includes:

87. Plaintiff has documentation, knowledge, substantiated belief, and personal experience Defendants' malicious disregard for the Constitutional protections of the First, Fifth, Ninth, and Fourteenth Amendments (as well as the Vermont Constitution and Vermont Open Meeting Laws) is heavily entrenched within the culture, and patterns and practices, of the Town of Underhill's governance.

88. Plaintiff references the Repa Road Litigation over landowner access rights, notably this litigation was involving efforts to deny landowner rightful access to private property and issues surrounding purported trails; as a matter of historical fact Repa Road previously continued into Westford as Goodrich Road, and a Class IV segment of Repa Road was upgraded to Class III road.

89. Plaintiff references Defendants' use of executive sessions and legal advice on ways to obstruct the wishes of landowners and over 15% of Underhill's registered voters who signed a landowner-backed petition to *discontinue* a Class IV segment of Butler Road (TH11), instead of *reclassifying* the segment into a Legal Trail (which would personally benefit Defendant Pat Sabalis).

90. Plaintiff references Underhill v Blais Litigation, which involved a landowner with property near Defendant Karen McKnight's home, and may have been predicated upon the tradition of Underhill Officials willful misrecording or deleting public records with an intent to later *rescind* prior promises similar to Plaintiff's experience.

91. Plaintiff references legal issues involving Lyn DuMoulin in Spring of 2002.

92. Plaintiff asserts *extreme* biases in what grants are, and are not, applied for and how those grants and the entire municipal budget is used (for instance, the improvement of the intersection of New Road and Pleasant Valley Road to support the desired purchase of Defendant Dick Albertini's property for a gravel pit and the Town of Underhill acting as a fiscal agent for a local church to receive a $60,000 grant, which is hoped to enable a local church to obtain ~2 acres of land functionally for *free,* even though Defendants obstinately refuse to apply for a grant to replace a culvert on Plaintiff's former road frontage).

93. Plaintiff references the Dumas Road and Roaring Brook situation as further demonstration how many *willful* procedural difficulties Defendants can create for a resident despite going to *extreme* efforts to assist others, such as seeking legal advice on how to go against 23 V.S.A. Section 1007 if the *right people*

request a speed limit lower than a State of Vermont professional speed study recommends.

94. Plaintiff has personal knowledge and experience of numerous instances in which Town officials ignore clear Conflicts of Interest in ways which have violated the procedural due process rights of numerous residents.

95. Plaintiff has credible knowledge and belief of the Town of Underhill has acted and refused to act in other situations which have caused civil rights violations to residents which are not currently listed in this complaint.

Official Policies and Patterns and Practices Relevant To Present Case

96. Present Monell claims against the Defendant Town of Underhill are also substantiated by Defendant Town of Underhill pattern and practice of sustained *willful* intentions, actions, and inactions over the span of over 20 years focused upon purloining landowner property rights along TH26.

97. Public records, and missing public records, document Defendant Town of Underhill willfully engaging in an ongoing pattern of censorship and misrepresentation of the public record (since at least 2001) and legal record (since at least 2009).

98. In an email dated 10/26/2020, The Underhill Town Clerk, claimed, in part:

> The only minutes in digital format are the ones on the website. Nothing else. The rest of the minutes are in paper form here at town hall.

99. Plaintiff asserts credible knowledge and belief Defendant Town of Underhill *willfully and perfidiously removed* incriminating public records from the Town of Underhill website as a way to manipulate the public record, interfere with Plaintiff's *reasonable* access to public records, and functionally defame Plaintiff's character because the public at large is denied *reasonable* access to public records *which were previously readily available on the Town's website* and the entire history is necessary to form an accurate opinion on Plaintiff's past and present litigation against Defendant Town of Underhill.

100. As of the date of the filing of the Original Complaint, the Town of Underhill Website has:

A. Development Review Board meeting minutes *available for free download* on the Town's website all the way back to January 2007,

B. Planning Commission Meeting Minutes *available for free download* on the Town's website all the way back to January 2009

C. The Underhill Trails Handbook, "adopted by the Selectboard as a best practice manual on September 22, 2009" is *available to download.*

D. Selectboard Meeting Minutes only after January 2012, and

E. Underhill Conservation Commission Minutes only after to April 2016.

101. Plaintiff engaged in *multiple years* of efforts to obtain fair treatment from Town of Underhill officials, including Plaintiff's efforts as a member of the Underhill Trails Committee, *prior to* the above referenced October 8, 2009 letter seeking legal advice on how to *rescind* prior promises made to Plaintiff and ensuant litigation.

102. Due to the public nature of litigation against a resident's local town government, the selective removal of public records, *which were previously readily available on the Town of Underhill official website*, and intentionally vague or misrepresentative meeting minutes has materially harmed both Plaintiff's local reputation and on-line reputation by censoring an accurate history of the events that caused past and present litigation.

103. Plaintiff asserts an example of a record which would be publicly exonerating to Plaintiff's personal and professional reputation, while simultaneously politically harming and incriminating for Defendants Town of Underhill and town officials involved in the October 9, 2009 Selectboard meeting, is the fact minutes on that date reference the October 8, 2009 letter which sought to *rescind* Plaintiff's prior access vaguely as, "Crane Brook Trail: Chris has sent a letter to Vince." *in the very same meeting* the Better Back Roads Grant program was discussed ***and*** the Underhill Trails Handbook was about to have a press release.

104. The public record should properly document Plaintiff spent considerable personal time participating in drafting the Underhill Trails Handbook as a Trails Committee member in a good faith effort to find solutions to problems caused by Defendant Town of Underhill's refusal to provide appropriate municipal maintenance to public roads and trails combined with numerous trail users causing problems for landowners; at present Defendant Town of Underhill *still* refuses to follow these outlined best management practices.

Substantiation of Claims Specific to First and Second Causes of Action

105. The staying of Plaintiff's first-filed road maintenance case for *years* allowed the Town of Underhill's legal counsel to craft a reclassification order to satisfy the low administrative standard of review which simply determine if there was *any* evidence in its favor; procedural due process required *impartial* weighing of the true *necessity* (as defined under 19 V.S.A. § 501 (1)) of the Selectboard proposed New Road reclassification which has taken Plaintiff's property without compensation for recreation.

106. Plaintiff asserts Defendants involved in the 2010 New Road reclassification willfully violated Plaintiff's structural and procedural due process rights to an *impartial* decision-making process.

107. Plaintiff asserts Defendant Town of Underhill's own records indicated Defendant Steve Walkerman and other named Defendants were interested in discouraging driving through New Road between Pleasant Valley Road and Irish Settlement Road in the early 2000's onward primarily for their own personal enrichment and cross-country skiing.

108. Plaintiff's Conflict of Interest Complaint submitted against Defendant Dan Steinbauer clearly outlines violations of Plaintiff's procedural due process and Defendants the Town of Underhill, Dan Steinbauer, Bob Stone and Peter Duval's lack of meaningful response (and censorship of the complaint from the Town of Underhill's website) further documents these allegations.

Substantiation of Claims Specific to Third and Fourth Causes of Action

109. Plaintiff asserts having credible knowledge and belief there is a *long* record of the Town of Underhill and numerous Town of Underhill officials having an interest in the taking of free recreational use of Plaintiff's property, which under Vermont law is an impermissible primary rational for an eminent domain proceeding.

110. In addition to the actual eventual taking of Plaintiff's property without compensation, Plaintiff asserts Defendants Town of Underhill and colluding town officials presently sued in their individual capacities violated the Ninth

and Fourteenth amendments by engaging in a *willful* and *relentless* effort over the span of around two decades to purloin the use, value, access and personal enjoyment of Plaintiff's private property *contrary to legally permissible purposes*.

111. Plaintiff has credible knowledge, information and belief Defendants Trevor Squirrell, Karen McKnight, Marcy Gibson (which were also JULT members) and other JULT members acting in their official capacities (most notably Defendants Steve Walkerman, Dan Steinbauer, and Stan Hamlet) colluded to violate Plaintiff's Due Process Rights by initiating the 2010 New Road Reclassification process with full confidence fellow affiliates of JULT could successfully act under color of law, with assistance of legal counsel for the Town of Underhill, to reach a *predetermined* future reclassification decision in order to take Plaintiff's property without compensation.

Substantiation of Claims Specific to Ninth Amendment Concurrent With *Willful* Violation of Vermont Constitution and State Laws

112. Article 2 and Article 7 of the Vermont Constitution, and the inherent right that a local municipality to abide by State and Federal laws, are rights clearly intended to be fully protected under the Ninth Amendment of the United States Constitution.

113. Plaintiff has credible knowledge, documentation, and personal experience observing Defendants' *willful indifference* to multiple clearly established laws in violation of the Ninth Amendment rights of Plaintiff and other landowners including the rights expressed Article 2 and Article 7 of the Vermont Constitution and Plaintiff's Right to Equal Treatment Under the Law.

Article 2: Private property subject to public use; owner to be paid

That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

114. Given the amount of legal advice obtained from Defendants, combined with their actions and inactions, it is inconceivable they would not be *fully* aware that under Vermont Law eminent domain proceedings define "Necessity" as:

A ***reasonable need*** that considers the greatest public good and the least inconvenience and expense to the condemning party and to the property owner. It shall not be measured merely by expense or convenience to the condemning party. Due consideration shall be given to the following factors:

(1) The adequacy of other property and locations.

(2) The quantity, kind, and extent of cultivated and agricultural land that may be made unfit for use by the proposed taking. In this connection, the effect on long-range agricultural land use as well as the immediate effect shall be considered.

(3) The effect of the taking upon home and homestead rights and the convenience of the owner of the land.

(4) The effect of the taking upon scenic and recreational values in the areas involved.

(5) The effect upon town grand lists and revenues.

(6) The effect upon fish and wildlife, forests and forest programs, the natural flow of water and the streams both above and below any proposed structure, upon hazards to navigation, fishing, and bathing, and upon other public uses.

(7) Whether the cutting clean and removal of all timber and tree growth from all or any part of any flowage area involved is reasonably required.

(c) The complaint, the service thereof and the proceedings in relation thereto, including rights of appeal, shall conform with and be controlled by 19 V.S.A. chapter 5.

Article 7: Government for the people; they may change it

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

115. Plaintiff asserts it is exceedingly implausible Defendants could possibly be unaware of the Vermont Supreme Court Decision of Rhodes v. Town of Georgia dated March 23, 2012 involving Article 7 of the Vermont Constitution.

116. Plaintiff asserts it is now *impossible* to conceivably find *any* defendant acted in an arbitrary and capricious manner since a municipality's maintenance and reclassification decisions have an unlimited administrative "discretion" under the Vermont Rule of Civil Procedure 75 "on the record" appeal process.

117. Plaintiff asserts any *reasonable* jury would believe the parcel name change from NR-144 to FU-111 was an antagonistic administrative decision indicative

of clear *mens rea* for the sole purpose of later attempting to circumvent the property rights protected by common law and Vermont Statute 19 V.S.A. § 717(c).

118. To make the seemingly self-evident point crystal clear, Plaintiff has documentation dated April 22, 2019, from the State of Vermont Department of Motor Vehicles, which as an *impartial* Vermont governmental agency states:

> Your requested selection of special plate FU has been denied.
>
> It has been deemed to be a combination that refers to vulgar, derogatory, profane, racial epithets, scatological or obscene language and has been denied based on that reason.

119. Defendant Town of Underhill efforts to violate Plaintiff's civil rights were far more egregious than efforts in the *Rhodes* case because Defendants intentionally caused Plaintiff's difficulty *continuing* to access his current *domicile* and infringed upon the reasonable expectations of privacy expected in and around one's *home,* as opposed to "only" taking the economic value of Plaintiff's private property and reasonable investment backed returns.

120. One, of many, examples of Defendants' excessive interest in cross-country skiing and other recreation on TH26, as opposed to recognition that the primary purpose of a road is the facilitation of travel, is Selectboard meeting minutes from the winter of 2002 state "The New Road is being plowed to the former Shakespeare property as the new owner [Plaintiff] *seeks* access."

121. Plaintiff asserts many of the purported "conservation" efforts created substantial economic gains for Defendants Dick Albertini, Carolyn Gregson, Steve Walkerman, Marcy Gibson, and others; the most dramatic of which being Dick Albertini's 5-lot subdivision (see Table 1 on page 25)

122. The Rhodes decision also succinctly explains the current circular argument within current Vermont legal interpretations which Defendants have maliciously capitalized on:

> The selectboard's decision to downgrade its status to a trail did not -- as we have elsewhere held -- constitute a "taking" entitling abutting landowners to compensation. See *Ketchum v. Town of Dorset*, 2011 VT 49, ¶ 13, 190 Vt. 507, 22 A.3d 500 (mem.) (reaffirming rule that "downgrading a road does not involve a taking"); *Perrin v. Town of Berlin*, 138 Vt. 306, 307, 415 A.2d 221, 222 (1980) (holding that downgrading of town highway to a trail "does not involve the acquisition of property rights from the abutting owners" so that "no damages are involved").

Substantiation of Claims Specific to Fifth and Sixth Causes of Action

123. The 2010 New Road Reclassification, instead of *discontinuing* a segment of TH26, functionally condemned a 49.5' wide swath of private property to simultaneously deny landowners reversionary property rights *and* rescind past, present, and prospective future accessibility to private property.

124. Defendants' willful actions and inactions have taken the Plaintiff's reasonable access to his domicile and the reasonable expectation of privacy in and around one's home.

125. Plaintiff asserts the prior landowners of NR-144 (Shakespeare, Sims, and Slater) requesting to have a segment of TH26 *discontinued* is fundamentally different than a *reclassification* into a legal trail against their will; a town highway *discontinuance* provides reversionary property rights to abutting landowners, ensures landowner privacy, and preserves a landowner's private right of way over the discontinued corridor in accordance with common law and Vermont Statute 19 V.S.A. § 717(c).

126. Given the length of time the Defendant Town of Underhill has refused to help minimize (and intentionally caused) problems for landowners, Plaintiff firmly believes any *reasonable* jury would view the totality of the Defendant Town of Underhill's actions as conspicuously pernicious during a span of over 20 years and based primarily upon the inappropriate personal desire of a handful of individuals to have landowners give away recreational use of private property for free (even if it would come at the extreme cost of taking landowners reasonable access to their homes), which was followed by a relentless and malicious retaliation and intentional violation of many of Plaintiff's other constitutional rights.

127. Plaintiff asserts Defendants have a pattern and practice of attempting to inhibit, and retaliating against, any landowners that wish to exercise the fundamental private property right to exclude others for at least 20 years.

128. Plaintiff has credible knowledge, belief, witnesses, and video documentation that Defendants and members of the public have felt entitled to disregard Plaintiff's reversionary property rights and go up onto Plaintiff's private property as if it were a part of the "Crane Brook Conservation District."

129. Plaintiff asserts there is a history of over 20 years in which Defendants have obstinately refuse to provide *any* reasonable maintenance to certain public infrastructure, including any meaningful assistance to Plaintiff or other nearby landowners plagued by illegal dumping and other problems caused public use and abuse of the "Crane Brook Area," the proximate cause of which is Defendant's advertising of the area as a recreational destination.

130. Plaintiff asserts Defendant's Trail Ordinance *willfully* mislead Plaintiff in the interest of later taking Plaintiff's property; in addition to prior promises officially made directly to Plaintiff, the purported Trails Ordinance included the provision that "permits **shall be issued** only to persons who … have a legitimate need to operate a vehicle on the Crane Brook Trail. For the purposes of this ordinance, 'legitimate need' shall mean a compelling personal or business purpose."

131. Plaintiff asserts Defendants have willfully refused to mitigate numerous problems caused by Defendant's "Crane Brook Conservation area," such as

the public nuisance caused by trash such as mattresses and tires that are illegally dumped and people going from the public areas onto private areas"

132. Plaintiff asserts despite willfully refusing to mitigate problems already created, Defendants have expressed the strong desire to increase public use of the Crane Brook Area (especially as related to developing and later advertising a "Pump Track" on Town property despite being unsure exactly how much such a development would increase public recreational traffic or resultant potential parking issues and additional environmental impacts to the area).

133. Plaintiff asserts the *de facto* legitimate need of Plaintiff to access his home, land and former agricultural operation was previously so definitively promised by the Town of Underhill that promissory estoppel should have precluded Defendant's relentless efforts to find "any way the Town could rescind the access"

134. Plaintiff asserts in April of 2002, the Selectboard consistently expressed concern about the amount of money it would take to make improvements to New Road but the Selectboard and Underhill Conservation Commission members of that era actually thought thee Town should buy Plaintiff's property and that "There is no penalty for them to give it to the town."

135. Plaintiff asserts in April of 2002 Defendants Stan Hamlet, Ted Tedford, Peter Brooks, Carolyn Gregson was made *fully aware* by a property owner's

attorney that they were violating his client's constitutional rights; The Town of Underhill and the town officials have *knowingly* engaged in the longstanding pattern and practice of violating individual property owners rights.

136. Plaintiff asserts when Plaintiff purchased NR-144 in 2002, it was possible for a standard auto to drive the vast majority of TH26 so long as the driver proceeded with caution and the entire road was easily driven in a standard pickup truck all the way from Pleasant Valley Road to Irish Settlement Road.

137. Plaintiff asserts at the time of purchasing his property, the Underhill Selectboard felt entitled to an *ultra vires* authority to simply "*veto*" a landowner's intention to build a home.

138. Plaintiff is unaware of *any* reasonable way to have exercised greater due diligence prior to purchasing property than having retained an attorney to review the land records and the purchase and sale agreement, having purchased title insurance, and having personally met with the local Selectboard prior to purchasing NR-144.

139. Plaintiff asserts when Plaintiff met with the Selectboard in May of 2002 to confirm there would be no issues with his plans to build an off-grid home, Selectboard members Stan Hamlet and Bob Pasco both approved Plaintiff's intentions for the property if he were to finalize his purchase of NR-144.

140. Plaintiff was promised access to NR-144 on what at the time was a through-road and mislead the rougher condition of New Road north of the Town Garage was due primarily to town budgetary constraints.

141. Plaintiff asserts Defendants' refusals to conduct *any* maintenance to the central segment of TH26 were based upon a malicious intention to eventually *rescind* Plaintiff's access to his home and land.

142. Plaintiff believes any reasonable jury aware of Plaintiff's plight over the following ~19 years, which has included ~12 years of active litigation due to the Town of Underhill seeking legal advice on "any way the Town could rescind the access" (letter dated October 8, 2009) would easily understand just how foreboding it was to refer to official ***promises*** made by the Selectboard to Plaintiff in a public meeting as, "initially we would go along with this.."

143. Plaintiff asserts Defendants have conspired, with the help of hours of legal advice in executive sessions, how to *rescind* landowner access to further their own personal interests and the interests of fellow Town Officials / Jericho Underhill Land Trust affiliates.

144. Plaintiff asserts Town Officials present (Stan Hamlet, Peter Brooks, Carolyn Gregson and Bob Pasco) in the May 20, 2002 morning Selectboard meeting are clearly aware the "Nuisance Ordinance" is unconstitutionally overbroad.

145. Plaintiff asserts the state of mind of Defendants Town of Underhll and defendant town officials in the May 20, 2002 era intended to criminalize innocuous conduct, but upon legal advice it was presumably determined civil sanctions are unlikely to raise to the level that an individual attempts to litigate an overly broad (and selectively enforced) ordinance instead of cowing to the Selectboard tradition of *ultra vires* abuse of governmental authority.

146. Substantiation of the preceding statement includes Selectboard meeting minutes dated May 20, 2002 involving the drafting of a Nuisance Ordinance which recognized the issue of:

> Nuisance Ordinance: The town lawyer recommended that, under the penalties section, we take out the alternative criminal sanction language. It was agreed to go with the civil sanctions. The issue of whether it would be nitpicking to create this ordinance was discussed. The village lighting was seen as a possible violating of the ordinance, as was the lighting at the school.

147. Plaintiff asserts the town received substantial legal advice throughout the past 20 years, so qualified immunity cannot protect individual town officials acting with deliberate indifference to Plaintiff's constitutional rights or individuals maliciously wielding municipal authority during this time because it is entirely implausible that Town Officials were not *fully aware* they were exceeding their lawful authority.

148. Plaintiff asserts there was no valid reasoning for renaming TH26 from "Dump Road" to "New Road" instead of the "Crane Brook Road" or other name consistent with typical naming practices, let along justification for what is presumably the inside joke of changing plaintiff's parcel codes (and those of two former co-litigants) from "NR" to "FU" *after* the purchase of parcels on "New Road." (see also paragraphs 116 through 119 on page 37)

149. Plaintiff asserts in the same November meeting, "Dick Albertini requested signs on either end of New Road to discourage people from driving through. The signs should go up now as people are getting stuck. It is officially closed Dec. 1;" but there are in fact no official looking signs to discourage vehicular through traffic.

150. Plaintiff asserts having built a permitted full-time dwelling would logically include plowing to his residence in the winter, and in Defendant's typical pattern and practice of creating revisionist history there is a second version of these meeting minutes which state, "David Demarest (new owner of the Shakespeare property) is plowing Fuller Road to his property."

151. Plaintiff asserts the extreme focus of Defendants creating recreational opportunities for cross country skiing, even if it requires claiming a resident's address has changed from "NR-144" to "FU-111" is indicative of the maliciously misplaced "priorities" of a handful of Town of Underhill Officials,

many of whom were also either furthering their own and fellow Jericho Underhill Land Trust (JULT) affiliates personal interests, or were overly influenced by an ability to personally profit from the sale of their private property to JULT and the Town of Underhill.

152. Plaintiff asserts the barely tenable "compromise" which was *promised in writing* to Plaintiff in 2005 by Defendant Stan Hamlet was a *substantial* reduction from the prior promises Stan Hamlet had *officially made* to Plaintiff in the Selectboard meeting Plaintiff had attended *prior to* purchasing NR-144.

153. Plaintiff asserts Town of Underhill's written promise to move boulders placed in the way of Plaintiff's right of way was first broken on November 13, 2019.

154. Plaintiff asserts the longstanding pattern and practice of efforts by the Town of Underhill to undermine landowner property rights, in combination with multiple town officials and other recreationalists believing they are *entitled* to personally enjoy outdoor recreational opportunities from the above-mentioned large blocks of forest land regardless of who owns the land, has ironically been the central factor forcing Plaintiff's previously proposed 9-lot subdivision.

155. Plaintiff asserts paragraph 194 on page 59 documents the duplicitous and conniving nature of Defendant Stan Hamlet, since he had been central to the initial promises made to Plaintiff *prior to* the purchase of NR-144.

156. Plaintiff has both accessed and previously plowed all the way from the Underhill Town Garage to Irish Settlement Road.

157. Plaintiff asserts the marketing of the "Trails Handbook" intentionally creates a false assurance that the Town of Underhill would follow the Best Management Practices, but Plaintiff is unaware of any instances in which Defendants have actually followed the Best Management Practices outlined in the Underhill Trails Handbook.

158. Plaintiff asserts since the 2010 New Road Reclassification, National Geographic Maps were updated to depict a significant portion of Plaintiff's former road frontage as a recreational trail which has resulted in increased problems for nearby private property owners without *any* meaningful effort by the Town of Underhill to mitigate.

159. Plaintiff has experienced repeated problems caused by specific individuals and public recreational use of New Road over many years due in a large part to the Town of Underhill's marketing of the recreational use of the "Crane Brook District" / "Crane Brook Area" / "Crane Brook Trail."

160. Plaintiff asserts the Town of Underhill continues to willfully refuse to mitigate problems caused by advertisement of the "Crane Brook Area" in complete disregard for the Best Management Practices outlined in the Underhill Trails Handbook.

161. Plaintiff asserts the degree and frequency of problems Plaintiff has experienced is dramatically higher than similarly situated private properties on other Class III or Class IV roads (or properly managed trails) due to the outright refusal of the Town of Underhill to help mitigate the increased number of issues with: the public nuisance of having vehicles parked on Plaintiff's property or in the way of Plaintiff's property access, the public nuisance of litter and illegal dumping, criminal trespass, crimes of vandalism, the theft of thousands of dollars of Plaintiff's personal property, and Plaintiff has even been shot at once while on his private property.

162. Plaintiff asserts Selectboard Minutes in spring of 2010 document the extreme abuses of municipal "discretion" since Defendants Steve Walkerman, Dan Steinbauer, and Steve Owen spending a highway surplus on the Pleasant Valley Road Reconstruction of approximately $108,000, consideration of obtaining a FEMA grant to replace a culvert on a *private* road for approximately $92,000, ***and*** preparation for the April 24 public hearing to reclassify a segment of New Road in complete disregard for the private

property rights expressed by Plaintiff, Michael and Tammy Linde, and Jonathon and Lisa Fuller.

163. Plaintiff believes there is no way to accurately summarize the amount of emotional duress protracted litigation over access to one's home and land can take on a person, or the loss of privacy at one's home, but Plaintiff having to bear witness to Defendants spending legal funds entertaining the precedent setting idea Underhill helping to obtain replacement of a *private* road culvert while simultaneously pursuing "any way" of Taking as much of Plaintiff's land (and corresponding lifestyle and sense of life's purpose) in ways which were once inconceivable all for *mere recreation* (and their own personal profit) would be unbearable for anyone that found themselves in a similar situation.

164. Plaintiff asserts the video recording of the April 24, 2010 New Road Reclassification hearing, the entirety of written submissions are incorporated by reference, and all video recordings of Defendants violating Plaintiff's constitutional rights while acting under color of law proves with a preponderance of evidence the willful violation of Plaintiff's Ninth and Fourteenth Amendment rights by Defendants colluding in the predetermined process.

165. Plaintiff asserts the 2010 New Road Reclassification purloined the reversionary property rights of an entire 49.5 feet wide public right of way for

recreation and Defendants have had over 11 years to work on how the "trail" will be managed without having taken any meaningful steps to mitigate the problems caused by public use and abuse of Plaintiff's former road frontage and ineffectual management which both willfully ignores, and at times even creates, problems for private property owners and the environment.

166. Plaintiff asserts Defendants Steve Walkerman, Dan Steinbauer, Steve Owen and Brad Holden colluded to violate Plaintiff's procedural due process rights and the public and private usability of the TH26 corridor for all reasonable interest groups could have been maintained for a very minimal financial municipal investment.

167. Plaintiff has knowledge and belief the primary motivation behind the Pleasant Valley Road Project mentioned was Defendants' efforts to allow Defendant Dick Albertini to substantially profit from the sale of his property for a Town gravel pit, after the Town gave him a special deal and even did the prospecting for him at the Town's expense instead of initiating a Request For Proposals process.

168. Plaintiff asserts Defendants Clifford Peterson and Rick Heh decision to rely purely upon a claim of unfettered municipal discretion by taking on appeal of the Vermont Superior Court ruling in favor of Plaintiff, and subsequent request for reconsideration and the appeal to the Vermont Supreme Court, occurred

concurrent with approval to spend an estimated $134,000 to pave up to a point near the southerly terminus of TH26 is indicative of how much effort the Town of Underhill and named Defendants have exerted to eliminate reasonable access to a property which is literally a short walk to the town highway department, which has exceptionally maintained access approximately half a mile from Pleasant Valley Road, which is a paved road to the south relative to taking a northerly route which necessitates driving 15-20 minutes out of the way *and* substantial personal time and expense to maintain since the Town of Underhill still refuses to provide ***any*** maintenance to Plaintiff's limited remaining *public* road frontage.

169. In the 5/18/2018 Selectboard meeting, Defendant Pat Sabalis willfully misrepresented Plaintiff's protected speech as "statements berating people and organizations. It's just something I wanted to put on the record because it's upsetting."

170. Plaintiff responded to this mischaracterization of the record on May 25, 2018 stating, in part:

> To clarify, Webster's definition of berate is "to scold or condemn vehemently and at length." This is fundamentally different than asking poignant questions that deserve answers before a Selectboard tends to dutifully move forward on whatever UCC members propose.

171. Plaintiff asserts the Town of Underhill has willfully and wantonly continued to refuse to provide **any** maintenance to any portion of plaintiff's limited remaining Class IV Road frontage up to the date of the filing of the present case before this court, despite spending significant sums of tax payer money on litigation against Plaintiff and other residents of Underhill.

172. Plaintiff asserts in June of 2019, Rick Heh to created a matrix of Class IV road characteristics in attempts to rationalize past and potential future Town of Underhill maintenance of Class IV roads and factual errors in this matrix are *willfully* prejudicial to Plaintiff since Plaintiff publicly made note of specific errors which have persisted over time.

173. Plaintiff asserts a Planning Commission meeting in May of 2019, led by Defendant Jonathan Drew Minutes with Defendant Carolyn Gregson also in attendance and Sandy Wilmot writing the meeting minutes willfully prevented Plaintiff's protected speech and obstructed Plaintiff's efforts to contribute to local governmental planning and decision-making; meeting "minutes" merely state "Overall discussion included" with bullet points of some of the topics discussed.

174. Plaintiff asserts the above mentioned Planning Commission meeting is an example of Plaintiff's protected speech being censored since it makes no mention of Plaintiff bringing up the outright refusal of the Town of Underhill

to follow the Best Management Practices outlined in the Underhill Trails Handbook, which Plaintiff had taken part of in efforts to ameliorate some of the problems recreationalists in Underhill had been causing for landowners, and that the Trails Handbook should not be promoted if it is not actually being followed because the Town should not promising things it is unwilling to uphold.

175. Plaintiff asserts in this above-mentioned meeting Plaintiff takes issue with the town deceiving landowners which are forced into taking the brunt of having to pick up litter on a public trail without any assistance from the Town of Underhill.

176. Plaintiff also pointed out parking issues, the lack of the town educating trail users to not leave the trail to go onto private property without permission, and a number of other concerns, which proper planning could help mitigate, but all points brought up by Plaintiff in the meeting were censored to the point that the recorded minutes and the public at large would not be aware of the substance behind the vast majority of the points Plaintiff raised, but most importantly none of Plaintiff's recommendations or assertions were incorporated into the 2020 Town Plan (or genuinely even considered by Town Officials) as is typical of what one Selectboard member referred to as "The Underhill Way."

177. In June of 2019, to add emphasis to the futility of residents attempting to have a say in their own local government, the Planning Commission Chair Jonathan Drew wrote an email to Plaintiff in response to a post made on www.FrontPorchForum.com.), stating, "Your incessant whining and profound ignorance is of little importance and interest. If you don't like it here leave."

178. Plaintiff asserts documentation Defendant Jonathan Drew's hostile email, which Plaintiff submitted in the public comment period of a Selectboard meeting in July of 2019, is not actually attached to the Selectboard meeting minutes posted on the Town Website to censor Plaintiff's protected speech to the point it is literally impossible to know if content of the email from Jonathan Drew is positive or negative.

179. Plaintiff asserts Selectboard meeting minutes in July of 2019 also censor Plaintiff and other members of the public which were pointing out other instances of the Town of Underhill's willful and wanton breach of prior promises, such as those made to neighbors of the old town garage on Beartown road (which were previously documented in earlier public meeting minutes).

180. Plaintiff asserts Town Officials willfully continue to use Front Porch Forum as the *primary* and in many situations *only venue* for members of the public to be aware of official municipality agendas and activities

181. Plaintiff reminded Defendants Karen McKnight, Nancy McRae, and Daphne Tanis in a June of 2020 Underhill Conservation Commission meeting that agenda should be posted to Underhill Town website in addition to FPF could post to FPF before the weekend (but not the official Town of Underhill website).

182. Plaintiff asserts Town Officials have a longstanding pattern and practice of willfully and wantonly ignoring the failed culvert which Plaintiff has made every conceivable effort to find solutions to remedy which could work for all *reasonable* interested parties prior to the filing of the Notice of Insufficiency in 2009; instead, Town Officials spend time on ineffectual small projects that have little genuine benefit to the Town of Underhill residents.

183. Plaintiff asserts Selectboard members *willfully* and *obstinately* refused to the minutes so as to avoid giving "a true indication of the business of the meeting," and the exclusion of Plaintiff's protected speech was predicated upon a desire to prevent factually and politically important details of the September 21, 2020 Selectboard meeting minutes from being publicly readily available.

184. Plaintiff asserts countless materially adverse actions by Town Officials are intended to dissuade landowners and other residents that may disagree with a town official from speaking out against problems within Underhill's

governance; this tradition prevents residents from contacting the Town about an issue lest they too be ostracized as "Others" (which will subject a resident to increased scrutiny by Town Officials or worse); those residents brave enough to speak out in spite of almost certain retaliation by officials are likely to have their constructive criticism ignored so there is a very reasonable question of "Why bother?" since nothing is likely to change even when "others" demand the town function for the public good.

185. Plaintiff asserts defendant Town of Underhill has continued to refuse the Conflict of Interest allegations submitted against Dan Steinbauer to be available for the public to review on the Town website; Conflict of Interest allegations which Jim Beebe Woodard, who at the time was the Town Administrator, submitted against Selectboard Member Peter Duval were readily viewable on the Town of Underhill website and Front Porch Forum did not censor substantial negative comments directed personally at Selectboard member Peter Duval.

186. Plaintiff asserts Selectboard meeting recordings from the Fall and Winter of 2020 demonstrate what has been publicly referred to by a town official as the "Underhill Way," with examples of multiple procedural due process violations, willful censorship of Plaintiff's protected speech, and violation of Plaintiff's Ninth Amendment rights since it is not constitutionally acceptable for a single

person to wield the power of the town against landowners as Dan Steinbauer does.

187. Plaintiff believes Defendants Dan Steinbauer, Bob Stone, and Brad Holden decided to have a Selectboard meeting at 830 am in December 2020 as a way to minimize public involvement in the budgetary process and avoid public oversight of issues within Underhill's governance; Defendants were demonstrably bothered that David Demarest and Natalie Coughlin were able to attend and the recording of this December 2020 Selectboard meeting documents Defendants violation of Plaintiff's First, Ninth, and Fourteenth amendment rights.

188. Despite Plaintiff's reasonable expectation of privacy being Taken by the start of a recreational trail destination being located bottom of his primary driveway, the Recreation Committee "didn't think it was right to have parking so close to Marcy's house and thought it would be better if it was to the right of the entrance to the town garage for convenience to the trails."

189. Plaintiff asserts Town of Underhill's budget is heavily controlled by a handful of heavily biased and self-dealing individuals willing to spend money in certain areas of the budget, while also the retaliatorily rescinding money from other budget items previously intended for purposes which could have

benefited Plaintiff (or at least mitigated the damages of public use and abuse of Plaintiff's former road frontage).

190. Plaintiff also asserts the start of a litigation between Plaintiff and co-litigants against the Town of Underhill began in the Selectboard's choice to use lawyers instead of potentially spending a mere $1,600 on road maintenance which could have allowed all *reasonable* interest groups to coexist instead of Taking Plaintiff's property without just compensation.

Substantiation of Claims Specific to Seventh and Eight Causes of Action

191. Plaintiff asserts, in presumable collusion among the Selectboard (SB), Underhill Recreation Committee (URC), Planning Commission (PC) and Underhill Conservation Commission (UCC) minutes, Defendants have been consistently and grievously censored and misrepresented Plaintiff's protected speech in public meetings.

192. Plaintiff asserts Defendants' have a pattern and practice going to great efforts to subvert landowner rights and the ability of impacted landowners to have a say in their own town's governance; this same type of behavior repeated itself in 2020 and included efforts to silence Plaintiff's attempts to have a say in the Town's budget discussion in a *morning* meeting which Plaintiff asserts was an effort by Defendants to avoid public involvement in budget decisions.

193. Plaintiff asserts the Town of Underhill has deleted *significant* portions of Trails Committee Meeting Minutes in which Plaintiff participated; Plaintiff was even involved the drafting of The Underhill Trails Handbook, which Defendants refuse to follow.

194. Plaintiff asserts an example of Plaintiff's protected speech occurred in correspondence around 2005, which further motivated Defendant's retaliation for Plaintiff's purchase of private property Defendants had wanted donated to the Town of Underhill, Plaintiff stated:

> Dear members of the Underhill Selectboard and fellow residents,
>
> I am writing to express a number of concerns about the Selectboard's decision to place boulders on New Road to eliminate all motor vehicle activity on New Rd/The Crane Brook Trail between December l and May 1.
>
> My primary concern, since my land is accessed by this long-standing road (by too many names: Dump Rd, New Rd, Fuller Rd, Crane Brook Trail) is that this will reduce my current ability to access my land. In addition, I believe the town may be not fully adhering to the law in blocking that section of road since it has already been legally established that a gate could not be placed there, which is the assumed reason for using the boulders/ however, the legal definition of a "gate" includes anything used to block passage (including boulders).
>
> In the meeting I attended in December to present these concerns and learn more about the decision making process, a number of additional problems became clear. Most importantly, the Chair of the Selectboard, Stan Hamlet had clearly made up his mind on what he wanted, and admitted that his wife strongly wanted to block the road, but pushed the decision through instead of professionally admitting to a conflict of interest stating his opinion and reasons for it, and then allow allowing his fellow Selectboard members to make the decision…

195. Plaintiff asserts Defendants refused to honor a petition submitted with the support of 60 residents in 2002 opposing the Underhill Trails Ordinance which stated, in part: We the legal voters of the Town of Underhill would like to petition the Selectboard of the Town of Underhill to reconsider their efforts and/or attempts to close down or stop thru traffic to any and or all motorized vehicles at any time of the year on the New Road (AKA the old Dump Road) It would be more beneficial for all taxpayers and the surrounding landowners of New Road for the road to be repaired and maintained for all residents to utilize instead of an elite few…

196. Plaintiff asserts in April of 2013 Plaintiff's attorney, Chris Roy with Downs Rachlin Martin, expressed to John O'Donnel, attorney for Defendant Town of Underhill:

> I have had a more detailed discussion with my clients.
>
> They are willing to stipulate to a remand and sign-off on a revised application by the trails committee if it includes the following:
>
> 1. Physical impediments constructed as part of the trail development which prevent use of side trails that extend onto adjoining private property.
>
> 2. Clear, obvious, periodic signage along the east side TH26 starting just north of the town garage to the Fuller property notifying users of TH26 that adjoining lands are private property and that there should be no trespassing. It is worth noting that people also cross the town property and other parcels on the west side of TH26 in the area of the beaver pond (e.g., in the winter), come to TH26, and then cross over onto the private property on the east side of TH26. This will only increase as the town encourages residents to use recreational trails in the area.
>
> 3. Development of the town trails will presumably create more need for parking as more people make use of the trails. In order to avoid "informal"

parking on TH26 which would create the same issues as "formal" parking in that location, some provision should be made for parking. Available land for parking that is already available to the town, would avoid the issue of blocking TH26, and would meet my clients' needs include the trailhead up on Irish Settlement Road, and town property just to the south of the town garage on New Road/TH26. Making parking available there, coupled with no parking signs on TH26 just to the north of the town garage, would seem to address both the town's needs and my clients' concerns.

I would anticipate that my clients would work with the town and its trails committee in developing the revised application. To the extent the DRB departs from any of the elements of the application forming the basis of my clients' agreement, however, they would reserve the right to appeal.

If the town and its trails committee is amenable to the above, let me know and I will inform the court that a settlement has been reached involving a remand, and will prepare a stipulated motion for remand for review. Thanks.

197. Plaintiff asserts later the same day Defendant Town of Underhill's Correspondence to Vermont Superior Court Docket No 160-10-11Vtec stated:

The Town of Underhill and its Trail's Committee has formally withdrawn its application to construct trails and related crossings/signage on property owned by the Town of Underhill at 77 New Road, Underhill Vermont. Consequently, a hearing on this appeal will no longer be necessary.

198. Relevant allegations Plaintiff asserts based upon paragraphs 196 and 197

None of the three proposed stipulations, which were based upon Plaintiff's experience of living near (or perhaps in?) Defendant's *ipse dixit* "Crane Brook Conservation District," were overly onerous or unreasonable.

199. Instead of considering reasonable stipulations, Defendants withdrew their application, publicly blamed Plaintiff, and as of the past year are currently moving forward without proper permitting and the ensuant procedural

protections, such as constructive notice, which the Development Review Process is intended to provide to nearby landowners and other interested persons.

200. Selectboard minutes dated October, 24, 2013 defame Plaintiff's character by describing Plaintiff and former co-litigants as "*the litigious nature of the appellants*" while willfully ignoring the factual history of Plaintiff's involvement in the Trails Committee prior to the Town of Underhill seeking legal advice on how to *rescind* Plaintiff's access.

201. Despite the recent discussions among Defendants on the Underhill Conservation Commission members mischaracterizing the beaver activity along the former TH26 as something new or somehow different from natural seasonal variations in beaver activity and pernicious impacts of Underhill's obstinate refusal to maintain the central segment of TH26, there is *only a single substantial difference* between the conditions Plaintiff attempted to have resolved in the September 14, 2020 Underhill Conservation Commission meeting and the May 10, 2021 meeting: As of this past February, the Vermont courts have allowed the Town of Underhill to achieve the avowed and clearly malicious goal of officially *rescinding* Plaintiff's previously promised otherwise self-executing southerly access to his domicile and surrounding *private* property.

202. Plaintiff asserts it took an *extreme* level of persistence by Plaintiff to convince Defendants to approve a revised version of the censored elements of the 9/14/2020 meeting minutes *nine months later* and the impact of this willful censorship persists since very few members of the public dig through meeting minutes that old and the potential to apply for the grant Plaintiff mentioned now requires waiting for the next grant-writing cycle.

203. As of August 2, 2021, the revised 9/14/2020 Underhill Conservation Commission minutes state "that could cover the partial cost (80% matching grant) of the ~$8,000 baffler" even though as emphasized by Plaintiff, it would be a 20% matching grant, and 80% of the cost could be covered by the grant.

204. The recording of the June 14, 2021 Underhill Conservation Commission meeting demonstrates Town Officials are willfully ignoring the fact public meetings minutes *are purely to document what has occurred in or been submitted to the meeting* and meeting minutes do not permit censorship, revisionist history, or the exercise of *creative* license.

205. Plaintiff has a substantiated belief the "gaps" in public records are *willful* and *pernicious* since landowners are denied constructive notice or warning as to what a small handful of JULT members intend to take for themselves.

206. Plaintiff asserts Defendant Town of Underhill and town officials presently sued in their individual capacity have a pattern and practice of actively

thwarting the individual rights to have a say in local government and ensured public opposition to what JULT members want would ineffectual; such as the "Underhill Conservation Commission" diverting landowners to the "Underhill Trails Committee" which made a "Trails Handbook" which has not been followed for the past 12 years, but does effectively create a knowingly false-promise in Defendants interest to convince naïve landowners to allow further development of trails despite absolutely no legal obligation to provide any maintenance on a trail.

207. Plaintiff asserts Town officials have violated Plaintiff's First amendment right by preventing him and other members of the public from speaking *at least once* about a topic being discussed or debated or taken other official actions to entirely censor Plaintiff or the accurate content of Plaintiff's protected speech in public meetings; the most brazen instances of violation of the First amendment rights Plaintiff and other residents have been committed by Defendants Stan Hamlet, Daniel Steinbauer, Bob Stone, Clifford Peterson, Karen McKnight, and Nancy McRae.

208. Plaintiff asserts the *entire* impetus for a Charter Change is Selectboard member Peter Duval; in contrast, *far* more grievous allegations against Defendant Daniel Steinbauer incorporated in Plaintiff's Petition on Public

Accountability was circumvented despite being properly filed with the support of over 5% of Underhill's voters on November 30, 2020.

Substantiation of Claims Specific to Front Porch Forum

209. The nexus of defendant Front Porch Forum acting as state actor and therefor subject to liability under §1983 is shown by the high number of municipalities throughout Vermont, including the Town of Underhill, which use Front Porch Forum *as the primary platform, if not sole method, of interacting with the public* and substantial public funding FPF receives as a "Public Benefit Corporation."

210. Paragraph 180 on page 54 is a perfect example of Town Officials willfully refusing to separate Front Porch Forum from serving as *THE* source for official communications from town officials acting under color of law: The Underhill Conservation Commission was reminded that agendas should be posted to the Town of Underhill website instead of only Front Porch Forum only to have Front Porch Forum used in the same meeting as *THE* source of official public communications about the Conservation Commission's plant sale..

211. Allegation 209 is also substantiated by the failure to post the *officially recognized and funded* Green Up Day to the Town of Underhill Calendar on

the Official Town Website (which Front Porch Forum posts by Defendant Karen McKnight informed the public would be held on May 1, 2021, and then a subsequent Front Porch Forum post by Karen McKnight notified the public Green Up Day was extended to May 3, 2021).

212. Plaintiff has knowledge and belief the Facebook group "Underhill Residents" was previously administered by a Town Official which censored protected speech in violation of the First Amendment; discovery is necessary to determine what individuals involved in Front Porch Forum's censorship of Plaintiff's protected speech were either Town of Underhill Officials or colluding with Town of Underhill Officials to violate Plaintiff's rights.

213. Front Porch Forum has censored Plaintiff multiple times and has a pattern and practice of censoring protected speech of other citizens, the most proactive of which was simply ensuring Plaintiff could not be involved in the public debate of the proposed discontinuance of Butler Road, Front Porch Forum's "Member Support" responded to Plaintiff's request not to be blocked on 3/17/2021 at 2:54 PM:

> Hi David – When an FPF member has trouble maintaining civility with other members or staff, or posts excessively to the point of driving away other participants, monthly posting limits come into play. FPF's mission is to help neighbors connect and build community, and we work to maintain open and civil forums where people will feel welcome and encouraged to participate.

Sometimes that requires asking more frequent and aggressive participants to take a break.

Member Support

FrontPorchForum.com - Essential civic infrastructure in Vermont

---

Name: David Demarest

Email: david@vermontmushrooms.com

Subject: Unable to post to FPF

Comments: I have only made a single post to FPF the past month, it is not appropriate to censor me on political and legal topics directly affecting me and my neighbors. Please remove the block on my account.

214. Front Porch Forum's email concedes FPF is "*Essential* civic infrastructure in Vermont" and discovery during other causes of action will allow the FPF cause of action to form a convenient trial unit with other causes of action.

215. For the purpose of context, Plaintiff's one and only post the preceding month, which was able to slip through the cracks of FPF censorship efforts:

Re: Butler Road Petition Found Invalid

Underhill – No. 3901 • David Demarest • New Road, Underhill
Posted to: Underhill
Mar 13, 2021

I wish I could say I was surprised that the Town of Underhill Selectboard would treat a landowner the way they have chosen to treat your family and all the voters that signed your petition (or the Petition on Public Accountability which should have been allowed to add articles to the Town Meeting Day warning...).

As David Brin observes, "It is said that power corrupts, but actually it's more true that power attracts the corruptible. The sane are usually attracted by other things than power..." I wish you and your family the best of luck and

> hope someday our town's governance can have the majority of our selectboard members actually respect the rights of our town's residents, and especially the constitutional rights of landowners whose personal property certain recreationalists covet and want to enjoy for free...

216. Plaintiff did manage to share the content of the most recent protected speech he was blocked from sharing on FPF in the non-governmental "Underhill Residents" Facebook Group (which as mentioned in paragraph 212 previously was run by a Town Official engaged in censorship on behalf of the Town of Underhill) which stated in part:

> all current Selectboard members AND Selectboard members of the past 12 years are FULLY aware that the Selectboard has the legal authority to use "discretion" to discontinue any and every single segment of Class IV road in our town (or turn it into a trail against landowner wishes..) WITHOUT a petition. I have knowledge and belief that the Cambridge Selectboard would gladly go along with the wishes of the landowners to discontinue the middle segment of Butler Road so our current Selectboard is merely going out of their way to make things difficult for landowners in our town...

217. Discovery is necessary to determine which individuals are involved behind the scenes to censor Plaintiff's protected speech of FPF are currently Town Officials, or other named Defendants acting under color of law.

218. Discovery is necessary to determine how many FPF moderators are simultaneously town officials or employees acting on behalf of a municipality.

219. Plaintiff has knowledge and belief of other citizens being censored or blocked from FPF and it may be judicially appropriate to add other interested parties to the cause of action against FPF.

220. The Town of Underhill regularly prefers to use Front Porch Forum, or a combination of Front Porch Forum and one or two non-official Underhill Facebook groups, to post meeting agendas and conduct surveys which may later have official Town-recognized significance, and in general to conduct official town business for impermissible reasons.

Substantiation of Claims Specific to Jericho Underhill Land Trust

221. Plaintiff asserts Defendants named in paragraphs 12, 15, 18, 19, 20, 22, 25, 28, 29, 32, 35, 36, 40, and 41 are known to be both JULT affiliates *and* Town Officials acting under color of law.

222. Plaintiff asserts multiple Defendants have quoted or otherwise made reference to a document purported to have established the "Crane Brook Conservation District" in the 1990s; however, none of the town officials present were able to provide Plaintiff with a copy of the document and Plaintiff believes this document documents the impermissible collusion between JULT members to violate the First, Fifth, Ninth, and Fourteenth amendment rights of local landowners for their own personal benefit.

223. Plaintiff asserts Defendants named in this complaint are *not* an exhaustive list of how JULT is able to use its special connection with the Town of Underhill's official governmental authority or JULT affiliates which also wear

the hat of Town Officials; proper discovery is important due to the inherent complexity of a case involving over 20 years of collusion between town officials, which has included the tampering with and destruction of official town records.

224. The Town of Underhill and Jericho Underhill Land Trust act together to preferentially purchase certain properties at a premium price from Town Officials or others among the "in crowd" primarily for recreation as opposed to genuine conservation (specifically the purchase of Casey's Hill and Tomasi Meadow properties by JULT and subsequent transfer to the Town of Underhill).

225. Plaintiff asserts JULT members made concerted efforts to purchase Defendant Dick Albertini's property for a gravel pit at a premium price demonstrating the degree in which personal ulterior motives control Underhill's governance in ways in which many of Underhill's Town Officials are rarely, if ever, reaching impartial decisions and JULT members consistently look out for the interests of other Town Officials and fellow JULT members.

226. The Jericho Underhill Land Trust and its affiliates, actively manipulate the public's interest in "conservation" and "preservation" to further an ancillary goal which is the goal of developing public recreational opportunities for *their*

membership in ways that *have extraordinarily little, if anything, to do with genuine environmental conservation and preservation.*

227. JULT's seemingly benign development of public recreational opportunities through public funding (including the Town of Underhill) and their membership has functioned as a thinly veiled way to increase personal property values and economic returns from the subdivision and development of JULT affiliate properties the optimal distance from recreational opportunities being developed at the expense of other nearby landowners, without compensation.

228. Livy Strong currently Chairs both JULT *and* the Jericho Underhill Park District; JULT recognizes the strong nexus between JULT and official governmental action throughout their website, including stating, "The Jericho Underhill Land Trust is best known for its establishment of the Mills Riverside Park in 1999…The Mills Riverside Park is owned and managed by the Jericho Underhill Park District."

229. The nexus of Defendant Jericho Underhill Land Trust actions under the municipal authority of the Town of Underhill enables JULT to violate Plaintiff's rights while in parallel finding public and private sources of funding to purchase properties owned by Town Officials or fellow JULT members to achieve a disproportionate benefit for JULT affiliates (which includes multiple

examples of a straightforward subdivision and development process for JULT member's real estate relative to other similarly situated real estate) at the cost of Plaintiff and other landowners.

230. The purchase of Casey's Hill, the effortless *preliminary* subdivision process of Defendant Dick Albertini's property and a similarly effortless *preliminary* subdivision process for Defendant Marcy Gibson provide substantiation for allegations in paragraph 223 when compared to the Town of Underhill's treatment of Plaintiff's property.

231. JULT Members outright lied during the 2010 New Road Reclassification and as outlined above fellow JULT affiliates had a majority roll in the outcome of the 2010 New Road reclassification enabling JULT to act in collusion to exert disproportionate influence in the future taking of Plaintiff's property.

232. Another example of the disproportionate influence of JULT members occurred on April 29th, 2014 when JULT's interests completely outweighed the voices of Nancy Shera, Jeff Moulton, Carol Butler, Jeff Sprout and Kane Smart (Downs Rachlin Martin, attorney for David Demarest and Jeff Moulton).

233. Dick Albertini and Marcy Gibson's furtherance of their own personal self-interests was only possible due to collusion with fellow JULT members with a shared desire to take Plaintiff's property and property access rights; this is

even more egregious because Plaintiff built his domicile on New Road *before* Marcy Gibson purchased her property and the disproportionate personal profit for members enjoying a streamlined subdivision and development process is not a permissible goal for a 501(c)3 Land Trust.

234. Marcy Gibson's special relationship with the Town of Underhill as a JULT member and former Town Official also allowed her to avoid the problems of having access to a trail begin at the bottom of her driveway (or the recreational destination which is advertised as the "Crane Brook Area") *even though the property opposite her driveway is publicly owned by the Town of Underhill* and despite Marcy Gibson officially seeking Plaintiff be forced into exactly that situation by the 2010 New Road Reclassification.

235. Town Officials with a special relationship with JULT, and JULT members actively serving as Town Officials, were heavily involved in both the fictional 2001 reclassification and Town of Underhill acquiring Casey's Hill in the early 2000's under very questionable circumstances and motivations.

236. It is vitally essential that Plaintiff be afforded the opportunity to conduct appropriate discovery into the *entire* circumstances surrounding *municipal decision making* and the eventual purchases of Casey's Hill at a substantial profit for Town Officials, instead of other available properties, and the concurrent Town of Underhill efforts to devalue NR-144 and other properties

which had their parcel code abbreviation changed to "FU" as demonstrated by Table 1 on page 25.

237. JULT decided to have the Town of Underhill acquire Tomasi Meadow; without *any* functional voter input on *the best focus of public conservation efforts,* as opposed to the binary choice of *conserve what JULT has chosen for the Town of Underhill or nothing at all,* despite other properties available for sale at the time with more acreage per dollar *and* naturally functioning ecosystems far more suitable for conservation.

Substantiation of Claims Specific to Petition Clause of First Amendment

238. Defendant Daniel Steinbauer willfully refused to remove himself from a lead role involving circumventing Plaintiff's Petition on Public Accountability, and the subsequent circumventing of the ability for Plaintiff and over 5% of Underhill's voters to have three *non-binding* articles properly warned and subsequently placed on the 2021 Town Meeting Day ballot is a recent overt example of the impacts of not resolving Conflict of Interest allegations against a Town Official.

239. Defendant Daniel Steinbauer was also central to circumventing the 2010 Petition on Fairness in Road Maintenance of Public and Private Roads, which

was submitted in accordance with state law and could have prevented over a decade of state litigation and many of the present causes of action.

240. Defendants Steve Walkerman, Dan Steinbauer, and Steve Owens unanimously refused to abide by the demands of the 2010 Petition on Fairness in Town Road Maintenance.

241. Defendants Dan Steinbauer, Bob Stone, and Peter Duval unanimously refused to abide by the demands of the 2020 Petition on Public Accountability.

242. Plaintiff has a preponderance of documentation, knowledge, and belief that a clique of Town Officials will readily follow input from a small fraction of Underhill's residents (even if it incurs additional legal expenses to seek legal advice on how best to go against the findings of a State of Vermont Speed Study, or results in litigation with residents…) while obstinately refusing to act on petitions submitted by Plaintiff or other residents (such as Lisa Fuller in 2002, or Natalie Caughlin in 2020) which had *substantial* voter support.

243. Plaintiff asserts there are literally hundreds of pages of public records *excerpts* over a span of the past 20 years which can document materially adverse actions by Town Officials which have been intended to dissuade landowners and other residents that may disagree with a town official from speaking out against problems within Underhill's governance, which in the

most extreme circumstances prevents residents from contacting the Town about both minor and major issues lest they too be ostracized as "Others."

244. Plaintiff asserts there is relevance of the word intentional choice “Others” in in various public meeting minutes and the willful decision to heavily censor “others present” from a functional say in the 2020 Underhill Town Plan is demonstrative of what has referred to as “The Underhill Way.”

245. Plaintiff asserts Defendants have also used deceptive exaggerations such as “Several members of the Conservation Commission” in attempts to create a perception of legitimacy to wield governmental authority to violate the right to petition for redress of grievances which includes refusing to honor a petition submitted by Lisa Fuller with the support of 60 residents, Plaintiff’s 2010 Petition in Fairness in Town Road Maintenance of Public and Private Roads which was duly submitted with over 5% of Underhill’s registered voters signatures, the Butler’s petition duly submitted with over 15% of Underhill’s registered voters signatures, and Plaintiff’s most recent 2020 Petition on Public Accountability duly submitted with the support of over 5% of Underhill’s registered voters.

FIRST CAUSE OF ACTION

Violation of the Fourteenth Amendment - Procedural Due Process

Plaintiff against Defendants named in ¶12-42 and restating 45 under 42 U.S.C. § 1983

246. Plaintiff re-alleges and incorporates by reference herein all relevant paragraphs of this Complaint.

247. Plaintiff has been denied structural due process, and the procedural due process right of access to *impartial* decision makers to determine municipal road maintenance decisions and road reclassification decisions; both of which have been *willfully* manipulated against Plaintiff to such an *extreme* degree by Defendants to willfully cause the intentional categorical taking of Plaintiff's private property and the vast majority of Plaintiff's property interests.

248. As elaborated in paragraphs 68-77 beginning on page 20 and throughout the present claims, a deferential administrative review of a Defendant-fabricated record involving narrowly defined preceding legal matters allowed *willful* and *malicious* intrinsic and extrinsic fraud by Defendants to be unaddressed in prior narrowly defined state court proceedings.

SECOND CAUSE OF ACTION

Corresponding Fourteenth Amendment 42 U.S.C. § 1983 Monell Claim

Plaintiff against Defendant Town of Underhill for Violation of the Fourteenth Amendment - Procedural Due Process

249. Plaintiff re-alleges and incorporates by reference all Town Official actions and inactions under the First Cause of Action as Monell Claim against the Town of Underhill with resultant municipal liability.

250. This complaint only documents a small fraction of the longstanding pattern and practice of the Town of Underhill's willful and perfidious violation of the rights of Plaintiff and other residents.

THIRD CAUSE OF ACTION

Violation of the Ninth and Fourteenth Amendment - Substantive Due Process

Plaintiff against Defendants named in ¶12-42 and restating ¶45

251. Plaintiff re-alleges and incorporates by reference herein all relevant paragraphs of this Complaint.

252. Plaintiff has been denied substantive due process by the combination of perfidious municipal breaches of promises and public trust combined with numerous malicious actions and inactions which have risen to such an extreme degree (both in duration and in severity) in violation of Plaintiff's First, Fifth, and Ninth amendments constitutional rights.

253. Defendants' actions and inactions over the past 20 years demonstrates an awareness that Vermont Law *only* allows municipalities to take private property by the process of Eminent Domain under a far more narrowly defined

set of circumstances which outright precludes recreation as a lawful primary goal of the taking.

254. Defendants have *never* made *any* arguments for the reclassification of a segment of TH26 into a Legal Trail which would not rationally have been better achieved by *either* proper maintenance of public infrastructure *or* the discontinuance of a segment of TH26 other than recreation.

255. Plaintiff asserts the facts stated in paragraph 253 and 254 when taken together clearly demonstrate Defendants acted contrary to clearly established state laws which has caused repetitive violation of the substantive right of privacy around one's domicile the proximate cause of which is Defendants creation of the "Crane Brook Trail" and subsequent advertising of the area as a recreational destination.

256. Plaintiff makes reference to paragraphs ____ to emphasize that Defendants had almost certain knowledge that as a matter of Vermont law the Vermont Constitution constrains the municipal taking of private property to *necessity*, as opposed to *simply creating recreational opportunities for the profit and pleasure of a few influential interest groups* at the expense of other local landowners.

257. Defendants The Town of Underhill, Dan Steinbauer, Bob Stone, and Peter Duval refusal to allow the Petition on Public Accountably, which Plaintiff submitted with over 5% of Underhill's registered voters signatures prevented three non-binding advisory articles to the ballot be voted on March 4, 2021.

258. Defendants have a longstanding pattern and practice of violating Plaintiff's constitutional right to equal treatment under the law.

259. Defendants' *willful* collusion to repeatedly violate both Federal and State laws is also a violation of Plaintiff's substantive rights.

FOURTH CAUSE OF ACTION

Corresponding Ninth and Fourteenth Amendment 42 U.S.C. § 1983 Monell Claim

Plaintiff against Defendant (¶9) Town of Underhill for Violation of the Fourteenth Amendment - Substantive Due Process

260. Plaintiff re-alleges and incorporates by reference the actions and inactions of the Third Cause of Action as Monell Claim against the Town of Underhill.

FIFTH CAUSE OF ACTION

Violation of the Fifth Amendment – Taking Clause

Plaintiff against Defendants ¶12-42, and recognizing 45, for persistent efforts to take consistently greater amounts of Plaintiff's property and property interests without just compensation under 42 U.S.C. § 1983

261. This cause of action is most succinctly supported by paragraph 82 on page 23 and Table 1 on page 25.

262. The February 26, 2021 Vermont Supreme Court Decision, which was built upon Defendants' persistent fraud on the court and due process violations in prior state litigation, officially extinguished Plaintiff's previously promised and self-executing private right of reasonable access to parcel NR-144 (which was later renamed FU-111) and documents the unconstitutional permanent taking of Plaintiff's property unless this Court grants Plaintiff's prayers for relief.

263. Plaintiff also re-alleges and incorporates by reference herein all relevant paragraphs of this Complaint.

SIXTH CAUSE OF ACTION

Corresponding Fifth Amendment 42 U.S.C. § 1983 Monell Claim

Plaintiff against Defendant (¶9) Town of Underhill for Violation of the Fifth Amendment – Taking Clause

264. Plaintiff re-alleges and incorporates by reference all actions and inactions by Town Officials under the Fifth Cause of Action as Monell Claim against the Town of Underhill with resultant municipal liability.

265. This complaint documents only a small handful of the longstanding patterns and practice of the Town of Underhill perfidiously violating the rights of Plaintiff and other residents in efforts to take private property and private property interests without just compensation.

SEVENTH CAUSE OF ACTION

Violation of the First Amendment – Censorship and Manipulation of Public Records of Plaintiff's Protected Speech and Retaliation for Plaintiff's Protected Speech

Plaintiff against Defendants in ¶ 12, 13, 21, 22 23, 24, 27, 28, 29, 31, 33, 34, 35, 36, 39, 40, 42, with the caveat expressed under ¶45, based upon 42 U.S.C. § 1983

266. Plaintiff re-alleges and incorporates by reference herein all relevant paragraphs of this Complaint.

267. Allegations against Defendants outlined in paragraph 193 on page 59, paragraph 198 and 199 beginning on page 61, paragraph are some of the most notable instances substantiating this cause of action.

268. It is inherently retaliatory to remove money from a budget which would improve the condition of the public right of way adjacent to Plaintiff's property simply because Plaintiff requested the maintenance be conducted in a manner that would benefit *all* reasonable interest groups, as opposed to only a few.

269. The Town of Underhill providing winter maintenance to one Class IV road segment while simultaneously choosing ~12 years of state court litigation instead of considering Plaintiff's good faith inquiry into the Town of Underhill's willingness to grant for a grant to replace a failed culvert with a municipal investment of a mere $1,600 (or assist in removal of litter for the

segment of New Road abutting Plaintiff's property north of the Town Garage) is demonstrative of a level of *de facto* bias against, retaliation against, and collusion against Plaintiff without furthering *any* legitimate government interest.

EIGHTH CAUSE OF ACTION

Corresponding First Amendment 42 U.S.C. § 1983 Monell Claim

Plaintiff against Defendant Town of Underhill (¶9) for Violation of the **First Amendment** –Censorship and Manipulation of Public Records of Plaintiff's protected speech and retaliation for Plaintiff's protected speech

270. Plaintiff re-alleges and incorporates by reference all actions and inactions perpetuated by Town officials which are claimed under the Seventh Cause of Action as a Monell Claim against the Town of Underhill with resultant municipal liability.

271. Plaintiff has personally witnessed a longstanding pattern and practice of the Town of Underhill willfully misrepresenting, editing, and deleting, and suppressing protected speech from public meetings and other records.

272. The degree and consistency of retaliation by the Town of Underhill for protected speech has caused a hesitancy of many residents to publicly express dissenting opinions.

NINTH CAUSE OF ACTION

Violation of the Fifth, Ninth and Fourteenth Amendment – Collusion to Violate Plaintiff's Procedural Due Process Rights and Substantive Due Process Rights

Plaintiff against Defendant Jericho Underhill Land Trust (¶44) under 42 U.S.C. § 1983

273. Plaintiff re-alleges and incorporates by reference herein all relevant paragraphs of this Complaint which involve Town of Underhill and Town Officials when such actions and inactions were predicated by decisions made by trustees, donors, members, and other known affiliates of JULT acting under color of law.

274. The percentage of Defendants to this complaint (paragraphs 12, 15, 18, 19, 20, 22, 25, 28, 29, 32, 35, 36, 40, and 41) which are known to be both JULT affiliates *and* Town Officials which acted under color of law to violate Plaintiff's clearly established rights is demonstrative of the ability of JULT to achieve its own private purposes synonymous with official governmental authority.

275. Paragraphs 221-237 beginning on page 69 are demonstrative of JULT's desires being synonymous with what actions Defendant Town of Underhill will make on behalf of JULT under color of law.

TENTH CAUSE OF ACTION

Violation of the First Amendment – Censorship of Plaintiff's Protected Speech

Plaintiff against Defendant Front Porch Forum, Inc. (¶43) under 42 U.S.C. § 1983

276. Plaintiff re-alleges and incorporates by reference herein all relevant paragraphs of this Complaint and public records specific to Front Porch Forum's special relationship with local Vermont governments and censorship of protected speech.

277. There are multiple prior instances of FPF censoring Plaintiff, and other residents throughout Vermont, the most egregious factual censorship of Plaintiff's protected speech on "*essential civic infrastructure*" is summarized in paragraphs 209-220 beginning on page 65.

278. FPF's has demonstrated a willful decision to achieve the ability to act under color of law with a significant nexus to official governmental authority and actions.

279. FPF has censored protected speech on multiple occasions throughout Vermont (which has included the retaliatory nature of blocking *all* of Plaintiff's potential *essential* public posts) is a violation of the First amendment.

ELEVENTH CAUSE OF ACTION

Violation of the First Amendment – Right to Petition Clause

(42 U.S.C. § 1983, Plaintiff against Defendants 12, 13, 14, 31, 40)

280. Plaintiff re-alleges and incorporates by reference herein all relevant paragraphs of this Complaint which involve Defendants refusing to abide by duly submitted petitions, including the 2010 Petition on Fairness ***or*** the 2020 Petition on Public Accountability.

281. Paragraphs 238-245 beginning on page 74 partially specifies how this specific constitutional violation has caused extreme harm to Plaintiff and democratic processes within Underhill's governance.

TWELFTH CAUSE OF ACTION

Corresponding Monell Claim for Violation of the Right to Petition Clause of First Amendment

282. Plaintiff re-alleges and incorporates by reference all actions and inactions perpetuated by Town officials which are claimed under the Eleventh Cause of Action as a Monell Claim against the Town of Underhill.

JURY DEMANDED

Plaintiff demands a jury trial.

REQUEST FOR RELIEF SPECIFIC TO FIRST AND SECOND CAUSES OF ACTION

A. Injunctive relief finding the current Vermont Supreme Court Precedent set in *Ketchum* creates an unconstitutional interpretation of Vermont law which results in *de facto* structural due process violation; a *constitutionally valid interpretation* of Vermont law requires road maintenance and reclassification decisions be appealable in accordance with the procedural due process protections of 19 V.S.A. § 740 and that this process shall be *competently* conducted in a *timely* manner, as was the case due to well-established law prior to the Vermont Supreme Court's *Ketchum* decision.

B. Injunctive relief, involving the segment of TH26/New Road/Fuller Road which remained a Class IV town highway after the 2010 New Road Reclassification, generally based upon the Vermont Superior Court decision in the prior maintenance appeal but updated to account for the further deterioration of Plaintiff's limited remaining Class IV road frontage in subsequent years due to Defendants' sustained refusal to conduct *any* maintenance of the segment of TH26 abutting Plaintiff's property.

C. Injunctive relief remanding a *new* Notice of Insufficiency appeal in Vermont courts to review the insufficiency in maintenance of the former Class III/Class IV segment of New Road which was reclassified into a Legal Trail in 2010 *separated from the prior intrinsic and extrinsic fraud upon the state courts*; since this segment was reclassified into a Legal Trail in 2010 based *purely* upon Defendants' fraud upon the court as a way to circumvent Plaintiff's *first-filed* Notice of Insufficiency appeal, it is necessary to stipulate that review be under Rule 74 of Vermont Rules of Civil Procedure and *based solely upon both the Underhill Road Policies and Vermont State Town Highway classifications of TH26 as existed on January 1, 2010.*

D. *If* Defendants require this Court issue the injunctive relief specified in C, as opposed to Defendants attempting to reach a mutual agreement through mediation between Plaintiff and *impartial* Town of Underhill representatives, it is judicially appropriate that this Court order Defendants to pay Plaintiff's legal fees and expenses for all Notice of Insufficiency appeals that may be remanded to Vermont courts. Injunctive relief requiring Town of Underhill Officials to recuse themselves, *or be recused against their will*, when a documentable conflict of interest exists since unaddressed Conflicts of Interest cause

an impermissibly high risk of additional procedural due process violations.

REQUEST FOR RELIEF SPECIFIC TO THIRD AND FOURTH CAUSES OF ACTION

E. Declaratory relief stating all Vermont Class IV Town Highways and Town Legal Trails *shall* be maintained without bias; interested persons in Vermont, in addition to a procedural due process protections of a *timely* Rule 74 appeal when a Town Highway is altered by a lack of maintenance or reclassification from that which would be reasonably expected have a substantive right that a Taking *only occurring* due to *Necessity*.

F. Relief sought under other causes of actions which may be more efficiently addressed under this cause of action.

REQUEST FOR RELIEF SPECIFIC TO FIFTH AND SIXTH CAUSES OF ACTION

G. Compensatory damages for the temporary categorial taking of Plaintiff's reversionary property rights and the unmitigated damages of the taking of additional property interests and value, subject to proof, from the date of the Town of Underhill's 2010 New Road Reclassification until such time as these damages may be mitigated.

H. Compensatory damages, according to proof, for the past taking of the reasonable expectation of privacy at Plaintiff's domicile since Defendants first began willfully directing public recreation to the "Crane Brook Conservation District" while simultaneously refusing to mitigate *any* resultant impacts to Plaintiff, other nearby private property owners, or the environment.

I. Declaratory relief confirming the downgrade of a Town Highway to an *entirely unmaintained* Legal Trail or an *entirely unmaintained* Class IV Road constitutes a greater categorical taking than a conversion of a railroad right of way into a Legal Trail: municipalities have discretion to EITHER provide *minimal* maintenance of Class 4 roads when staff and financial resources allow (consisting of, at a minimum, honoring the historical municipal promise of replacement of bridges and culverts, "as needed" addition of gravel, and periodic litter removal) and "Legal Trails" (such as, at a minimum, periodic litter removal) OR they *shall* follow the legal procedure to discontinue an unmaintained Class 4 Road or Legal Trail to avoid the categorical and regulatory taking of private property and property interests without constitutionally required due process *or* just compensation.

J. Injunctive relief requiring the Town of Underhill to EITHER reclassify the Legal Trail portion of the central segment of the former TH26 corridor back into a Class III or IV Town Highway *which is reasonably maintained* OR *discontinue* a portion of the unmaintained segment of Class IV road and all of the Legal Trails on TH26 *with legally binding stipulations agreeable to Plaintiff* OR fully compensate Plaintiff for the ongoing current and future loss of reversionary property rights, the permanent taking of the previously promised reasonable southerly access to Plaintiff's domicile and surrounding property, the resultant taking of reasonable investment-backed returns of Plaintiff's property taken by the most recent Vermont Supreme Court Decision, and financial compensation for the taking of the intrinsic value and privacy of a personal domicile above the purely financial losses of private property economic value.

K. Compensatory damages of lost potential income and reasonable returns on investment of Plaintiff's farm, Green Mountain Mycosystems LLC, and concurrent damages caused by Defendants willful misrepresentation of Plaintiff's protected speech in ways that damaged Plaintiff's professional reputation as an Environmental Scientist.

L. Compensation for the compensable property interest inherent to the Notice of Insufficiency, which Plaintiff and co-litigants timely filed; addition of additional interested parties to this cause of action as the court deems just and proper.

M. In addition to punitive damages against Defendant Steve Walkerman stated in paragraph U, an additional punitive damage equal to the total amount of capital gains Steve Walkerman achieved from the sale of his real estate located near TH26.

N. In addition to punitive damages against Defendant Dick Albertini stated in paragraph U, additional punitive damages equal to the total amount of capital gains obtained from the subdivision and sale of PV109 and the total capital gains from the sales of all other nearby real estate Dick Albertini profited from.

REQUEST FOR RELIEF SPECIFIC TO SEVENTH AND EIGTH CAUSES OF ACTION

O. As the Court deems proper, according to proof, compensatory and punitive damages for Defendants' retaliatory actions and inactions the proximate cause of which were Plaintiff's protected speech.

P. As the Court deems proper, according to proof, compensatory and punitive damages for Defendants' *willful* mischaracterization of, or

willful censorship of, public records and Plaintiff's protected speech which has resulted in personal and professional harm to Plaintiff's good name and reputation.

REQUEST FOR RELIEF SPECIFIC TO NINTH CAUSE OF ACTION

Q. As the Court deems proper, compensatory and punitive damages against Defendant Jericho Underhill Land Trust for violation of Plaintiff's Fifth, Ninth, and Fourteenth amendment rights.

R. After discovery is complete, compensatory and punitive damages as the Court may deem just and proper against any additional individual Town Officials and Jericho Underhill Land Trust affiliates functionally acting under color of law, according to proof of individual capacity liability for violation of, or collusion to violate, Plaintiff's constitutional rights.

REQUEST FOR RELIEF SPECIFIC TO TENTH CAUSE OF ACTION

S. Declaratory relief finding the nexus between Defendant Front Porch Forum and local Vermont governmental authority as "Essential Civic Infrastructure" precludes the censorship of protected speech.

REQUEST FOR RELIEF SPECIFIC TO ELEVENTH AND TWELFTH CAUSES OF ACTION

T. Injunctive relief requiring Defendant Town of Underhill allow the Petition on Public Accountability *Advisory-Articles* to be properly warned and placed on the ballot to be voted upon Town Meeting Day.

REQUESTS FOR RELIEF ATTRIBUTED TO INDIVIDUALLY NAMED DEFENDENTS' *WILLFUL* VIOLATION OF PLAINTIFF'S CIVIL RIGHTS

U. Punitive damages against Defendants Daniel Steinbauer, Dick Albertini, Jonathan Drew, Marcy Gibson, Stan Hamlet, Clifford Peterson, Patricia Sabalis, Trevor Squirrel, Ted Tedford and Steve Walkerman, each individually, equal to 3 times all presently claimed compensatory damages.

V. Punitive damages against Defendant Bob Stone, Rick Heh, Brad Holden, Steve Owen, Rita St Germain, Karen McKnight, Nancy McRae, Daphne Tanis, Mike Weisel, each individually, equal to all presently claimed compensatory damages.

REQUESTS FOR RELIEF ATTRIBUTED TO ALL CAUSES OF ACTION AGAINST TOWN OF UNDERHLL AND NAMED TOWN OFFICIALS

W. Payment of compensatory damages adjusted for inflation consisting of all legal fees, expenses, and professional services Plaintiff has incurred in preparation for and in actual past litigation of legal matters

the proximate cause of which was official the pursuit of "*any way* the Town could rescind the access [to Plaintiff's home and land]" and all resultant past and present *willful* violations of Plaintiff's civil rights.

X. Compensatory damages according to proof, and adjusted for inflation, for the extreme stress, mental and emotional pain and suffering, and the physical health impacts protracted litigation with the Town of Underhill has caused Plaintiff due to the *malicious* intention to purloin Plaintiff's property expressed in the October 8, 2009, the complete disregard for and *willful* violation of the legal protections of *promissory estoppel,* and the subsequent violation of Plaintiff's First, Fifth, Ninth, and Fourteenth amendment rights caused by Defendants Town of Underhill and Defendant town officials sued in an individual capacity for relentlessly pursuing that avowed malicious goal.

Y. Any request for relief specified under one cause of action may be more appropriately awarded based upon another cause of action or applied as a directly related self-executing constitutional right.

Z. All awarded compensation shall be adjusted for both inflation and taxation implications.

AA. Payment of legal expenses and expert testimony for the present case.

Complaint for Violation of Civil Rights (Non-Prisoner)

BB. Payment of reasonable attorney's fees pursuant to 42 U.S.C. Section 1988.

CC. All other relief the Court may deem to be just or proper.

CERTIFICATION AND CLOSING

283. Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

284. I agree to provide the Clerk's Office with any changes to my address where case–related papers may be served. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Date of signing: August 2, 2021 Signature of Plaintiff: _____

David P Demarest
P.O. Box 144
Underhill, VT 05489
(802)363-9962

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

DAVID P. DEMAREST, an individual, PLAINTIFF	)	
v.	)	CASE NO. 2:21-cv-00167-wks
TOWN OF UNDERHILL, a municipality and charter town, SELECTBOARD CHAIR DANIEL STEINABAUER, as an individual and in official capacity, et al.	)	

MOTION TO DISMISS AMENDED COMPLAINT

The Defendants, Town of Underhill (the "Town"), Daniel Steinbauer, Bob Stone, Peter Duval, Dick Albertini, Judy Bond, Peter Brooks, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Anton Kelsey, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daphne Tanis, Walter "Ted" Tedford, Steve Walkerman, Mike Weisel, and Barbara Yerrick (the "Town" and the "31 named individuals", collectively, the "Municipal Defendants"), by and through their attorneys, Carroll, Boe, Pell & Kite, P.C., respectfully submit this Motion to Dismiss Amended Complaint under F.R.C.P. 12(b)(6), asking that the Court dismiss the Amended Complaint on the grounds of (1) statute of limitations; (2) *res judicata*; and (3) failure to state a claim upon which relief may be granted. In further support of this Motion, the Municipal Defendants provide the following:[1]

[1] In joining this motion, Defendants who have not yet been served do not intend to waive any objection to sufficiency of Service. *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (1972) ("A party can file a general appearance and object to personal jurisdiction or venue at any time before the answer is filed or in the answer.").

MEMORANDUM OF LAW

I. STANDARD OF REVIEW FOR 12(b)(6) MOTION

The factual background of this case is summarized in the next section. However, because a full overview of the case's context requires judicial notice of public documents associated with the "12 years of Vermont state court litigation," Doc. 46 at ¶ 3, referenced throughout the First Amended Complaint, this Motion first discusses the standards related to a motion to dismiss under F.R.C.P. 12(b)(6) and the information this Court may consider in reviewing such a motion.

The standard of review on a motion to dismiss self-filed by a *pro se* plaintiff is well-established and may be summarized as follows:

> The court is required to read a self-represented plaintiff's complaint liberally and to hold it "to less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (internal quotation marks and citation omitted); *see also Harris v. Miller*, 818 F.3d 49, 56-57 (2d Cir. 2016) (per curiam) (noting district courts must afford "special solicitude" to a self-represented litigant including reading the complaint liberally and construing it to raise the strongest arguments it suggests).
>
> All complaints, however, must contain "sufficient factual matter[] . . . to state a claim" for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 8(a) (listing required contents of a pleading that states a claim for relief). In determining whether a complaint states a claim, the court must "accept as true all of the allegations contained in a complaint" and decide whether the complaint states a plausible claim for relief. *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. While "special solicitude" is required, self-represented litigants nevertheless must satisfy the plausibility standard set forth in *Iqbal*. *See Harris*, 818 F.3d at 56; *Harris v. Mills*, 572 F.3d 66, 68, 72 (2d Cir. 2009). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

Gadreault v. Bent, 2021 U.S. Dist. LEXIS 28443, *3-4, 2021 WL 579801 (D. Vt. 2021).

Under F.R.C.P. 12(d), a court may convert a motion to dismiss to a summary judgment motion under F.R.C.P. 56 if the court considers "matters outside the pleadings." However, a

district court *may* consider state court complaints and decisions while reviewing a motion to dismiss, without converting the motion into a summary judgment motion, because such documents are public records and appropriate for judicial notice. *Williams v. N.Y. City Hous. Auth.*, 816 Fed. Appx. 532, 534, 2020 U.S. App. LEXIS 17454, *3 (2d Cir. 2020); *Heathcote Assocs. v. Chittenden Trust Co.*, 958 F. Supp. 182, 185 (D. Vt. 2020). When a district court considers such materials, it may not rely on the state court documents for the truth of the *factual* matters asserted therein; rather, it may take notice of such documents to "establish the fact of such litigation and related filings." *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998). Such consideration may extend to taking notice of the specific claims considered and the specific grounds upon which those issues were resolved. *Dixon v. Blanckensee*, 994 F.3d 95, 103 (2d Cir. 2021).

In addition to such public records, a district court may also consider documents of which a plaintiff had notice, to which a plaintiff refers, and on which a plaintiff relies in his or her complaint.

> When a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint, the defendant may produce the [document] when attacking the complaint for its failure to state a claim, because plaintiff should not so easily be allowed to escape the consequences of its own failure.

Cortec Industries, Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991); *also Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217, (2d Cir. 2004). Court consideration and review of such documents does *not* convert a motion to dismiss into a motion for summary judgment under F.R.C.P. 12(d). *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the

complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.").

In reliance on these principles, the Municipal Defendants ask this Court to consider four decisions in four separate state court matters referenced in Plaintiff's Complaint, but only for the purposes of (1) establishing that the four matters were litigated, (2) identifying the issues that were considered in each matter, (3) clarifying the manner in which the issues in each matter were resolved, and (4) resolving the Municipal Defendants' res judicata defenses (discussed infra). Such use of these state court decisions is appropriate on this motion to dismiss because Plaintiff repeatedly alleges misuse of state court litigation in his Complaint, quotes one of these state court decisions extensively to establish the accrual date of his claims and had full notice of these decisions prior to filing his Complaint. Accordingly, the Plaintiff has himself invited use of these decisions in the context of this motion to dismiss.

II. THE FACTUAL BACKGROUND FOR PLAINTIFF'S CLAIMS

A brief overview of major events in Plaintiff's Amended Complaint will facilitate understanding of the First Amended Complaint and this Motion to Dismiss.[2] Plaintiff's claims relate to three broad categories of events: (1) claims related to access and maintenance of Town Highway 26 ("TH 26") (which abuts Plaintiff's property in Underhill, Vermont) from the period 2001 through 2012; (2) claims related to the Vermont Supreme Court's interpretation of Vermont highway law in *Ketchum* and the Municipal Defendants' reliance on *Ketchum* in state court actions; (3) First Amendment claims alleging the defendants refused to abide by the

[2] This version of events is drawn primarily from Plaintiff's Amended Complaint, Doc. 46, and assumes all well-plead factual allegations in the Complaint to be true. The Town reserves the right to dispute any of these alleged facts in the future. However, because the Amended Complaint does not clearly describe the state litigation that forms a central foundation of Plaintiff's allegations, this overview also relies on reported opinions in the relevant state court actions to explain the fact that litigation occurred, the issues the state courts considered, and the manner in which those issues were resolved.

demands of lawfully submitted petitions and censored Plaintiff by illegally shaping the public record. This section provides necessary background on each category of claim and describes those claims in broad strokes. Some details of the claims are discussed more fully in the Argument that follows.

A. Plaintiff's Access and Maintenance Claims: 2001-2010.

In 2002, Plaintiff purchased property in the Town of Underhill located on TH 26. Doc. 46 at ¶ 136. The Figure to the right (copied from ¶ 48 of the Amended Complaint) depicts the disputed portion of TH 26. The road depicted on the left side of the Figure represents TH 26 and the Figure includes handwritten notes describing features located along the road, including (moving from south to north) the location of the "Town Garage," "Sheera's Property," and the "Demarest Property." To the south, at the bottom of the figure, TH 26 is shown intersecting with another road, which is Pleasant Valley Road. Doc. 46 at ¶ 168. Although not pictured in the schematic, TH 26 intersects with Irish Settlement Road to the north. Doc. 46 at ¶ 58.

The core contention of the Amended Complaint is that the defendants violated Plaintiff's constitutional rights by improperly removing

vehicular access to his property along the portion of TH 26 lying between the two hand-drawn lines in Figure 1, from the Town Garage in the south to Plaintiff's driveway to the north. This disputed portion of TH 26 is now known as Crane Brook Trail. Plaintiff seeks vehicular access running from his driveway, along Crane Brook Trail to the South, past the Town Garage, and then on to Pleasant Valley Road (the "Southern Access Route").[3] *See* Doc. 46 at ¶ 168 (describing northern and Southern Access) and ¶ 48 (providing depiction of subject routes).

The Amended Complaint does *not* allege that Plaintiff has been deprived of *all* vehicular access to his property; rather, Plaintiff alleges that he retains vehicular access to his property from the north, along the northern segment of TH 26 and then onto Irish Settlement Road. *Id.* at ¶ 168. However, Plaintiff prefers the southern access because he considers the northern access inconvenient and unreasonable. *See id*. at ¶ 168. Accordingly, the Amended Complaint repeatedly asserts that Plaintiff is seeking "reasonable" access to his property or compensation for its loss. *E.g.*, *id.* at ¶ 1, ¶ 56 n.1, ¶ 70 and ¶ J. Although many other claims attend this core allegation or flow naturally from it, the practical, physical and legal loss of the Southern Access Route and the resulting litigation over that loss form the central through-line of the Amended Complaint.

In 2001, prior to Plaintiff's purchase, TH 26 was classified under Vermont law as a "Class 3" road in some locations and a "Class 4" road in others. *Id.* at ¶ 59 and ¶ 48. This fact is significant to Plaintiff's claims because towns have a statutory obligation to maintain Class 3 and

[3] Over the last 21 years, TH 26 has been known by many names and designations, including ""TH26" / "New Road" / Fuller Road" / "Crane Brook Trail" / "Old Dump Road."" Doc. 46 at ¶ 59. For the sake of simplicity, this Motion will refer to the disputed portion of TH 26 as Crane Brook Trail and the route from Plaintiff's property to Pleasant Valley Road via Crane Brook Trail as the "Southern Access Route," which both specifies the location of the disputed portion of TH 26 relative to Plaintiff's property (i.e., to the south) and the purpose—access—to which Plaintiff wishes to put it. The phrase is admittedly imprecise, but it is sufficient for purpose of this Motion, given the Complaint does not seek clarification of the exact location of the access route, but rather seeks confirmation that Plaintiff is entitled to use a vehicle to pass over the route and/or to be compensated for the loss of that access. Doc. 46 at ¶ 201.

Class 4 roads in accordance with the standards imposed by 19 V.S.A. § 310(a) (Class 3) and 19 V.S.A. § 310(b) (Class 4), meaning the Town would have a statutory obligation to maintain the entirety of TH 26, from Irish Settlement Road to the north to Pleasant Valley Road to the south.

In 2001, however, the Town of Underhill conducted proceedings in an effort to reclassify the middle portion of TH 26—the portion now known as Crane Brook Trail—as a "trail." *Id.* at ¶ 4. The Town's 2001 reclassification effort was significant because, under Vermont law, although a town *is* subject to maintenance requirements for Class 3 and Class 4 roads, a town is "not liable for construction, maintenance, repair, or safety of trails." 19 V.S.A. § 310(c). However, a "trail" is still a public "right of way."[4] 19 V.S.A. § 301(8). The middle portion of TH 26 would only cease to be a public right of way if the Selectboard had discontinued the segment entirely. 19 V.S.A. § 771 *et seq*.

Plaintiff alleges this 2001 reclassification effort was subsequently held invalid in 2011 by a Vermont trial court and maintains that the Town had a continuing obligation from 2001 to 2010 to maintain TH 26 in accordance with the highway's classifications in existence prior to the 2001 reclassification effort. Under this view, between 2001 and 2010, the southern portion of TH 26 (from Pleasant Valley Road to "Sheera's Property") should have been maintained as a Class 3 highway and the northern portion of TH 26 (from "Sheera's Property" to Irish Settlement Road) should have been maintained as a Class 4 highway. Doc. 46 at ¶¶ 4, 48 and 50A. However, after the 2001 reclassification attempt, the Town of Underhill ceased maintenance of Crane Brook Trail and conditions along the segment deteriorated over the next nine years. *Id.* at ¶ 47.

[4] The full definition of "trail" reads: "'Trail' means a public right-of-way which is not a highway and which: (A) previously was a designated town highway having the same width as the designated town highway, or a lesser width if so designated; or (B) a new public right-of-way laid out as a trail by the selectmen for the purpose of providing access to abutting properties or for recreational use. Nothing in this section shall be deemed to independently authorize the condemnation of land for recreational purposes or to affect the authority of selectmen to reasonably regulate the uses of recreational trails." 19 V.S.A. § 301(8).

Plaintiff also alleges that Town officials promised him prior to his 2002 purchase that the Town would preserve vehicular access along the Southern Access and that this promise was subsequently broken. *Id.* at ¶ 130 and 168.

B. Plaintiff's Access and Maintenance Claims: 2010-2016.

The Town's treatment of Crane Brook Trail as a trail during 2001 through 2010 yielded three separate state court actions. In 2010, Plaintiff and others filed suit, seeking an order directing the Town to maintain Crane Brook Trail in accordance with the Class 3/Class 4 maintenance standards that were in place for the segment prior to the Town's 2001 effort to reclassify the segment as a trail (the "2010 Trail Maintenance Case").

In response to this suit, the Town held new municipal proceedings in 2010 to reclassify the middle portion of TH 26 as a trail. Am. Compl. at ¶ 59. The Selectboard issued a 2010 order stating:

> TH 26 should now consist of three separate segments: The first segment shall extend, as before, from Pleasant Valley Road north to the Town Garage and shall be maintained as a Class 3 highway; the second shall be a legal trail extending from the Town Garage north to a point just south of the current driveway access to TH 26 from the property now owned by David Demarest, and; the third remaining segment shall extend from the northern end of the legal trail north to Irish Settlement Road, shall be known as Fuller Road, and shall be maintained as a Class 4 highway.

Demarest v. Town of Underhill, 2013 VT 72, ¶5, 195 Vt. 204, 207. Plaintiff and others then appealed this 2010 reclassification decision (the "2010 Reclassification Appeal") via Vermont Rule of Civil Procedure (V.R.C.P.) 75. (The significance of this procedural fact will become apparent below.)

On February 28, 2012, while the 2010 Maintenance Case and the 2010 Reclassification Appeal were ongoing, Plaintiff and others filed a "Notice of Insufficiency" pursuant to 19 V.S.A. § 971, alleging that the Town had failed to maintain the northern, Class 4, segment of TH 26 in

accordance with 19 V.S.A. § 310(b) (the "2012 Class 4 Maintenance Case"). *Demarest v. Town of Underhill*, 2016 VT 10, ¶5, 201 Vt. 185, 187.

At first, the 2010 Trail Maintenance Case and the 2010 Reclassification Appeal proceeded simultaneously. However, the trial court in the 2010 Trail Maintenance Case stayed that action while the 2010 Reclassification Appeal was underway because the trial court recognized that the decision in the reclassification case might render the 2010 Trail Maintenance Case moot. *Demarest v. Town of Underhill*, 2013 VT 72, ¶19, 195 Vt. 204, 213.

In a 2013 decision, the Vermont Supreme Court affirmed the 2010 reclassification, concluding "there is competent evidence to support the Town's decision to reclassify the road." *Demarest v. Town of Underhill*, 2013 VT 72, ¶28, 195 Vt. 204, 216. The Vermont Supreme Court confirmed that the Town's 2010 reclassification effort had succeeded and that the disputed portion of TH 26 was a legal trail (now named Crane Brook Trail). This decision severed vehicular access along Plaintiff's Southern Access Route because the Town of Underhill's 2002 Trail Ordinance prohibited vehicular access over the trail. *Demarest v. Town of Underhill*, 2013 VT 72, ¶30, 195 Vt. 204.

Following the 2013 reclassification decision, the trial court in the 2010 Trail Maintenance Case dismissed the action on the ground that it was now moot, because the disputed portion had been successfully reclassified as a trail. Plaintiff appealed and, in 2015, a three-Justice panel of the Vermont Supreme Court held that, given the Court's 2013 decision in the 2010 Reclassification Appeal, the 2010 Trail Maintenance Case was "moot" because the case no longer presented

> an actual live, controversy. The ultimate fact remains, as explained by the trial court, that the disputed segment of TH 26 is a trail, and the town has no legal obligation to maintain a trail.

In re Town Highway 26, 2015 Vt. Unpub. LEXIS 87, *9, 199 Vt. 648, 114 A.3d 505. This resolved whether the Town was required to maintain Crane Brook Trail.

Meanwhile, the trial court in the 2012 Class 4 Maintenance Action received the recommendations of the County Road Commissioners and issued an order (based in part on those recommendations) directing the Town to maintain the northern Class 4 portion of TH 26 in a court-directed manner. The Town appealed this order to the Vermont Supreme Court.

In a January 1, 2016 decision, the Vermont Supreme Court held that "the trial court misconstrued and incorrectly applied the statutory provisions for the maintenance of Class 4 roads and erroneously established its own maintenance standard."[5] *Demarest v. Town of Underhill*, 2016 VT 10, ¶1, 201 Vt. 185, 186. The Court emphasized the wide discretion the Legislature had given towns in connection with maintenance of Class 4 highways:

> Although the Town's road policy establishes less town responsibility for Class 4 highway repair and maintenance than appellees desire, or even than the Commissioners recommend, it is fully consistent with the discretion accorded by § 310(b). Both appellees and the Commissioners are bound to respect the Town's discretion, and cannot "trump the selectboard's decision through their own view of what the public good requires." *Id.* at 622, 795 A.2d at 1269. If appellees do not agree that the Town's decision satisfies the necessity of the town, the public good, or the convenience of the inhabitants of the Town, the "[c]onduct of elected officials, detrimental to the interests of the town but not amounting to arbitrary abuse of authority justifying the issuance of a writ, is subject to regulation at the polls." *Couture v. Selectmen of Berkshire*, 121 Vt. 359, 364, 159 A.2d 78, 81 (1960).

Demarest v. Town of Underhill, 2016 VT 10, ¶16, 201 Vt. 185, 192. This 2016 decision brought the two 2010 actions and the 2012 action to a close.

[5] It should be noted that the Town had already appealed the superior court's maintenance order when the Supreme Court decided the reclassification issue in 2013; the court noted the pending appeal in its opinion. *Demarest v. Town of Underhill*, 2013 VT 72, P8 n.2, 195 Vt. 204, 208 n.2, 87 A.3d 439, 442.

C. Plaintiff's Access and Maintenance Claims: 2016-2021.

In 2015, Plaintiff submitted a subdivision permit application to the Town, which included a new request for vehicular access over the Crane Brook Trail to allow Plaintiff to access some of the proposed subdivided parcels over the Southern Access Route. The Selectboard denied the application, refusing to exercise its discretion under the 2002 Trail Ordinance to grant Plaintiff vehicular access over Crane Brook Trail. Plaintiff filed suit in 2016 (the "2016 Subdivision Appeal") "seeking a declaration that he had a right of vehicle access over Crane Brook Trail and appealing the denial of the permit." *Demarest v. Town of Underhill*, 2021 VT 14, ¶6.

The 2016 Subdivision Appeal reached its final resolution on February 26, 2021, when four of the five Vermont Supreme Court Justices held that Plaintiff's claims were barred on *res judicata* grounds because Plaintiff had already litigated the issue of vehicular access over Crane Brook Trail in the 2010 Reclassification Appeal:

> Plaintiff also argues that claim preclusion does not apply given the nature of the prior action. The Rule 75 appeal [the 2010 Reclassification Appeal] challenged the Town's roadway reclassification, which was an action affecting all residents of the Town, and therefore plaintiff asserts that it would not have been an appropriate forum to raise his individual claim regarding his right of access. There may be cases where an individual claim is not barred by *res judicata* based on the individual's participation in a prior group or class action. *See, e.g., Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1266, 1268-70 (D. Kan. 2012) (holding that employee's action for retaliatory discharge was not barred by claim preclusion based on his participation as class member in Fair Labor Standards Act action because combining actions would not have conformed to parties' expectations and would have presented serious disadvantages). We need not decide the circumstances or scope of such a rule, however, because this situation did not involve a prior class or group action. Here, the Rule 75 case was not litigated on behalf of a group or class; rather, plaintiff litigated that action as an individual. As explained in detail above, plaintiff could have sought declaratory relief in that case, and having failed to do so, is barred from now relitigating the issue.

Demarest v. Town of Underhill, 2021 VT 14, ¶20. The Court also concluded "The Selectboard acted well within its discretion under the Town Ordinance in considering a variety of factors, including environmental concerns, and denying plaintiff's request to use the trail as a roadway."

Demarest v. Town of Underhill, 2021 VT 14, ¶30. The 2021 decision resolved the fourth and last of Plaintiff's four state court actions related to TH 26. The Amended Complaint alleges no post-2010 allegations regarding Crane Brook Trail. *But see* Doc. 46 at ¶ 171 (alleging Town has refused to "provide any maintenance" of the Class 4 section of TH 26); *also id*. ¶ 168.

D. Plaintiff's *Ketchum* Litigation Claims.

The second broad category of claims in the Amended Complaint center on the manner in which the state court litigation described above was conducted, with particular focus on *Ketchum v. Town of Dorset*, 2011 VT 49, ¶1, 190 Vt. 507, 507. The Amended Complaint alleges that the Vermont Supreme Court's *Ketchum* decision has permitted the Town and its officials "to willfully deceive the Vermont state courts by misrepresenting or censoring relevant facts" in the 2010 Maintenance Case, the 2010 Reclassification Appeal, and the 2016 Subdivision Case. Doc. 46 at ¶ 60. The Complaint contends that the Municipal Defendants "willfully perpetuated" "deceit, fraud, and obstruction" in the three litigations, which the Complaint describes as "a Kafkaesque maze of non-chronological appellate-style reviews of Defendants Town of Underhill's administrative decisions over the span of 12 years of Vermont state court litigation." Doc. 46 at ¶ 3. The Complaint alleges further that Town officials "committed intrinsic and extrinsic fraud in Vermont courts." *Id.* at ¶ 73; also *id.* at ¶¶ 50, 77, 248, 262, and C.

Ketchum considered whether reclassification of an existing highway was subject to review under Vermont Rule of Civil Procedure (V.R.C.P.) Rule 74—which allows *de novo* review of selectboard action—or V.R.C.P. 75—which allows review of selectboard actions based on review of the administrative record. Generally, V.R.C.P. 75 applies whenever the Vermont statutes are silent on the form of review. *See* V.R.C.P. 75(a). Although review of the administrative record is the usual path for a Rule 75 appeal, a reviewing court *does* have

discretion to "to engage in a de novo proceeding and take additional evidence. *See* V.R.C.P. 75(d) (allowing for trial by jury in some cases)." *Garbitelli v. Town of Brookfield*, 2011 VT 122, ¶9, 191 Vt. 76, 81. When a Rule 75 appeal is resolved by review of the administrative record, the reviewing court will affirm selectboard action "if there was adequate evidence to support the selectboard's decision, and the superior court correctly denied plaintiffs' request to supplement the record on appeal." *Ketchum v. Town of Dorset*, 2011 VT 49, ¶16, 190 Vt. 507, 511.

To determine whether a reclassification proceeding was subject to Rule 74 or Rule 75 review, the *Ketchum* Court examined 19 V.S.A. § 740.[6] The *Ketchum* Court concluded that "reclassification" of a highway did not come within the scope of § 740 based on a plain reading of the statute. *Ketchum v. Town of Dorset*, 2011 VT 49, ¶11, 190 Vt. 507, 510. The *Ketchum* Court expressly rejected the argument that the word "altering," used in the statute, should include reclassification of a highway:

> We cannot say that it is wholly irrational for the Legislature to choose to have a different standard of review for the selectboard's decision to reclassify a town highway than for the altering, laying out or resurveying of a highway. All of the latter decisions implicate a town's eminent domain power because they may require a taking of land abutting the town highway. In contrast, downgrading a road does not involve a taking. *See Whitcomb*, 123 Vt. at 399, 189 A.2d at 553 (explaining that reclassifying a road to a trail does not involve the condemnation of land). While there may be reasons to adopt a different procedure than the one set forth in the statute, "we must implement the Legislature's policy choice rather than the court's." *Town of Calais v. Cnty. Rd. Comm'rs*, 173 Vt. 620, 624, 795 A.2d 1267, 1271 (2002) (mem.). We will not second-guess the Legislature's unambiguous direction by inserting words into the statute.

Ketchum v. Town of Dorset, 2011 VT 49, ¶13, 190 Vt. 507, 510. Plaintiff quotes this holding, in part, in the Amended Complaint. Doc. 46 at ¶ 68.

[6] Under § 740, Rule 74 review is available "When a person owning or interested in lands through which a highway is laid out, altered, or resurveyed by selectboard members, objects to the necessity of taking the land, or is dissatisfied with the laying out, altering, or resurveying of the highway, or with the compensation for damages." 19 V.S.A. § 740.

The Complaint alleges, *inter alia*, (1) that *Ketchum* is "an unconstitutional judicial interpretation of Vermont law." Doc. 46 at ¶ 68; (2) that "due to *Ketchum*, interested persons in Vermont are now denied the procedural due process afforded a Rule 74 appeal," *id.* at ¶ 72; (3) that "Rule 75 appeals are so heavily deferential to municipal administrative decisions that, as a matter of law, a structural due process violation occurred," *id.* at ¶ 73; (4) that the *Ketchum* ruling allows the Town to "create its own legal record to undergo administrative review," *id.* at ¶ 75; and (5) that the *Ketchum* ruling has given town officials "a windfall level of unchecked governmental authority to use executive actions and concurrent willful extrinsic and intrinsic fraud to violate Plaintiff's procedural due process rights," *id*. at ¶ 105 and ¶ 116. The Amended Complaint seeks injunctive relief that would (1) find that *Ketchum* is an unconstitutional interpretation of Vermont law, (2) re-interpret Vermont law to require that road maintenance and classification appeals be appealable under Rule 74; and (3) require Vermont courts to hold a new appeal hearing of Plaintiff's maintenance and reclassification claims using the Rule 74 appeals process. Doc. 46 at ¶¶ A-C.

E. Plaintiff's First Amendment Claims.

Plaintiff also alleges that town officials have violated his First Amendment rights in two distinct ways. First, Plaintiff alleges that the Municipal Defendants have censored Plaintiff by distorting the public record of his input to public proceedings and have retaliated against Plaintiff for his public speech. *See* Doc. 46 at Seventh and Eighth Causes of Action, ¶¶ 266-269. Second, Plaintiff alleges that the Municipal Defendants have violated his First Amendment right to petition by "refusing to abide by duly submitted petitions." *Id.* at Eleventh and Twelfth Causes of Action, ¶¶ 280-282. The specific allegations related to these claims are discussed infra.

F. The Current Procedural Posture.

Plaintiff filed the first Complaint in this action on June 21, 2021. On July 13, 2021, the Municipal Defendants filed a Motion to Dismiss seeking dismissal of the Complaint on the grounds, *inter alia*, that Plaintiff's allegations were prolix, vague, and unfocused and lacked specific allegations against the named defendants, referring instead to the "Defendants" collectively, a choice that made it difficult for the individual defendants to frame an adequate response. On August 2, 2021, Plaintiff filed an Amended Complaint.

This Motion to Dismiss is a response to the Amended Complaint. Because "Plaintiffs' filing of the First Amended Complaint mooted the motion to dismiss and the related briefing," *Given v. Rosette*, 2015 U.S. Dist. LEXIS 118689, *3, the Municipal Defendants will not provide any additional briefing related to the original Motion to Dismiss. However, the Municipal Defendants will "incorporate" some of the briefing into this Motion to Dismiss Amended Complaint. *Given v. Rosette*, 2015 U.S. Dist. LEXIS 118689, *4.

III. ARGUMENT

The following argument will show (1) that Plaintiff's Ketchum-based claims are barred by the *Rooker-Feldman* doctrine; (2) that the Amended Complaint fails to state a claim upon which relief may be granted as to the Municipal Defendants; (2) that the Plaintiff's claims are barred by the applicable statute of limitations; (3) that some of Plaintiff's claims are barred by *res judicata*; (4) that the Amended Complaint must be dismissed as to certain individual defendants because it makes no allegations against them; and (5) the infirmities of the Complaint described in the Municipal's Defendants' Motion to Dismiss persist in the Amended Complaint.

A. Plaintiff's Ketchum claims should be dismissed based on the Rooker-Feldman doctrine.

As mentioned previously, Plaintiff asks this Court to reject the Vermont Supreme Court's interpretation of Vermont state law in *Ketchum* as unconstitutional and to reverse the Vermont Supreme Court's rulings in the cases in which Plaintiff was involved, giving Plaintiff a de novo hearing of his claims regarding Crane Brook Trail. Doc. 46 at ¶¶ A-C. Plaintiff's request to reject state law judgments and make him the victor as to Crane Brook Trail presents a textbook *Rooker-Feldman* scenario, and his *Ketchum* claims must be dismissed on that basis.

"[T]he *Rooker-Feldman* doctrine is the principle, expressed by Congress in 28 U.S.C. § 1257, that within the federal judicial system, only the Supreme Court may review state-court decisions." *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005). The *Rooker-Feldman* doctrine bars a federal suit if the following factors are present:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state-court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state-court judgment must have been rendered before the district court proceedings commenced.

Hoblock, , 422 F.3d at 85 (internal emendations omitted). All of these elements are present here. Here, Plaintiff has lost, not once, but four times in four separate state court judgments, and he complains of injuries caused by those judgments. Plaintiff expressly invites the district court to review and reject those judgments, all of which were rendered before Plaintiff filed this action. Plaintiff's claims, to the extent they seek to overturn the Vermont State Court's rulings in the prior litigation are barred under the *Rooker-Feldman* doctrine and should be dismissed.

B. The Amended Complaint fails to state a claim against upon which relief can be granted against the Municipal Defendants.

Plaintiff asserts five basic § 1983 claims against the Municipal Defendants: (1) a procedural due process claim based on alleged violations of the Fourteenth Amendment (First

and Second Causes of Action); (2) a substantive due process claim based on alleged violations of the Ninth and Fourteenth Amendment (Third and Fourth Causes of Action); (3) a takings claim based on alleged violation of the Fifth Amendment (Fifth and Sixth Causes of Action); (4) a "censorship and manipulation of public records" claim based on alleged violation of the First Amendment (Seventh and Eighth Causes of Action); and (5) a "right to petition" claim based on alleged violation of the First Amendment (Eleventh and Twelfth Causes of Action). Plaintiff asserts no state law claims[7] and asserts jurisdiction solely on the basis of federal question and civil rights. Despite devoting 97 pages to the effort, the Amended Complaint fails to state a claim upon which relief can be granted for any of these five basic claims.

a. The Amended Complaint fails to state a takings claim.

This argument begins with Plaintiff's takings claim because in a sense, it is the central claim in the Amended Complaint, *viz.*, that the Municipal Defendants have taken Plaintiff's constitutionally-protected property rights by reclassifying a portion of TH 26 into Crane Brook Trail and by using the Vermont state courts to maintain that reclassification.

> [T]he federal and Vermont Constitutions use virtually the same test for takings review. In order to state a claim under the Takings Clause, a plaintiff must sufficiently plead: (1) a protected property interest; (2) that has been taken under color of state law; (3) without just compensation. A plaintiff is no longer required to exhaust state procedures for obtaining just compensation before bringing her takings claims to federal court.

Martell v. City of St. Albans, 441 F. Supp. 3d 6, 21 (D. Vt. 2020) (internal citations and quotation marks omitted). Plaintiff fails to sufficiently plead that a protected property interest has been taken from him without just compensation.

[7] Plaintiff references Article 2 and Article 7 of the Vermont Constitution without any articulation of such a claim premised under either Article. *See* p. 20, n.9, infra.

A fair reading of the Amended Complaint and reference to Plaintiff's requested relief suggests that the takings claim is squarely based on the Municipal Defendants' decision to reclassify TH 26 as Crane Brook Trail and to prohibit vehicular traffic over the trail, thereby depriving Plaintiff of his Southern Access Route. *See* Doc. at ¶ J (requesting relief appearing to compensate Plaintiff for the Crane Brook Trail decision). In particular, Plaintiff contends that the Municipal Defendants have taken his "reversionary property rights" by reclassifying the middle segment of TH 26 as a trail instead of discontinuing it:

> The 2010 New Road Reclassification, instead of discontinuing a segment of TH26, functionally condemned a 49.5' wide swath of private property to simultaneously deny landowners reversionary property rights and rescind past, present, and prospective future accessibility to private property.

Doc. 46 at ¶ 123; *see also* ¶¶ 125; 254; I and J (making argument). This argument gravely misconstrues the nature of a public right of way.

It is clear that the Town has already justly compensated landowners for the takings necessary to create TH 26. Under Vermont law, a selectboard must compensate a landowner when a municipality lays out a public highway through the landowner's property. 19 V.S.A. § 712. If the landowner is dissatisfied with the damages the selectboard offers, the landowner may appeal those damages under 19 V.S.A. Chapter 7, Subchapter 3. Vermont law has provided this basic protection since its very first statutes. Accordingly, if TH 26 *is* a valid public right of way, as Plaintiff alleges, then, under applicable statutes, Plaintiff's predecessor in title, who owned the property at the time TH 26 was laid out, received damages for the original taking of the right of way and its devotion to public use. Plaintiff does not allege otherwise.

Under Vermont law, once a highway is devoted to public use, it remains in public use until the municipality terminates the public right of way by discontinuing it as a highway and

declining to designate the right of way as a trail. 19 V.S.A. § 775.[8] Only then is a landowner's reversionary right triggered. *Id*. Until the municipality releases the public's interest in the right of way, the right of way remains open to the public 24 hours a day, even if the right of way is devoted solely to pedestrian traffic. *See Baird v. City of Burlington*, 2016 VT 6, ¶4, 201 Vt. 112, 115 ("Despite having the character of an outdoor pedestrian mall, Church Street is nevertheless a public right-of-way and is accessible to the public twenty-four hours a day.").

Nothing has been taken from Plaintiff that was not already taken from his predecessors in title. The portion of TH 26 that is now Crane Brook Trail was a public right of way open to public use *before* the 2010 reclassification and remains a public right of way *after* the 2010 reclassification—the only change has been in the character of the public use from vehicular roadway to pedestrian trail. Conversely, Plaintiff had no ability to exclude the public from using TH 26 *before* the 2010 reclassification, and he has no ability to exclude the public from its use *after* its reclassification—his position with respect to control over the public right of way remains unchanged. "[D]owngrading a road does not involve a taking." *Ketchum v. Town of Dorset*, 2011 VT 49, ¶13, 190 Vt. 507, 510.

The only practical change is that Plaintiff can no longer drive a vehicle over the Southern Access Route, although he retains vehicular access to his property over the Class IV segment of TH 26 to the north. Although Plaintiff views that northern route as unreasonable and prefers to access his property over the Southern Access Route, Plaintiff has no constitutional right to his

[8] 19 V.S.A. § 775 reads in full: "§ 775. Title to discontinued highway. The selectmen shall notify the commissioner of forests, parks and recreation when they have filed a petition to discontinue a highway under this subchapter. The selectmen may designate the proposed discontinued highway as a trail, in which case the right-of-way shall be continued at the same width. The commissioner of forests, parks and recreation with the approval of selectmen, may also make this designation. If the discontinued highway is not designated as a trail, the right-of-way shall belong to the owners of the adjoining lands. If it is located between the lands of two different owners, it shall be returned to the lots to which it originally belonged, if they can be determined; if not, it shall be equally divided between the owners of the lands on each side."

"preferred" access. Similarly, although Plaintiff enjoys a common law right of access to Crane Brook Trail as an abutting landowner, the Town has no obligation to maintain the trail to provide Plaintiff with the kind of access over the trail that he would prefer. *See Okemo Mt., Inc. v. Town of Ludlow*, 171 Vt. 201, 209-210 (2000) (holding that, although landowner had a common law right to access a public road, "We are not suggesting that [the landowner] has a right to require the Department to plow the road for his access by automobile in the winter.").

By referencing *In re Town Highway No. 20*, 2012 VT 17, 191 Vt. 231, Doc. 46 at ¶ 115, Plaintiff may hope to equate the reclassification in the present case with the reclassification in *In re Town Highway No. 20* and argue that the reclassification here somehow violates Plaintiff's constitutional rights. However, this case differs from *In re Town Highway No. 20* in key respects.

First, it is important to note that *In re Highway No. 20* does not say that reclassifying a road to a trail is a taking. *See In re Town Highway No. 20*, 2012 VT 17, ¶47, 191 Vt. 231, 259 ("Having ultimately recognized the Unnamed Road as a town highway, the selectboard's decision to downgrade its status to a trail did not — as we have elsewhere held — constitute a 'taking' entitling abutting landowners to compensation."). Rather, the case involved a claim under Article 7 of Vermont's Constitution, which "finds no precise analog among the rights provided by the U.S. Constitution." *In re Town Highway No. 20*, 2012 VT 17, ¶63 n.10, 191 Vt. 231, 267 n.10. Plaintiff brings no such claim here.[9]

Moreover, *In re Town Highway No. 20* involved a "lengthy pattern of invidious delay, obstruction, and discriminatory decisionmaking" by the Georgia selectboard. *In re Town*

[9] Although the Amended Complaint references Articles 2 and 7 of the Vermont State Constitution, *see* Doc. 46 at ¶¶ 112-113, Plaintiff brings no such claims in his Causes of Action. Instead, he attempts to shoe-horn those two Articles into a Claim under the Ninth Amendment. Doc. 46 at ¶ 112. The relationship between Article 2 and Article 7 and the Ninth Amendment is not clear, considering that the Ninth Amendment is "a rule of construction that does not give rise to individual rights." *Zorn v. Premiere Homes, Inc.*, 109 Fed. Appx. 475, 475, 2004 U.S. App. LEXIS 20329, *2 (2d Cir. 2004)

Highway No. 20, 2012 VT 17, ¶47, 191 Vt. 231, 259. The pattern of decisions included, among other things, removing without explanation a culvert from plaintiff's access road, thereby preventing plaintiff from accessing his property; refusing the plaintiff's request to upgrade Town Highway No. 20 (TH 20) at plaintiff's own expense, when the selectboard had granted similar requests to other landowners with lesser showings; granting permission to the plaintiff's neighbors to store their personal property on TH 20, further impeding plaintiff's access to his property; and refusing to require the neighbors to remove a fence and barbed wire gate they erected—with all these selectboard decisions being made for the express purpose of increasing the value of the neighbor's property while decreasing the value of the plaintiff's. *In re Town Highway No. 20*, 2012 VT 17, ¶3- ¶9, 191 Vt. 231, 238-241. These persistent, intermittent, and repeated choices covered a span of over a decade. *In re Town Highway No. 20*, 2012 VT 17, ¶21, 191 Vt. 231, 245-246.

No such pattern of discriminatory decision making exists here. In contrast, the Town Selectboard's action with respect to Crane Brook Trail have been straightforward and consistent. The Selectboard attempted to reclassify a portion of TH 26 as a trail in 2001, treated the segment as a trail until 2010, then once again reclassified the same segment as a trail after Plaintiff challenged the 2001 reclassification as invalid. Since then, the Town has consistently treated Crane Brook Trail as a trail. There are no allegations of a series of invidious refusals, denials, and obstructions like those in *In re Town Highway No. 20*. Rather, Plaintiff here complains that the Town has persisted in its decision to keep Crane Brook Trail a trail.

Because Plaintiff has not demonstrated that a protected property interest has been taken from him without just compensation, the takings claim must fail and the Fifth and Sixth Causes of Action must be dismissed.

b. The Amended Complaint fails to state a procedural due process claim.

> A procedural due process claim requires proof of two elements: "(1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process." *Bryant v. N.Y. State Educ. Dept.*, 692 F.3d 202, 218 (2d Cir. 2012). These elements derive from the Due Process Clause of the Fourteenth Amendment, which prohibits the deprivation of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Cyr v. Addison Rutland Supervisory Union, 955 F. Supp. 2d 290, 295 (D. Vt. 2013). Plaintiff cannot prove he was deprived of a property interest or that he was denied due process.

Plaintiff's procedural due process claims are based entirely on either the access and maintenance issues related to Crane Brook Trail, Doc. 46 at ¶ 247, or on Plaintiff's claim that *Ketchum* represents an unconstitutional interpretation of Vermont law that creates a "deferential administrative review" that fails to provide adequate due process in "narrowly defined state court proceedings," Doc. 46 at ¶ 248.

First, as discussed extensively above in connection with Plaintiff's takings claim, Plaintiff has not identified any protected property interest of which he has been "deprived" in connection with the 2010 reclassification of Crane Brook Trail. TH 26 is a public right of way today, as it was before it was reclassified. Although the character of that public use has changed, Plaintiff had no right to unilaterally direct the public use of TH 26, and Plaintiff has not been deprived of vehicular access to his property, which he enjoys over TH 26 and Irish Settlement Road to the north.

Second, the process which Plaintiff has enjoyed in Vermont state courts, which involved four separate state court actions and 12 years of litigation, was adequate for constitutional due process purposes.

> For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental

> that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.

Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994 (1972).

Here, Plaintiff brought the 2010 Trail Maintenance Case and the 2012 Class 4 Maintenance Case and was the master of his own Complaints (along with the other plaintiffs). In these cases, he had the opportunity to present his claims to the County Road Commissioners and to present evidence in support of those claims. Doc. 46 at ¶¶ 4 and 50. He also had the opportunity to participate in the Town's 2010 reclassification proceeding and presented evidence in support of his own 2016 subdivision application. After these opportunities to be heard, Plaintiff appealed both the 2010 Reclassification Appeal and the 2016 Subdivision Appeal up through the Vermont Supreme Court. Even the Rule 75 appeal process included the possibility of *de novo* review by the reviewing court. *Garbitelli v. Town of Brookfield*, 2011 VT 122, ¶9, 191 Vt. 76, 81 (noting the opportunity for a *de novo* proceeding under V.R.C.P. 75(c)). These proceedings—even the more limited review under V.R.C.P. 75—are sufficient for due process purposes. *Gauthier v. Kirkpatrick*, 2013 U.S. Dist. LEXIS 172578, *62 (D. Vt. 2013) (dismissing due-process claim because judicial review was available under V.R.C.P. 75—a "meaningful" remedy).

Plaintiff has failed to state a procedural due process claim in the Amended Complaint and for this reason, the First and Second Causes of Action should be dismissed.

c. The Amended Complaint fails to state a substantive due process claim.

Plaintiff's substantive due process claims, like his procedural due process claims, are also based on the allegations concerning the maintenance and reclassification of Crane Brook Trail. *See* Doc. 46 at ¶¶ 109-111 and ¶¶ 252-259. They therefore suffer from the same central defect:

Plaintiff has not identified a constitutionally protected interest he has lost as a result of the reclassification of Crane Brook Trail.

In addition, to "establish a violation of substantive due process rights, a plaintiff must demonstrate that the state action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 431 2d Cir.) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). Moreover, "'[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" *Montagno v. City of Burlington*, 2017 U.S. Dist. LEXIS 83679, *30, 2017 WL 2399456 (quoting *Albright v. Oliver*, 510 U.S. 266 (1994)); *also Velez v. Levy*, 401 F.3d 75, 94 (2d Cir. 2005) ("[W]here a specific constitutional provision prohibits government action, plaintiffs seeking redress for that prohibited conduct in a § 1983 suit cannot make reference to the broad notion of substantive due process.").

Here, because Plaintiff's substantive due process claims are based entirely on the alleged Fifth Amendment takings resulting from the reclassification of Crane Brook Trail, "his substantive due process claim is 'either subsumed in [his] more particularized allegations, or must fail.'" *Montagno*, 2017 U.S. Dist. LEXIS 83679, *31-32, 2017 WL 2399456 (*quoting Velez v. Levy*, 401 F.3d 75, 93 (2d Cir. 2005)).

For these reasons, Plaintiff's Third and Fourth Causes of Action must be dismissed.

d. The Amended Complaint fails to state a claim for censorship and manipulation of public records.

The Amended Complaint's "censorship and manipulation of public records" claims are based on allegations that Municipal Defendants distort, diminish, or omit Plaintiff's participation

in public meetings from the public record, such as meeting minutes.[10] Plaintiff also alleges that the Town refuses to make certain records available on the internet.[11] The difficulty with Plaintiff's censorship and manipulation of public records claims is that there is *no* constitutionally-protected interest in these allegations. "The inaccuracy of records compiled or maintained by the government is not, standing alone, sufficient to state a claim of constitutional injury under the due process clause of the Fourteenth Amendment." *Steuerwald v. Cleveland*, 2015 U.S. Dist. LEXIS 44246, *18 (D. Vt. 2015). Indeed, the Northern District of New York concluded that a plaintiff failed to state a claim under the Ninth or Fourteenth Amendments even when a university police officer allegedly entered false information concerning a plaintiff into police reports and refused to correct or redact the false information. *Tylicki v. Schwartz*, 2009 U.S. Dist. LEXIS 73263, *9-10 (N.D.N.Y. 2009).

Furthermore, although Plaintiff may have a right to access public records in accordance with Vermont's Public Records Act, 1 V.S.A. § 315, *et seq.*, he does not have a constitutionally protected right to access such public records *online*. *See Lancaster v. Harris Cty.*, 821 Fed. Appx. 267, 271, 2020 U.S. App. LEXIS 21440, *9 (5th Cir. 2020) ("As for Claim 6 [for a conspiracy to cover up civil-rights violations by deleting online records], the briefing is devoid of a case even hinting at the right to access state-court-protective-order records online.").

The allegations do not state a cause of action under the First Amendment, nor do they state a cause of action for procedural due process or substantive due process under the Fourteenth Amendment. For these reasons, the Seventh and Eighth Causes of Action must be dismissed.

---

[10] *See* Doc. 46 at ¶¶ 172-179, 183, 200, 202-207.
[11] Doc. 46 at ¶¶ 97-104.

e. *The Amended Complaint fails to state a constitutional violation of Plaintiff's First Amendment right to petition*.

In his Eleventh Cause of Action, Plaintiff alleges a claim under 42 U.S.C. § 1983 based on a violation of the First Amendment Right to Petition Clause, alleging "Defendants refusing to abide by duly submitted petitions, including the 2010 Petition on Fairness or the 2020 Petition on Public Accountability." Doc. 46 at ¶ 280. The "2010 Petition of Fairness" is a petition allegedly filed with the Town in 2010. *Id.* at ¶¶ 239 and 245. The "2020 Petition on Public Accountability," filed in 2020, is "Plaintiff's most recent" Petition. *Id.* at § 245.

Plaintiff's Amended Complaint alleges that the Town and certain named defendants did not "abide" by Plaintiff's "demands" as expressed in Plaintiff's lawfully submitted petitions. *See id.* at ¶ 240 (alleging defendants "refused to *abide by the demands* of the 2010 Petition on Fairness in Town Road Maintenance.") and ¶ 241 (alleging defendants "refused to *abide by the demands* of the 2020 Petition on Public Accountability" (emphasis added); *also id.* at ¶ 280 (alleging "Defendants refus[ed] to abide by duly submitted petitions"). These claims are premised on the notion that Plaintiff has the right to have any "demands" contained in a lawfully submitted petition implemented by the officials receiving the petitions.

Plaintiff has no such Constitutional right. The United States Supreme Court made this point clear in *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984):

> Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues. Indeed, in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-466 (1979), the Court rejected the suggestion. No other constitutional provision has been advanced as a source of such a requirement. Nor, finally, can the structure of government established and approved by the Constitution provide the source. It is inherent in a republican form of government that direct public participation in government policymaking is limited. *See* The Federalist No. 10 (J. Madison). Disagreement with public policy and disapproval of officials' responsiveness, as Justice Holmes suggested in Bi-Metallic, supra, is to be registered principally at the polls.

Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 285 (1984).

The Second Circuit has applied *McKnight* to cases, like the present case, in which the plaintiffs alleged violations of the First Amendment's right to petition based on the failure of state, county or local officials to respond to the plaintiffs' petitions. E.g., *Futia v. Westchester Cty. Bd. of Legislators*, 2021 U.S. App. LEXIS 11589, *3-4, __ (2d Cir. 2021); *Futia v. New York*, 837 Fed. Appx. 17, 20, 2020 U.S. App. LEXIS 37156, *3 (2d Cir. 2020). Plaintiff alleges that the Town refused to "abide by the demands" of his Petitions. Such refusal does not state a claim upon which relief may be granted under the First Amendment.

Furthermore, any claim Plaintiff may have based on the defendants' failure to "abide by the demands" of the 2010 Petition would be time-barred.[12] As a general rule, § 1983 actions related personal deprivations are subject to the statute of limitations for personal injury claims of the state in which the alleged violation occurred, which, for Vermont is three years. 12 V.S.A. § 512; *Irina Assur v. Cent. Vt. Med. Ctr.*, 2012 U.S. Dist. LEXIS 185260, *18 (D. Vt. 2012); *Brewer v. Hashim*, 2017 U.S. Dist. LEXIS 98884, *24 (D. Vt. 2017). According to the Complaint, Plaintiff's 2010 Petition was submitted in 2010 and "could have prevented over a decade of state litigation and many of the present causes of action." Am. Compl. at ¶ 239. Plaintiff alleges that the Town and other defendants "refused to abide" by the 2010 Petition. Am. Compl. at ¶ 280. This claim, being over 11 years old, is barred by the three-year statute of limitations.

Finally, although the Complaint alleges only Federal claims and does not assert any *state law* claims, it is worth noting that the Town's handling of Plaintiff's 2020 petition does not violate Vermont state law. 17 V.S.A. § 2642 is the Vermont law governing Plaintiff's petitions in

[12] The statute of limitations is addressed extensively with regard to other claims below.

this case. Under Section 2642, selectmen must "warn any article or articles requested by a petition signed by at least five percent of the voters of the municipality and filed with the municipal clerk not less than 47 days before the day of the meeting." 17 V.S.A. § 2642. However, the Vermont Supreme Court has construed this statute to require warning only of those items that are within the "voters' authority to decide" at Town meeting. *See Skiff v. S. Burlington Sch. Dist.*, 2018 VT 117, ¶24, 208 Vt. 564, 574-575. The selectmen have no legal duty to warn or include "advisory" articles that call for action beyond the scope of the voter's authority.

Plaintiff expressly acknowledges that the 2020 Petition contained "non-binding," "advisory" articles that the Underhill selectboard was not bound by Vermont law to warn or include in the town meeting. Am. Compl. at ¶ 237 (describing requested articles as "*non-binding*") (emphasis in original); ¶ 257 (alleging town officials "prevented three *non-binding advisory articles* to the ballot be voted on March 4, 2021) (emphasis added); ¶ T (requesting injunctive relief requiring "*Advisory-Articles* to be properly warned and placed on the ballot to be voted upon Town Meeting Day") (emphasis added).

Because Plaintiff has not stated a claim upon which relief may be granted for a violation of the First Amendment right to petition, the related Monell claim against the Town also fails. *E.g., Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006); *Sims v. City of New York*, 788 Fed. Appx. 62, 64, 2019 U.S. App. LEXIS 37218, *6 (2d Cir. 2019).

Plaintiff's Eleventh and Twelfth Causes of Action therefore must be dismissed.

f. The Amended Complaint fails to state any claim for collusion or conspiracy.

Finally, it should be noted that the Amended Complaint repeatedly alleges that the defendants have colluded and/or conspired to violate his constitutional rights.[13] The Ninth Cause of Action appears to focus these allegations on Defendant JULT and on the individual defendants referenced in ¶ 274.[14] Plaintiff cites 42 U.S.C. § 1983 as the foundation of this claim, but conspiracy claims are not available under § 1983; rather, they are available under 42 U.S.C. § 1985(3).

However, Plaintiff's Amended Complaint fails to state a claim under § 1985(3) because Plaintiff must allege and show that the alleged conspiracy was "motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus," such as "race, color, gender, sex, veteran status, or disability status." *Doe v. Fenchel*, 837 Fed. Appx. 67, 68, 2021 U.S. App. LEXIS 5220, *3 (2d Cir. 2021). Moreover, a "complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss." *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983).

Here, Plaintiff's Amended Complaint makes *no* allegation that a conspiracy was motivated by racial or class-based discriminatory animus or that Plaintiff is a member of a protected class. Therefore, the Ninth Cause of Action must be dismissed.

C. Plaintiff's claims are barred by applicable statutes of limitations.

The preceding discussion demonstrates that the Amended Complaint fails to state a claim upon which relief can be granted against the Municipal Defendants. As a separate and

[13] *See* Am. Compl. at ¶¶ 1, 110, 111, 143, 164, 166, and 212.

[14] Although Plaintiff does not expressly name these defendants as targets of the Ninth Cause of Action, excess of caution and the liberal construction that *pro se* complaints receive require that these defendants respond to the claims here.

independent ground for dismissal, Plaintiff's claims must be dismissed because they are barred by the applicable statute of limitations. To demonstrate this, a brief summary of the limitation's principles applicable to § 1983 claims is necessary.

a. The applicable law indicates that Plaintiff's claims are subject to a three-year statute of limitations.

First, in general, 42 U.S.C. § 1983 actions are subject to the statute of limitations applicable to personal injury claims in the state in which the tort is alleged to have occurred, which, in Vermont, is three years, as provided in 12 V.S.A. § 512(4). *E.g.*, *Owens v. Okure*, 488 U.S. 235, 249-250 (1989); *Tester v. Pallito*, 2020 U.S. Dist. LEXIS 95092, *7 (D. Vt. 2020); *Miller v. Vt. Assocs.*, 2021 U.S. Dist. LEXIS 27307, *7 (D. Vt. 2021); *Brewer v. Hashim*, 2017 U.S. Dist. LEXIS 98884, *24 (D. Vt. 2017). A takings claim is governed by the general six-year statute of limitations in 12 V.S.A. § 511. *Dep't of Forests, Parks & Rec. v. Town of Ludlow Zoning Bd.*, 2004 VT 104, ¶6, 177 Vt. 623, 626.

Second, although the limitations period of a § 1983 claim is determined by reference to state law, "the accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law." *Wallace v. Kato*, 549 U.S. 384 (2007). "Generally, under federal law, a cause of action accrues when 'the plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Finley v. Hersh*, 2013 U.S. Dist. LEXIS 95159, *10 (D. Vt. 2013) (citing *Covington v. City of New York*, 171 F.3d 117, 121 (2d Cir. 1999)).

Third, "when a federal court looks to state law to determine the most appropriate statute of limitations, it must also, so long as federal policy is not thereby offended, apply the state's rules as to the tolling of the statute." *Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1987) (citing *Chardon v. Fumero Soto*, 462 U.S. 650, 655-62, 77 L. Ed. 2d 74 (1983)); *also Abbas v.*

Dixon, 480 F.3d 636, 641 (2d Cir. 2007). Vermont's tolling statute appears at 12 V.S.A. § 551 *et seq.* None of Vermont's tolling provisions applies to the claims in Plaintiff's Complaint.

Fourth, "'[a]lthough the statute of limitations is ordinarily an affirmative defense that must be raised in the answer, a statute of limitations defense may be decided on a Rule 12(b)(6) motion if the defense appears on the face of the complaint.'" *Powell v. Lab Corp.*, 789 Fed. Appx. 237, 239, 2019 U.S. App. LEXIS 29845, *3 (2d Cir. 2019) (summary order) (quoting *Thea v. Kleinhandler*, 807 F.3d 492, 501 (2d Cir. 2015)); also *Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315, 319 (2d Cir. 2021) ("A court accordingly may dismiss a claim on statute-of-limitations grounds at the pleadings stage 'if [the] complaint clearly shows the claim is out of time.'") (quoting *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999)).

Fifth, "exhaustion is not a prerequisite to an action under § 1983." *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982); *also Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2173 (2019); *West v. Morrisville*, 728 F.2d 130, 136 n.2 (2d Cir. 1984); *Brown v. Windham Northeast Supervisory Union*, 2006 U.S. Dist. LEXIS 65884, *60-61 (D. Vt. 2006). As a result, Plaintiff was not required to wait for state court litigation to run its course before bringing these claims.

Sixth, Plaintiff's claims against each individual defendant are subject to the rules governing statute of limitations, accrual, tolling, and exhaustion of remedies. As a result, claims based on individual conduct that occurred more than three years prior to the filing of the Complaint are time-barred unless tolled for some reason. *See Powell v. Lab Corp.*, 789 Fed. Appx. 237, 239-240, 2019 U.S. App. LEXIS 29845, *2-4 (2d Cir. 2019) (analyzing statute of limitations issue with reference to defendant's individual conduct as alleged in complaint).

Finally, the existence of an alleged conspiracy "does not postpone the accrual of causes of action arising out of the conspirators' separate wrongs." *Singleton v. New York*, 632 F.2d 185,

192 (2d Cir. 1980); *Powell v. Lab Corp.*, 789 Fed. Appx. 237, 240, 2019 U.S. App. LEXIS 29845, *3-4 (2d Cir. 2019); *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1157 (2d Cir. 1995). Accordingly, a plaintiff cannot use a conspiracy theory to "circumvent the statute of limitations," *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1156-1157 (2d Cir. 1995).

Plaintiff's Complaint was filed on June 21, 2021. If we apply the longer, six-year statute of limitations (for takings) to all of Plaintiff's claims (although some are actually governed by the three-year period), then any claim premised on conduct that occurred before June 21, 2015, is barred by the statute of limitations and is not actionable, unless tolled by Vermont state law.

b. All of Plaintiff's claims based on vehicular access to, maintenance of, and reclassification of Crane Brook Trail are barred by the six-year statute of limitations.

Turning to the specific claims in the Complaint, all of Plaintiff's specific factual allegations related to the Town's efforts to eliminate vehicular traffic from Crane Brook Trail occurred during or *prior* to 2010.

First, Plaintiff alleges that the Town and various defendants failed to keep a promise, allegedly made in 2001, that Plaintiff would be entitled to retain vehicle access to his property over Crane Brook Road and the Southern Access Route.[15] However, any promise the Town may have made to Plaintiff was broken when the Town attempted to reclassify the Southern Access Route as a trail in 2001, when the Town adopted the Trails Ordinance in 2002, and when the Town reclassified the Southern Access Route as a trail in 2010.

Similarly, any claim based on Plaintiff's allegation that the Town and various defendants deliberately failed to maintain Crane Brook Trail during the period 2001 to 2010 is also barred. If, as Plaintiff alleges, the 2001 reclassification effort was invalid and the Town had a duty to

[15] See, generally, Am. Compl. at ¶¶ 1, 44, 45, 53, 54, 55, 78, 89, 117, 120, 127, 129, 138, 139, 141, 188, 248, and J.

maintain the Southern Access Route between 2001 and 2010, then claims based on that conduct accrued throughout the early 2000s and reached full boil on May 31, 2011, the date Plaintiff contends the 2001 reclassification effort was invalidated by a Vermont superior court. *See* ¶ 50 (citing this date as date of judicial determination of invalidity). If the Town's failure to maintain the road violated any of Plaintiff's constitutional rights, then the basis for recovery was clear as of that date. Any § 1983 claim based on the Town's failure to maintain the Southern Access Route expired on May 31, 2017—six years later.

Likewise, if the Town violated Plaintiff's constitutional rights by wrongly reclassifying the disputed portion of TH 26 as a trail in 2010, thereby depriving Plaintiff of the "reasonable access" he hoped to retain,[16] then a claim based on that action expired six years later—in 2016.

All of this alleged conduct-- that the Town promised Plaintiff in 2001 that he would retain vehicular access over Crane Brook Trail, that the Town deliberately and improperly failed to maintain TH 26 during the early 2000s, and that the Town improperly reclassified Crane Brook Road to a legal trail in 2010, all occurred well before June 21, 2015, which is the cut-off date for a § 1983 takings claim brought in Vermont on June 21, 2021. Therefore, any claims based on this specific conduct are barred by the six-year statute of limitations in 12 V.S.A. § 511.

Major portions of Plaintiff's First, Second, Third, Fourth, Fifth and Sixth Causes of Action are based on the maintenance and road classification decisions made by Town officials from 2001-2010. Plaintiff's "General Allegations" and "General Chronology of Facts Relevant to the Present Claims" are entirely related to pre-2010 conduct. *See* Doc. 46 at ¶¶ 46-67. Other than referencing the February 26, 2021, decision in the 2016 Subdivision Appeal, this section of

[16] See, generally, Am. Compl. at ¶¶ 53-59 and ¶¶ 79-84, 105-111, 120, 123-168.

Plaintiff's Complaint does not allege any dated conduct later than 2013 (the date of the findings of the Chittenden County Road Commissioners referenced in ¶ 50.B).

Similarly, when one examines the allegations provided in support of the first six Causes of Action, see Doc. 46 at ¶¶ 87-190, the overwhelming majority of the dated allegations of conduct reference events that occurred well before June 21, 2021.[17] Those allegations that do allege conduct occurring after June 21, 2018 refer to Plaintiff's First Amendment claims, rather than his access and maintenance claims.[18] From this review of Plaintiff's stated bases for claims First through Sixth, it is apparent that those claims are barred by the six-year statute of limitations as to all Municipal Defendants to the extent they are based on pre-2015 conduct.[19]

c. February 26, 2021 is not the accrual date for Plaintiff's claims.

Plaintiff, apparently mindful of the statute of limitations issue, alleges that the accrual date for his "present claims" should be February 26, 2021, because that is the date that the Vermont Supreme Court ruled against Plaintiff in his 2016 Subdivision Appeal. Doc. 46 at ¶ 85; *see also Demarest v. Town of Underhill*, 2021 VT 14, ¶33 (February 26, 2021, decision). The Amended Complaint cites language from dissenting Justice Robinson's opinion as embodying the reasons why the decision date should be the accrual date. Doc. 46 at ¶ 85. However,

> Under federal law, accrual occurs "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Wallace*, 549 U.S. at 388 (citations and internal quotation marks omitted). Stated

---

[17] The dated allegations referencing pre-June 21, 2018 conduct include: ¶ 91 (2002), ¶ 100 (2007, 2009, 2012, 2016); ¶ 101 (2009); ¶ 103 (2009); ¶ 106 (2010); ¶ 107 (early 2000's); ¶ 111 (2010); ¶ 115 (2012); ¶ 120 (2002); ¶ 123 (2010); ¶ 125 (pre-2002); ¶ 134 (2002); ¶ 135 (2002); ¶ 136 (2002); ¶ 139 (2002); ¶ 140 (2002); ¶ 142 (2009); ¶ 144 (2002); ¶ 145 (2002); ¶ 146 (2002); ¶ 152 (2005); ¶ 158 (2010); ¶ 162 (2010); ¶ 164 (2010); ¶ 165 (2010); ¶ 168 (Town's decision to appeal in 2016 Subdivision Appeal); ¶ 182 (2009).

[18] The post-June 21, 2020 allegations include: ¶ 172 (2019, erroneous matrix by Rick Heh); ¶ 173 (2019, erroneous minutes of Planning Commission meeting); ¶ 177 (2019, demoralizing email from Jonathan Drew); ¶ 178 (2019, omission of hostile email); ¶ 179 (2019, incomplete meeting minutes); ¶ 181 (2020, posting agenda to Front Porch Forum); ¶ 183 (2020, excluding Plaintiff's speech from minutes); ¶ 186 (2020, selectboard meetings); ¶ 187 (2020, scheduling selectboard meeting for 8:30 a.m.).

[19] As shown above, the post-2018 allegations also fail to state a claim upon which relief may be granted.

> differently, the claim accrues and thus the statute of limitations begins to run, "when the wrongful act or omission results in damages[,] . . . even though the full extent of the injury is not then known or predictable." *Id*. at 391 (quoting 1 C. Corman, Limitation of Actions § 7.4.1, pp. 526-27 (1991) (footnote omitted)). The Second Circuit explained that accrual occurs "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980) (internal quotation marks omitted); *see Holiday v. Martinez*, 68 Fed. Appx. 219, 2003 WL 21242641, at *2 (2d Cir. 2003) (three-year statute of limitations applies to § 1983 due process claim, which accrues when plaintiff knows or has reason to know of the injury which is the basis of his action).

Brewer v. Hashim, 2017 U.S. Dist. LEXIS 98884, *24-25, 2017 WL 2787622.

When Plaintiff filed his 2016 Subdivision Appeal, he was aware of all of the factual allegations discussed above—that the Town had attempted to reclassify Crane Brook Trail in 2001, that the Municipal Defendants had failed to maintain Crane Brook Trail from 2001 to 2010, that the Town reclassified Crane Brook Trail once again in 2010, that the Town had maintained the Class 4 portion of TH 26 in a manner that Plaintiff thought was insufficient, and that the Town had denied his request for vehicular access over Crane Brook Trail. The Complaint includes *no* allegations concerning the Municipal Defendants' conduct in these matters occurring later than 2010. In fact, the Amended Complaint makes no specific factual allegations concerning the period from 2015 on, except allegations related to the fact that the Town *litigated* the 2016 Subdivision Appeal or allegations related to the First Amendment public record and petition claims. There is no factual basis for Plaintiff's claims accruing on the date the Vermont Supreme Court issued its final decision in the 2016 Subdivision Appeal.

To stretch the accrual date out to February 2021, Plaintiff may hope to avail himself of the "continuing violation doctrine," which is an "exception to the normal knew-or-should-have-known accrual date of a discrimination claim" that applies "when there is evidence of an ongoing discriminatory policy or practice, such as use of discriminatory seniority lists or employment tests." *Harris v. City of New York*, 186 F.3d 243, 248 (2d Cir. 1999) (internal quotation marks

and citations omitted). However, to demonstrate that the exception is applicable, "the claimant must allege both the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of that policy." *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999). Here, Plaintiff does not allege any specific "non-time-barred" factual allegations related to the vehicular access issue. Any denial of due process or taking by the Municipal Defendants related to Crane Brook Trail occurred no later than 2010, when the Town re-reclassified Crane Brook Trail. The Vermont state courts' later judicial consideration of that issue, and the Vermont Supreme Court's ultimate conclusion that Plaintiff's 2016 Subdivision Appeal was barred by claim preclusion does not in any way change the accrual date for purposes of Plaintiff's federal § 1983 claims based on the denial of vehicle access over Crane Brook Trail.

For all the reasons above, the accrual date in this action is not February 21, 2021, and any claim related to denial of vehicular access over Crane Brook Trail is barred by the applicable statute of limitations.

d. Claims against certain individual defendants are also barred by the statute of limitations.

The argument above is generally applicable to *all* the Municipal Defendants. However, it should be noted that the reasoning is equally applicable to each individual defendant. For seven individual Municipal Defendants, Plaintiff's Amended Complaint only asserts allegations of specific conduct that occurred before June 21, 2015.[20] Because these allegations occurred more

[20] For each Defendant, the following lists the name of the Defendant, the paragraphs in which each Defendant is specifically named, and, for each allegation, the year in which the allegation occurred:

1. Peter Brooks: ¶ 46; ¶ 54 (2002), ¶ 135 (2002); ¶ 144 (2002);
2. Carolyn Gregson: ¶ 55 (2001-2002); ¶ 121; ¶ 135 (2002); ¶ 144 (2002); ¶ 173; ¶ 144 (2002);
3. Stan Hamlet: ¶ 46; ¶ 55 (2001-2002); ¶ 59 (2010); ¶ 111 (2010); ¶ 135 (2002); ¶ 139 (2002); ¶ 152 (2005); ¶ 155 (2005); ¶ 194 (2005); ¶ 207;
4. Steve Owens: ¶ 47 (2009); ¶ 57 (2009); ¶ 59 (2010); ¶ 73 (2010-2013), ¶ 74 (2010); ¶ 240 (2010);
5. Clifford Peterson: ¶ 168 (2012-2016, referencing decision to appeal the trial court order in the 2012 Class 4 Maintenance Case); ¶ 207;
6. Trevor Squirrell: ¶ 47 (2009); ¶ 57 (2009); ¶ 59 (2010); ¶ 111 (2010);

than six years before the date of Plaintiff's Complaint, the claims against Defendants Brooks, Gregson, Hamlet, Owens, Peterson, Squirrell, and Tedford are barred by the six-year statute of limitations.

D. All of Plaintiff's claims based on vehicular access to, maintenance of, and reclassification of Crane Brook Trail are barred by the doctrine of claim preclusion.

Even if the claims related to Crane Brook Trail are not time-barred, they would still be barred as to the Town by the doctrine of claim preclusion. The Second Circuit summarized the elements of claim preclusion in a prior 42 U.S.C. § 1983 case arising from Vermont:

> "[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); *accord O'Connor v. Pierson*, 568 F.3d 64, 69 (2d Cir. 2009). In Vermont, *res judicata* will preclude a claim from being litigated "if (1) a previous final judgment on the merits exists, (2) the case was between the same parties or parties in privity, and (3) the claim has been or could have been fully litigated in the prior proceeding." *Iannarone v. Limoggio*, 190 Vt. 272, 279, 30 A.3d 655 (2011) (internal quotation marks omitted); *see also Carlson v. Clark*, 185 Vt. 324, 331, 970 A.2d 1269 (2009) ("[U]nder the doctrine of claim preclusion, a final judgment in previous litigation bars subsequent litigation if the parties, subject matter, and cause(s) of action in both matters are the same or substantially identical." (internal quotation omitted)).

Steuerwald v. Cleveland, 651 Fed. Appx. 49, 50, 2016 U.S. App. LEXIS 10333, *1-2 (2d Cir. 2016); *also Madden v. Town of New Haven*, 2015 U.S. Dist. LEXIS 91076, *13-14 (D. Vt. 2015).

Here, claim preclusion applies as to any claim against the Town as to both the maintenance claims and the reclassification claims. A previous final judgment on the merits exists on both issues in the 2010 Trail Maintenance Case and the 2010 Reclassification Appeal. These two cases reached a previous final judgment on the merits, were between the same parties,

7. Walter "Ted" Tedford: ¶ 135 (2002).

and the claims presented here were or could have been fully litigated in the prior proceedings. This, in fact, is the conclusion the Vermont Supreme Court reached in February of this year with respect to the issue of vehicular access over Crane Brook Trail. *Demarest v. Town of Underhill*, 2021 VT 14, ¶20.

E. The Amended Complaint must be dismissed as to 12 defendants because the Amended Complaint alleges *no* conduct on their part.

The Amended Complaint contains *no* specific factual allegations concerning 12 of the individual Municipal Defendants.[21] In the Second Circuit, "'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'" *Wright v. Smith*, 21 F.3d 496, 501, 1994 U.S. App. LEXIS 6641, *16-17 (quoting *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991) and citing other cases). Because Plaintiff's Amended Complaint contains no allegations specifically regarding these defendants, the claims must be dismissed. *E.g., Gregoire v. Citizens Bank*, 2020 U.S. Dist. LEXIS 149776, *7 (D. Vt. 2020); *Levesque v. Vermont*, 2014 U.S. Dist. LEXIS 127916, *13 (D. Vt. 2014).

Because the Amended Complaint fails to state a claim against Defendants Bond, Greene, Ingulsrud, Johnson, Oman, Pacifici, Seybolt, St. Germain, Weisel, and Yerrick, the Amended Complaint should be dismissed in its entirety as to these Defendants.

F. Plaintiff's Amended Complaint remains vague, conclusory and prolix.

The Municipal Defendants sought dismissal of Plaintiff's original Complaint on the ground that it did not contain "a short and plain statement of the claim showing that the pleader

[21] Outside of identifying them as defendants, the Amended Complaint makes no specific factual allegation against 10 Defendants, *viz*., Judy Bond, Barbara Greene, Faith Ingulsrud, Kurt Johnson, Michael Oman, Mary Pacifici (deceased); Cynthia Seybolt, Rita St. Germain, Mike Weisel, or Barbara Yerrick.

With regard to Defendants Seth Friedman and Anton Kelsey, the Amended Complaint only lists the 2019 assessments of their properties, without alleging any specific factual conduct committed by them. *See* Am. Compl. at ¶ 84, Table 1 (Parcel ID numbers PV-139 and PV-200).

is entitled to relief" as required by Fed. R. Civ. Proc. 8(a)(2). *See* Doc. 5 at 3-10. In response, Plaintiff filed the Amended Complaint, rendering the prior Motion to Dismiss moot.

The Amended Complaint does provide additional detail regarding specific conduct by named defendants—indeed this additional detail, in many instances, clarified that Plaintiff's claims against those individuals are time-barred—however, the Amended Complaint still resembles the "shotgun" *Magluta* pleading discussed in the original Motion to Dismiss,

> replete with allegations that "the defendants" engaged in certain conduct, making no distinction among the [34] defendants charged, though geographic and temporal realities make plain that all of the defendants could not have participated in every act complained of." *Id.*

Doc. 5 at 10 (quoting *Magluta v. Samples*, 256 F.3d 1282, 1284 (10th Cir. 2001). The Amended Complaint is 97 pages, seven pages longer than the original Complaint, and still contains many paragraphs that make vague, conclusory allegations against unspecified defendants.[22]

This continuing vagueness has made it difficult for the Municipal Defendants to properly respond. The analysis in this Motion to Dismiss Amended Complaint reflects a significant amount of time and effort on counsel's part to parse Plaintiff's pleading, to determine what claims are being asserted, and to respond to those claims as best as can be done. However, in many areas of the Amended Complaint doubt still remains as to the basis of Plaintiff's claims, the factual allegations intended to support them, the specific individuals who are supposed to have caused Plaintiff harm, and even the claims themselves. *Semon v. Rock of Ages Corp.*, 2011 U.S. Dist. LEXIS 161594, *38-39, 2011 WL 13112212. Therefore, as a separate and independent ground for dismissal, the Municipal Defendants respectfully request that the paragraphs listed in

[22] See Doc. 46 at ¶¶ 1, 2, 3, 4, 49, 51, 52, 60, 61, 70, 71, 72, 75, 76, 77, 80, 81, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 99, 101, 105, 106, 109, 110, 113, 114, 115, 117, 120, 124, 125, 126, 127, 128, 129, 130, 131, 132, 141, 142, 143, 147, 148, 151, 153, 154, 157, 158, 159, 163, 165, 182, 184, 191, 205, 206, 207, 212, 222, 223, 225, 242, 243, 244, 247, 248, 250, 252, 253, 254, 255, 256, 258, 259, 262, 265.

Note 17 be dismissed on the grounds and for the reasons discussed in Section II of the original Motion to Dismiss, which is hereby incorporated by reference. *See* Doc. 5, at 3-10 (making argument); *also Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977) ("This court has repeatedly held that complaints containing only "conclusory," "vague," or "general allegations" of a conspiracy to deprive a person of constitutional rights will be dismissed."); *Ali v. Town of Putney*, 2007 U.S. Dist. LEXIS 56364, *4-5, 2007 WL 2220486 ("When the complaint fails to comply with Rule 8, a court may dismiss the complaint or strike those portions that are redundant or immaterial.").

IV. CONCLUSION

Wherefore, for the reasons above, the Municipal Defendants respectfully request this Court dismiss all the claims asserted in the Amended Complaint.

Respectfully submitted, this 23rd day of August, 2021.

CARROLL, BOE, PELL & KITE, P.C.

BY:/s/: Kevin L. Kite

James F. Carroll, Esquire
Kevin L. Kite, Esquire
64 Court Street, Middlebury, VT 05753
(802) 388-6711
jcarroll@64court.com
kkite@64court.com

Attorneys for Municipal Defendants

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

DAVID P. DEMAREST, an individual, PLAINTIFF v. TOWN OF UNDERHILL, a municipality and charter town, SELECTBOARD CHAIR DANIEL STEINBAUER, as an individual and in official capacity, et. al.	CASE NO: 2:21-cv-167-wks (42 U.S.C. § 1983) (42 U.S.C. § 1983 Monell) Jury Trial Demanded

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

The motions to dismiss filed by Defendants Town of Underhill and named town officials fails to diminish any of the facts and legal merit of Plaintiff's causes of action presently before this Court. Plaintiff's responding opposition responds in the organizational sequence and numbering of Defendants' Memorandum.

I. Standard Of Review

Defendants want this Court to extrapolate the differential administrative review of narrowly defined *Defendant-created* legal records for the purpose of establishing a *res judicata* defense *while fully ignoring the appropriate Standard of Review for all present claims is not differential in nature*. This Court has jurisdiction to apply an *appropriate standard of review* to the present case to determine both the veracity and legal merit of present claims before this Court.

Granting full faith to the inextricably intertwined factual determinations made by County Road Commissioners in preceding state court proceedings is both legally appropriate and adds emphasis to allegations in present Complaint.

Preceding state court judicial abdication, which was predicated entirely upon the unconstitutional interpretation of Vermont law in *Ketchum v. Town of Dorset,* does not limit this Court's jurisdiction on present causes of action. Most notably and undeniably relevant to an analysis under Rooker-Feldman Doctrine, Plaintiff was not a party to the *Ketchum* decision. This Court has both the jurisdiction and responsibility to find a state law, or the law *as now precedentially applied due to a prior state court legal interpretation of law*, as unconstitutional when the law *as interpreted and applied* violates one or more Federal civil rights.[1] This Court also has authority to find 19 V.S.A. § 701(2) *unconstitutionally vague* since the definition of the "Altered" has left all potential major physical changes of a town highway other than "a change in width from a single lane to two lanes" to the absolute discretion of a defendant municipality even when a major change severely harms a private property interest (such as conversions of a once functional

[1]Vermont law (19 V.S.A. §740) clearly provides the right of interested parties to the procedural due process of a *timely* Rule 74 appeal when a Town Highway is *altered*; the *Ketchum* decision at issue created a state precedent which disregarded the plain reading and historical understanding of the word *altered.* Town Highway *reclassifications* and *notices of insufficiency* in Vermont now only receive a differential Rule 75 administrative review of a record which is provided by the municipal defendant, instead of the due process incorporated in a Rule 74 appeal. The *Ketchum's* misinterpretation of the word *altered* is also relevant to potential compensation under 19 V.S.A. §808, which only provides a mechanism for compensation when laying out *or altering* a Town Highway.

town highway access into a recreational trail which denies landowners prior access, or *extreme* dereliction of municipal maintenance duties such as refusals to replace bridges and culverts). As the prior state court record involving Plaintiff clearly documents, *which is not being appealed:* there was never any meaningful judicial review of Defendants' *malicious* administrative decisions (or due to the *Ketchum* precedent, the ability to uphold *any* of the *factual* determinations of the *impartial* County Road Commissioners). In short, *Res judicata* and claim preclusion do not apply to the present case because:

(1) The present causes of action have not been previously litigated,

(2) The *confirmed* taking of Plaintiff's *self-executing and exercised* property access rights over the segment of TH26 converted into the Crane Brook Trail did not occur until the Vermont Supreme Court decision dated February 26, 2021.[2]

(3) Plaintiff did not have standing to file a Federal Fifth Amendment Takings Claims until *Knick v. Township of Scott* was wisely decided on June 21, 2019.

Plaintiff's Response to II. (Factual Background)

It is not necessary at this time for Plaintiff to contest each of Defendants' subtle mischaracterizations of the factual history in their efforts to divert focus away from the merit of present causes of action; the central uncontested historical fact is

[2] The Underhill Trails ordinance, *which has never been enforced*, still presently claims, "Permits *shall be* issued only to persons who, in the judgement of the Selectboard, have a legitimate need to operate a vehicle on the Crane Brook Trail. For the purposes of this ordinance, '*legitimate need' shall mean a compelling personal or business purpose*."

Plaintiff built his domicile in 2002 under a new dwelling permit issued to "NR-144" with the implicit and explicit promise of vehicular access on New Road and a reasonable expectation of privacy building a domicile in the middle of over 50 acres of *private* property. There is no *genuine* substantiation of claims Plaintiff's present access and privacy abutting a town highway is *equal but separate* to the prior access and reasonable expectations of privacy at Plaintiff's domicile. *Defendants have provided no compensation or genuine justification based upon necessity as statutorily defined* for the conversion of a central segment of TH-26 into a public trail destination instead of either preserving the segment as a functional town highway or discontinuing the segment.

The background of present claims is also relevant to document:

(1) Patterns and Practices of civil rights violations to establish *Monell* liability,

(2) The lack of impartiality among certain town officials and the persistent failures of certain town officials to recuse themselves when appropriate,

(3) The degree of collusion, intrinsic fraud, and extrinsic fraud which is alleged to have been perpetuated by Defendants both prior to and after the initiation of non-chronological appellate-style state court proceedings,

(4) Absolute and qualified immunity do not shield Defendants from the *willful* actions and inactions which, at an absolute minimum, were in *reckless disregard* for Plaintiff's constitutional rights, and

(5) The longstanding pattern and practice of *ultra vires* efforts of individually named Underhill town officials to both self-deal to themselves and *willfully* harm Plaintiff due to his exercise of First Amendment protected speech (and desire that his property rights be respected) provides justification for the award of punitive damages against individually named Defendants.

As a matter of law, Promissory Estoppel precludes Defendants materially benefiting from a breach of the past promises explicitly made to Plaintiff because the promises were reasonably relied upon (as noted in ¶133 and ¶140 of Complaint). Plaintiff has alleged a mere sampling of multiple instances of censorship which for the purposes of consideration of a motion to dismiss as a matter of law shall be construed as true; Plaintiff is willing and ready to substantiate present First Amendment claims during discovery.

As will be elaborated upon under heading III (D) below, prior non-chronological appellate-style review of Defendants' administrative decisions is not binding on this Court, as stated in ¶50 of the Amended Complaint, Plaintiff decisively won "on the merits" in preceding state court proceedings *when permitted an appropriate standard of review of Defendants' actions and inactions.*

Prior to *Knick v. Township of Scott*, and even prior to the 2010 New Road conversion of a portion of TH-26 from a Class III/Class IV Town Highway into a Public Trail, Plaintiff has consistently engaged in dutifully attempting to

exhaust all potential state remedies in efforts to minimize harm caused by relentless efforts to take Plaintiff's property rights without compensation.

III(A) Defendants attempt to misapply Rooker-Feldman doctrine to injunctive relief sought involving *Ketchum's* unconstitutional interpretation of Vermont Law even though Plaintiff was not a party to the Ketchum decision

Rooker-Feldman doctrine does not apply to Plaintiff's request for relief involving *Ketchum v. Town of Dorset* decision since Plaintiff was not, *and could not have been*, a party to that *precedential* Vermont Supreme Court decision. This Court has jurisdiction and responsibility to strike down both unconstitutionally vague laws and the unconstitutional interpretations of a laws.

As elaborated upon in ¶68-78 of Plaintiff's Amended Complaint, and the present structural and procedural due process causes of action, interested parties throughout Vermont seeking to appeal a municipality's town highway *reclassification* (or *extreme* failures to maintain public infrastructure which may adversely impact private property) are presently denied the procedural due process protections of a Rule 74 appeal; a Rule 75 administrative review of a *defendant-created* record amounts to no genuine procedural due process at all. Plaintiff's standing to contest the constitutionality of a state law which is either *unconstitutionally vague* or *unconstitutional due to prior state court precedent* is entirely different than requesting this Court to conduct an appellate review of any of the state court judgments which involve present parties.

In order to provide for 14th Amendment Procedural Due Process when a property interest may be at stake, Vermont law has *and should continue to* provide interested persons the right to a Rule 74 appeal of a municipal "*alteration"* to a Town Highway, but the *Ketchum* interpretation of Vermont law now prevents the plain reading of an "*alteration*" from encompassing a "*reclassification,*" or the functional *alteration* of a Town Highway due to a municipality's sustained refusal to provide *any* maintenance to public infrastructure. The Kafkaesque non-chronological appellate-style review of administrative decisions involving Plaintiff (and co-litigants) with the Town of Underhill serves to document how a municipality's *sua sponte* conversion of a town highway into a recreational trail is now able to circumvent both a residents' *first-filed* Notice of Insufficiency and take significant portions of a landowner's bundle of private property rights without *any* genuine procedural due process protection at all.

Rooker-Feldman doctrine *only* precludes a District Court's *appellant review* of a case which received a state court's final judgment *on the merits.* None of the preceding non-chronological appellate-style state court differential reviews of Defendant's administrative decisions and Defendant-created record are binding on this Court. Questions of law and fact surrounding the word *altered* are at issue, but no portion of Plaintiff's Complaint "expressly invites the district court to review and reject those judgments" to which Plaintiff was party to in prior proceedings.

The present causes of action, *and relief sought*, specifically seeks a redress from Defendants' constitutional violations, as opposed to appealing any of prior state court judgements involving Plaintiff which were reached *on the merits* (reference Amended Complaint ¶50 on page 14, ¶60-67 on pages 18 and 19, and injunctive relief B and C on page 87 and 88 *which seeks to uphold prior findings on the merits separated from Defendant's intrinsic and extrinsic fraud upon the courts*, while also needing to account for further degradation of the TH-26 corridor which occurred over the years after County Road Commissioner findings of fact).

III(B)(a) Fifth Amendment Takings Cause of Action

Defendants largely attempt to claim facts not in the record and boldly make assertions which are either mutually exclusive or easily contradicted by fact. Defendants state on page 19, "Nothing has been taken from Plaintiff that was not already taken from his predecessors in title" only to immediately concede in the next paragraph "Plaintiff can no longer drive a vehicle over the Southern Access Route." The very same paragraph which states Plaintiff can no longer drive a vehicle over the "Southern Access Route" states "Plaintiff enjoys a common law right of access to Crane Brook Trail as an abutting landowner." The last Vermont Supreme Court decision clearly documents Plaintiff's *self-executing* common law (and statutory) right of access over the segment of TH-26 which was converted

into the Crane Brook Trail has now been *taken* by Defendant Town of Underhill. Plaintiff adequately alleges this taking was *willfully malicious* and *self-dealing*.

Paragraph 122 of Plaintiff's Amended Complaint succinctly states how Vermont courts have deemed, as a matter of Vermont law, the conversion of town highways into recreational trails does not constitute a taking. This premise is not binding on this Court *and completely irreconcilable with relatable Federal case law*. Clearly established Federal case law, such as *Caquelin v. United States (2015*), recognizes converting the use of a Railroad Right of Way (which unlike a town highway generally provides little *if any* utility or right to vehicular access to an abutting landowner) into use as a Recreational Trail constitutes a categorical taking. The genuine facts and legal record (such as the findings of the Country Road Commissioners) of prior state court proceedings are sufficient for any reasonable jury to find the conversion of TH-26 into a recreational destination and years of subsequent Defendant misconduct has resulted in a compensable taking.

Defendants claim the present case "differs from *In re Town Highway No. 20* in key respects" under the heading of III(B)(a) of their memorandum even though this element of present claims was brought under the Third and Fourth Causes of Action (see ¶109-122 of Amended Complaint) as opposed to the First and Second Causes of Action. Regardless, Defendants' argument completely ignores the allegation Defendants' actions, "were far more egregious than efforts in *Rhodes*

because Defendants intentionally caused Plaintiff's difficulty *continuing* to access his current *domicile* and infringed upon the reasonable expectations of privacy expected in and around one's home, as opposed to 'only' taking the economic value of Plaintiff's private property…" (¶119 of Amended Complaint). Table 1 of the Amended Complaint contains compelling factual basis to recognize "selectboard decisions being made for the express purpose of increasing the value of the neighbor's property while decreasing the value of the plaintiffs."

As clearly illustrated in Plaintiff's complaint,

> It is now impossible to conceivably find any defendant acted in an arbitrary and capricious manner since a municipality's maintenance and reclassification decisions have an unlimited administrative "discretion" (¶116 of Plaintiff's Amended Complaint)

Plaintiff's Complaint makes clear reference to The Vermont Supreme Court decision dated February 26, 2021 which officially vanquished the possibility of reasonable investment-backed return from Plaintiff's proposed 9-lot subdivision[3] (to which the Town of Underhill denied even a *preliminary* access permit based *solely* upon the conversion of a segment of TH-26 into the Crane Brook Trail).

Nothing in the record known to Plaintiff substantiates the conclusory assertion, "It is clear that the Town has already justly compensated landowners for

[3] The loss of both reasonable expectations of privacy and reasonable access to Plaintiff's domicile *due to Defendant's willful actions and inactions,* combined with numerous nearby subdivisions and development, created an impetus to subdivide which was not reasonably foreseeable at the time of the 2010 New Road Reclassification.

the takings necessary to create TH 26." As a matter of historical fact, the present TH-26 corridor was re-routed from where it was first laid out *for the purpose of a mutually beneficial Town Highway which simultaneously established a public right to vehicular travel on the town highway* ***and*** *a private right of vehicular access to abutting private property by way of the town highway.* At the time of purchasing NR-144, Plaintiff had the reasonable expectation of owning "51.64 +/- acres," but the actual survey acreage of Plaintiff's parcel is 51.3 acres *due to the historical rerouting of TH-26*. Plaintiff is unaware of evidence to substantiate the claim compensation was provided to the predecessor in title of parcel NR-144 (as opposed to other parcels) for the change in acreage to NR-144 caused by the rerouting.[4]

Elements of the Procedural Due Process and Takings causes of action which have been sufficiently plead in both the Original and Amended Complaint before this Court include (1) the *conversion* of what was once a mutually beneficial town highway into a public recreational destination to benefit a few individuals at Plaintiff's expense without any genuine procedural due process, (2) Defendants' *willful* decision to take Plaintiff's previously promised and rightful vehicular access without just compensation, and (3) Defendants' efforts to advertise

[4] Plaintiff does not seek, and never has sought, compensation for the historical rerouting of TH-26 *as a public through-road which provided the concurrent self-executing private right of vehicular access to parcel NR-144.*

the entire "Crane Brook Area" as a public recreational destination without *any* mitigation or compensation for resultant impacts or the taking of Plaintiff's privacy in the middle of over 50 acres of *private* property.

III(B)(b). Procedural Due Process Causes of Action

Defendants' choice to quote Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994 (1972) is apropos to the present claim: "an opportunity to be heard must be granted *at a meaningful time and in a meaningful manner."*

Defendants reference Plaintiff's *meaningless* "opportunity" to *eventually* present evidence to the County Road Commissioners but ignore the County Road Commissioners, *despite assuming certain false claims presented by Defendants' as true*, found "The Town cannot now insulate itself from its responsibilities to maintain the "trail" portion of Town Highway 26…" (Exhibit #6). Literally nothing in Plaintiff's Complaint goes against the Full Faith and Credit Act, 28 U.S.C. § 1738, which requires that federal courts "give the same preclusive effect to a state-court *judgment* as another court of that State would give." *Exxon Mobil Corp. v. Saudi Basic Indus.* Corp., 544 U.S. 280, 293 (2005). A non-chronological administrative review of *Defendant-fabricated records* has absolutely no preclusive effect. Exhibits #1 - #6 contain a chronological sample of some of the most significant prior state court records referred to in ¶50 and ¶58 of Amended Complaint.

As the record demonstrates, the *Ketchum* precedential decision the word "*altered*" would no longer apply to reclassifications, or extreme dereliction of road maintenance responsibilities, results in no procedural due process protections at all; *municipal defendants throughout Vermont now have unlimited "discretion" to rescind a landowner's prior self-executing rights of vehicular access* by discontinuing a town highway *and* reclassifying the former town highway right of way into 49.5' wide public "trail" to block landowner reversionary property rights.

Plaintiff's Complaint also includes a plethora of material facts demonstrative of Defendant town officials having failed to recuse themselves from municipal decisions when conflicts of interest are readily apparent; no reasonable jury would believe the town officials involved in the *sua sponte* 2010 New Road reclassification were impartial (Amended Complaint ¶57 and ¶59).

The factual elements and preceding history of *Gauthier v. Kirkpatrick* referenced by Defendants, which arose after criminal proceedings and involved a plaintiff that *inter alia* attempted to sue municipal judges and did not even bother to respond to a motion to dismiss, has nothing in common with the present case. The issues of the present case are solely Defendants' actions and inactions (Amended Complaint ¶60), which were never permitted a *meaningful* time *or* manner to be heard due to Defendants' conduct and the *Ketchum* interpretation of the word *altered* which resulted in a non-chronological judicial administrative

review being limited to an "on the record" review of a *Defendant-fabricated* record (Amended Complaint ¶76).

III(B)(c). Substantive Due Process of Causes of Action

The 9th Amendment, *is actionable under very narrow factual situations* against the States due to the 14th Amendment, recognizing, "The enumeration in the Constitution, of certain rights, shall not be construed to *deny or disparage others retained by the people*." The plain reading of the 9th Amendment and relevant history necessitated a lack of specificity to preserve unenumerated rights.

Plaintiff has adequately alleged the Town of Underhill's advertisement of the "Crane Brook Area" has been, and continues to be, the proximate cause of an abnormally high number of random violations of Plaintiff's privacy at his domicile.

Katz v. United States, 389 U.S. 347 (1967) overturned *Olmstead v. United States*, 277 U.S. 438 (1928) and adds emphasis to Mr. Justice Brandeis' dissenting opinion from the *Olmstead v. United States* decision which involved the principles underlying the Constitution's guarantees of the right to privacy:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. (as quoted in *Griswold v. Connecticut* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510)

Plaintiff has provided factual support for the direct and sole causes of Plaintiff's loss of privacy at his domicile in the middle of over 50 acres of *private* property is the Town of Underhill's conversion of a segment of TH-26 into the "Crane Brook Trail," and persistent advertisement of the "Crane Brook Area" as a recreational destination while *willfully* refusing to either manage public use or make *any* genuine attempt to discourage the public from exploring nearby private property.

In addition, Article IV Section 2 Clause 1 (Privileges and Immunities Clause) unequivocally confers the right of an out-of-state resident to "be entitled to all Privileges and Immunities of Citizens" as granted a resident of the state they are visiting. As a matter of logic and law, the non-specificity of the 9th Amendment ensures the 'Privileges and Immunities' guaranteed[5] to an "out-of-state" resident as equally actionable for an "in-state" resident.

Unlike Federal eminent domain authority, Vermont's Constitution has more limitations on local municipal eminent domain powers (see ¶114 of Plaintiff's Amended Complaint); lack of eminent domain authority to take private property for public recreation and the precedent set in *Preseault v. United States* (U.S. Ct. of Appeals, Federal Circuit 1996) was certainly known by Defendants given decades of *extensive* legal advice. The long history of Defendants' conduct is

[5] Either by judicial precedent (as in the case of the right to privacy), *or when explicitly both guaranteed and actionable in a relevant State Constitution* (as in case of the rights outlined in ¶112-¶122 of Plaintiff's Amended Complaint)

prima facie evidence Defendants sued in an individual capacity had *malicious* intentions to take property rights from others for recreation and personal gain.

III(B)(d). First Amendment Causes of Action (censorship and manipulation of public records, and retaliation for Plaintiff's protected speech)

Defendants misconstrue the narrow applicability of the Court findings in *Tylicki v. Schwartz* which explicitly states, "His allegation…that Schwartz began investigating him only after he publicly criticized the State University of New York at Binghamton is not properly before this Court as it was not raised in the district court." *See Westinghouse Credit Corp. v. D'Urso,* 371 F.3d 96, 103 (2d Cir. 2004) ("In general we refrain from passing on issues not raised below.").

Steuerwald v. Cleveland, 2015 U.S. Dist. LEXIS 44246, *18 (D. Vt. 2015) is likewise inapplicable and extremely narrow in scope since, "The inaccuracy of records compiled or maintained by the government is not, *standing alone,* sufficient to state a claim of constitutional injury under the due process clause of the Fourteenth Amendment." The *willful* and *repetitive* "inaccuracy" of public records demonstrates Defendants' *mens rea.* As opposed to theoretical harm, prayers for relief K, O and P articulate harm suffered, the proximate cause of which was the *willful* and *repetitive* censorship and manipulation of public records.

Plaintiff has alleged a plethora of the facts which constitutes First Amendment retaliation claim according to Revels v. Vincenz (382 F.3d 870):

> (1) he engaged in a protected activity, (2) the government official[s] took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity.

III(B)(e). First Amendment Causes of Action (violation of right to petition).

The duly submitted petitions Plaintiff submitted with the support of over 5% of the Town of Underhill's voters were quite literally circumvented by Defendants named under the Eleventh Cause of Action despite many of the officials having obtained their position either unopposed or as a write-in; Defendants' refusal to allow the 2020 Petition on Public Accountability to be voted on, despite the support of over 200 Underhill Voters, is starkly contrasted by an eagerness to self-deal or appease a handful of residents *depending upon who they are* (even to the extent of spending public funds for legal advice on how to go against a State of Vermont speed study *simply because the right person asked*)[6].

As alleged, Defendants' have a pattern and practice of refusing to abide by multiple duly submitted petitions; *willfully* obstructing petitions supported by over 5%-15% of Underhill's voters stands in stark contrast to Defendants' eagerness to entertain requests made by the right person or clique of people, even if doing so increases town legal expenses for trivial matters (such as footnote 6 below).

---

[6] December 15, 2020 Selectboard meeting minutes, "Dan said two issues were discussed during the executive session. The first was the speed study. We are going to contact the CCRPC, the originators of the study, and develop a plan in order to justify a lower speed limit than what the speed study indicates and get their support for doing that… Bob said the second discussion was about the petition presented by David Demarest. The board is going to take that matter under consideration, and draft a response and will take the item up again..."

Plaintiff separated the right to petition clause of the first amendment from the censorship/manipulation of public records and retaliation cause of action because as a separate cause of action there should not be any contested facts. Which leaves only three questions to be decided under the 11th and 12th causes of action: (1) Does the First Amendment support voters *right to petition?* (2) If so, can voters compel a municipality to add articles to a ballot if supported by sufficient voter support under state law? (In Vermont, 5% of a municipality's registered voters is sufficient for both legal and practical reasons). (3) Does the Right to Petition preclude a municipal official with a clear conflict of interest from involvement in the municipality's response to said duly submitted petition?

III(B)(f). Claims of collusion and conspiracy.

Plaintiff has not attempted to advance any claims under 42 U.S.C. § 1985(3) under the assumption that such claims require the element of having been motivated by being a member of a racial or other already named protected class. The invidious discriminatory animus exhibited by individually named town officials, many of which are or were also Jericho Underhill Land Trust ("JULT") affiliates, against Plaintiff as a *landowner* that simply wanted his property rights to be respected (such as allegations stated in ¶126 of Plaintiff's Amended complaint) may justify the addition of causes of action under 42 U.S.C. § 1985(3) after discovery.

Claims of collusion and conspiracy by individually named town officials (and members of the Jericho Underhill Land Trust) to violate Plaintiff's civil rights are directly relevant to present 42 U.S.C. § 1983 action by demonstrating the merit of the prayers for relief presently sought while also further substantiating causes of action either caused or exacerbated by a *willful* lack of *impartiality* among colluding town officials in efforts to violate Plaintiff's civil rights. Both absolute and qualified immunity defenses, although not presently raised by Defendants, do not shield Defendants from the merit of any present causes of action.

Equally notable in 42 U.S.C. § 1983 claims, while the Court may award punitive damages for defendant conduct that is merely reckless or callous, awards rightly seek to "punish the defendant for his willful or malicious conduct and to deter others from similar behavior." (Memphis Community School Dist. v. Stachura, 29 477 U.S. 299, 306 n.9 (1986)). The merit of facts alleged, such as ¶51 of Plaintiff's Amended Complaint, *and the degree and duration of collusion among individually named Defendants* are directly relevant to determination of "the degree of reprehensibility of the Defendants' conduct."

III(C) Defendants again attempt to avoid accountability by misapplication of applicable statutes of limitations.

In addition to legal considerations of *equitable tolling, equitable estoppel*, and *promissory estoppel*, a few of the most notable recent factual allegations which

demonstrate the statute of limitations does not apply to present claims and the taking of Plaintiff's private right of access over the Crane Brook Trail:

1) November 13, 2019 was the *first instance* the Town of Underhill refused to move the boulders which were sporadically placed in the way of Plaintiff's southerly access route on the current and former TH-26 corridor (reference ¶153 and ¶154 of Amended Complaint)
2) Plaintiff has made use of the entire TH-26 corridor with personal motor vehicles openly since 2002, albeit with increasingly *extreme difficulty* due to Defendant Town of Underhill's refusal to provide *any* maintenance to the Crane Brook Trail, *or* even permitting Plaintiff to maintain the Crane Brook Trail portion of TH-26 for access at his own expense.
3) It was not until February 26, 2021, *despite well-reasoned dissenting opinion*, that the Vermont Supreme Court granted the Town of Underhill discretion to *rescind* Plaintiff's *self-executing and exercised* prior right of access over the "Crane Brook Trail."

For the purposes of present causes of action involving the taking of Plaintiff's property, present causes of action were timely filed. It is largely immaterial if the accrual date is deemed to be **February 26, 2021** (the date of the official rescinding of Plaintiff's private right of access on the portion of TH-26 converted into the Crane Brook Trail, and the confirmed taking of the vast majority of Plaintiff's

reasonable investment backed returns), or **June 21, 2019** (the date of the wise decision by the United States Supreme Court in *Knick v. Township of Scott* which conferred standing to bring present Takings claims in this Court, instead of Plaintiff exhausting all Sisyphean pursuits of "potential" state remedies which already consumed ~12 years of Plaintiff's *diligent efforts* in lower courts. Defendants also failed to account for the tolling due to COVID's State of Emergency.

Dixon v. United States, (1999 U.S. App. LEXIS 13215 (10th Cir. Okla. 1999)) provides solid rationale for equitable tolling of Plaintiff's present causes of action.

III (D) Claim Preclusion

The past Vermont court decisions based upon an appropriate standard of judicial review for issues presently raised and genuine facts (as opposed to the portions of the prior state litigation legal record riddled with intrinsic and extrinsic fraud) are:

A. The un-appealed Vermont court decision May 31, 2011 (Docket No S0234-10, which found Defendants' claim that a 2001 New Road Reclassification had occurred was in fact entirely invalid),
B. The findings of Chittenden County Road Commissioners for Docket No 234-10 CnC (Dated June 26, 2013, "Repairs are to consist of those repairs recommended by petitioner, consulting engineer, John P. Pitrowski, P.E., as set forth in a letter to petitioners' counsel dated November 21, 2012...").
C. Despite the Road Commissioners finding entirely in favor of Plaintiff, they still did not take into account all relevant historical facts, such as a prior Town of Underhill Road Foreman's factual knowledge and the malicious intentions of a clique of Town Officials which is self-evident from over 20 years of public meeting minutes, which were never allowed into the record.
[Exhibit #1 of Filing #45 is an example of relevant history kept from incorporation into the prior state court legal record]

The doctrine of Claim preclusion requires a final decision *"on the merits."* The *prior non-chronological appellate-style reviews of Defendants' administrative decisions are not decisions on the merits* for the purposes of any of the *civil rights* causes of action currently before this Court so claim preclusion does not apply to any of the present causes of action or requests for relief.

In addition, as a matter of law an unasserted permissive counterclaim does not provide the requisite element for claim preclusion. Prior to the February 26, 2021 Vermont supreme court decision (*Vermont Supreme Court Docket No 2020-098)* there was no legal ambiguity that a landowner abutting a town highway held a private right of vehicular access to their property by way of a current or former Town Highway in accordance with common law, Vermont *19 V.S.A. §717(c)*, and in present case the fact Plaintiff has continued to exercise this *self-executing* right to access his domicile by way of New Road despite extreme difficulty the proximate cause of which was created by the *willfully* deteriorated condition of the former roadbed and the unpredictability of whether or not there will be boulders or vehicles in the way. Plaintiff has standing to seek injunctive relief to end the present unconstitutional interpretation of Vermont law due to *Ketchum v. Town of Dorset* precedent; relief sought in the Amended Complaint is in accordance with *28 U.S.C. § 1738* since it simply seeks this Court to extend full faith to prior *genuine* findings of fact (specifically B and C of Amended Complaint).

As alleged in Plaintiff's complaint, due to the *Ketchum v. Town of Dorset* decision to which Plaintiff was not a party, the subsequent interpretation of Vermont law prevents any genuine determination "on the merits" of cases involving a municipal conversion of a town highway into a public trail which denies landowners' prior vehicular use. Extreme levels of arbitrary and capricious municipal road maintenance decisions which result in an alteration of the usability of a town highway are likewise *entirely discretionary*. As emphasized in ¶76 of Plaintiff's Amended Complaint, *Ketchum's* precedent causes interested parties to receive "no fact-finding. It is an appellate-style review of an administrative decision." (Referenced court document is attached as Exhibit 5).

The change from the right of a Rule 74 appeal to only a cursory Rule 75 appeal allows municipal defendants to serve as their own adjudicator when interested parties either appeal a conversion of a town highway into a public trail, or three landowners file a Notice of Insufficiency involving *extreme* failures to provide reasonable and necessary maintenance to a town highway.

III (E) and (F)

Plaintiff humbly requests this Court's understanding as to the length of the complaint given to the duration of factual history of claims raised, the number of town officials directly involved, and the degree of collusion alleged to have occurred among town officials (and Jericho Underhill Land Trust affiliates).

Reference to records of public meetings (Amended Complaint ¶51-52, ¶97, ¶164, ¶179, ¶186-187, ¶191-193, ¶204, ¶207 ¶243-245, and ¶271) should not be misconstrued as vague or conclusory; it is axiomatic Defendants have greater access to their own public records than Plaintiff. Plaintiff should not be faulted for allegations any reasonable jury would make when presented with all relevant evidence. Plaintiff has certified under Rule 11, "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Dismissal of claims against the twelve Defendants referenced under III(E) would be premature and inappropriate based on the context of present causes of action and ¶45 of the Amended Complaint. Plaintiff believes discovery to be the time to fully substantiate causes of action against each Defendant; at a minimum, Plaintiff should be granted leave to amend additional allegations involving each Defendant presently named. Exhibits #8 - #9 are a *partial example* of records supporting elements of claims against Defendants Seth Friedman and Anton Kelsey.

In Summary

Plaintiff's complaint pleads discrete claims in separate counts which have merit. The taking of Plaintiff's property without compensation is distinct from the Procedural Due Process violation which occurred when Defendant Town of Underhill, and other Defendants involved in the 2010 New Road Reclassification,

crafted a record in support of a *predetermined* result in *willful* indifference to Plaintiff's procedural due process rights. Defendants also violated Plaintiff's Ninth and Fourteenth Amendment substantive due process rights to privacy and protection of explicit state constitutional rights.

Defendants' regular use of legal advice conferred undeniable knowledge of *Presault v. United States, 100 F.3d 1525 (Fed. Cir. 1996)* and that recreation (and self-dealing) are impermissible justifications for municipal takings in Vermont.

Retaliation for Plaintiff's protected speech, willful censorship and misrepresentation of the public record, and violation of the right to petition have merit on their own and emphasize a *malicious disregard* for constitutional rights.

The argument of *equal but separate* access and privacy after the conversion of a central segment of TH-26 into an unmaintained public recreational destination *which rescinds self-executing landowner access rights* is fundamentally flawed. None of Defendants' arguments and "shotgun approach" of potential legal technicalities diminish the merit of present causes of action.

For the above stated reasons, the Motion to Dismiss filed should be denied.

Respectfully submitted this 17th day of September 2021.

By: /s/: David Demarest
David P Demarest, *Pro Se*
P.O. Box 144
Underhill, VT 05489
(802) 363-9962
david@vermontmushrooms.com

Index Describing Each Exhibit

Exhibit 1: Plaintiff (*and former co-litigants)* "Notice of Insufficiency/Invalid Effort to Reclassify Town Highway 26 as a Trail," dated February 17, 2010, "the Petitioners…ask that the Town simply acknowledge its statutory obligations and begin maintaining the entire length of TH26…in the manner that it should have been maintained over the last several years, consistent with 19 V.S.A. §302(a)(3)(9)(B) and the Map on file with VTrans."

Exhibit 2: Defendant Steve Walkerman's "Response to Notice of Insufficiency" as Chair for the Underhill Selectboard, "The Town is maintaining the Class 3 portion of TH26. The Town is required to maintain the Class 4 portion to the extent required by the necessity of the Town, the public good and the convenience of the inhabitants of the Town. In the opinion of the Selectboard, the Class 4 portion of TH 26 is being so maintained. The Town is not required to maintain a legal trail," dated February 19, 2010.

Exhibit 3: Vermont Superior Court Ruling "the Town's 2001 attempt to reclassify TH26 was not valid…" (Docket No. S0234-10 Cnc, dated May 31, 2011).

Exhibit 4: Affidavit of Christian Fuller dated February 28, 2012, "the town highway department stopped removing beaver dams and clearing out the culvert. As a result, the water level of the beaver pond was raised to the point where it began flooding the road."

Exhibit 5: Vermont Superior Court Decision on Motions for Summary Judgement (Docket No. S 0234-10 CnC and Docket No. 937-10 CnC, dated June 26, 2012), "See *Ketchum v. Town of Dorset*, 2011 VT 49 (mem) … There is no fact-finding. It is an appellate-style review of an administrative decision."

Exhibit 6: Report of County Road Commissioners, (Docket No 234-10 Cnc, dated June 26, 2013), "Repairs are to consist of those repairs recommended by petitioners…"

Exhibit 7: Emails between Plaintiff and Defendant Seth Friedman dated November 25, 2020 - November 28, 2020, Plaintiff's recent appeal to Underhill Recreation Committee members involving the Best Management Practices of the Underhill Trails Handbook, "I would be very grateful if we could work together to achieve a reasonable level of public maintenance of public infrastructure…"

Exhibit 8: Underhill Recreation Committee Minutes for January 21, 2021, "After meeting with abbutting [*sic*] land owner Dave Demerest [*sic*], it was determined he was not supportive of bridge idea and money was pulled out of the budget..."

Respectfully submitted this 17th day of September 2021.

By: /s/: David Demarest
David P Demarest, *Pro Se*
P.O. Box 144
Underhill, VT 05489
(802)363-9962
david@vermontmushrooms.com

Certified Article Number
7160 3901 9845 5756 8576
SENDERS RECORD

DRM
DOWNS RACHLIN MARTIN PLLC

CHRISTOPHER D. ROY
croy@drm.com

February 17, 2010

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Town of Underhill Selectboard
c/o Steve Walkerman, Chair
Town of Underhill
P.O. Box 32
Underhill Center, VT 05490

Re: Notice of Insufficiency/Invalid Effort to Reclassify Town Highway 26 as a Trail

Dear Mr. Walkerman:

On behalf of David Demarest, Jonathan Fuller and Jeffrey Moulton (collectively, the "Petitioners"), each of whom are residents of the Town of Underhill (the "Town"), I am submitting this Notice of Insufficiency to you and the Town's Selectboard (the "Selectboard") pursuant to 19 V.S.A. § 971. In particular, the Petitioners request that (i) the southernmost 1.06-mile segment of Town Highway 26, a/k/a New Road/Fuller Road ("TH26") immediately be repaired and maintained as a Class 3 town highway, (ii) the remainder of TH26 be immediately repaired and maintained as a Class 4 town highway, and (iii) the culvert near the intersection point between the Class 3 and Class 4 segments of TH26 (the "Culvert") be immediately repaired and maintained in a manner designed to preserve the TH26 roadbed along its entire length.

According to the Town's highway map (the "Map") currently on file with the Vermont Agency of Transportation ("VTrans"), TH26, which runs from Pleasant Valley Road to Irish Settlement Road, is 2.60 miles in length. The southernmost 1.06-mile segment of TH26 is shown on the Map as a Class 3 town highway, while the remainder of TH26 (1.54 miles in length) is shown as a Class 4 town highway.

In 2001, the Selectboard apparently convened a hearing to consider reclassification of the segment of TH26 running from the location of the town garage to a point near the northerly boundary of Mr. Demarest's property. It appears that notices were sent out and published, and

that a site visit took place, all in accordance with 19 V.S.A. § 709. The Selectboard then apparently conducted some form of hearing to consider the issue on October 18, 2001. At that point, the paper trail breaks down.

My firm's research has been unable to locate a final, typed version of the minutes for the Selectboard's October 18, 2001 meeting. Instead, we have only located handwritten, draft minutes. Nor have we been able to locate minutes for any subsequent meeting during which the Selectboard formally approved the draft October 18, 2001 minutes. The Town's attorney, Vincent Paradis, Esq., has not directed my attention to any such documents.

More importantly, our review of the Town's Land Records does not reveal the preparation and recording of the Selectboard's return pursuant to 19 V.S.A. § 711. Again, Attorney Paradis has not directed my attention to any such recorded document. Section 711 requires that, ***within 60 days of the hearing***, "the selectmen ***shall*** return the original petition with a report of their findings and of the manner of notifying the parties together with the survey or discontinuance, to the town clerk's office. Their order laying out, altering, reclassifying or discontinuing the highway, with the survey, ***shall be recorded by the clerk***." (Emphasis added).

The recording of a formal order by the Selectboard is crucial because the right of appeal to the Superior Court enjoyed by any person "owning or interested in lands through which the highway is laid out, altered, or resurveyed …" is dependent upon the recording of the return. More precisely, 19 V.S.A. § 740 allows for an appeal to the Superior Court "within 30 days after the order of the selectboard members on the highway ***is recorded***." (Emphasis added). *See generally Gabriel v. Town of Duxbury*, 171 Vt. 610 (2000) (mem.) (acknowledging that the right of appeal set forth in 19 V.S.A. § 740 applies to reclassification proceedings). In addition, the final act rendering a reclassification legally valid is its recording within 60 days of the hearing. If 60 days elapse with no order being recorded, any effort to reclassify the town highway becomes void.

Subsequently, the Selectboard ceased maintaining the portion of TH26 it had "reclassified" as a legal trail. This included a failure to properly maintain the Culvert. Over time, the Town's lack of maintenance has allowed the Culvert to fail and the roadbed to severely erode. This has created additional environmental problems due solely to the Town's failure to maintain TH26 consistent with its statutory obligations. Then, in 2002, the Selectboard enacted the Underhill Trail Ordinance (the "Ordinance"). The Ordinance purported to impose restrictions on the use of motor vehicles along the segment of TH26 that the Selectboard had "reclassified" as a legal trail, though the Ordinance's enforcement has been inconsistent at best.

In the meantime, the Town has never submitted a revised highway map to VTrans. Thus, the Town has apparently continued to receive state aid pursuant to 19 V.S.A. § 306 for the entire 1.06-mile segment of TH26 that continues to be shown on the Map as a Class 3 highway. This is the case despite the Selectboard's supposed reclassification of a portion of the Class 3 town highway as a legal trail ineligible for state aid, and its discontinuance of maintenance efforts beyond the town garage.

As noted above, the Selectboard was obligated to file in the land records within 60 days of issuance its order reclassifying as a legal trail any portion of TH26 formerly classified as either a Class 3 or Class 4 town highway. In a case in which I successfully represented private citizens objecting to the invalid discontinuance of a town highway, the Vermont Supreme Court made it clear that the process for laying out, altering or discontinuing highways "'is wholly statutory and the method prescribed must be substantially complied with ***or the proceedings will be void***.'" *In re Bill*, 168 Vt. 439, 442 (1998) (quoting *In re Mattison*, 120 Vt. 459, 462 (1958)) (emphasis added). Here, the Town did not comply with the mandatory aspects of the reclassification procedure identified through the use of the statutory term "shall." Consequently, the Town did not substantially comply with the process for reclassifying a portion of TH26, and thus its effort at reclassification was and is void.

Regardless of its intent, the Selectboard never validly reclassified TH26 in 2001, or at any time thereafter. Given the undisputed circumstances discussed above, the Petitioners are submitting this Notice of Insufficiency pursuant to 19 V.S.A. § 971, and ask that the Town simply acknowledge its statutory obligations and begin maintaining the entire length of TH26 as a Class 3 and Class 4 town highway – i.e., in the manner that it should have been maintained over the last several years, consistent with 19 V.S.A. § 302(a)(3)(B) and the Map on file with VTrans.

The Petitioners look forward to a timely response within 72 hours pursuant to 19 V.S.A. § 971.

Very truly yours,

Christopher D. Roy

David Demarest Jonathan Fuller Jeffrey Moulton

cc: Vincent A. Paradis, Esq. (via first class mail)
Mr. David Demarest (via first class mail)
Mr. Jonathan Fuller (via first class mail)
Mr. Jeffrey Moulton (via first class mail)

3465137.1

7160 3901 9845 5756 8576

TO: Town of Underhill Selectboard
c/o Steve Walkerman, Chair
Town of Underhill
P.O. Box 32
Underhill Center, VT 05490

SENDER: CDR

REFERENCE: 09998-0000002

PS Form 3800, January 2005

RETURN RECEIPT SERVICE	Postage	0.44
	Certified Fee	2.80
	Return Receipt Fee	2.30
	Restricted Delivery	0.00
	Total Postage & Fees	5.54

US Postal Service
Receipt for Certified Mail
No Insurance Coverage Provided
Do Not Use for International Mail

POSTMARK OR DATE
BURLINGTON VT 05401-9998 FEB 17 2010 USPS

2. Article Number
7160 3901 9845 5756 8576

3. Service Type **CERTIFIED MAIL**

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

1. Article Addressed to:
Town of Underhill Selectboard
c/o Steve Walkerman, Chair
Town of Underhill
P.O. Box 32
Underhill Center, VT 05490

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly) Rene C. Linde
B. Date of Delivery 2/18/10
C. Signature ☒ Agent ☐ Addressee
D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

Reference Information
09998-0000002
CDR

PS Form 3811, January 2005 Domestic Return Receipt

TOWN OF UNDERHILL
PO Box 32
Underhill Center, VT 05490
Phone: (802) 899-4434 Fax: (802) 899-2137

February 19, 2010

Christopher D. Roy, Esq.
Downs Rachlin Martin PLLC
199 Main Street PO Box 190
Burlington, VT 05402-0190

Re: Notice of Insufficiency - Underhill, Vermont Town Highway 26

Dear Attorney Roy,

Pursuant to 19 V.S.A. §971, this letter is in response to your February 17, 2010 letter ("Notice of Insufficiency/Invalid Effort to Reclassify Town Highway 26 as a Trail").

The Town of Underhill substantially complied with the applicable statutory requirements when it reclassified a portion of Town Highway 26 into a legal trail.

The Town is maintaining the Class 3 portion of TH26. The Town is required to maintain the Class 4 portion to the extent required by the necessity of the Town, the public good and the convenience of the inhabitants of the Town. In the opinion of the Selectboard, the Class 4 portion of TH 26 is being so maintained. The Town is not required to maintain a legal trail.

The Selectboard denies the allegation that the maintenance of Town Highway 26 is insufficient.

Sincerely,

Steve Walkerman, Chair, for the
Town of Underhill Selectboard

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

IN RE: TOWN HIGHWAY 26, UNDERHILL	Docket No. S0234-10 CnC

RULING ON PETITION SEEKING REVIEW OF NOTICE OF INSUFFICIENCY

This case is one of two cases before the court concerning a road in the Town of Underhill (the Town).[1] Some procedural background is necessary to understand the posture of this case and the issue presented. By a Notice of Insufficiency dated February 17, 2010 and addressed to the Town Selectboard, Underhill residents David Demarest, Jonathan Fuller, and Jeffrey Moulton (Petitioners) alleged that, beginning in 2001, the Town stopped maintaining a portion of Town Highway 26 (TH26),[2] the result of which was that that segment of the highway (the Segment) had fallen into disrepair. Petitioners requested that the Segment be immediately repaired and maintained. The Town responded in a letter dated February 19, 2010, stating that the maintenance of TH26 is legally sufficient because the Segment was reclassified as a trail in 2001 and the Town is not required to maintain a trail.[3]

On February 26, 2010, Petitioners filed this case pursuant to 19 V.S.A. §971, seeking an order that the Town perform the repairs and maintenance. That statute provides for the filing of a complaint in court or with the road commissioners, "setting forth in general terms the location of the highway or bridge and the nature of the

[1] The second case is Demarest v. Town of Underhill, No. S0937-10 CnC.

[2] Town Highway 26 is apparently also variously referred to as "New Road" and "Fuller Road."

[3] It is undisputed that towns are not responsible for maintaining trails. *See* In re Town Highway No. 20 of the Town of Georgia, 2003 VT 76, ¶3 n.*, 175 Vt. 626 (mem.) (citing 19 V.S.A. § 302(a)(5)).

insufficiency." Id. Road commissioners, who are appointed annually by the court, are then to inspect the road or bridge, determine what needs to be done, and order the town to do whatever they decide is needed. Id. § 972. The court clerk then issues judgment, which the town can appeal to the judge (a rather odd and unusual procedure). Id. § 976.

Here, the parties stipulated at a hearing on March 3 that the route in question has not been maintained as a road, only as a trail, because the Town says it reclassified the route to a trail in 2001. Petitioners say that the reclassification was invalid because the Town did not comply with the statutory reclassification procedures. The issue as presented by the parties is whether the Town's actions in 2001 were legally sufficient. At the present stage, then, this case does not require the commissioners to determine whether the "public good demands" that TH26 be repaired or maintained. 19 V.S.A. § 972. The question is what the *law* demands—i.e., whether the Segment was validly reclassified in 2001.

Petitioners' allegation of statutory non-compliance is akin to an assertion that the Selectboard lacked subject matter jurisdiction, and thus may be asserted at any time. In re Town Highway No. 20 of the Town of Georgia, 2003 VT 76, ¶ 10, 175 Vt. 626 (mem.) (citing In re Bill, 168 Vt. 439, 442 (1998)).[4] Prior to the adoption of V.R.C.P. 81(b), the proper remedy would have been to seek a writ of prohibition. *See* Petition of Mattison, 120 Vt. 459, 463 (1958). In modern practice, the procedural rule governing this issue is V.R.C.P. 75. Christopher D. Roy, Esq. represents Petitioners; Vincent A. Paradis, Esq. and John W. O'Donnell, Esq. represent the Town.

[4] The court therefore rejects the Town's laches argument, which appears in the Town's response filed April 4, 2011.

Background

The Underhill Selectboard held a meeting on May 30, 2001. There was a discussion on the reclassification of New Road. In a letter dated July 27, 2001, the Selectboard notified New Road residents, abutting landowners, and interested parties that it would conduct a site visit on Wednesday, August 29, and that the Board was also considering reclassifying portions of the road. On August 23, 2001, the Board issued a "Notice of Public Hearing" indicating that the Board would conduct a site visit on August 29, 2001, and hold a public hearing on September 4, 2001 to consider reclassifying a portion of TH26. A similar notice was published in the Burlington Free Press on August 24, 2001. The site visit was held on August 29, 2001.

The public hearing was held on September 4, 2001. In a petition dated September 5, 2001, about sixty individuals (including Jonathan Fuller and Jeffrey Moulton) asked the Selectboard to reconsider its proposal to "demote" any section of the New Road and proposed instead that it be repaired. The Selectboard held a meeting on September 13, 2001. A handwritten document titled "Selectboard Mtg 9/13/1" appears to be the minutes from that meeting . The document contains the following entry: "New Road—petition presented w/60 signatures to improve Road. Board to consider and discuss issue on 10/11 meeting. Jeff Moulton asked to meet with Steve Walkerman about placing a trail next to the road. Letter from Paul Gillies re: court scenarios." Town's Ex. A (filed Mar. 21, 2011), "Selectboard Mtg 9/13/01."

It is unclear whether the Selectboard held a meeting on October 11, 2001, but it is undisputed that it held a meeting on October 18, 2001. A handwritten document titled "Selectboard Meeting 10/18/01" appears to be the minutes from that meeting. Petitioners

argue that neither party has unearthed a "final, typed version" of minutes for the October 18, 2001 meeting. Petitioners also argue that there is no record that the Selectboard subsequently approved any minutes from the October 18 meeting. The Town argues that Selectboard minutes from 2001 were all handwritten and not formally adopted.[5] The minutes from the October 18 meeting include the following entry:

> Motion by Peter Brooks re: New Road. To reclassify approx. 4000' of New Road from a Class 4 to a Trail, starting just north of the Town Garage entrance for approx. 4000' to the property line of the Shakespear's on the East, Town of Underhill on the West and the Weenings on the North.
>
> Seconded by Ted Tedford.
>
> Discussion by Shakespear's—Rehash of past arguments.
>
> Stan Hamlet emphasized that we do not want to spend Town monies on New Road.
>
> Jeff Moulton: part of target area is in fact a class 3 Rd.
>
> Motion amended by Ted Tedford, seconded by Peter Brooks to read: "... from a class 3 / class 4 to a trail..."
>
> Passed unanimously.

Town's Ex. A (filed Mar. 21, 2011), "Selectboard Meeting 10/18/01." The Town asserts that the documents recording the 2001 reclassification of TH26 were all public records available in the Underhill Town Clerk's office. The Town does not assert that any of

[5] In support, the Town has supplied the affidavit of Sherri Morin, the Town Clerk for the Town of Underhill since 2003. Morin states that she has reviewed the Town records for Selectboard meetings in 2001, and that Selectboard minutes in 2001 were routinely handwritten and not usually formally adopted. Petitioners have not supplied any affidavits or materials to dispute Morin's assertions.

these documents were recorded in the Underhill land records, and the court takes it as undisputed that they were not.[6]

In 2002, the Selectboard adopted a Trail Travel Ordinance for the Crane Brook Trail, which the Ordinance defines as "the Legal Trail on New Road (Town Highway #26)." The Trail Travel Ordinance was adopted after public notice and an informational meeting.

Discussion

"When purporting to discontinue or reclassify a highway, a town must substantially comply with the statutory method for discontinuance or the resultant change will be void." In re Town Highway No. 20 of the Town of Georgia, 2003 VT 76, ¶ 10, 175 Vt. 626 (mem.) (citing In re Bill, 168 Vt. 439, 442 (1998)). The court presumes that actions taken by a selectboard within the scope of its duties are in accordance with statutory requirements. Id. "However, when a selectboard acts outside its statutory authority, it acts without jurisdiction and consequently its proceedings are void and may be impeached at any time." Id.

The process to reclassify a town highway may be commenced by petition or on the Selectboard's own motion. 19 V.S.A. § 708(a). Here, the record does not reveal any petition in writing from at least five percent of the Town's voters to reclassify TH26. Instead, it appears that the Selectboard commenced the reclassification process, as § 708(a) permits it to do. Petitioners concede that notices were sent out and published, and that a site visit took place, all in accordance with 19 V.S.A. § 709. Pet'rs' Mem. of Law Regarding the Invalidity of Purported 2001 Reclassification at 2 (filed Mar. 18,

[6] The Town does assert that the documents were "recorded by the clerk," presumably meaning written down by a clerk at the meeting, but does not go so far as to assert that the Town Clerk formally recorded any of the documents in the Town land records.

2011). The court therefore concludes that the reclassification process was properly commenced and that a site visit and public hearing were properly noticed and conducted.

Petitioners argue strenuously that the Town failed to comply with the following provision:

> Within sixty days after the examination and hearing, the selectmen shall return the original petition with a report of their findings and of the manner of notifying the parties together with the survey or discontinuance, to the town clerk's office. Their order laying out, altering, reclassifying or discontinuing the highway, with the survey, shall be recorded by the clerk.

19 V.S.A. § 711(a). Petitioners do not argue that any of the documents discussed above were not returned to the Town Clerk within sixty days. Their argument, as the court understands it, is that no "formal order" was ever (1) created or (2) formally recorded.[7]

The first sentence of § 711(a) specifies what the Selectboard is required to return to the Town Clerk's office: (1) the "original petition"; (2) "a report of their findings"; (3) a report of "the manner of notifying the parties"; and (4) "the survey or discontinuance." There was no petition, so the first provision is inapplicable here. It is undisputed that the notices were proper and that they were returned to the Town Clerk's office, so the third provision is satisfied. No survey was required, as there is no allegation that the right of way could not be determined, and there was no discontinuance. *See* 19 V.S.A. § 710. Thus, the fourth provision is satisfied.

As to the third provision, the court concludes that the minutes reflecting the vote are sufficient to satisfy the requirement for a report of the Selectboard's findings, despite

[7] Petitioners also assert that the Town never submitted a revised highway map to VTrans, and has thus continued to receive state aid pursuant to 19 V.S.A. §306 for the portion of the Segment that was previously a class 3 highway. The provisions of Chapter 3 of Title 19 do require that "[w]hen class 1, 2 or 3, or 4 town highways . . . are . . . reclassified, a copy of the proceedings shall be filed in the town clerk's office and a copy shall be forwarded to the [Agency of Transportation]." 19 V.S.A. § 305(b). However, this requirement does not appear in Chapter 7, Subchapter 2 of Title 19, and thus the court does not read it as a requirement for a valid reclassification.

their handwritten and informal nature, and that no more formal or detailed document is required by the statute.[8] *Accord* Freund v. Town of Hartland, Nos. 223-4-04 Wrcv and 227-5-04 Wrcv, 2005 WL 5872176 (Vt. Super. Ct. Sept. 13, 2005) (DiMauro, J.) (concluding that the term "findings" in § 711(a) for the purposes of a discontinuance means simply the result of the selectboard's deliberations). Likewise, although the second sentence of § 711(a) refers to the Town Clerk's duty to record the Selectboard's "order" of reclassification, the court concludes that the Selectboard's informal October 18, 2001 minutes reflecting the decision on the issue sufficiently constitute such an "order."

However, while the order was made available as a public record in the Town Clerk's office, it is undisputed that it was never formally recorded in the Town land records. Town clerks are required to record in the land records "instruments delivered to the town clerk for recording." 24 V.S.A. § 1154(a)(9). Section 711(a) requires the Selectboard's order to be delivered to the Town Clerk for recording, and thus § 1154(a)(9) requires the Town Clerk to do more than receive the order and make it available to the public—the Town Clerk is to record the order in the Town's land records. That was not done here.[9] Thus, the question becomes whether despite that failure the actions taken here constitute "substantial compliance" with the statutory requirements for reclassification.

---

[8] It is not entirely clear whether Petitioners are specifically alleging that the Selectboard failed to include a report of its "findings," but they do assert that no "return" was ever recorded. The court therefore addresses this issue.

[9] The basis for review in the nature of prohibition is that the *Selectboard* acted outside of its statutory authority. In re Bill, 168 Vt. 439, 442 (1998). The Supreme Court has not discussed whether the same basis applies when the *Town Clerk* fails to perform his or her duty to record a reclassification order. However, because it is a duty incorporated into § 711(a), the court concludes that it is one of the statutory requirements for reclassification, and that it could potentially deprive the reclassification proceedings of validity.

What constitutes substantial compliance is undefined, but the court looks to the purpose of the recording requirement to ascertain that here. Petitioners assert that the recording of a formal order is crucial because the right of appeal is dependent upon the recording of the return. Specifically, Petitioners assert that 19 V.S.A. § 740 allows for an appeal to the Superior Court "within 30 days after the order of the selectboard members on the highway is recorded" (emphasis added). That specific argument is unpersuasive because the Supreme Court has recently made clear that § 740 does not apply to reclassifications. Ketchum v. Town of Dorset, 2011 VT 49, ¶¶ 11–14 (mem.). Thus, the language in § 740 tying appeal rights to recordation does not apply.

Instead, the language of Rule 75 sets the time limit on the right to appeal. Under that rule, absent a court-ordered enlargement of time, "if no time limit is specified by statute, the complaint shall be filed within 30 days after notice of any action or refusal to act of which review is sought . . . ." V.R.C.P. 75(c). Thus, similar to § 740, Rule 75 creates a time limit for appeal based on notice.

Section 711(a) does not declare the purpose for the recording requirement, but in other contexts the recording of documents in the land records serves the purpose of giving notice of those documents. *See* Madowitz v. Woods at Killington Owners' Ass'n, 2010 VT 37, ¶ 24 (declaration which set forth developers' rights and which was filed in the land records gave deed holders constructive notice of those rights); Conn. Nat'l Bank v. Lorenzato, 602 A.2d 959, 961 (Conn. 1992) ("We have consistently held that the recordation of a valid mortgage gives constructive notice to third persons if the record sufficiently discloses the real nature of the transaction so that the third party claimant, exercising common prudence and ordinary diligence, can ascertain the extent of the

encumbrance."). Indeed, the Town appears to concede that a notice function is necessary. *See* Town's Mem. of Law (filed Mar. 21, 2011) ("The reclassification records provided the notice that TH26 had been reclassified.").

In addition to arguing that the records were publicly available in the Town Clerk's office, the Town argues that notice was supplied in various other ways. The Town asserts that it noticed and passed the Trail Ordinance in 2002, presumably in support of an argument that the Trail Ordinance would have provided additional notice that a portion of TH26 had been reclassified as a trail. The Town also asserts that Jeffrey Moulton and also David Demarest's predecessor in title had actual notice of the reclassification.

The court concludes that none of these circumstances constitutes substantial compliance with§ 711(a)'s recording requirement. Although the Town's public records did include the documents discussed above, the court cannot conclude that they supplied the constructive notice § 711(a) requires. It is true that the Supreme Court in New England Federal Credit Union v. Stewart Title Guarantee Co. noted that "records imparting constructive notice of matters relating to real property are not confined under our statutory scheme solely to documents recorded in the municipal land records." 171 Vt. 326, 332 (2000) (footnote omitted). However, the Court in that case specifically noted that at the time in question there was no statute requiring recordation in the municipal land records. *See* id. at 333 (noting that 18 V.S.A. § 1221b was not in effect at the time of the events in question). Here, § 711(a) was in effect for all relevant times, and thus individuals interested in road reclassifications could reasonably conclude that to learn about any reclassification, they would only need to consult the land records. Notice

of the Selectboard's action in the public records of its meetings would not constitute the constructive notice that § 711(a) requires.

Furthermore, even assuming that David Demarest, Jonathan Fuller, and Jeffrey Moulton had actual notice, that would not translate into substantial compliance with § 711(a). Section 711(a) requires recordation so that *everyone* will be on constructive notice. Thus, when § 711(a)'s recording requirement is complied with, there is an identifiable limit on the time for appeals by operation of V.R.C.P. 75. The Town's failure to provide constructive notice to the world undermines the expectation that reclassification decisions can be found in the land records and leaves open the possibility that appeals attacking the merits of those decisions might be filed years or even decades later by individuals claiming they did not know of the decision.[10] *Accord*, Hillelson v. Grover, 480 N.Y.S. 2d 779, 780 (N. Y. App. Div. 1984) ("The filing of surveyor's maps or tax maps in the county clerk's office is no substitute for the formal requirements" requiring recordation of an order laying out a highway).

Similarly, the subsequent passage of the Trail Ordinance did not supply constructive notice of the reclassification. It is not entirely clear from the Trail Ordinance itself that it relates to the Segment in question rather than to a trail that, for example, might run parallel to New Road. Ultimately, the Trail Ordinance is no substitute for constructive notice of the reclassification by recording in the land records.

[10] Of course, as here, an individual can attack a reclassification on jurisdictional grounds at any time. *See* In re Town Highway No. 20 of the Town of Georgia, 2003 VT 76, ¶ 10, 175 Vt. 626 (mem.) ("[W]hen a selectboard acts outside its statutory authority, it acts without jurisdiction and consequently its proceedings are void and may be impeached at any time.").

For all the above reasons, the court concludes that the Town did not substantially comply with the second sentence of § 711(a) when it attempted to reclassify TH26 in 2001. Accordingly, those proceedings are void.

Order

The court concludes that the Town's 2001 attempt to reclassify TH26 was not valid because the Town did not comply with the requirement that the Selectboard's order be recorded in the Town's land records. However, given the pendency of Demarest v. Town of Underhill, No. S0937-10 CnC, which addresses whether the Town has more recently reclassified the road properly, the court will stay any further action in this case pending resolution of that matter.

Dated at Burlington this 31st day of May, 2011.

Helen M. Toor
Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT
Chittenden County Unit

CIVIL DIVISION
Docket No. S0234-10 CnC

IN RE:)
)
TOWN HIGHWAY 26, UNDERHILL)

AFFIDAVIT OF CHRISTIAN FULLER

I, Christian Fuller, submit the following Affidavit with respect to the issues raised in the Motion for Summary Judgment filed by the Town of Underhill (the "Town") in the above-captioned appeal:

1. My name is Christian "Crick" Fuller. I have resided in the Town for my entire life, and I am 72 years old.

2. At the end of 2002, I retired after 28 years of employment as a member of the maintenance crew for the Town's Highway Department (the "Department").

3. I am making this Affidavit based upon my personal knowledge, information and belief. So far as this Affidavit is based upon information and belief, I believe such information to be true.

4. During my 28 years working for the Department, I was regularly assigned work to maintain, repair, and replace bridges, culverts, and other crossings. As part of my job duties for the Department, I was also regularly assigned work regarding the repair and maintenance of Town roads.

5. I am personally familiar with Town Highway 26 ("TH26"), which is now known as New Road to the south, and Fuller Road to the north.

6. I am personally familiar with the segment of TH26 which the Town is now claiming has been reclassified as a trail.

7. Attached is a list of TH26-related projects which I specifically recall working on over the years that involved the road segment now claimed to be a trail, as well as New Road and Fuller Road.

Dated at Underhill, Vermont this 28th day of February, 2012.

Christian R. Fuller
Christian Fuller

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

On this 28th day of February, 2012, personally appeared Christian Fuller, and made oath that the foregoing instrument, subscribed by him, is true.

Before me,

Notary Public

My Commission Expires: 2/10/15

7101948.1

ATTACHMENT TO AFFIDAVIT OF CHRISTIAN FULLER

TOWN HIGHWAY WORK BY CHRISTIAN FULLER ON THE SEGMENT OF TOWN HIGHWAY 26 THAT THE TOWN OF UNDERHILL NOW CLAIMS IS A TRAIL

1. Going back as long as I can remember and up into the 1970s, the Town of Underhill maintained a wooden bridge over the stream crossing where the beaver pond along Town Highway 26 drains to the south.

2. The crossing was necessary because that segment of road provided access to the old town dumps on Town Highway 26 for people coming from the north.

3. Sometime around the mid- to late 1970s, I was part of the town highway crew that removed the old wooden bridge and replaced it with a culvert and gravel. At the time, Norm Robarge was also a member of the highway crew, and I believe the town's road foreman was Richard Wells.

4. Over the years, I remember removing beaver dams from that beaver pond 5-6 times as part of the road crew to prevent water from the beaver pond flooding the low point of the road near the stream crossing.

5. In the 1980s and possibly afterwards, I remember being part of the road crew that cleared out the culvert that had replaced the wooden bridge at least 4-5 times.

6. Eventually, the town dumps on Town Highway 26 were closed.

7. At some point, the town highway department stopped removing beaver dams and clearing out the culvert. As a result, the water level of the beaver pond was raised to the point where it began flooding the road.

8. During the mid- to late 1970s, I remember the town highway crew running a bulldozer along this segment of Town Highway 26 to level it for maintenance purposes.

9. During the mid- to late 1970s, I remember the town highway crew replacing an existing culvert that diverted water from the east into the beaver pond at a point along Town Highway 26 further to the north.

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION

IN RE: TOWN HIGHWAY 26, UNDERHILL

DOCKET NO. S 0234-10 CnC

DAVID DEMAREST
v.
TOWN OF UNDERHILL

DOCKET NO.: 937-10 CnC

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

These cases concern a segment of the New Road (Town Highway 26) in the Town of Underhill. These are two of three cases, all of which concern efforts by abutting landowners to compel the Town to maintain the section in dispute as a Class IV road. The Town has filed a motion for summary judgment in S 0234-10 CnC and in S 937-10 CnC.

FACTS

The undisputed facts are as follows:

The New Road is a paved road from the intersection with the Pleasant Valley Road to the town maintenance garage. North of the town garage the New Road becomes a rough track through the woods. Depending upon the season, water runs freely down the middle of the road. About a mile north of the town garage, the source of the water becomes evident. There is a large impoundment of at least an acre on the westerly side of the road. An extensive beaver dam has raised the level of the impoundment several feet above the track. Water spills out of the impoundment and crosses the New Road on its way to a brook. A few hundred yards north of the impoundment, the New Road runs into the Irish Settlement Road which is maintained as a year-round gravel road. The Town continues to maintain the final, northernmost portion of the New Road as a Class IV road.

In the past, the New Road was passable along its entire length by cars and trucks. The middle portion south of the Irish Settlement Road and north of the town garage has fallen into disuse. One abutting neighbor David Demarest feels strongly that the Town should restore the New Road to a condition which would permit him to use it for access from the southerly end of his property. He currently has access to the northerly Class IV portion of the New Road from the the northern end of his property. He is joined in these cases by several other property owners.

In 2001, the Underhill Selectboard took steps to reclassify the middle segment of the New Road in dispute (the "Segment") as a trail. They conducted a site visit with notice to residents and

abutting landowners. They held a public hearing with notice by publication. They voted at a public meeting to reclassify the road to a trail. The following year, the Selectboard enacted an ordinance to govern use of the road which was renamed the Crane Brook Trail.

In a decision dated May 31, 2011, this court issued a decision voiding the reclassification because the Town had failed to record the Selectboard's order in the land records. The court ruled that "the Town's 2001 attempt to reclassify TH26 was not valid because the Town did not comply with the requirement that the Selectboard's order be recorded in the Town's land records."

Between 2001 and 2011, the Town did not maintain the Segment as a road at all. It was used for recreational purposes pursuant to the Crane Brook Trail ordinance.

In 2010, the Town repeated the reclassification process. Petitioners have challenged this reclassification in Docket No. S0937-10 CnC.

The disputed facts concern the use of the Segment in recent decades. Petitioners contend that the Town maintained a wooden bridge near the site of the current impoundment until town employees replaced it with a culvert in the 1970's. The Town denies that it placed a culvert in the Segment and maintains that any culverts were private.

ANALYSIS

I. Docket 234-10

In Docket 234-10, the petitioners seek a ruling from the Road Commissioners requiring the New Road to be restored to its pre-2001 condition. Only then, petitioners argue, can the Town and the court fairly consider whether the 2010 reclassification should occur. The Town argues that because it had good reason to believe that the Segment was a trail from 2001 until the court's ruling concerning the lack of recording in 2011, it cannot be required to restore a decade of benign neglect of a little-used road. It has moved for summary judgment on this basis.

The court starts with the perspective that its prior ruling has undone the 2001 effort at reclassification. Crane Brook Trail is returned at least for now to its prior status as a section of the New Road which is a Class IV road. The issue, therefore, is what is the maintenance obligation of the Town with respect to a road which it intends to reclassify as a trail. Must it spend substantial sums to make up for a decade of deferred maintenance for a road which it intends to reclassify within the next year? Or are the petitioners correct that fairness requires that the money be spent now to repair damage and deterioration which occurred during the years between the original reclassification vote in 2001 and the court ruling in 2011?

These questions are answered by 19 V.S.A. § 310(b) which places broad discretion with the Town to decide whether to spend maintenance dollars on a Class IV road. This discretion was recognized in *Town of Calais v. County Road Commissioner*, 173 Vt. 620 (2002).

The Town has enacted a Class IV Roads and Trail policy which provides for no maintenance of trails and minimal maintenance of Class IV roads during summer months only "except as required by necessity, and the public good and convenience of the inhabitants." In applying this policy to the Segment, the Town has explicitly decided not to spend money to maintain the road. Instead, it has sought to reclassify the Segment as a trail. Under the Road and Trails policy and under 19 V.S.A. § 310(c), reclassification amounts to a decision to withhold maintenance from any road which becomes a trail.

Since 2001, the Town has held public meetings, reclassified the Segment, and enacted a specific trail ordinance – all in the exercise of its discretion to cease maintenance of the New Road. The 2001 reclassification failed due to a recording mistake, but the record of public notice and public meetings clearly establishes the Town's decision, taken in a public manner and after receiving comment from opponents, to stop spending money to maintain the Segment.

The Town's discretion is not boundless. It cannot act in an arbitrary or discriminatory manner. The petitioners offer no record evidence which would support a finding of arbitrary or discriminatory decision-making. They seek to have the road maintained for their own reasons, but there is no showing that the Town's decision-making process was influenced by improper motives or some other unfair consideration.

In light of the broad discretion given to the Town over decisions concerning maintenance of the Segment, it is clear that the court lacks the authority to order the Town to restore the Segment to its pre-2001 condition at this time. The legislature has entrusted that decision to the municipality which has decided to spend its road budget elsewhere. This municipal decision is subject to review by the Road Commissioners. It is not one which the court can make through summary judgment at this time for two reasons:

First, to enter summary judgment at this stage would put the cart before the horse. Any final judgment must follow the Road Commissioners' ruling and is essentially an appeal of their decision. The initial decision is theirs to make and no appeal to Superior Court can happen until after they make it.

Second, the parties differ about the facts in some respects. They disagree about whether there were publicly-installed culverts on the Segment or private culverts. They disagree about how the extent of maintenance of the Segment by town employees in the 1970's and 1980's. In light of the reclassification efforts after 2000, these may not be the most critical facts, but they are in dispute and should be considered in the first instance by the Road Commissioners.

What to do next?

With these legal conclusions in mind, the court turns to the question of whether and how to enter judgment in Docket 234-10 which is brought pursuant to 19 V.S.A. § 971. Section 972 anticipates that the county road commissioners will conduct a hearing. Section 973 requires the

commissioners to submit a report. Any appeal to this court pursuant to section 976 must follow the commissioner's report– even in a case such as this which is commenced in the Superior Court.

Accordingly, the only order the court will enter at this time is a denial of the motion for summary judgment. The court will furnish a copy of this decision to the Road Commissioners so that they may complete their report. In the event of an appeal, the court will issue a final judgment. In addition, to the extent there was any uncertainty about whether the court would order immediate repairs, the court will not issue an interim order of its own requiring repairs to be made to the New Road. This is an issue for the Road Commissioners to make as they review the Town's decisions.

Now pending before the County Road Commissioners are the following petitions:

1. Docket No. 234-10 CnC

   The original request for review of road and culvert maintenance.

2. Docket No.: S 370-12 CnC

   A renewed request for review of road and culvert maintenance.

These two requests for review are ready for consideration by the Road Commissioners.

II. Docket S0937-10 Cnc.

The final docket is S0937-10 CnC. This is a direct appeal to the Superior Court of the most recent reclassification decision. This case does not require referral to the Road Commissioners. It is an on the record review pursuant to V.R.Civ.P. 75. See *Ketchum v. Town of Dorset*, 2011 VT 49 (mem). The court's role is to determine if there is adequate evidence to support the selectboard's decision. The court reviews only the record below without new evidence. There is no fact-finding. It is an appellate-style review of an administrative decision.

With the Rule 75 standard in mind, it is clear that there is no longer any reason to postpone consideration of the reclassification decision. There is no legal requirement that the road be brought back to its condition in 2001 before the court considers the issue of reclassification. This was the plan previously, but with the *Ketchum* decision in hand, it becomes clear that the only evidence to be considered by the court is the record of the selectboard decisionmaking which is already complete. There is no longer anything to wait for.

The plaintiffs' opposition reflects the prior plan of waiting for additional information about measures taken to repair the road after the selectboard's decision. The court allows the plaintiffs 15 days to supplement their response and to respond more substantively to the Town's argument that there is sufficient evidence to support the selectboard's decision. Although there is no Statement of Undisputed Facts, the Town has provided a detailed account of the evidence it

believes was before the selectboard when it voted for reclassification. The plaintiffs should have an opportunity to provide any supplemental information or to dispute whether the materials described were placed before the selectboard and formed a basis for its decision.

Once the court has heard from both sides, it will conduct a Rule 75 review of the evidence and issue a decision on the reclassification issue. The motion for summary judgment in this docket remains pending.

CONCLUSION

The Town's motion for summary judgment is denied in Docket No.:234-10 The two maintenance complaints are ready for decision by the Road Commissioners. The court will issue a decision in Docket No. 937-10 after receiving a supplemental response from plaintiffs.

Dated: 6/25/12

Geoffrey Crawford,
Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
CHITTENDEN COUNTY
ROAD COMMISSIONERS

IN RE: TOWN HIGHWAY 26, UNDERHILL
DOCKET NO. 234-10 CnC

REPORT OF COUNTY ROAD COMMISSIONERS

The above entitled matter came before the Chittenden County Road Commissioners duly appointed pursuant to Title 19 Section 970 of the Vermont Statutes Annotated by the filing of a Petition by the Petitioners, David Demarest, Jonathan Fuller and Jeffrey Moulton, three citizens or taxpayers in the state as required by 19 V.S.A. Section 971. The Petition was dated February 25, 2010.

ALLEGATIONS OF PETITION

The Petition, as filed, contains a written and signed "Verified Petition Seeking Review Of Notice Of Insufficiency By County Road Commissioners" (***See Exhibit A attached***) relating to Town Highway 26, a/k/a New Road/Fuller Road. The insufficiency of the road is alleged to be the Town's lack of maintenance allowed the culvert near the intersection point between Class 3 and Class 4 segments of Town Highway 26 to fail and the roadbed to severely erode. In addition, the petitioners have requested that the southernmost 1.06 mile segment of Town Highway 26, a/k/a New Road/Fuller Road ("TH26") immediately be repaired and maintained as a Class 3 town highway and the remainder of TH26 be immediately repaired and maintained as a Class 4 town highway.

The petition further alleges that the Town's highway map filed with the Vermont Agency of Transportation shows that TH26, which runs from Pleasant Valley Road to Irish Settlement Road, is 2.60 miles in length. The southernmost 1.06 mile segment of TH26 is shown on the map as a Class 3 town highway and the remainder of TH26 is 1.54 miles in length and is shown as a Class 4 town highway. The petitioners pursuant to 19 V.S.A. Sections 971-974 have requested that the County Road Commissioners review the allegations contained in the

petition and order the Town to perform the requested maintenance work on Town Highway 26.

The petition further recites the allegation that the Selectboard for the Town of Underhill convened a hearing in 2001 to reclassify the segment of TH26 running from the location of the town garage to a point near the northerly boundary of petitioner Demarest's property. As a result, after 2001 that portion of TH26 was no longer maintained by the Town and fell into disuse. By letter under date of February 19, 2010 the Town took the position that reclassification of that portion of TH26 was substantially in compliance with statutory requirements and the remaining Class 4 portion of TH26 was being maintained to the extent required by the necessity of the Town, the public good and the convenience of the inhabitants of the Town. As a consequence, the Town denied the allegation contained in the Petition.

As required by 19 V.S.A. Section 972, on April 19, 2010 the Chittenden County Road Commissioners conducted a site visit for the purpose of examining the highway. A public hearing to take evidence from interested parties concerning the insufficiency of the New Road segment of Town Highway 26 was held on January 15, 2013.

FINDINGS OF FACT

1. Town Highway 26 runs from Pleasant Valley Road to Irish Settlement Road a total distance of 2.60 miles in length.

2. The first segment of the road, also known as New Road, is a paved road leading from the intersection of Pleasant Valley Road to the town maintenance garage.

3.. The southernmost portion of Town Highway 26 is 1.06 miles in length and was classified as a Class 3 road.

4. As a result of the partial reclassification of Town Highway 26 in 2001 to a trail the 1.06 mile segment which was formerly a Class 3 road was reduced to 0.75 miles of Class 3 road.

5. As a further result of reclassification the trail segment is now 0.55 miles in length of which 0.31 miles is a former Class 3 road to the south and 0.24 miles is a former Class 4 road to the north.

6. As far back as the 1970's the Town of Underhill maintained a wooden bridge over the stream crossing where a beaver pond along Town Highway 26 drains to the south. ***See Affidavit of Christian Fuller attached as Exhibit B.***

7. The bridge crossing was necessary to allow access over the road from the north to the town landfill which presently no longer exists.

8. In the late 1970's the wooden bridge was replaced by a culvert and gravel.

9. Over the ensuing years from the 1970's beaver dams were removed which if left unattended would have allowed water from the beaver pond to flood the low point of Town Highway 26 near that point north of the former land fill where a stream crossed the road.

10. The culvert that replaced the wooden bridge was cleaned out on several occasions by the Town's road crew in the 1980's.

11. After the closing of the town land fill in the late 1980's or early 1990's, the town highway department stopped removing beaver dams and clearing out of the culvert.

12. As a result of the lack of maintenance of the culvert and clearing of the beaver dams the water level of the beaver pond rose to the point where the road began to flood and eventually erode.

13. During a period of time in the mid to late 1970's the town highway crew employed a bulldozer to level the segment of the Town Highway 26 in the vicinity of the beaver pond.

14. In the mid to late 1970's the town highway crew also replaced a second culvert located north of the location of the former wooden bridge.

15. Prior to 2001, in part, due to the closure of the town landfill Town Highway 26 fell into disuse.

16. Beginning in 2001 the Town of Underhill initiated a statutory process to reclassify part of the New Road portion of Town Highway 26 leading from the town maintenance garage a distance of 0.55 miles in a northerly direction.

17. Between 2001 and 2010 the Town of Underhill did not maintain the 0.55 mile segment of Town Highway 26 as a road.

18. As a result of reclassification to trail status the former road was used as a recreational trail in accordance with a trail ordinance enacted by the Town.

19. The "trail" section of Town Highway 26 presently has four (4) culverts.

20. Upon site visit, the culverts were determined to be in poor condition with evidence of sediment, without covers or undersized. One culvert was displaced and was found lying beside the road and not functional.

21. The roadbed of the "trail" section of Town Highway 26 was in some parts poorly maintained with evidence of ruts, flooding, washouts and minimal amounts of gravel.

22. The "trail" section of Town Highway 26 was examined on September 11, 2012 by an engineer employed by the Petitioners.

23. After conducting the examination, the engineer, John P. Pitrowski P.E. conducted a boundary survey of neighboring land owned by petitioners, Moulton and Demarest, a topographic survey of the road and a photographic survey.

24. The recommendations of Mr. Pitrowski to make the former roadway function as it did before maintenance efforts were abandoned by the Town of Underhill both before and after 2001 consisted of replacing the four culverts, raising the roadway near the beaver pond, installing gravel on the bad sections of the roadway, and repairing or replacing the beaver pond overflow structure.

25. A further recommendation of Mr. Pitrowski was that a reliable overflow device be installed for the beaver pond located on the west side of the "trail" section of Town Highway 26.

26. Mr. Pitrowski was of the further opinion that the lack of a reliable overflow device was allowing the water level to rise significantly above the road as evidenced by the existence of washouts and dam failures.

27. Based upon his professional knowledge, experience and direct observation of the "trail" section of Town Highway 26, Mr. Pitrowski was of the opinion that the preliminary cost estimate for the recommended upgrades was $63,000.00.

28. Mr. Pitrowski's cost estimate was principally based upon the fact that the "trail" section of the road had not been maintained on a regular basis since 2002. Had maintenance been ongoing the repair cost would have been significantly less.

29. Mr. Pitrowski was of the further opinion that the cost of annual maintenance of the "trail" section would be between $1,500 to $2,500 per year.

30. Mr. Pitrowski had no knowledge of the extent of maintenance of the "trail" section of Town Highway 26 prior to 2001.

CONCLUSIONS OF LAW

19 V.S.A Section 971 confers authority upon the Road Commissioners to examine the road, hold a hearing, and order the Town of Underhill to make the necessary repairs if it is determined that the highway is out of repair or unsafe for travel and that the public good demands that the highway be repaired. Based upon the examination of the road and the evidence adduced at the hearing, the Road Commissioners have concluded that the road is out of repair or unsafe for travel.

The conclusion of the Road Commissioners is based upon the opinion that the now "trail" section of Town Highway 26 fell into disuse after the closing of the town landfill some time in the late 1980's or early 1990's. Thereafter, the use of the "trail" section for the most part was by the petitioners and other adjoining property owners. Due to the lack of annual maintenance and periodic maintenance warranted by beaver activity and weather events the roadbed became deteriorated to the point that it was no longer functional for safe passage of motor vehicles.

The lack of maintenance by the Town of Underhill after the closing of the landfill influenced the decision making of town authorities in 2001 to seek a reclassification of a portion of Town Highway 26, (now known as the "trail" portion) from, in part, a Class 3 road, and, in part, a Class 4 road to a trail. The Road Commissioners are of the opinion that the further neglect of the "trail" portion of Town Highway 26 that ensued after reclassification cannot now be used to absolve the town of further responsibility for repair. Although the town did enact a Road Policy in 2002 which addresses the standards of care for trails and Class 4 roads, such policy did not exist prior to 2002 when maintenance of the road was of critical importance. The Town cannot now insulate itself from its responsibilities to maintain the "trail" portion of Town Highway 26 when its failure to properly maintain the road prior to 2001 created the circumstances which triggered the decision to reclassify it.

DECISION

For the reasons stated hereinabove, the Chittenden County Road Commissioners hereby order the Town of Underhill to undertake the following repairs to the "trail" portion of Town Highway 26. For purposes of this order the "trail" is that portion of the road leading in a northerly direction from the town garage at a point identified by a concrete monument located on the east side of the roadbed and proceeding a distance of 0.55 miles toward the land of petitioner, David Demarest, which end point is identified by a concrete monument adjacent to the roadbed. Repairs are to consist of those repairs recommended by petitioners, consulting engineer, John P. Pitrowski, P.E., as set forth in a letter to petitioner's counsel dated November 21, 2012 and incorporating all attachments thereto. ***See copy attached.*** As a cost saving measure, the Town is free to use its own staff and materials to accomplish the repairs.

CHITTENDEN COUNTY ROAD COMMISSIONERS

Dated: June 26, 2013 By: /s/ Daniel S. Triggs
Daniel S. Triggs

Dated: June 26, 2013 By: /s/ Alan J. Charron
Alan J. Charron

Dated: June 26, 2013 By: /s/ John Moran
John Moran

November 21, 2012

Mr. Chris Roy, Esq.
Downs Rachlin Martin, PLLC
199 Main Street, P.O. Box 190
Burlington, VT 05402-0190

Subject: *Town Highway 26, a/k/a New Road, Underhill, VT (Section of Road purportedly reclassified as Trail)*
Project # 2012057-2

Dear Chris:

At your request, I conducted a site visit with you to observe the condition of Town Highway 26. The focus of my observations was on the section of Highway 26 that the Town of Underhill has purportedly reclassified as Trail. I made my observations with you on September 11, 2012 and then subsequent to that, conducted a boundary survey of the neighboring land (Moulton and Demarest), topographic survey of the road, and photographic survey. Included with this letter is the results of the information we collected.

The "Trail" section of Town Highway 26 spans approximately 2800 feet as shown on the attached plans sheets C1-01 and C1-02. This section of the road has four culverts as noted on the attached Culvert Inventory and photographs. Culvert 22 is an 18 inch CMP located near the Beaver Pond and found to be in poor condition. It is over half full of sediment and water, does not have proper cover, does not have headwalls, and is deteriorating. Culvert 23 was located at the low point at the head of the Beaver Pond, but the pipe has been displaced and is sitting beside the road and not functional. This pipe is an 18 inch CMP. Culvert 24 is a 12 inch CMP pipe which has also been displaced and is sitting on the side of the road. Culvert 25 appears to be in the best condition with reasonable road cover, however, the pipe is 12 inch CMP and the standard practice for roadway and driveway culverts is a minimum 18 inch diameter.

The pictures of the roadway near culvert 25 illustrate the roadway in a reasonable and maintained condition. In contrast, the pictures of the roadway near culvert 23 and 24 show a poorly maintained roadway with ruts, flooding, washouts, and very minimal amounts of gravel.

You asked me to comment on what reasonable measure would be required to have this section of roadway function as it did before maintenance efforts were abandoned by the town. My recommendations would be to replace the four culverts, raise the roadway near the Beaver Pond, install gravel on the bad sections of roadway, and repair or replace the Beaver Pond overflow structure. I did not observe this, but I recommend something be done (repair or replace) to provide a reliable overflow device for the Beaver Pond. The current condition of the Beaver Pond is not safe. The water level is significantly above the road and there is evidence of washouts and dam failures.

The Preliminary Cost Estimate for the recommended upgrades is attached. The amount is $63,000. It was reported to me that the roadway has not been maintained since before 2002. If it had been maintained on a regular basis, the cost to keep it reasonably functional (like a driveway to a home) would have been significantly less. Lack of maintenance over the last 10 years has exasperated the deficiencies and thus increased the cost to restore the road. For 2800 feet of roadway, I would anticipate it might cost $1500 to $2500 per year to keep it maintained, ($15,000 to $25,000 over 10 years). Due to this lack of maintenance, I have estimated it will cost around $63,000 to restore this roadway to a reasonable and functional condition.

Regards,

STATE OF VERMONT
JOHN P. PITROWISKI, PE
8104
CIVIL
LICENSED
PROFESSIONAL ENGINEER

John P. Pitrowiski, P.E.
Senior Engineer

cc: Mr. Jeffrey Moulton
David Demarest

Enclosed: Underhill Road Policy, Underhill Vermont Adopted March 2002
Existing Conditions Plans C1-01 & C1-02
Culvert Inventory / Preliminary Cost Estimate
Pictures

S:_TCE PROJECTS\2012\057 DRM,PLLC (Moulton) Underhill\2 - Road Engineering\Town Highway 26 - Letter to C.Ray 2012 1106 Trail.docx

Culvert Inventory

Station +/-	Diameter (inches)	Length (feet)	Type
4+40	12	30	CMP
14+60	12	15	CMP
20+00	18	12	CMP
25+55	18	15	CMP

Preliminary Cost Estimate

1.	Replace culvert 22 (raise, properly bed & headwalls)	$ 3,000
2.	Restore culvert 23 with new pipe	$ 3,000
3.	Restore and upgrade culvert 24 (18" HDPE w/ headwalls)	$ 3,000
4.	Replace culvert 25 with larger pipe (18" HDPE)	$ 3,000
5.	Raise and repair roadway with fabric then gravel	$ 36,000
6.	Repair or replace overflow structure for Beaver Pond	$ 10,000
7.	Contingencies	$ 5,000
	Grand Total	**$ 63,000**

David D <david@vermontmushrooms.com> 11/28/2020 2:10 PM

Re: Crane Brook Bridge?

To seth friedman <sfried411@gmail.com>

Seth, I don't have Anton's email so please forward the below to him as well:

Dear Seth and Anton,
I really appreciate that we were able to meet today in a mutually respectful manner to discuss the idea of building a bridge on The Crane Brook Trail. Even if our specific priorities may differ, it is vitally important to have open and honest communications among all interest groups. I am in no way opposed to the enrichment of outdoor recreational opportunities in our town IF done right, and that last caveat is the crux of the issue. As is evident on the ground when we walked from the Town Shed to the area where the beaver pond washed out an old culvert, the best management practices outlined in the Underhill Trails Handbook have not been followed both when the Town of Underhill reclassified a segment of New Road into "The Crane Brook Trail" in 2010 and every single year since.

I can't emphasize enough that I still believe the vast majority of reasonable recreational interests AND historical landowner access rights could have and should have always been able to coexist without any significant conflicts. It is a true tragedy the Selectboard and UCC of 2009 chose to drag our town into 11 years and counting of litigation with efforts to *rescind* my rightful (and previously promised) access to my home and land. With that said, it's never too late to start doing the right thing.

As you witnessed firsthand with Daphne Tannis today, there are a handful of recreationalists that are hostile to a landowner if that landowner is not in their opinion "open-minded" enough to allow free recreational use of their property or simply regularly shrug off their posted signs being disregarded. There is also a long history of deceitfulness ranging from renaming the Dump Road to "New Road" even though the road had been there since at least the 1870s on up to today when Daphne Tanis made the preposterous claim today that the Underhill "Conservation" Commission had been unable to install a sign on town owned land due to litigation along with her claims to personally respect private property.

Obviously, the Town of Underhill has always had complete and total latitude to install any sign they want on town owned land, and the way Daphne and I first met is indicative of her complete lack of respect for other people's private property. Personally I am 100% behind having a sign (or multiple signs...) that convey to the public the importance of limiting themselves to staying on the town's land (and/or only respectfully using private property WITH permission), not trespassing/respecting any constraints placed on the public use of their property, picking up litter (and dog waste), avoiding bird nesting grounds during specific seasons, etc, etc, etc.

I would also greatly appreciate the Recreation Committee's support in encouraging the Selectboard to consider the potential of properly repairing the washed out segment of New Road/Crane Brook Trail in a manner that simultaneously preserved my longstanding southerly access to my home and land AND the ability of the public at large, regardless of physical ability, to continue to enjoy that public right of way. I firmly believe getting out to enjoy nature should not be artificially limited to only those able to enjoy physically active activities like running and mountain biking. The father and son in the pickup truck that we met driving through were a perfect example of members of the public that clearly had a long history of enjoying this area and that should not be discounted when decisions involving the trail segment of New Road are being made.

In accordance with the Best Management Practices outlined in the Underhill Trails Handbook, I would be very grateful if we could work together to achieve a reasonable level of public maintenance of public infrastructure by replacing the failed culvert in a manner that kept the corridor usable by all, which would truly be in everyone's best interest.

The other option I am also open to, which is also in accordance with the Underhill Trails Handbook, is that the segment of New Road that the Selectboard reclassified into a legal trail in 2010 against landowner wishes could simply be discontinued. Either option is acceptable to me, but I am simply not open to the development or expansion of recreational opportunities if they sacrifice the privacy and/or access that a landowner should rightfully be able to enjoy.

Best regards,
David Demarest

> On 11/27/2020 6:09 PM David D <david@vermontmushrooms.com> wrote:
>
> Yea, that would be fine. Lets meet at the town garage.
> David
>
> > On 11/27/2020 4:05 PM seth friedman <sfried411@gmail.com> wrote:
> >
> > Can you do tomorrow morning at 8am?
> >
> > On Thu, Nov 26, 2020 at 11:41 AM David D <david@vermontmushrooms.com> wrote:
> >
> > > I'm pretty flexible, early morning and early evening in so much as reasonable I want to be in the woods hunting (even though I know of at least 3 good bucks that tend to go through my land have already been taken this year :-/), but that's about it in terms of set schedule the next few days.
> > >
> > > When's good for you?
> > > Dave
> > >
> > > > On 11/26/2020 7:46 AM seth friedman <sfried411@gmail.com> wrote:
> > > >
> > > > Hey Dave
> > > > Glad you reached out, been meaning to do the same. Let's meet up and walk out there, what's your next few days like? Any openings?
> > > > Thanks
> > > > S
> > > >
> > > > On Wed, Nov 25, 2020 at 3:43 PM David D <david@vermontmushrooms.com> wrote:
> > > >
> > > > > Hi Seth,
> > > > > Looking over the November 19th Recreation Committee minutes it looks like you are the point person in relation to the idea of building a bridge on the Crane Brook Trail? If so, I figured it would be worth contacting you to discuss the same possibilities that I brought up back in 2009 before the Selectboard and UCC lawyered up against me (and again during the 9/14/2020 Underhill "Conservation" Commission meeting, which I should note the meeting minutes leave out certain inconvenient truths which I brought up in the meeting. This is why Karen McNight decided to table the approval of those minutes indefinitely...).
> > > > >
> > > > > I am in no way opposed to a bridge being built where the beaver dam currently overflows so long as any bridge constructed is:
> > > > > 1) both wide enough and strong enough to be able to support the weight of my vehicles and equipment, and
> > > > > 2) it does not interfere with my use of my most southerly internal access road, which was already there before I bought my land in 2002.
> > > > >
> > > > > As you may or not know, the question of whether or not the Town of Underhill is able to get away with purloining my rightful southerly access to my home and land is currently before the Vermont Supreme Court. If I were to hazard a guess their decision will likely come sometime this winter or early spring, but either way that decision is decided there may be an appeal to

the Vermont District Court, so as is typical of the past 11 years of litigation against me by a handful of people running our town it seems worth considering the historical usage of that segment by nearby landowners when considering a potential bridge (not only does the historical use of that segment as a through road date back to the 1800's until the 2010 New Road Reclassification it also includes my 18 years and counting of personally using that segment with various personal vehicles, tractors, and rented equipment). Given the weight of my tractor (along with other equipment, such excavators which I have rented periodically and had delivered to the Town Shed) I believe a beaver baffler covered with a combination of gravel in some parts and 4" minus stone in others would be the most cost effective option in both the short and longer term to the benefit of literally all reasonable interest groups.

In 2009, Rod Fuller as Road Foreman for the Town of Underhill estimated it would cost about $8,000 and the grant I proposed in 2009 is still a grant that the Town of Underhill could apply for now. Although with that said, the pre-application deadline is December 11, 2020 so time is running out on this grant cycle IF that is something the Recreational Committee was open to pursuing: https://fpr.vermont.gov/recreational-trails-program.

Sincerely,
David Demarest
david@vermontmushrooms.com
(802)363-9962

Town of Underhill Meeting Agenda & Minutes

Date & Start Time: Thursday January 21, 2021, 6:00 p.m. End Time: 7:00 p.m.
Meeting Type: RECREATION COMMITTEE MEETING
Location: Go to Meeting

HANDOUT:

INVITEES/ATTENDEES:		
Chair - Anton Kelsey		
Recorder - Emilie Soisson		
Melanie Poley	Meredith Chaudoir	Seth Friedman
Emilie Soisson	Dean Haller	Isabel Tuck
Anton Kelsey	Nick Tanner	Lynne Kemp

AGENDA

Item #	Agenda Items	Comments/Minutes	Action Number
1	Call Meeting to Order/Approve November minutes	Minutes approved.	
2	Public Comment Period		
3	Town Parks • Pump Track • Trail updates/Crane Brook • Tomasi meadow planning	**Pump Track** Nick Tanner (former president of Brewster River Mountain Bike Club) looking into possibility of pump track in Underhill. Has explored a number of areas. Crane Brook also discuss but parking issues remain. There have been discussions about adding parking to the Crane Brook area which may make that a possibility. Funding discussed. $10,000 for labor and committement. Nick can approach BRBMC. Grant money may be available. Anton to call the town to explore local possibilities. Determine if pump track would be a allowed use for Crane Brook. Would we need to discuss a backup location, town pond is a flood plain. Anton to report back next month. **Tomasi Meadow** Grooming has been groomed for skate skiing. Ben Connington has been grooming and did it many times in the last few days. Peter Davis has been looking at an attachment for Nordic skiing. Parking on Mountain Road is prohibited. VT Digger put Casey's hill as the number 2 sledding hill in Vermont. On the selectboard agenda and may result in and additional parking area. Anton still looking into management plan. The rec committee has volunteered to take on a bigger role in managing this land. **Crane Brook** After meeting with abbutting land owner Dave Demerest, it was determined he was not supportive of bridge idea and money was pulled out of the budget for a bridge on the Crane Brook Trail abutting Mr. Demerest's property.	

Town of Underhill Meeting Agenda & Minutes

Date & Start Time: Thursday January 21, 2021, 6:00 p.m. End Time: 7:00 p.m.
Meeting Type: RECREATION COMMITTEE MEETING
Location: Go to Meeting

		Anton is still working with the conservation commission to allow more rec committee involvement with these trails. There is currently no management plan of the Crane Brook area.	
4	Maintenance Items • Rink	Rink has been going well. Shoveling crew has been reliably shoveling the rink and the rink has been well used. Some teenagers have been messing with the lights but no complaints from neighbors. There is a need for additional shovels. Should we consider a time for little kids? Been popular with teenagers. 9-10:30 no hockey daily. Anton will make a sign an post on FPF. Lights will be kept on all season.	
5	Events • Food Trucks	Will plan for food trucks again this summer. Cosidering hosting food truck in Tomasi Meadow versus Moore Park. Dates and planning to be added to agenda for the next meeting.	
6	Administrative	Anton looked into the idea of having town emails. Sheri Morin is setting it up. We should communicate through town email to protect our own email. Should have it by next week. All rec commttee budget requests are in the town budget.	
7	Floor Open	Need more white lights for Moore Park for next year. Also need more lights on Park Street. Should be no problem to purchase more lights next year.	
8	Adjourn Recreation Committee Meeting (Tentative)		

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

DAVID P. DEMAREST, an individual, PLAINTIFF	)	
v.	)	CASE NO. 2:21-cv-00167-wks
TOWN OF UNDERHILL, a municipality and charter town, SELECTBOARD CHAIR DANIEL STEINABAUER, as an individual and in official capacity, et al.	)	

THE TOWN OF UNDERHILL'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

The Municipal Defendants,[1] by and through their attorneys, Carroll, Boe, Pell & Kite, P.C., reply to Plaintiff's Memorandum in Opposition to Motion to Dismiss, Doc. 55 ("Opposition"), as follows:

I. Standard of Review & Factual Background

Plaintiff does not contradict that the Court may consider the records of the four prior state court actions when considering dismissal without converting the motion to dismiss to a motion for summary judgment. Moreover, Plaintiff has attached several state-court documents to his own Opposition. *See* Docs. 55-4 through 55-7. Accordingly, no dispute exists regarding the standard of review or the Court's consideration of the underlying state court documents.

Although Plaintiff insinuates that the Factual Background provided in the Motion to Dismiss includes "subtle mischaracterizations of the factual history," Doc. 55 at 3, Plaintiff

[1] The "Municipal Defendants" are, collectively, the Town of Underhill (the "Town"), Daniel Steinbauer, Bob Stone, Peter Duval, Dick Albertini, Judy Bond, Peter Brooks, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Anton Kelsey, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daphne Tanis, Walter "Ted" Tedford, Steve Walkerman, Mike Weisel, and Barbara Yerrick.

apparently agrees that this case centers on the Plaintiff's "central" allegation that the Town has wrongfully denied him vehicular access along what is now Crane Brook Trail, beginning in 2002. *E.g.,* Doc. 55 at 3-4.

III(A). The *Rooker-Feldman* doctrine applies to Plaintiff's claims

Plaintiff, citing no case law, seeks to avoid application of the *Rooker-Feldman* doctrine by arguing that "Plaintiff was not, *and could not have been*, a party to [*Ketchum*]," Doc. 55 at 6 (emphasis in original). The Town does not contend that Plaintiff was a *Ketchum* party or seek to apply *Rooker-Feldman* to the *Ketchum* decision. *Rooker-Feldman* applies because Plaintiff and the Town were adverse parties in four separate state court actions, all of which Plaintiff ultimately "lost," and Plaintiff, complaining of injuries caused by these state court judgments, seeks to undo them here in Federal District Court. *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 83 (2d Cir. 2005).

Plaintiff contends he is not seeking to review and reject those decisions. Doc. 55 at 7. This position is untenable. The Amended Complaint asks this Court to accept the portions of state litigation in which Plaintiff was momentarily victorious and reject those portions in which he lost. Doc. 46 at ¶ 50; Doc 46 at ¶ 60; *also* Doc. 55 at 21.

Plaintiff's specific requests for relief in connection with his procedural due process claim clearly ask this Court to review and reject those prior state court judgments. Plaintiff asks this Court to overrule *Ketchum* and decree that *all* road maintenance and reclassification decisions in Vermont must be conducted under Rule 74, rather than Rule 75, Doc. 46 at 88, ¶ A, a decision that would directly overrule the 2010 Reclassification Appeal decision, *Demarest v. Town of Underhill*, 2013 VT 72, ¶12-¶14, 195 Vt. 204, 210-211. Plaintiff also asks for injunctive relief regarding Irish Settlement Road "generally based on the Vermont Superior Court decision in the

prior maintenance appeal but updated," Doc. 44 at p. 87, ¶ B, a request that would overturn the 2012 Maintenance Appeal decision, *Demarest v. Town of Underhill*, 2016 VT 10, ¶16, 201 Vt. 185, 192, which acknowledged the Town has wide discretion in its decisions regarding maintenance of Class 4 roads. Further, Plaintiff asks this Court to "remand[] a *new* Notice of Insufficiency appeal in Vermont courts" for Crane Brook Trail and require that the new appeal be conducted under Rule 74 "based *purely*" on the 2010 policies and highway classifications, Doc. 44 at p. 88, ¶ C (emphases in original), relief that would both grant Plaintiff a re-do of the Notice of Sufficiency in the 2010 Reclassification Appeal *and* reverse the Vermont Supreme Court's appeal decision, *In re Town Highway 26*, 2015 Vt. Unpub. LEXIS 87, *9, 199 Vt. 648, 114 A.3d 505, 2015 WL 23836772012. Finally, Plaintiff asks the Court to "remand" the 2010 Reclassification and 2012 Maintenance Appeals and direct Town officials to recuse themselves "*or be recused against their will*" during the new Notice of Insufficiency appeals. *Id.* at ¶ D. Taken together, these requests asks this Court to take up the four state court judgments, rewrite them to make Plaintiff the winner, and then "remand" the entire controversy to Vermont courts to be re-heard in compliance with this Court's rulings. *Rooker-Feldman* is intended to prevent actions just like this. *See Hoblock*, 422 F.3d at 87. To the extent Plaintiff's Complaint seeks review and rejection of the four state court judgments, this Court lacks subject matter jurisdiction and Plaintiff's federal avenue of appeal lies with the United State Supreme Court. *Hoblock,* 422 F.3d at 83-84.

III(B)(a). The "Rails-to-Trails" Cases are inapposite

Plaintiff's reliance on the "Rails to Trails" cases, Doc. 55 at 9 and 15, is misplaced. "Rails to Trails" cases involve challenges to the 1983 "Rails-to-Trails Act" (the "Act"). *See, e.g., Preseault v. United States*, 100 F.3d 1525, 1529 n.3, (Fed. Cir. 1996) (describing "Rails-to-

Trails" Act). Vastly oversimplified, these cases hold that a taking occurs when a government-controlled change in use from railroad to recreational trail exceeds the scope of the easement originally acquired by the railroad as determined by state law. *E.g., Preseault,* 100 F.3d at 1533, 1541-1544; *Caquelin v. United States*, 959 F.3d 1360, 1367 (Fed. Cir. 2020); *see also Caquelin,* 959 F.3d at 1363-1364 (describing Act in greater detail).

This case involves neither the Rails-to-Trails Act nor an easement. Any interest the Town has in TH 26 was acquired by condemnation to public use, not by grant of easement. Once condemned, the Town's control over the public highway is notably different from a limited railroad easement. Vermont law expressly grants the Town control over features in public rights of way, including the power to set off portions of public highways for pedestrian and bicycle use, *see* 24 V.S.A. § 2291(1), or even to shut off vehicular access to a road entirely, *Baird v. City of Burlington*, 2016 VT 6, P4, 201 Vt. 112, 115, 136 A.3d 223, 226, 2016 Vt. LEXIS 5, *3. Importantly, Vermont law expressly gives Towns the authority to reclassify roads and create legal trails that may be used for recreational purposes. 19 V.S.A. § 775. Only when the Town completely relinquishes the public right of way does title revert to the adjoining landowners. *Id.* The "Rails-to-Trails" cases do not apply to this case and do not demonstrate that the Town has exceeded the scope of its use acquired through the original condemnation of TH 26.

The Town's acknowledgement that the reclassification of a portion TH 26 to a trail limited the public's use of the right of way by preventing vehicular access is not a concession. Doc. 55 at 8. Since TH 26 was established as a public highway, the Town has had the authority to change and limit the public's use of the right of way in accordance with statutory authority. The Town's decision to reclassify the highway as a legal trail and restrict vehicular access across the trail was based on such statutory authority, and no new condemnation was required for the

Town to effect this change. Plaintiff has cited no legal authority to indicate otherwise. Plaintiff has not suffered a "taking" in the constitutional sense.

III(B)(b). *Gauthier* demonstrates a Rule 75 appeal is "meaningful"

The Town has demonstrated that, under the law, Plaintiff had a meaningful opportunity to be heard that would satisfy constitutional concerns. Doc. 52 at 22-23. Plaintiff's unfounded contention that his opportunity to be heard was "meaningless" is unsupported by fact or by law.

Gauthier is on point. In *Gauthier*, a state official failed to remove the plaintiff's name from the Vermont Sex Offender Registry. The Court concluded that the ability to make an online request to investigate the discrepancy and the ability to have that decision reviewed under V.R.C.P. 75 was "meaningful, and Plaintiffs have therefore failed to state a claim against Goode for any due-process violation." *Gauthier v. Kirkpatrick*, 2013 U.S. Dist. LEXIS 172578, *62, 2013 WL 6407716. Here, Plaintiff appealed the Town's decisions to Vermont Superior Court and then on to the Vermont Supreme Court, not once, but *four separate times*. That the Court rejected Plaintiff's arguments does not make his opportunity to be heard "meaningless," Doc. 55 at 12. Plaintiff has not alleged facts sufficient to demonstrate a procedural due process claim.

III(B)(c). Plaintiff fails to state a Substantive Due Process claim

Katz v. United States, 389 U.S. 347 (1967) and Justice Brandeis' dissenting opinion in *Olmstead v. United States*, 277 U.S. 438 (1928) do not help Plaintiff establish a substantive due process claim because *Katz* and *Olmstead* involve the Fourth Amendment right to be free of unreasonable search and seizure and the Fifth Amendment right to be free from compelled self-incrimination. *Katz v. United States*, 389 U.S. 347, 348-349, 349 n.3 (1967); *Olmstead v. United States*, 277 U.S. 438, 455, 48 S. Ct. 564, 565 (1928). These cases cannot counter the argument presented in the Town's Motion to Dismiss that Plaintiff has failed to state a substantive due

process claim. *See* Doc 52 at 23-24. Similarly, Plaintiff's appeal to the plain language of the Ninth Amendment does not change the Second Circuit's conclusion that the Ninth Amendment is "a rule of construction that does not give rise to individual rights." *Zorn v. Premiere Homes, Inc.*, 109 Fed. Appx. 475, 475 (2d Cir. 2004).

III(B)(d). *Tylicki* and *Steuerwald* apply to this case

Plaintiff misreads the appellate case *Tylicki v. Schwartz*, 401 Fed. Appx. 603, 604 (2d Cir. 2010). *See* Doc. 55 at 16 (making argument). The *Tylicki* district court dismissed the plaintiff's complaint on a number of grounds, including the ground for which the Town cited *Tylicki* in the motion to dismiss. Doc. 52 at 25. The Second Circuit affirmed on appeal, concluding, "Tylicki's contention that Schwartz violated his right to privacy by creating police records containing false information, and distributing this false information, fails to allege a violation of a constitutional right." *Tylicki*, 401 Fed. Appx. at 603. The language Plaintiff cites is a separate issue. *Tylicki*, 401 Fed. Appx. At 604.

The Town cited *Steuerwald v Cleveland,* 2015 U.S. Dist. LEXIS 44246, *18 (D. Vt. 2015) to demonstrate that efforts to state constitutional violations based on inaccurate records have failed. Doc. 52 at 25. Plaintiff has not cited any cases demonstrating such claims succeed.

III(B)(e). Plaintiff does not state petition or conspiracy claims

As the Town's Motion to Dismiss demonstrates, although Plaintiff has a protected right to petition government officials, there is no constitutional requirement for those government officials to "listen or respond." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984). Plaintiff petitioned the Town, and the Town declined to "listen or respond" as Plaintiff would have liked. Plaintiff has not demonstrated that this violated the U.S. Constitution or even Vermont law. *See* Doc. 44 at 26-28.

Moreover, Plaintiff apparently concedes and confirms that he is *not* asserting a conspiracy or collusion claim. Doc. 55 at 18. Plaintiff's efforts to cast those allegations as relevant to a prospective damages award is speculative and unfounded in law. Plaintiff's response clarifies he has not stated a conspiracy or collusion claim in his Amended Complaint.

III(C). Plaintiff's proposed accrual dates are not valid under the law

Plaintiff does not counter the Municipal Defendants' extended discussion in the Motion to Dismiss of how applicable statutes of limitations bar Plaintiff's assorted claims. *See* Doc. 52 at 29-37. Plaintiff asserts that *Dixon v. United States*, 1999 U.S. App. LEXIS 13215 (10th Cir. 1999) "provides solid rationale for equitable tolling in Plaintiff's present cause of action." Doc. 55 at 21. However, *Dixon* provides no analysis or explanation of how or when equitable tolling would apply; in any event, *Dixon declined* to apply equitable tolling and affirmed dismissal of the complaint based on statute of limitations grounds. *Dixon v. United States*, 1999 U.S. App. LEXIS 13215, *3-4 (10th Cir. 1999). Plaintiff cites no authority other than *Dixon* explaining how or why these tolling doctrines should apply to his claims.

Plaintiff contends November 13, 2019 should be the accrual date of his claims. Doc. 55 at 20; *see also* Doc 46 at ¶ 153. This date cannot be the accrual date interference with Plaintiff's use of the Southern Access Route because the "promise" Plaintiff references was made in 2005, Doc. 46 at ¶ 152, and Plaintiff simultaneously alleges the Town interfered with Plaintiff's access along the Southern Access Route repeatedly since 2005. Doc. 44 at ¶ 47 and ¶ 57; ¶ 71. Assuming all these allegations to be true, Plaintiff cannot contend that November 13, 2019 somehow marked the date upon which the Town first broke its 2005 promise to Plaintiff or first interfered with Plaintiff's vehicular access along Crane Brook Trail.

Plaintiff argues that June 21, 2019, the date the U.S. Supreme Court decided *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), should be the "accrual date" because "Plaintiff did not have standing to file a Federal Fifth Amendment Takings Claims [sic]" until then. Doc. 55 at 3 and 21. Although *Knick* and *Pakdel v. City & Cty. of San Francisco*, 141 S. Ct. 2226, 2231 (2021) removed the previous "ripeness" and "exhaustion" requirements, these cases do not provide Plaintiff with a basis for asserting June 21, 2019 as the accrual date because

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993). Indeed, one court has already recognized that *Knick* must be applied retroactively, "even if it makes a previously timely action untimely." *4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810, 819 (Ky. E.D. 2019) (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995)).

Plaintiff also suggests February 26, 2021 (the date of the 2016 Subdivision Appeal, *Demarest v. Town of Underhill*, 2021 VT 14, P3, 2021 Vt. LEXIS 20, *2, 256 A.3d 554, 2021 WL 747756) should be the accrual date. Doc 55 at 3 and 20. However, Plaintiff provides no rebuttal to the Municipal Defendant's demonstration that this date cannot serve as the accrual date of Plaintiff's claims. *See* Doc. 52 at 34-36. Moreover, *Pakdel* makes clear that the Vermont Supreme Court's February 26, 2021 decision is *not* the accrual date for Plaintiff's claims. *Pakdel* expressly rejects the exhaustion of remedies requirement and explains "The finality requirement is relatively modest. All a plaintiff must show is that 'there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 141 S. Ct. at 2230 (citation omitted). "Once the government is committed to a position . . . the dispute is ripe for judicial resolution." *Id.*

In any event, Plaintiff missed his opportunity to bring his takings claim even under pre-*Knick* rules. Plaintiff alleges that the Town violated his Fifth Amendment rights by taking his right to vehicular access along Crane Brook Trail. The alleged taking, if it occurred, occurred as early as 2002, when the Town first attempted to reclassify a portion of TH 26 and reduced maintenance of the segment, and no later than 2010, when the Town successfully reclassified a portion of TH 26 as Crane Brook Trail. That was the year the Town "committed to a position" with respect to vehicular access. *Pakdel*, 141 S. Ct. at 2230. Plaintiff appealed the Town's 2010 reclassification all the way to the Vermont Supreme Court, whose final decision was issued on September 13, 2013. *Demarest v. Town of Underhill*, 2013 VT 72, 195 Vt. 204. If reclassification to a trail constituted a taking, then the claim was ripe and Plaintiff had exhausted his administrative remedies by no later than September 13, 2013. The Amended Complaint was filed more than six years later and is time-barred.

III(D). Reply to Plaintiff's Response Regarding Claim Preclusion

With regard to claim preclusion, Plaintiff argues that the prior cases are not "decisions on the merits" for purposes of any "civil rights" claims. Doc. 55. In addition, Plaintiff argues that claim preclusion does not bar an "unasserted permissive counterclaim." *Id.* This is no answer to the case law cited in the Motion to Dismiss Amended Complaint. *See* Doc. 52 at 37-38.

Under Vermont law, claim preclusion applies both to claims that were brought and claims that could have been brought in prior litigation. *Steuerwald v. Cleveland*, 651 Fed. Appx. 49, 50 (2d Cir. 2016); *Demarest v. Town of Underhill*, 2021 VT 14, ¶20.

The factual allegations in the Amended Complaint mirror the factual allegations actually considered and litigated in state court, including, for example, challenges to the *Ketchum* decision, *Demarest*, 2013 VT 72, ¶13-¶14, 195 Vt. 204, 210-211, arguments that the road

reclassification decision should have been treated as "a de novo proceeding requiring the appointment of commissioners," instead of "as a Rule 75 appeal, *id*., 2013 VT 72, ¶11, 195 Vt. 204, 209, challenges to the sequencing of the appeals and the stays, *id*., 2013 VT 72, ¶15-¶19, 195 Vt. 204, 211-213, concerns about inadequate evidence for the reclassification decision, *id.*, 2013 VT 72, ¶20, 195 Vt. 204, 213, allegations that "some elected officials had been motivated to reclassify the segment in an attempt to increase personal property values," *id.*, 2013 VT 72, ¶25, 195 Vt. 204, 215, and allegations that "the reasons identified by the Town for its decision lacked evidentiary support or rested on inaccurate assumptions," *id.*, 2013 VT 72, ¶27, 195 Vt. 204, 216. In short, the allegations in the Amended Complaint were actually litigated in the state court litigation, and Plaintiff's constitutional concerns could have been raised in the context of those cases. Claim preclusion therefore applies.

IV. Conclusion

For all the reasons provided above and in the Motion to Dismiss Amended Complaint, the Town and the Municipal Defendants respectfully request this Court dismiss the Amended Complaint in its entirety as to the Town and the Municipal Defendants.

Respectfully submitted, this 1st day of October, 2021.

CARROLL, BOE, PELL & KITE, P.C.

BY:/s/: Kevin L. Kite

James F. Carroll, Esquire
Kevin L. Kite, Esquire
64 Court Street, Middlebury, VT 05753
(802) 388-6711
jcarroll@64court.com
kkite@64court.com

Attorneys for Municipal Defendants

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

DAVID P. DEMAREST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:21-cv-167
	)	
TOWN OF UNDERHILL, et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER
(Docs. 5, 8, 51, 52)

Pro se plaintiff David P. Demarest brings this civil action against the Town of Underhill (the "Town"), Daniel Steinbauer, Bob Stone, Peter Duval, Dick Albertini, Judy Bond, Peter Brooks, Seth Friedman, Marcy Gibson, Barbara Greene, Carolyn Gregson, Stan Hamlet, Rick Heh, Brad Holden, Faith Ingulsrud, Kurt Johnson, Anton Kelsey, Karen McKnight, Nancy McRae, Michael Oman, Steve Owens, Mary Pacifici, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daphne Tanis, Walter "Ted" Tedford, Steve Walkerman, Mike Weisel, Barbara Yerrick (the "Individual Defendants" and, collectively with the Town, the "Municipal Defendants"), Front Porch Forum ("FPF"), and the Jericho Underhill Land Trust ("JULT"). His claims stem in large part from the Town's reclassification of a portion of Town Highway 26 ("TH 26"), which abuts his private property, to trail status.

On June 21, 2021, Plaintiff initially filed a ninety-page Complaint alleging twelve causes of action and naming two Defendants, the Town and Town Selectboard Chair Daniel Steinbauer, in the caption of the Complaint. (Doc. 1.) On July 13, the Municipal Defendants moved to dismiss the Complaint arguing, among other things, that Plaintiff's failure to name all thirty-four defendants in the case caption required dismissal of the Complaint and leave to file an Amended

Complaint. (Doc. 5.) On July 14, FPF moved to dismiss the single claim alleged against it in the Complaint under Federal Rule of Civil Procedure 12(b)(6) arguing Plaintiff failed to state a claim for violation of his First Amendment rights against FPF because FPF is not a governmental entity and cannot be held liable under 42 U.S.C. § 1983. (Doc. 8.) On August 2, in response to the motions to dismiss, Plaintiff filed opposition briefs as well as an Amended Complaint. (*See* Docs. 44–46.)

On August 20, 2021, JULT moved to dismiss the two counts alleged against it in Plaintiff's Amended Complaint under Rule 12(b)(6) arguing Plaintiff failed to state a claim for violation of his constitutional rights against JULT because JULT is not a governmental entity and cannot be held liable under 42 U.S.C. § 1983. (Doc. 51.) Because of the length and breadth of the ninety-six page Amended Complaint (Doc. 46), the Municipal Defendants sought and received permission to file a forty-page motion in response to the pleading. On August 23, they moved to dismiss under Rule 12(b)(6) arguing Plaintiff's claims are barred by the statute of limitations and res judicata and nonetheless fail to state a claim upon which relief can be granted. (Doc. 52.) Plaintiff opposes each of these motions (Docs. 55, 56) and the Municipal Defendants and JULT each filed replies. (Docs. 58, 59.) FPF's motion to dismiss is also fully briefed. (*See* Docs. 50, 53, 57.[1])

Factual and Procedural Background

I. Plaintiff's Allegations, Claims, and Relief Sought

Plaintiff alleges that, in violation of his constitutional rights, the Municipal Defendants "have recently succeeded in their long-term goal of maliciously rescinding all prior implicit and

[1] Although the Court's Local Rules do not authorize sur-replies and Plaintiff did not seek leave of court, given his pro se status and FPF's filing of a response to the sur-reply, the Court considers the additional filings. *See Newton v. City of New York*, 738 F. Supp. 2d 397, 417 (S.D.N.Y. 2010) ("Courts have broad discretion to consider arguments in a sur-reply.").

explicit promises made by The Town of Underhill to Plaintiff for reasonable access to and use of his domicile and over 50 acres of surrounding private property." (Doc. 46 at 2, ¶ 1.) He further alleges the Municipal Defendants have discriminated against him under color of law by censoring and misrepresenting his protected speech, intentionally retaliating against his protected speech, and obstructing his right to petition. He asserts the Municipal Defendants have violated his substantive due process rights under the First, Ninth, and Fourteenth Amendments.

Plaintiff alleges the violations of his civil rights have been exacerbated "by the special self-dealing relationship and decision-making authority the Jericho Underhill Land Trust has in the Town of Underhill's determination [of] which properties the Town [] will acquire from willing sellers and which property, such as Plaintiff's, the Town [] will take without compensation." (*Id.* at 4, ¶ 5.) Plaintiff alleges the violations of his civil rights have been exacerbated by FPF's "willingly participating in the censorship of Plaintiff's protected speech." (*Id.* ¶ 5.) Plaintiff's more specific allegations are discussed in connection with analysis of his twelve claims.

Plaintiff asserts that this Court has federal question jurisdiction over the twelve causes of action he seeks to allege under 42 U.S.C. § 1983. They are: (1) violation of his procedural due process rights under the Fourteenth Amendment against the Individual Defendants; (2) a "corresponding" Fourteenth Amendment claim against the Town asserting municipal liability; (3) violation of his substantive due process and privacy rights under the First, Ninth, and Fourteenth Amendments against the Individual Defendants[2]; (4) a "corresponding" claim under the First, Ninth, and Fourteenth Amendments against the Town asserting municipal liability;

[2] Plaintiff's Fourth Claim also includes an allegation relating to the Town and Defendants Steinbauer, Stone, and Duval refusing to allow three non-binding advisory articles to be included on the ballot of March 4, 2021. (Doc. 46 at 80, ¶ 257.)

(5) violation of his Fifth Amendment right concerning the taking of his property against the Individual Defendants; (6) a "corresponding" claim under the Fifth Amendment against the Town asserting municipal liability; (7) violation of his First Amendment rights against certain Individual Defendants; (8) a "corresponding" claim under the First Amendment against the Town asserting municipal liability; (9) conspiracy to violate his procedural and substantive due process rights under the Fifth, Ninth, and Fourteenth Amendments against JULT; (10) violation of his First Amendment rights against FPF; (11) violation of his First Amendment right to petition against Defendants Steinbauer, Stone, Duval, Owens, and Walkerman; (12) a "corresponding" claim under the First Amendment against the Town asserting municipal liability. *See* Doc. 46 at 77–86, ¶¶ 246–82.

For relief, Plaintiff seeks: (1) in connection with Claims One and Two: an injunction finding a Vermont Supreme Court decision to be an unconstitutional interpretation of Vermont law (Doc. 46 at 87, ¶ A), an injunction "involving the segment of TH26/New Road/Fuller Road which remained a Class IV town highway . . . generally based upon the Vermont Superior Court decision in the prior maintenance appeal but updated to account for [] further deterioration," (*id.* ¶ B), an injunction remanding "a *new* Notice of Insufficiency appeal" to Vermont courts (*id.* at 88, ¶ C), and an injunction requiring the recusal of Town officials in the event of a conflict of interest; (2) in connection with Claims Three and Four: declaratory relief stating "all Vermont Class IV Town Highways and Town Legal Trails *shall* be maintained without bias" and that interested persons in Vermont "have a substantive right that a Taking *only occur*[] due to *Necessity*" (*id.* at 89, ¶ E); (3) in connection with Claims Five and Six: compensatory damages for the "temporary categorical taking of Plaintiff's reversionary property rights and the unmitigated damages of the taking of additional property interests and value" from the 2010 road

reclassification until the damages are mitigated (*id.* ¶ G), compensatory damages "for the past taking of the reasonable expectation of privacy at Plaintiff's domicile," (*id.* at 90, ¶ H) and declaratory relief "confirming the downgrade of a Town Highway to an *entirely unmaintained* Legal Trail or an *entirely unmaintained* Class IV Road constitutes a greater categorical taking than a conversion of a railroad right of way into a Legal Trail" (*id.* ¶ I), an injunction requiring the Town to reclassify the Crane Brook Trail back to Class III or Class IV Town Highway that is "*reasonably maintained*," or to "*discontinue* a portion of the unmaintained segment of Class IV road and [Crane Brook] Trail," or compensate Plaintiff for the loss of all claimed property rights (*id.* at 91, ¶ J), and punitive damages against Defendants Walkerman and Albertini equal to the amount of capital gains they each received from sale of real estate; (4) in connection with Claims Seven and Eight: compensatory and punitive damages for Defendants' retaliatory actions and censorship; (5) in connection with Claim Nine: compensatory and punitive damages against JULT for violations of Plaintiff's constitutional rights and any additional Individual Defendants liable for collusion; (6) in connection with Claim Ten: a declaration that "the nexus between Defendant Front Porch Forum and local Vermont governmental authority as 'Essential Civic Infrastructure' precludes the censorship of protected speech" (*id.* at 93, ¶ S); (7) in connection with Claims Eleven and Twelve: an injunction requiring the Town to allow "the Petition on Public Accountability *Advisory-Articles* to be properly warned and placed on the ballot to be voted upon Town Meeting Day" (*id.* at 94, ¶ T). Plaintiff also seeks punitive damages against a number of Individual Defendants. Against the Town and Town officials, Plaintiff seeks compensatory damages for costs incurred in past litigation and for the extreme stress, mental and emotional pain and suffering, and physical health impacts litigation with the Town caused.

II. Prior Litigation

Plaintiff owns a 51.3-acre parcel of land adjacent to TH 26 that he purchased in 2002. "[P]laintiff's land is adjacent to the corridor of former TH 26 and, after the Town reclassified portions of TH 26, a segment became a legal trail. The westerly boundary of [P]laintiff's property adjoins a southerly segment of Fuller Road and the northerly segment of Crane Brook Trail. The property is not adjacent to New Road." *Demarest v. Town of Underhill*, 2021 VT 14, ¶ 22, 256 A.3d 554.

Plaintiff and the Town have an extensive history of prior litigation involving TH 26 beginning over a decade ago in 2010. As the Supreme Court of Vermont has explained:

> The Town reclassified portions of TH 26 as a legal trail in 2001 and stopped maintaining the roadway at that time. The Town initiated a new reclassification proceeding in 2010, after a suit was filed, that challenged the sufficiency of the 2001 reclassification and sought an order requiring the Town to maintain the roadway. Plaintiff was involved in that suit. The June 2010 Selectboard reclassification decision found that reclassification was for the public good and convenience and necessary for the Town's inhabitants. The Town's reclassification resulted in TH 26 being divided into three segments: (1) New Road, a class 3 town highway; (2) Fuller Road, a class 4 town highway, and (3) Crane Brook Trail, a legal trail, connecting New Road and Fuller Road.
>
> Plaintiff, and other landowners appealed the Selectboard's reclassification decision under Vermont Rule of Civil Procedure 75. The Maintenance case was put on hold pending resolution of the reclassification appeal. Ultimately, the superior court concluded that the Town's 2010 reclassification was supported by the evidence. That case was appealed, and this Court affirmed, holding that the Selectboard's decision was supported by the evidence. *See Demarest v. Town of Underhill*, 2013 VT 72, ¶¶ 26-32, 195 Vt. 204, 87 A.3d 439 (affirming Town's decision to reclassify road as a trail).
>
> When [P]laintiff initially purchased his property in 2002, the Town approved the construction of a residence on the property. The parties dispute whether access to the property was primarily by Fuller Road or New Road prior to the reclassification. After the Town reclassified a portion of TH 26 as a trail, [P]laintiff's only highway access was by Fuller Road. If [P]laintiff could use the trail to access New Road, he would have a more direct route to Underhill Center.
>
> In August 2015, [P]laintiff applied to the Town's Selectboard for highway access to a proposed new subdivision on his property. He proposed that some of the lots would have access by Fuller Road with the remaining lots to have

> vehicular access via the [Crane Brook] trail to New Road. The Selectboard denied the application in May 2016.
>
> Plaintiff filed this suit, seeking a declaration that he had a right of vehicular access over Crane Brook Trail and appealing the denial of the permit. The parties cross-moved for summary judgment on different grounds. Plaintiff moved for summary judgment on the issue of whether he had a right of access over the trail. . . . The Town moved for summary judgment on the ground that [P]laintiff's claim was barred by res judicata.

Demarest v. Town of Underhill, 2021 VT 14, ¶¶ 2–7, 256 A.3d 554.

The Vermont Supreme Court determined that:

> [T]he claim here regarding [P]laintiff's reasonable and convenient access to his property involves the same set of facts as those relevant to the Rule 75 appeal in that the facts are related in time, space, origin, and motivation. Both cases originated with the Town's act of reclassifying a portion of TH 26 as a trail. This action gave rise to both the appeal of the classification decision and [P]laintiff's dispute over whether he was entitled to vehicle access across the new trail.

Id. ¶ 14. The VSC further noted "[P]laintiff's motivation for challenging the reclassification decision was the same as his motivation underlying his current request for a declaratory judgment[:] Plaintiff's concern has always been his access to his property via the trail." *Id.* ¶ 15. Accordingly, the court held Plaintiff's "declaratory-judgment claim asserting a right of access over the trail is barred because it should have been brought in the first suit given that both claims stemmed from the same transaction." *Id.* ¶ 19.

Justice Robinson dissented from the "majority's conclusion that [P]laintiff forfeited his right to advance his private claims for access over the Crane Brook Trail to subdivided lots on his parcel by joining with neighbors in appealing the Town's decision to establish that trail in place of the public highway that previously traversed the same corridor." *Demarest*, 2021 VT 14, ¶ 34 (Robinson, J., dissenting). She determined that the "two cases arise from distinct transactions that are separate in time and character and do not constitute a convenient trial unit, and treating them as a unit does not conform to the parties' expectations or business usage." *Id.*

Discussion

I. Legal Standards

A. Motion to Dismiss

In adjudicating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must "accept as true all of the allegations contained in a complaint" and decide whether the complaint states a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* All complaints, therefore, must contain "sufficient factual matter[] . . . to state a claim" for relief. *Id.* While the Court must draw all reasonable inferences in the non-moving party's favor, *Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 150 (2d Cir. 2016), self-represented litigants nevertheless must satisfy the plausibility standard set forth in *Iqbal*. *See Costabile v. N.Y.C. Health & Hosps. Corp.*, 951 F.3d 77, 80–81 (2d Cir. 2020). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. Therefore, after separating legal conclusions from well-pleaded factual allegations, the Court must determine whether those facts make it plausible—not merely possible—that the Plaintiff is entitled to relief. *Id.* at 679.

In reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6), "the Court is entitled to consider facts alleged in the complaint and documents attached to it or incorporated in it by reference," as well as "facts of which judicial notice may properly be taken." *Heckman v. Town of Hempstead*, 568 F. App'x 41, 43 (2d Cir. 2014). "[A court] may properly take judicial notice of [a] document" when the document is "publicly available and its accuracy cannot reasonably be questioned." *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 60 (2d Cir. 2016); *see also* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that

is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). Because Plaintiff references the prior state-court litigation between Plaintiff and the Town and the court may consider matters of public record, the Court takes judicial notice of the Vermont Supreme Court decisions which are public records. *See Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012) ("[R]elevant matters of public record" are susceptible to judicial notice."); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) ("It is well established that district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including case law and statutes.").

Dismissal is appropriate when "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000). "Although the statute of limitations is ordinarily an affirmative defense that must be raised in the answer, a statute of limitations defense may be decided on a Rule 12(b)(6) motion if the defense appears on the face of the complaint. *Conn. Gen. Life Ins. Co. v. BioHealth Labs, Inc.*, 988 F.3d 127, 131–32 (2d Cir. 2021) (internal quotation marks omitted).

B. Amended Pleading

Plaintiff filed his Amended Complaint, together with a red-lined version as required by local rule, "as a matter of course in accordance with Federal Rules of Civil Procedure." (Doc. 46 at 1.) Under Rule 15, "[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b) . . . , whichever is earlier." Fed. R. Civ. P. 15(a)(1). Because Plaintiff timely

amended his Complaint in response to the Municipal Defendants' and FPF's motions to dismiss, the Amended Complaint is the operative pleading in this case. *See Hancock v. Cnty. of Rensselaer*, 882 F.3d 58, 63 (2d Cir. 2018) ("It is well settled that an amended pleading ordinarily supersedes the original and renders it of no legal effect[.]") (internal quotation marks omitted).

"[W]hen a plaintiff properly amends her complaint after a defendant has filed a motion to dismiss that is still pending, the district court has the option of either denying the pending motion as moot or evaluating the motion in light of the facts alleged in the amended complaint." *Pettaway v. Nat'l Recovery Solutions, LLC*, 955 F.3d 299, 303–04 (2d Cir. 2020). Here, because the Municipal Defendants have moved to dismiss the Amended Complaint, their original motion to dismiss the superseded Complaint (Doc. 5) is DENIED as it is moot. FPF, however, did not move to dismiss the Amended Complaint. Instead, in its reply in further support of its original motion, FPF requests the Court apply its arguments to the Amended Complaint. (*See* Doc. 50 at 2.) Plaintiff does not oppose this request. Accordingly, the Court evaluates FPF's motion to dismiss (Doc. 8) in light of the allegations contained in Plaintiff's Amended Complaint.

C. 42 U.S.C. § 1983

Congress enacted § 1983 to provide a statutory remedy for violations of the Constitution and federal laws. Section 1983 does not itself create or establish a federally protected right; instead it creates a cause of action to enforce federal rights created elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

To allege a violation pursuant to § 1983, a plaintiff must plausibly plead "(1) actions taken under color of [state] law; (2) deprivation of a constitutional or statutory right; (3) causation; [and] (4) damages." *Roe v. City of Waterbury*, 542 F.3d 31, 36 (2d Cir. 2008). Because the statute requires that "the conduct at issue must have occurred 'under color of' state law . . . liability attaches only to those wrongdoers who carry a badge of authority of a State and represent it in some capacity." *Tarkanian*, 488 U.S. at 191 (internal quotation marks omitted). Accordingly, private actors are not proper § 1983 defendants when they do not act under color of state law. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999) ("[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.").

As the Supreme Court has explained, "a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." *Manhattan Comm. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (internal citations omitted). "In final analysis[,] the question is whether the conduct allegedly causing the deprivation of a federal right can be fairly attributable to the State." *Tarkanian*, 488 U.S. at 199 (internal quotation marks omitted).

Under § 1983, "local governments are responsible only for their *own* illegal acts[;] . . . [t]hey are not vicariously liable under § 1983 for their employees' actions." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (internal quotation marks and citations omitted) (municipalities can be held liable "if the governmental body itself subjects a person to a deprivation of rights or causes a person to be subjected to such deprivation"). A municipality

may be liable under § 1983 only "if the deprivation of the plaintiff's rights under federal law is caused by a governmental custom, policy, or usage of the municipality." *Jones v. Town of East Haven*, 691 F.3d 72, 80 (2d Cir. 2012) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978)). "Absent such a custom, policy, or usage, a municipality cannot be held liable on a *respondeat superior* basis for the tort of its employee." *Id.* The plaintiff therefore must plead "three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir. 2007) (internal quotation marks omitted). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick*, 563 U.S. at 61.

Section 1983 actions that are filed in Vermont are subject to Vermont's three-year statute of limitations for personal injury actions. *See* 12 V.S.A. § 512(4); *Wallace v. Kato*, 549 U.S. 384, 387 (2007) ("Section 1983 provides a federal cause of action, but . . . the statute of limitations . . . is that which the State provides for personal-injury torts."). The accrual date of a § 1983 cause of action, however, is a "question of federal law that is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388; *see also Spak v. Phillips*, 857 F.3d 458, 462–63 (2d Cir. 2017). Under federal law, accrual occurs "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief[.]" *Wallace*, 549 U.S. at 388 (citations and internal quotation marks omitted).

II. Front Porch Forum's Motion to Dismiss

In his Tenth Cause of Action, Plaintiff alleges a First Amendment violation under 42 U.S.C. § 1983 against FPF. He alleges that FPF censored Plaintiff's speech by blocking his ability to post on its platform. Plaintiff asserts FPF has a special relationship with local Vermont

governments including the Town. FPF moves to dismiss this claim under Rule 12(b)(6) arguing that because it is not a state actor and did not act in concert with a state actor, it cannot be held liable under § 1983.

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. The Fourteenth Amendment makes the First Amendment's free speech clause applicable against the states.[3] *See Halleck*, 139 S. Ct. at 1928. The free speech clause "prohibits only *governmental* abridgement of speech[,] . . . [it] does not prohibit *private* abridgement of speech." *Id.*

Plaintiff asserts that "[i]t is a First Amendment violation for a public benefit corporation to act in willing participation and support of a State-actor by engaging in unequivocal viewpoint discrimination through the policy of selectively censoring political speech." (Doc. 53 at 1 (emphasis omitted).) Plaintiff argues that FPF can be considered a state actor because it is providing two "essential civic infrastructure" functions which were traditionally and exclusively functions of the government. These are "the non-censored delivery of the modern-day analogue of 'post,' which was once a function exclusive to the United States Post Office," and providing "a public forum, similar to a public square, for the purpose of public assembly and communicating thoughts of local political importance." (Doc. 53 at 1 (emphasis omitted).) He further argues that "at times FPF is the exclusive online source of official governmental information." (Doc. 45 at 2.)

[3] The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Generally, "the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'" *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Burton*, 365 U.S. at 722).

The Supreme Court "has stressed that 'very few' functions fall into th[e] category" of exclusive public function, giving the examples of "running elections and operating a company town." *Halleck*, 139 S. Ct. at 1929. Examples of functions that the Supreme Court has ruled do not fall into that category are operating nursing homes, providing special education, representing indigent criminal defendants, supplying electricity, and operating public access channels on a cable system. *See id.* (collecting cases).

Here, delivering information or providing a forum are not functions that have traditionally and exclusively been performed by the government. "[I]t is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." *Halleck v. Manhattan Comm. Access Corp.*, 882 F.3d 300, 311 (2d Cir. 2018) (Jacobs, J., dissenting). Neither does Plaintiff's allegation that the Town itself uses FPF to "post" information transform FPF into a state actor. Because "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints," *Halleck*, 139 S. Ct. at 1930, the Court finds that Plaintiff has failed to plausibly allege that FPF is a private actor that is subject to liability under § 1983 for a First Amendment violation. Indeed, "a private entity may [] exercise editorial discretion over the speech and speakers in the forum." *Id.* Even where a government grants a monopoly to or funds or subsidizes a private entity, the private entity is not transformed into a state actor unless it is performing a traditional, exclusive public function. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 314 (2d Cir. 2007) (noting "the Supreme Court has narrowed the scope of its state-action jurisprudence" so that "the Court has found on more than one occasion that an entity was not engaged in state action even though it was extensively

regulated, obtained governmental approval, received substantial governmental assistance, and performed an important societal function") (internal quotation marks omitted).

Because Plaintiff's arguments and allegations regarding FPF do not suffice for the Court to find FPF is a state actor, FPF is not subject to First Amendment constraints, and FPF's motion to dismiss (Doc. 8) is GRANTED.

III. JULT's Motion to Dismiss[4]

In his Ninth Cause of Action, Plaintiff alleges a conspiracy to violate his procedural and substantive due process rights under the Fifth, Ninth, and Fourteenth Amendments under § 1983 against JULT. He alleges that a significant number of the Individual Defendants are "both JULT affiliates and Town Officials acting under color of law" and the Town and JULT "act together to preferentially purchase certain properties at a premium price from Town Officials or others . . . primarily for recreation as opposed to genuine conservation." (Doc. 46 at 69–70, ¶¶ 221, 224 (emphasis omitted).) JULT moves to dismiss under Rule 12(b)(6) arguing that because it is not a state actor and did not act in concert with a state actor, it cannot be held liable under § 1983. JULT further argues Plaintiff's claim is barred by both the applicable statute of limitations and the doctrine of claim preclusion.

To state a conspiracy claim under § 1983, Plaintiff must allege sufficient facts to plausibly suggest: "'(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act

[4] JULT states that Plaintiff's Seventh Cause of Action alleges a violation of the First Amendment by JULT. *See* Doc. 51 at 1. Reading Plaintiff's Amended Complaint liberally, the Court, however, does not infer that the Seventh Cause of Action includes JULT. The Court presumes it is Plaintiff's reference that "discovery is necessary . . . to potentially substantiate addition of other parties," (Doc 46 at 13, ¶ 45) as the basis for JULT's statement but the Court will not read the claim to include JULT on such a thinly veiled reference given the length and breadth of the Amended Complaint. Nonetheless, given the Court's analysis regarding JULT's state actor status, the Court would be constrained to dismiss a First Amendment Claim under § 1983 asserted against it.

done in furtherance of that goal causing damages.'" *Grega v. Pettengill*, 123 F. Supp. 3d 517, 541 (D. Vt. 2015) (quoting *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999)). "'Complaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." *Id.* (quoting *Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002)).

The Ninth Amendment provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. This Amendment is "not an independent source of individual rights." *Jenkins v. Comm'r of Internal Revenue Serv.*, 483 F.3d 90, 92 (2d Cir. 2007). Accordingly, it cannot serve as the basis for a § 1983 claim.

The Fifth Amendment provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment thus prohibits two types of takings: "takings without just compensation and takings for a private purpose." *Rumber v. Dist. of Columbia*, 487 F.3d 941, 943 (D.C. Cir. 2007).

The Fourteenth Amendment's substantive due process clause component "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *see also supra* Part II, note 5. Government conduct may be actionable under § 1983 as a substantive due process violation if it "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952).

Plaintiff's plausible allegations allege at most favoritism but fail to rise to the level of inflicting an unconstitutional injury on Plaintiff himself. Plaintiff has no enforceable rights under the Ninth Amendment. Plaintiff does not allege that his property was taken without compensation or for a private purpose by JULT and the Town. None of Plaintiff's plausible allegations rise to the level of shocking the conscience. His complaints that JULT worked together with the Town to preserve land for recreation as opposed to conservation do not violate Plaintiff's constitutional rights or demonstrate damage to Plaintiff.[5] Even assuming an agreement between defendants, without a plausible allegation of a constitutional violation and damages, Plaintiff has failed to plausibly allege a conspiracy claim under § 1983 against JULT. Accordingly, JULT's motion to dismiss (Doc. 51) is GRANTED.

IV. Municipal Defendants' Motion to Dismiss

The Municipal Defendants move to dismiss Plaintiff's Amended Complaint on multiple grounds, including that it fails to state a claim and is largely barred by res judicata and the statute of limitations. (Doc. 52.) Plaintiff opposes the motion.

A. Official Capacity Claims

As an initial matter, the Court must dismiss Plaintiff's claims against the Individual Defendants in their official capacities as Town officials. "There is no longer a need to bring official-capacity actions against local government officials [because] local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *see also Coon v. Town of Springfield*, 404 F.3d 683, 687 (2d Cir. 2005) ("[A] § 1983 suit against a municipal officer in his official capacity is treated as an action

[5] The VSC did not find an abuse of discretion the trial court's rejection of Plaintiff's assertion that "some elected officials had been motivated to reclassify [TH 26] in an attempt to increase personal property values." *Demarest*, 2013 VT 72, ¶ 25 & n.5.

against the municipality itself."). Accordingly, the Court dismisses Plaintiff's claims against all Individual Defendants sued in their capacities[6] as Town of Underhill officials for failure to state a claim on which relief may be granted.

B. Res Judicata

Plaintiff and the Town have engaged in protracted litigation regarding the Town's reclassification and maintenance of TH 26 as well as Plaintiff's vehicular access to the Crane Brook Trail. As explained above, other than Plaintiff's initial success in challenging the 2001 reclassification of TH 26, Plaintiff has lost in each state court case following the Town's 2010 reclassification proceeding. In 2013, the VSC affirmed the Town Selectboard's decision to reclassify a portion of TH 26 as a trail. Following that decision, Plaintiff's case challenging the Town's refusal to maintain the trail as a road was dismissed as moot in the Superior Court and in 2015, the VSC affirmed upon de novo review. The VSC noted that although Petitioners, including Plaintiff "believe that a more 'convenient' route is available to them[,] the fact remains that they have not been denied access to their property; they have access to their property via a public road that is maintained by the Town." *In re Town Highway 26*, 2015 WL 2383677, at *5. In 2016, however, the VSC reversed a trial court order requiring the Town to maintain the Class 4 section of TH 26. Finally, in 2021, the VSC affirmed the dismissal of Plaintiff's action seeking a declaration that he had a right of vehicle access over the portion of TH 26 reclassified as Crane

[6] Because Peter Duval, Judy Bond, Peter Brooks, Seth Friedman, Barbara Greene, Carolyn Gregson, Faith Ingulsrud, Kurt Johnson, Anton Kelsey, Michael Oman, Mary Pacifici, and Barbara Yerrick were named in their official capacity only, they are DISMISSED from this action. Further, Plaintiff alleges that Stan Hamlet is deceased. Under Federal Rule of Civil Procedure 17(b), the capacity of an individual to be sued is determined by the law of the individual's domicile, which the court here assumes to be Vermont. The VSC has noted that the "capacity to sue or be sued exists only in persons in being, and not in those who are dead, . . . and so cannot be brought before the court." *Benson v. MVP Health Plan, Inc.*, 2009 VT 57, ¶ 6, 978 A.2d 33, 186 Vt. 97 (quoting *Mortimore v. Bashore*, 148 N.E. 317, 319 (1925)). Because a deceased person does not have the capacity to be sued, Defendant Hamlet is also DISMISSED.

Brook Trail and appealing the Town's denial of a permit for highway access over Crane Brook Trail to a proposed new subdivision on his property. The VSC determined Plaintiff was barred from relitigating the issue of his right of access over Crane Brook Trail. Regarding Plaintiff's subdivision application, the VSC explained that "[i]n sum, the request was denied because allowing vehicular access across Crane Brook Trail was in direct conflict with the Town's prior prohibition of vehicles on the trail." *Demarest*, 2021 VT 14, ¶ 30.

Res judicata limits repetitious suits and preserves judicial economy. *See Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). Under the doctrine, a "federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *New York v. Mtn. Tobacco Co.*, 942 F.3d 536, 543 (2d Cir. 2019). In Vermont, the doctrine "will preclude a claim from being litigated [in a later litigation] 'if (1) a previous final judgment on the merits exists, (2) the case was between the same parties or parties in privity, and (3) the claim has been or could have been fully litigated in the prior proceeding.'" *Steuerwald v. Cleveland*, 651 F. App'x 49, 50 (2d Cir. 2016) (quoting *Iannarone v. Limoggio*, 30 A.3d 655 (2011)). Many of the claims against the Municipal Defendants in Plaintiff's current case meet these requirements and are therefore barred from relitigation in this case. *See Nevada v. United States,* 463 U.S. 110, 130 (1983) (noting a final judgment on the merits "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever"); *see also Russell v. Atkins,* 165 Vt. 176, 179, 679 A.2d 333, 335 (1996) (recognizing that "[r]es judicata is intended to protect the courts and the parties from the burden of relitigation").

Each of the VSC's prior rulings were final judgments on the merits by a court with jurisdiction over the subject matter. The parties are fundamentally the same, as in all prior cases

Plaintiff sued the Town and, in this case, Plaintiff seeks to bring claims against the Town and individuals connected with the Town. Therefore, any cause of action asserted, or that could have been asserted, in any of the prior cases and included in this action is barred.

1. Claims One and Two

In Claims One and Two, Plaintiff alleges a violation of his procedural due process rights under the Fourteenth Amendment. He asserts the "Defendants involved in the 2010 New Road reclassification willfully violated Plaintiff's structural and procedural due process rights to an impartial decision-making process." (Doc. 46 at 32, ¶ 106.) He states the stay of the initial road maintenance case allowed the Town "to craft a reclassification order to satisfy the low administrative standard of review." *Id.* ¶ 105. He argues procedural due process "required impartial weighing of the true necessity" of the reclassification "which has taken Plaintiff's property without compensation for recreation." *Id.* ¶ 106. As relief, Plaintiff seeks four injunctions: (1) finding the Vermont Supreme Court decision of *Ketchum v. Town of Dorset*, 22 A.3d 500 (Vt. 2011), to be an unconstitutional interpretation of Vermont law; (2) "involving the segment of TH26/New Road/Fuller Road which remained a Class IV town highway . . . generally based upon the Vermont Superior Court decision in the prior maintenance appeal but updated to account for [] further deterioration . . due to Defendants' sustained refusal to conduct *any* maintenance of the segment of TH26 abutting Plaintiff's property," (Doc. 46 at 87, ¶ B); (3) remanding "a *new* Notice of Insufficiency appeal" to Vermont courts to review the maintenance of the segment of TH 26 that was reclassified as Crane Brook Trail, (*id.* at 88, ¶ C); and (4) requiring the recusal of Town officials in the event of a conflict of interest.

Plaintiff challenged the Town's reclassification of TH 26 as well as the Town's maintenance of TH 26 all the way to the VSC. The VSC determined the evidence was sufficient

to support the Town's reclassification order.[7] Plaintiff may not again challenge the process that was expressly approved by the VSC. The VSC has also determined the Town has discretion to deny requests to regularly maintain Class 4 roadways, including the portion of TH 26 that abuts Plaintiff's property. The VSC explained:

> Although the Town's road policy establishes less town responsibility for Class 4 highway repair and maintenance than [Plaintiffs] desire, . . . it is fully consistent with the discretion accorded by [governing statute]. [Plaintiffs] are bound to respect the Town's discretion, and cannot trump the selectoard's decision through their own view of what the public good requires. If [Plaintiffs] do not agree that the Town's decision satisfies the necessity of the town, the public good, or the convenience of the inhabitants of the Town, the conduct of elected officials, detrimental to the interests of the town . . . , is subject to regulation at the polls.

Demarest v. Town of Underhill, 2016 VT 10, ¶ 16, 138 A.3d 206, 211, 201 Vt. 185, 192 (internal quotation marks omitted). Finally, the VSC affirmed that a town has no obligation to maintain a legal trail. *See In re Town Highway 26*, No. 2014-386, 2015 WL 2383677, at *4 (Vt. May 2015) ("The ultimate fact remains . . . that the disputed segment of TH 26 is a trail, and the [T]own has no legal obligation to maintain a trail."). Plaintiff may not again challenge the Town's reclassification or maintenance decisions in this Court under the guise of due process.[8] *See*

---

[7] The VSC noted that the circumstances were "unique":

> [A]s a matter of law the segment at the time of the 2010 reclassification order consisted of a Class 3 and Class 4 road. But the practical reality on the ground was that it had long since reverted to trail-like conditions, and was perceived as a trail by townspeople as a result of the later-invalidated 2001 reclassification effort. Whether the decision here was to 'downgrade' the legal status of the segment, or to not upgrade it, it was amply supported by the Selectboard's findings and the evidence upon which it relied.

Demarest, 2013 VT 72, ¶ 33.

[8] To the extent that Plaintiff names additional Individual Defendants who were not parties to the prior actions, who have not already been dismissed, those Individual Defendants, as current and former town officials, are in privity with the Town with regard to these claims because Plaintiff does not allege any acts by any individual that was "separate and apart from acts done in their supervisory authority." *See Cornelius v. Vermont*, No. 2020-227, 2021 WL 1853674, at *2 (Vt. May 7, 2021) (noting that "although a public official sued in her individual capacity is generally not considered to be in privity with the government for purposes of res judicata, that is not true . . . when a party is sued as an individual for actions taken solely in her official role.") (internal quotation marks omitted).

Exxon Mobil Corp. v. Healey, No. 18-1170, --- F.4th ---, 2022 WL 774516, at *10 (Mar. 15, 2022) (explaining claims share identity when they "grow out of the same transaction . . . and seek redress for the same wrong") (cleaned up). Plaintiff's argument that his constitutional claims were not adjudicated by the state court are unavailing because a state court is fully competent to adjudicate federal constitutional claims. *See Haywood v. Drown*, 556 U.S. 729, 739–41 (2009) (explaining that state courts of general jurisdiction may properly hear both suits for damages under § 1983 and suits for declaratory and injunctive relief").

Additionally, to the extent Plaintiff seeks review of the VSC's ruling in *Ketchum*, this court does not sit as a court of appeals for the state courts. *See Skinner v. Switzer*, 562 U.S. 521, 532 (2011). This Court also does not remand cases to the state court. If Plaintiff desires to bring a new notice of insufficiency appeal, such a claim is properly pursued in state court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Therefore, to the extent that Plaintiff is complaining of injury caused by any of the Vermont state court decisions, such as the VSC's decision applying *Ketchum*, this Court would lack subject matter jurisdiction over his claims under the *Rooker-Feldman* doctrine. *See Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005) (explaining the *Rooker-Feldman* doctrine applies when a plaintiff: (1) loses in state court; (2) complains of injuries caused by a state-court judgment; (3) invites the federal court to review and reject that judgment; and (4) commences federal court proceedings after the state-court judgment was rendered); *see also Grundstein v. Vt. Bd. of Bar Examiners*, Case No. 5:20-cv-210, 2021 WL 2660083, at * 7 (D. Vt. May 25, 2021) (explaining that, under the *Rooker-Feldman*

doctrine, "a federal district court lacks subject matter jurisdiction over the functional equivalent of an appeal from a state court ruling").

Plaintiff's Claims One and Two must be dismissed because they are barred by res judicata.

2. Claims Three and Four

In Claims Three and Four, Plaintiff alleges a violation of his substantive due process and privacy rights under the First, Ninth, and Fourteenth Amendments. He asserts Municipal Defendants violated the Ninth and Fourteenth amendments "by engaging in a *willful* and *relentless* effort over the span of around two decades to purloin the use, value, access and personal enjoyment of Plaintiff's private property." (Doc. 46 at 33-34, ¶ 110.) He states a number of Individual Defendants "colluded" to violate his due process rights "by initiating the 2010 New Road Reclassification process . . . to reach a predetermined future reclassification decision in order to take Plaintiff's property without compensation." *Id.* at 34, ¶ 111. Plaintiff seeks declaratory relief stating "all Vermont Class IV Town Highways and Town Legal Trails *shall* be maintained without bias" and that interested persons in Vermont "have a substantive right that a Taking *only occur*[] due to *Necessity*." (Doc. 46 at 89, ¶ E.)

As the VSC has explained, "[i]n 2001, the [Underhill] selectboard reclassified portions of TH 26 as a legal trail to be used for recreational purposes. The Town complied with all of the statutory procedures for reclassification, except that it failed to formally record the reclassification order in the land records." *In re Town Highway 26*, 2015 WL 2383677, at *1. After the reclassification, the Town stopped maintaining the Crane Brook Trail segment of TH 26. Plaintiff purchased his property in 2002. In 2010, following Plaintiff's challenge of the 2001 reclassification order, the Town again approved the reclassification which, as discussed

above, was affirmed by the VSC. Plaintiff's challenges with regard to maintenance of both the Crane Brook Trail and of the remaining Class 4 portion of TH 26 have failed. The VSC has explained the Town has discretion to deny requests to regularly maintain Class 4 roadways and has no legal obligation to maintain a trail. As with Claims One and Two, Plaintiff may not again challenge the Town's reclassification or maintenance decisions in this Court under the guise of due process. *See Faulkner v. Caledonia Cnty. Fair Ass'n*, 869 A.2d 103, 108 (Vt. 2004) (explaining a plaintiff is required "to address in one lawsuit all injuries emanating from all or any part of the transaction, or series of connected transactions, out of which the action arose").

Plaintiffs' Claims Three and Four must be dismissed because they are barred by res judicata.

3. Claims Five and Six

In Claims Five and Six, Plaintiff alleges a violation of his Fifth Amendment right concerning the taking of his property. He asserts the 2010 reclassification "functionally condemned a 49.5' wide swath of private property to simultaneously deny landowners reversionary property rights and rescind past, present, and prospective future accessibility to private property." (Doc. 46 at 38, ¶ 123.) He alleges Defendants have taken the "reasonable access to his domicile and the reasonable expectation of privacy in and around one's home." (*Id.* ¶ 124.) As relief, Plaintiff seeks compensatory damages for the "temporary categorical taking of Plaintiff's reversionary property rights and the unmitigated damages of the taking of additional property interests and value" from the 2010 road reclassification until the damages are mitigated (*id.* at 89, ¶ G), compensatory damages "for the past taking of the reasonable expectation of privacy at Plaintiff's domicile," (*id.* at 90, ¶ H) and declaratory relief "confirming the downgrade of a Town Highway to an *entirely unmaintained* Legal Trail or an *entirely unmaintained* Class

IV Road constitutes a greater categorical taking than a conversion of a railroad right of way into a Legal Trail" (*id.* ¶ I), an injunction requiring the Town to reclassify the Crane Brook Trail back to Class III or Class IV Town Highway that is "*reasonably maintained*," or to "*discontinue* a portion of the unmaintained segment of Class IV road and [Crane Brook] Trail," or compensate Plaintiff for the loss of all claimed property rights (*id.* at 91, ¶ J), and punitive damages against Defendants Walkerman and Albertini equal to the amount of capital gains they each received from sale of real estate.

While the Court is not insensitive to Plaintiff's frustration regarding access to his home, the VSC has determined that access to Plaintiff's home remains via the northern Class 4 section of TH 26 and has affirmed the reclassification of the former Town Highway to a legal trail. With regard to the maintenance, or lack thereof, of the Class 4 portion of TH 26, the Court is left to restate the VSC's 2016 conclusion: "If [Plaintiff] do[es] not agree that the Town's decision satisfies the necessity of the town, the public good, or the convenience of the inhabitants of the Town, the conduct of elected officials, detrimental to the interests of the town . . . , is subject to regulation at the polls." *Demarest*, 2016 VT 10, ¶ 16. Res judicata prevents this Court from considering a claim challenging the Town's VSC-affirmed reclassification of TH 26, creation of Crane Brook Trail, and maintenance of Class 4 TH 26 roadway. *See Faulkner*, 869 A.2d at 108. Plaintiff's Claims Five and Six must be dismissed.

This Court has acknowledged that "applying res judicata, especially in a pro se case, can render harsh results." *Steuerwald*, No. 1:14-cv-88, 2015 WL 1481564, at *6 (D. Vt. Mar. 31, 2015). However, the doctrine is equally applicable to pro se plaintiffs.[9] *See Cieszkowska v. Gray Line N.Y.*, 295 F.3d 204, 205-06 (2d Cir. 2002) (affirming dismissal of pro se plaintiff's

[9] The Court notes that Plaintiff was represented by counsel in state court.

complaint on res judicata grounds where plaintiff raised new legal theory involving the same events as those alleged in the first complaint). As the Supreme Court has explained, "Section 1983[] does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims." *Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 81 (1984). Issues arising out of the same set of operative facts cannot be relitigated in federal court simply because Plaintiff has decided to cast them in a slightly different mold. Res judicata prevents such a result.

C. Statute of Limitations

Plaintiff commenced his action in this Court on June 21, 2021. In Claims One through Six, as discussed above, Plaintiff primarily challenges the 2010 reclassification of TH 26 and the effects of that decision on his vehicular access to his property. The statute of limitations for a § 1983 claim brought in federal court in Vermont is three years. Even if these claims are construed as takings claims, which enjoy a longer six-year statute of limitations under 12 V.S.A. § 511, all claims based on conduct occurring prior to June 21, 2015, would be barred.

All of Plaintiff's relevant factual allegations regarding Claims One through Six predate 2015. *See generally* Doc. 46. Plaintiff argues that his claims are not barred because the VSC's decision in his action seeking a declaration that he had a right of vehicle access over Crane Brook Trail and appealing the denial of a permit for highway access over Crane Brook Trail for his proposed subdivision was issued February 26, 2021. He asserts that, in that decision, the VSC "granted the Town of Underhill discretion to rescind Plaintiff's self-executing and exercised prior right of access over the 'Crane Brook Trail.'" (Doc. 55 at 20 (emphasis omitted).) The VSC's holding, however, was that Plaintiff's claims were barred by claim preclusion because they involved the same set of facts as his earlier litigation, specifically "the

Town's act of reclassifying a portion of TH 26 as a trail." *Demarest*, 2021 VT 14, ¶ 14. The VSC highlighted that "Plaintiff's concern has always been his access to his property via the trail." *Id.* ¶ 15.

Plaintiff also argues that the Supreme Court's decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), saves his claims from the statute of limitations bar. Plaintiff is correct that the Supreme Court overturned prior precedent that required exhaustion of remedies in state court. *See Knick*, 139 S. Ct. at 2177 (holding a plaintiff asserting a Takings Clause claim need not seek relief in state courts before bringing a claim in federal court). The fact remains that Plaintiff brought his claims stemming from the Town's handling of TH 26 in state court and lost. As determined above, the Court is required by federal law to apply res judicata to Plaintiff's claims raised here. *See Morabito v. New York*, 803 F. App'x 463, 468 (2d Cir. 2020) (rejecting argument that, in the wake of *Knick*, the federal district court should not apply collateral estoppel to state court rulings). Plaintiff fails to cite support for the proposition that *Knick* somehow resurrects claims barred by res judicata. *Compare Stensrud v. Rochester Genesee Reg'l Transp. Auth.*, 507 F. Supp. 3d 444, 455 (W.D.N.Y. 2020) (allowing a takings claim to proceed in federal court where "when *Knick* was issued, [the] plaintiff was actively litigating a takings claim through state court procedures but had not yet filed a §1983 claim in federal court").

Plaintiff's allegations in support of Claims One through Six demonstrate that Plaintiff had a complete cause of action before the middle of 2015 as his constitutional claims arise from decisions the Town made with regard to reclassifying and then maintaining, or failing to maintain, TH 26 which occurred prior to 2015. Accordingly, even if Plaintiff's Claims One through Six were not barred by the doctrine of res judicata, the Court would find that they are barred by the statute of limitations governing § 1983 actions.

D. Failure to State a Claim

1. Claims Seven and Eight

In Claims Seven and Eight, Plaintiff alleges a violation of his First Amendment rights against certain Individual Defendants and the Town. Plaintiff alleges a longstanding pattern and practice of the Town willfully misrepresenting, editing, deleting, and suppressing speech from public meetings and other records, including deleting significant portions of Trails Committee Meeting Minutes in which Plaintiff participated. He states the Town removed public records from the Town website "to manipulate the public record [and] interfere with Plaintiff's . . . reasonable access to public records which were previously readily available on the Town's website." (Doc. 46 at 30, ¶ 99.) He asserts Defendants refused to honor a petition submitted in 2002 requesting the Town reconsider its efforts to prohibit vehicular traffic of TH 26. He alleges October 24, 2013 Town Selectboard minutes defame his character by describing him and former co-litigants as "litigious" but "ignoring the factual history of Plaintiff's involvement in the Trails Committee." (*Id.* ¶ 200.) Plaintiff asserts the September 14, 2020 Town Selectboard meeting minutes were censored and the revised minutes continued to contain inaccuracies. He further alleges the Municipal Defendants "have a pattern and practice of actively thwarting the individual rights to have a say in local government." (*Id.* at 63-64, ¶ 206.) "Plaintiff asserts Town officials have violated [his] First [A]mendment right by preventing him . . . from speaking at least once about a topic being discussed or debated or taken other official actions to entirely censor Plaintiff or the accurate content of Plaintiff's protected speech in public meeting." (*Id.* at 64, ¶ 207 (emphasis omitted).) As relief, he seeks compensatory and punitive damages for Defendants' retaliatory actions and censorship.

To state a plausible claim of a violation of the right to free speech, a plaintiff must allege "that official conduct actually deprived them of that right." *Williams v. Town of Greenburgh*, 535 F.3d 71, 78 (2d Cir. 2008). To prove this deprivation, a plaintiff must allege facts "showing either that (1) defendants silenced him or (2) defendants' actions had some actual, non-speculative chilling effect on his speech." *Id.* (cleaned up); *see also Spear v. Town of W. Hartford,* 954 F.2d 63, 68 (2d Cir. 1992) (requiring plaintiff to show that defendants "inhibited him in the exercise of his First Amendment freedoms"). Without more, the single allegation[10] that Municipal Defendants violated Plaintiff's constitutional right by preventing him from speaking "at least once" is a legal conclusion that the Court need not accept as true.

Plaintiff's remaining allegations pertain to the Town's handling of its public records. His allegations of misrepresenting, editing, deleting, and suppressing speech from meeting minutes, as well as his allegation of removal of records from the Town website, do not support a finding that Municipal Defendants actually silenced him or that these actions, ostensibly taken after Plaintiff's speech, had any effect on his speech. This Court has noted that the "inaccuracy of records compiled or maintained by the government is not, standing alone, sufficient to state a claim of constitutional injury." *Steuerwald*, 2015 WL 1481564, at *7.

Because Plaintiff's allegations fail to support a claim of a denial of his constitutional right, they also cannot support a claim of municipal liability. Plaintiff has failed to allege specific facts indicating that Municipal Defendants actually deprived Plaintiff of his right to speak freely. His allegation that Town officials prevented him from speaking "at least once" about "a topic" is conclusory. *See Twombly,* 550 U.S. at 561–63 (observing that "a wholly

[10] Plaintiff also asserts Individual Defendants Hamlet, Steinbauer, Stone, Peterson, McKnight and McRae committed "brazen" violations of his First Amendment rights but without stating any particular details of these alleged violations. (Doc. 46 at 64, ¶ 207.) As a result, the Court cannot determine whether these Individual Defendants' actions actually deprived him of his right to free speech.

conclusory statement of claim" warrants dismissal). In the absence of specific factual allegations that Municipal Defendants inhibited his exercise of his First Amendment freedoms, Plaintiff has failed to state a claim. Counts Seven and Eight must be dismissed.

2. Claims Eleven and Twelve

In Claims Eleven and Twelve, Plaintiff alleges a violation of his First Amendment right to petition against Defendants Steinbauer, Stone, Duval, Owens, and Walkerman as well as the Town. He alleges that these defendants "refused to abide by the demands" of the 2010 Petition on Fairness in Road Maintenance of Public and Private Roads or of the 2020 Petition on Public Accountability. (Doc. 46 at 75, ¶¶ 240–41.) He asserts the 2010 Petition "could have prevented over a decade of state litigation and many of the present causes of action." (*Id.* at 74–75, ¶ 239.) He states the 2020 Petition sought "to have three non-binding articles properly warned and subsequently placed on the 2021 Town Meeting Day ballot." (*Id.* at 74, ¶ 238.)

The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend I. However, "[n]othing in the First Amendment or in th[e] [Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minn. State Bd. v. Knight*, 465 U.S. 271, 285 (1984). Notably, Plaintiff does not allege that he was prevented from presenting his petitions containing his grievances to the Town. Because Plaintiff alleges only that Town Officials refused to abide by the demands he presented in the two petitions, conduct which does not offend the Constitution, he fails to state a claim under the First Amendment right to petition on which relief can be granted.[11] *See Ridgeview Partners, LLC v. Entwhistle*, 227 F. App's 80, 82 (2d Cir. 2007)

[11] Even if Plaintiff had stated a cognizable § 1983 claim based on the Town's handling of the 2010 Petition, it would be barred by the statute of limitation. *See Ellul v. Congregation of Christian Bros.*,

(affirming dismissal of First Amendment claim "alleging that appellees 'refuse[d] to consider or act upon grievances' [because such] conduct does not violate the First Amendment"); *see also Futia v. Westchester Cnty. Bd. of Legislators*, 852 F. App'x 30, 32 (2d Cir. 2021) (affirming dismissal of First Amendment right to petition claim for failure to state a claim "because the right to petition the state does not mean there is a right to a response"). In the absence of a plausible constitutional violation of his First Amendment right to petition the government, Plaintiff's municipal liability claim also fails.

Even if Plaintiff could establish an Individual Defendant or the Town itself unlawfully deprived him of the right to have his petitions presented to voters at Town meeting, "a public official's failure to follow state law . . . is not equivalent to a federal constitutional injury." *Tallman v. City of Chautauqua*, 335 F. App'x 92, 94 (2d Cir. 2009). Such a claim is "properly pursued in state court." *Id.* at 94; *see also Pennhurst*, 465 U.S.at 106 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

Plaintiff's Counts Eleven and Twelve are DISMISSED.

V. Leave to Amend

The Second Circuit has cautioned that a court "should not dismiss a pro se complaint without granting leave to amend at least once, unless amendment would be futile." *Garcia v. Super. of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016) (per curiam) (internal quotation marks omitted). "Amendment is futile where the problems with the complaint's claims are substantive and not the result of inartful pleading." *Biswas v. Rouen*, 808 F. App'x 53, 53 (2d Cir. 2020) (internal quotation marks and alterations omitted). As Plaintiff acknowledges, he

774 F.3d 791, 798 n.12 (2d Cir. 2014) (explaining the issue of the statute of limitations may be decided at the motion to dismiss stage if it appears on the face of the complaint).

has been engaged in litigation with the Town challenging the reclassification, maintenance and use of TH 26 for over a decade. Consequently, several of his claims are barred by res judicata, statutes of limitations, or both. Certain claims are also barred by the lack of state action and a plain failure to state plausible constitutional harm. Better pleading will not cure those deficiencies. The motions to dismiss brought by FPF and JULT, as well as the municipal defendants' motion to dismiss Counts 1-6 and 11-12, are dismissed with prejudice and without leave to amend.

The Court is dismissing Counts 7 and 8 against the municipal defendants for failure to state a plausible factual claim. Although it is not clear that better pleading could cure the deficiencies in those claims, Plaintiff may petition the court for leave to amend. In doing so, Plaintiff must explain why further amendment of each claim he seeks to assert would not be futile. Additionally, he must include his proposed Second Amended Complaint.

A proposed Second Amended Complaint must include all of Plaintiff's factual allegations in their entirety and must set forth all plausible claims he has against all defendants and all the relief he seeks. *See* Fed. R. Civ. P. 8(a). A Second Amended Complaint, if filed, will supersede and completely replace the Amended Complaint. *See Hancock*, 882 F.3d at 63 (noting "it is well settled that an amended pleading ordinarily supersedes the original and renders it of no legal effect") (cleaned up). Accordingly, reference back to either the original Complaint or Amended Complaint is insufficient under Rule 15(b) of the Local Rules of Civil Procedure for the District of Vermont. *See* D. Vt. L.R. 15(b). Equally important, a Second Amended Complaint must comport with the Federal Rules of Civil Procedure, including setting forth short and plain statements of each claim as required by Rule 8, and doing so in consecutively numbered paragraphs as required by Rule 10. Plaintiff is advised against unnecessary prolixity as it "places

an unjustified burden on the court and the part[ies] who must respond to it because they are forced to select the relevant material from a mass of verbiage." *Salahuddin v. Cuomo*, 861 F.2d 40, 42–43 (2d Cir. 1988) (cleaned up) (affirming dismissal of a fifteen-page single-spaced complaint containing a "surfeit of detail").

CONCLUSION

For the reasons discussed above, Municipal Defendants' original motion to dismiss the superseded Complaint (Doc. 5) is DENIED AS MOOT; Defendant Front Porch Forum's motion to dismiss (Doc. 8) is GRANTED; Defendant Jericho Underhill Land Trust's motion to dismiss (Doc. 51) is GRANTED; and Municipal Defendants' motion to dismiss (Doc. 52) is GRANTED. Plaintiff's Amended Complaint (Doc. 46) is DISMISSED. Plaintiff may move for leave to amend as set forth above. Failure to file a motion for leave to amend, together with a proposed Second Amended Complaint, on or before April 29, 2022, shall result in closure of the case.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 29th day of March 2022.

/s/William K. Sessions III
William K. Sessions III
District Court Judge

Federal Rules of Appellate Procedure Form 1. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

DAVID P. DEMAREST, an individual, PLAINTIFF v. TOWN OF UNDERHILL, a municipality and charter town, SELECTBOARD CHAIR DANIEL STEINBAUER, as an individual and in official capacity, et. al.	Notice of Appeal CASE NO: 2:21-cv-167-wks (42 U.S.C. § 1983) (42 U.S.C. § 1983 Monell)

Notice Of Appeal

Notice is hereby given that Plaintiff David Demarest hereby appeal to the United States Court of Appeals for the Second Circuit from OPINION AND ORDER entered in on the 29th day of March, 2022 as it pertains to *Dismissal with Prejudice* of meritorious claims against the following Municipal Defendants: Town of Underhill, Daniel Steinbauer, Bob Stone, Dick Albertini, Seth Friedman, Marcy Gibson, Rick Heh, Brad Holden, Anton Kelsey, Karen McKnight, Nancy McRae, Steve Owens, Clifford Peterson, Patricia Sabalis, Cynthia Seybolt, Trevor Squirrell, Rita St. Germain, Daphne Tanis, Walter "Ted" Tedford, Steve Walkerman, and Mike Weisel.

Respectfully submitted this 27th Day of April, 2022.

By: /s/: David Demarest
David P Demarest, *Pro Se*
P.O. Box 144
Underhill, VT 05489
(802) 363-9962
david@vermontmushrooms.com