

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

835 HINESBURG ROAD, LLC,)
Plaintiff)

v.)

CITY OF SOUTH BURLINGTON,)
SOUTH BURLINGTON CITY COUNCIL,)
MEAGHAN EMERY, TIMOTHY BARRITT,)
and HELEN RIEHLE,)
Defendants)

Case No. 5:22-cv-58

JURY TRIAL DEMANDED

COMPLAINT

Nature of Action

1. By three to two vote, the South Burlington City Council seized 1,300 acres of land throughout the City without paying for it. The recent amendments to the Land Development Regulations ("LDR") exclude large swaths of land from any development at all. South Burlington barred all activity in "Habitat Blocks." Under South Burlington's LDRs, "all lands within a Habitat Block must be left in an undisturbed, naturally vegetated condition" and the "encroachment of new development into . . . Habitat Blocks is prohibited." The City Council's action constitutes an illegal taking under both the United States and Vermont Constitutions. It must pay for approximately 1,300 acres of land that it has taken.

2. In casting the critical vote, Meghan Emery, who was both a City Councilor and an employee of the University of Vermont, struggled under heavy conflicts of interest that violated the City of South Burlington's "Conflict of Interest and Ethics Policy." At the eleventh hour, the University of Vermont negotiated additional specific language that protected it from the land seizures that the City Council executed. It did so after threatening to sue the City for violating its

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property rights. Despite having a clear “conflict of interest” under the City of South Burlington’s ethics policy, she failed to recuse herself and voted for the adoption of the Land Development Regulations. The last minute version of the Regulations contained specific language designed to insulate the University of Vermont from its effects. The Court should nullify Ms. Emery’s vote because voting with the conflict of interest violates the Due Process Clause, Vermont’s equivalent, and South Burlington’s own regulations.

3. The designation of land owned by 835 Hinesburg Road, LLC (“835 Hinesburg”) as a “Habitat Block” violates the United States Constitution’s Equal Protection Clause, Vermont Constitution’s Common Benefit Clause, and Vermont statutes. The designation of the 835 Hinesburg’s land as a Habitat Block was improper because it discriminated against property owners’ rights to develop their land. The consultants that the City of South Burlington (the “City”) hired failed to visit 835 Hinesburg’s land to determine whether it actually was a Habitat Block. 835 Hinesburg presented expert analysis to the City Council that rebutted the City’s consultants and that showed that the land should not be included in the areas designated as Habitat Blocks. Moreover, encouraging species to roam across 835 Hinesburg’s land puts them at risk of being run over on the interstate, undermining the purpose of the “Habitat Blocks.” The City Council ignored this evidence and decided to continue to include the land.

4. South Burlington’s LDRs are also fatally ineffective in accomplishing the goals for Habitat Blocks. For example, the exemption of the University of Vermont’s land completely undermines the basis of the LDRs. The land owned by UVM is large and centrally located in South Burlington. By excluding land from the University, the stated goals of protecting Habitat Blocks are significantly undermined. Additionally, the purpose of helping species navigate the

fragmented land in South Burlington is also undermined by allowing walking paths on land preserved as Habitat Blocks. Animals generally avoid all human contact and their canine pets.

Parties

5. Plaintiff 835 Hinesburg is a Vermont limited liability company.
6. The City is a Vermont municipality.
7. The City Council is the governing body for the City of South Burlington.
8. Meaghan Emery is a member of the City Council and is named in this action in her official capacity. She voted in favor of the amendments to the Land Development Regulations.
9. Timothy Barritt is a member of the City Council and is named in this action in his official capacity. He voted in favor of the amendments to the Land Development Regulations.
10. Helen Riehle is the chair of the City Council and is named in this action in her official capacity. She voted in favor of the amendments to the Land Development Regulations.
11. The City, the City Council, and the members of the City Council acted under color of state law when they undertook the actions described in this complaint.

Jurisdiction and Venue

12. This Court has jurisdiction pursuant to 28 U.S.C. §1331. The federal issues include resolution of a Fifth Amendment illegal takings claim, Fifth and Fourteenth Amendment Due Process claims, and a Fourteenth Amendment Equal Protection Claim.
13. This Court may enter a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2202.
14. Venue lies in this jurisdictional district pursuant to 28 U.S.C. § 1391(b).

Facts

835 Hinesburg Owns Property In South Burlington

15. 835 Hinesburg owns property in South Burlington, Vermont. Interstate 89 and Burlington International Airport are directly to the north of the property. Heavy industrial development and a major state highway, Routh 116, is directly to the east. A major sports complex and hundreds of homes are to the west. Hundreds of additional homes lie to the south.

16. 835 Hinesburg has been seeking to develop its property for a number of years. In 2015, it presented a plan to the Planning Commission. The members of the Planning Commission responded favorably to the plan.

The Amended LDRs Completely Takes 835 Hinesburg's Property

17. On February 7, 2022, the City Council voted to adopt the amendments to the Land Development Regulations.

18. Section 12.04 (F) of the amended regulations completely prevents any use of the area of land designated a Habitat Block: “all lands within a Habitat Block must be left in an undisturbed, naturally vegetated condition.”

19. Section 12.04(F) specifically prevents a number of traditional property rights associated with fee simple ownership, including: (1) “the clearing of trees and understory vegetation is prohibited except as specified in this section,” (2) “the creation of new lawn areas is prohibited,” (3) “Snow storage areas are prohibited.”

20. Section 12.04(F) also undermines one of the most traditional and important rights of private property – the right to exclude. 835 Hinesburg cannot erect a fence to exclude either humans or wild animals under Section 12.04(F).

21. Section 12.04(H) also prohibits development in the Habitat Block: “The encroachment of new development activities into, and the clearing of vegetation, establishment of lawn, or other similar activities in Habitat Blocks is prohibited.”

22. The broad language of the LDRs prohibits any manner of uses including the fundamental right to exclude others from entering your property. The prohibition on “disturbing” the land prevents a property owner from even walking his or her land for fear of disturbing animals.

The Entire Process To Develop The Amendments
To The Land Development Regulations Suffered From Severe Conflicts Of Interest

23. At all relevant times, Meaghan Emery is and was a professor of French at the University of Vermont.

24. The City Council has adopted a conflict of interest policy. The policy defines a conflict of interest to include the following:

A real or seeming incompatibility between a public officer’s private interests and his or her public or fiduciary interests to the municipality he or she serves. A conflict of interest arises when there is ***a direct or indirect personal or financial interest of a public officer or a person or group closely tied with the officer including his or her spouse, household member, child, stepchild, parent, grandparent, grandchild, sibling, aunt or uncle, brother or sister-in-law, business associate, or employer or employee in the outcome of an official act or action***, or any other matter pending before the officer or before the public body in which the public officer holds office.

(emphasis added).

25. Meaghan Emery should have recused herself long ago from the consideration of the Land Development Regulations. Her employer, the University of Vermont, had a direct

financial interest in the outcome of the consideration of the Land Development Regulations. *See infra* ¶¶ 50-55.

26. Under rules governing South Burlington’s City Council, any measure needs at least three votes to pass. Here, the vote on the Land Development Regulations would have failed had Meaghan Emery properly recused herself.

The Interim Zoning Committee’s Work Was Flawed, Conflicted, And Biased

27. On November 13, 2018, the City imposed a ban on development by adopting interim zoning. During the period of time that interim zoning was in effect, no one in South Burlington could develop property without the approval of the City Council.

28. During the existence of Interim Zoning, the City Council acts both in a legislative and quasi-judicial capacity. The City Council is the final arbitrator of development rights during the period of interim zoning.

29. The City formed an Open Space Interim Zoning Committee (“Interim Zoning Committee”) on December 17, 2018. The Clerk of that committee was Meaghan Emery who was also a City Councilor for the City of South Burlington.

30. In its first report to the South Burlington City Council, the Interim Zoning Committee made clear that its intent was to strip private property owners of their development rights. The untitled power point said: “The relevant issue for our work is that we don’t want to expend resources (time & \$) on the protection of properties that may not be developable.”

31. The final report from the Interim Zoning Committee made clear that the Committee was seeking to undermine the development potential of private property owners. “The assessment process led to the distillation of a list of 25 highest priority parcels for open

space conservation. Twenty are privately-owned properties and five are owned by the University of Vermont.”

32. The Committee took a hands-off approach to the University of Vermont properties: “The high priority UVM properties do not fit neatly into these categories, but we suggest that the city work with UVM to better understand their long-term goals for properties within South Burlington.”

33. The Committee excluded from its prioritization system any properties owned by public entities or that already had certain conservation protections. The final report said: “We then eliminated parcels that were already conserved through 1) permit requirements which restrict development, 2) publicly-owned parks or lands with conservation designation, and 3) third party conservation ownerships or easements.”

34. The Committee also arbitrarily excluded properties of a smaller size regardless of the environmental attributes found on the properties.

35. By excluding these properties from the scoring system, the Committee fatally undermined any legitimate environmental conservation.

36. For the 25 properties that the Interim Zoning Committee included, it did not take an objective approach. Instead, it allowed the personal preferences of some of its members to infect the scoring system for the properties.

37. While the Report purported to prioritize properties if they had a “hit” on 4 of the 5 categories under consideration, the members of the Committee had their collective thumb on the scale. These five categories were “water,” “wetland,” and “forest,” “aesthetics,” and “agriculture.” The scoring system had no basis in environmental science and was created to over identify property as having important environmental attributes. The over identification of

properties with environmental attributes was consistent with the anti-growth philosophies of the Committee members.

38. Even though the Committee claims that 835 Hinesburg's property had 4 out of 5 on its own scoring system, 835 Hinesburg's property did not have 4 out of 5. The Committee itself determined that there was no scoring for "aesthetics" or "agriculture." In other words, there were on 3 out of 5 categories that applied to 835 Hinesburg's property based on the Committee's own scoring. Yet, inexplicably, the Committee gave the property a 4 out of 5 score.

39. The Committee excluded a number of properties that had scored a 3 of 5 from its identification as "Habitat Blocks." These property owners were identically situated to 835 Hinesburg for the purposes of identifying "Habitat Block" but, for inappropriate reasons, were excluded from designation as a "Habitat Block."

40. Hinesburg's property should not have even scored a 3 out of 5.

41. The Committee claimed that 835 Hinesburg's property had forest habitat. That conclusion was inconsistent with the State of Vermont's Biofinder tool. The Biofinder showed that the 835 Hinesburg property had neither a "Highest Priority" nor "Priority" for "Interior Forest Block" status.

42. The Committee's conclusions concerning wildlife also are suspect. The Committee admitted that its system did not include actual visits to the properties: "the ratings in this report for each parcel were primarily done using mapping, not on-site visits by professionals." The scoring of 835 Hinesburg's property appears to be based on a single observation from June 21, 2008 that was logged not by the Committee but by someone with access to the BioFinder tool. This observation was more than ten years old before the Committee's report.

43. The Committee relied on this information even though it acknowledged that it should not rely on this data. In its report, it quoted Biofinder's own statement concerning its lack of reliability for the very task that the Committee used it: "For example, under the "Community and Species Scale" one finds this caution: 'As you interact with this map, please remember that all data were collected for use at the state or town level. Though you can zoom in to individual parcels, for example, you need to understand the limitations of each of the datasets you're using.'"

44. The report again quoted Biofinder which again said that the Biofinder tool should not be used for the purpose for which the Committee used it: "The accuracy for other components (Interior Forest) can diminish as one zooms in. Because of these accuracy issues at the local scale, BioFinder cannot replace site visits or site-specific data and analyses and should only be used to gain a general understanding of components likely to be at play." The Committee never verified that its information was current or reliable.

45. In the final report, the Committee stated that "As the 2014 report by the previous Open Space Committee noted, field surveys will be ultimately required to verify the existence or absence of the resources." Despite this acknowledgement, no one from the City ever verified the conclusions of the Committee by conducting a site visit to the property.

46. Correcting for this faulty information, the 835 Hinesburg property should have scored a 1 out of 5 and not been included in the properties that should be preserved for environmental reasons.

47. The five categories themselves do not represent any legitimate basis for prioritizing conservation of environmental resources. Instead, they were simply a guise for the

Committee's desire to prevent any further private commercial development of property in that area of South Burlington.

48. In an effort to give their conclusions the aura of legitimacy, the Committee hired Arrowwood as a consulting firm to bless its conclusions.

49. The 2020 Arrowwood report admitted that its employees did not visit the sites under consideration. Arrowwood admitted this even though the Committee had said that its conclusions should be field verified.

The University Of Vermont Objected Vigorously To Adopting The LDRs

50. On March 5, 2020, the University of Vermont wrote a letter that described its unease at the activity that was occurring at the Interim Zoning Committee.

51. On May 21, 2021, the University of Vermont wrote a letter that described the significant legal concerns that the University had to the draft regulations.

52. On September 14, 2021, the University of Vermont, through its attorneys, sent a letter detailing its legal objections to the proposed Land Development Regulations. These objections included that the regulations violated the Due Process Clause, constituted an illegal taking without compensation, and violated provisions of state law.

53. On January 3, 2022, the University of Vermont sent a letter reiterating their opposition to the designation of their land as a Habitat Block ("January 3 UVM Letter"). The University noted that the City had designated 193 acres of its property as a Habitat Block under the proposed Land Development Regulations. The January 3 UVM Letter noted that it had purchased the 193 acres. It also disclosed that it had plans to develop some of its land by potentially constructing buildings on these properties.

54. The January 3 UVM Letter also correctly noted that the regulations proposed to limit all development within the Habitat Blocks. In addition, the UVM Letter correctly noted that this type of regulation is a taking that requires just compensation.

55. The January 3 UVM Letter closed by informing the City Council that the UVM Board of Trustees had authorized the University to pursue litigation against the City based on the illegal actions that the City was engaged in.

The City Council Process Was Conflicted And Failed To Follow Proper Procedure

56. After the Interim Zoning Committee completed its work, the effort to pass the Land Development Regulations shifted back to the City Council. At this point in the process, the City Council was acting under a heavy conflict of interest because the University had strongly objected to the draft amended regulations and threatened to sue the City.

57. On November 8, 2021, the City Council voted to authorize notice of one or more hearings with specific proposed language for the Land Development Regulations. At the first meeting on January 3, the City Council considered the language of the draft Land Development Regulations. The City Council authorized another hearing on February 7, 2022.

58. Shortly before the February 7, 2022 meeting, the University of Vermont and the City came to an agreement that introduced new language into the Land Development Regulations.

59. In comments to the Other Paper, Andrew Bolduc indicated that the change to the regulations language occurred because the University had threatened to sue the City of the Land Development Regulations.

60. The last minute changes to the Land Development Regulations were designed to provide additional legal protection for the University of Vermont. The new language included

the following language: “For example, Habitat Block and Habitat Connector designations are subject to the limitations in 24 V.S.A § 4413(a) for uses enumerated therein and proposed by entities such as the State of Vermont, the City of South Burlington, the Champlain Water District, or the University of Vermont.”

61. The exclusion of property owned by the University of Vermont from the definition of “Habitat Block” fatally undermines the justification for introducing the concept of “Habitat Blocks” in the Land Development Regulations.

62. The agenda for the February 7, 2022 makes no express mention of these changes or their import.

63. A memorandum included in the materials for the February 7 meeting makes a vague reference to some changes that the City Council approved on January 18. Yet the agenda for the January 18 meeting makes no reference to any official action by the City Council on the Land Development Regulations.

64. The actions that the City Council took were not properly warned under Vermont law.

835 Hinesburg Objected To The Process At The City Of South Burlington

65. 835 Hinesburg objected early and often to the process occurring at the City of South Burlington.

66. In a February 2020 letter, 835 Hinesburg urged the City Council not to use the process that was unfolding at the Interim Zoning Commission. In that letter, 835 Hinesburg noted that “Many environmental features (e.g., wetlands) can be scientifically identified, mapped and protected through delineations and/or buffers.” Despite this statement, the City never sent anyone to the property to document properly the actual features of 835 Hinesburg’s land.

67. The February 2020 letter also objected to the approach of selecting the properties to stop development then justifying their selection after the fact by customizing how environmental criteria are applied.

68. The February 2020 letter also noted that acting on the preliminary plan would amount to an illegal taking.

69. On August 31, 2021, 835 Hinesburg sent a letter objecting to the Planning Commission's abandonment of its efforts to work with 835 Hinesburg. Instead, the Planning Commission spent its time adopting regulations that were consistent with the reports from the Interim Zoning Committee that sought to stop all development in "Habitat Blocks" and to expand buffer zones beyond what was required by the State of Vermont regulations.

70. On November 2, 2021, 835 Hinesburg submitted another letter objecting to the draft of the Land Development Regulations that the Planning Commission voted to approve.

71. In that letter, 835 Hinesburg objected to the Land Development Regulation's concept of a Habitat Block as a taking.

72. On January 6, 2022, 835 Hinesburg sent an additional letter objecting to the adoption of the proposed Land Development Regulations.

73. With its January 6, 2022 letter, 835 Hinesburg submitted expert analysis on the suitability of the land for Habitat.

74. This analysis found that there were no advantages to designating the land as a "Habitat Block." The analysis found that over 12 years the expert had not seen evidence of the species for which Habitat Blocks were created. This expert had actually visited the property.

75. The expert had seen no signs of unusual, threatened or endangered species.

76. The expert concluded that: “The site [HB12] is not a movement corridor to the north and it never will be so long as down-town exists. Common sense dictates that vertebrates would avoid the noise/smells/sounds/sights of a 4-lane divided highway with high speed traffic. Animals might attempt it once, but the danger is obvious - and is continuous 24/7. Ultimately, if crossing repeatedly, most small, mid or large land animals crossing I-89 will be killed or injured.” The expert also noted that the presences of walking trails brought human through the forested area that provided another disincentive for species to be present on the property.

77. The expert also noted that the alleged “Habitat Block” on 835 Hinesburg’s property was not connected to any other protected forest area.

78. The expert concluded that species have already shifted to those species adapted to survive in a suburban environment. The expert also concluded that the state sponsored 50 foot buffer was sufficient to protect the wetland areas and related species.

79. The January 6, 2022 letter noted that with the addition of the expert analysis, the City Council had no rational basis for designating 835 Hinesburg’s land as a “Habitat Block.” The letter also objected that there was no way to rebut the conclusion that the land was a “Habitat Block.” The letter noted that the Land Development Regulations violated the Due Process Clause, the Equal Protection Clause, and their Vermont equivalents.

The City Council Denied 835 Hinesburg The Right
To Develop Its Land Because It Was Located In A Habitat Block

80. The August 31, 2021 letter also noted that 835 Hinesburg felt it had no choice but to submit for sketch plan review a plan to develop the property with the then existing Land Development Regulations.

81. 835 Hinesburg submitted its sketch plan to the City Council on August 31, 2021.

82. On November 8, 2021, the City Council denied 835 Hinesburg the opportunity to develop the property by saying that the Property did not meet the proposed new regulations. As part of its decision, the City Council relied on the fact that some of the proposed development was located within a Habitat Block.

Despite Detailed Legal And Scientific Information That Showed The Application Of A Habitat Block To 835 Hinesburg's Land Was Unwise And Illegal, The City Council Adopted The Amendments To The Regulations

83. The City Council did not carefully review whether the amendments to the LDRs should be applied to 835 Hinesburg's land. Had they done so, they would have seen that the application to 835 Hinesburg's land runs contrary to the purposes of the regulations.

84. The City did not even act consistently with its plan to designate 835 Hinesburg's land as a "Habitat Block." The City has approved the placement of a dog park within Wheeler Park abutting the habitat block. It would not have allowed dogs near a "Habitat Block" if it were truly concerned with making the land hospitable to wild species.

85. Despite having all the information about the flawed nature of the regulations and their adoption, the City Council voted to continue to include 835 Hinesburg's land in the designation of a "Habitat Block" under the City's amended Land Development Regulations and to increase the buffer for the wetland to 100 feet. The City failed to ever conduct an onsite evaluation of the "Habitat Block" to verify the tentative conclusions of the Interim Zoning Committee. It failed to do so even though the Interim Zoning Committee said that it must do so to have any validity.

The Amendments Of The Land Development
Regulations Will Result In Negative Environmental Consequences

86. The State of Vermont is facing a housing crisis both for “affordable housing” and workforce housing. The City Affordable Housing Committee has documented this worsening situation.

87. The prices of real estate and developed housing have increased rapidly in the last few years.

88. Vacancy rates in Chittenden County for rental and homes for purchase are exceptionally low.

89. In the absence of construction in the core areas of Chittenden County, the high prices for real estate in Chittenden County have caused and will continue to cause housing to be constructed in the outlying areas of Chittenden County and areas outside of Chittenden County. This construction will reduce more significantly the amount of forested areas. This is because the property outside South Burlington is more forested than property within South Burlington. The construction outside South Burlington will also cause significantly worse environmental impacts including the goals identified for passing the Habitat Blocks.

90. Private employment for the State of Vermont is focused in the core areas surrounding Burlington, Vermont.

91. Employees traveling to work in Burlington and the core areas of Chittenden County will often use Interstate 89 through South Burlington.

92. The development of the property at 835 Hinesburg is ideal for reducing transportation travel times and distances because the property is situated on Interstate 89. There are currently plans to develop an interstate interchange on or near the property at 835 Hinesburg.

93. By further reducing the supply of available housing, the City has increased the pressure to build outside of the core areas of Chittenden County.

94. By furthering reducing the supply of available housing, the City of South Burlington will increase both particulate air pollution and greenhouse gases by forcing employees in the core of Chittenden County to travel longer distances to housing outside the core areas of Chittenden County. The increased transportation along Interstate 89 will also increase water pollution in surrounding waterways.

95. Transportation is the largest source of greenhouse gases in Vermont.

96. Building housing close to employment would lead to less overall pollution. Moreover, constructing a residential neighborhood that integrated appropriate commercial development would also reduce the use of pollution from transportation.

South Burlington's "Habitat Blocks" Will
Undermine The Goals Of Vermont's "Forest Blocks"

97. The "Forest Block" concept under Vermont law bears no relation to South Burlington's implementation of its "Habitat Blocks."

98. The state statute developed as an attempt to balance development with protection of "large areas of contiguous forest." *See* 2014 Act 188 S 1(2); *see also* 24 V.S.A. § 4303(34) (defining "forest block" as "a contiguous area of forest . . .).

99. South Burlington's own consultant, Arrowwood Environmental, concluded that "South Burlington does not contain large areas of continuous forest cover." Arrowwood Environmental, LLC, "City of South Burlington Habitat Block Assessment & Ranking 2020," ("Arrowwood 2020") at 1. The consultant's report also notes the "Habitat Blocks" in South Burlington "are likely too small by themselves to support breeding populations of wide ranging wildlife species such as bobcat and fisher." Arrowwood 2020 at 13.

100. One of the chief aims of the state statute is to maintain connections between forest blocks. 2015 Act 171 § 14. The idea is to allow species to move between various forest blocks. Here, no one should want species to move to 835 Hinesburg's property. Interstate 89 and Burlington International Airport are directly to the north of the property. Heavy industrial development and a major state highway, Routh 116, are directly to the east. A major sports complex and hundreds of homes lie to the west. Hundreds of additional homes are to the south. In addition, there are no forest blocks on the property on the other side of Interstate 89.

101. Encouraging species to move toward the Interstate and the property north of Interstate 89 or easterly toward Route 116 puts them in danger of collisions with cars and trucks. It runs contrary to the purposes of the legislation adding the forest blocks. Moreover, animals tend to avoid areas near already existing development and areas where humans have walking paths.

102. On a regional or state-wide basis, preventing 835 Hinesburg from developing its land will have adverse effects on real forest blocks. As Arrowwood notes, "South Burlington is one of the most populous cities in Vermont. . . ." Arrowwood at 1. South Burlington made its decisions about whether it would support forest blocks a long time ago. It choose to have economic development. The maps from regional and town planners reflect these facts. Map 1 from the Chittenden County Regional Planning Commission labels the area as an employment zone with sewer service. Map 2 related to future land use gives the land an "Enterprise Designation." The City's Comprehensive Plan Map 11 labels the area as medium to high density and principally non-residential.

103. The "Habitat Blocks" and the amendments to the LDRs are not consistent with the regional plan. South Burlington voted to approve the regional plan in 2018.

The Zoning Of 835 Hinesburg's Land Amounted To Illegal Reverse Spot Zoning

104. The City created an entirely new zoning district for 835 Hinesburg's land. 835 Hinesburg's land is by far the largest – if not only – parcel of land in the new zoning district.

105. The zoning district took away 835 Hinesburg's right to develop the property as an industrial area under the former zoning.

106. The chief opposition to the amendments to the Land Development Regulations came from citizens who rightly cited the regulations as restricting the availability of affordable housing in the City.

107. The City's own Affordable Housing Committee opposed the passage of the Land Development Regulations.

108. The City used the rezoning of 835 Hinesburg's property as an attempt to justify its reduction in affordable housing by claiming that 500 additional units could be built on the property. City Councilors who favored the new Land Development Regulations cited faulty calculations from the City managers to drum up support for the amendments. They used this faulty calculations at public meetings and failed to recognize the true facts when representatives of 835 Hinesburg corrected them.

109. Of course, the City's designation of a large block of the property as a Habitat Block makes that calculation of the number of units a fantasy.

110. Because of the uniquely negative treatment that 835 Hinesburg received under the new zoning regulations, the zoning of its property is illegal reverse spot zoning.

COUNT I

Illegal Taking (U.S and Vermont Constitution)

111. Plaintiff realleges the previous paragraphs as if set out in full here.

112. The United States Constitution prohibits the government from taking private property for public use without just compensation. *See* U.S. Const. amend. V. Plaintiff seeks to enforce its federal constitutional rights through 42 U.S.C. § 1983.

113. The Vermont Constitution prohibits the government from taking private property for public use without just compensation. *See* Vermont Constitution, Ch. 1, Articles 2, 4, 9.

114. 835 Hinesburg has a legal interest of record in the property it owns at 835 Hinesburg Street in South Burlington, Vermont.

115. The amendments to South Burlington’s Land Development Regulation are an illegal taking under the Vermont Constitution. In particular, the creation of Habitat Blocks and the increase of the buffer zones around wetlands from 50 to 100 feet represent takings by the City.

116. In this case, the taking is a physical taking. The restrictions on any land that is a “Habitat Block” are so severe that 835 Hinesburg may not even put up a fence to keep people off of its property. Recent inspection during a snow storm showed that there are people illegally entering 835 Hinesburg’s land for recreational purposes. The restriction violates 835 Hinesburg’s most fundamental property right – the right to exclude others from entering its property. Moreover, the City has acquired the land for someone else – the animals that are to inhabit the land designated as a “Habitat Block.”

117. To the extent that the Court considers it a regulatory taking, the taking is illegal because 835 Hinesburg had definite investment back expectations that it would be able to use the whole property with a Habitat Block designation. At the time that 835 Hinesburg bought the property and throughout most of the time that it was developing the property, the concept of a

“Habitat Block” did not exist. The investment backed expectations included paying more than 20 years of property taxes.

118. The “Habitat Block” concept does not represent any true environmental science concern. Instead, it is a guise to allow anti-property rights advocates to prevent further development in South Burlington. Thus, the “Habitat Block” concept does not promote the public good, but instead it promotes the individual interests of a small group of private residents.

119. Moreover, the application of the “Habitat Block” concept to 835 Hinesburg’s property actually decreases the public good because it will lead to negative impacts to the public good like increased greenhouse gases, decreased real “Forest Blocks,” and increased particulate pollution.

COUNT II
Due Process (U.S. and Vermont Constitution)

120. Plaintiff realleges the previous paragraphs as if set out in full here.

121. Vermont statutory law authorizes local municipalities to engage in zoning in their jurisdictions and regulate land development. *See* 24 V.S.A. Chapter 117.

122. One significant restriction on local zoning is found in 24 V.S.A. § 4302, which requires that “[i]n implementing any regulatory power under this chapter, municipalities shall take care to protect the constitutional right of the people to acquire, possess, and protect property.” 24 V.S.A. § 4302. This restriction creates a property interest for 835 Hinesburg.

123. 835 Hinesburg also has a property interest in its fee simple ownership of the property at 835 Hinesburg Road in South Burlington, Vermont.

124. 835 Hinesburg also had a property interest in an unbiased determination by a neutral decisions maker. Vermont law guarantees that right.

125. The United States Constitution forbids government action that arbitrarily or irrationally impairs a property interest. The Fifth and Fourteenth Amendments guarantee the right to procedural and substantive due process, including the right to fair and impartial adjudicatory proceedings. Plaintiff seeks to enforce its federal constitutional rights through 42 U.S.C. § 1983.

126. The Vermont Constitution forbids government action that arbitrarily or irrationally impairs a property interest. Articles 4, 7, and 9 guarantee the right to procedural and substantive due process, including the right to fair and impartial adjudicatory proceedings.

127. The City deprived 835 Hinesburg of its constitutionally guaranteed due process rights by engaging in ex parte communications with UVM that resulted in a settlement that changed the language in the Land Development Regulations.

128. By failing to provide 835 Hinesburg with notice of proceedings of the changed language for the University of Vermont, the City deprived 835 Hinesburg of the opportunity to participate in proceedings concerning its property rights.

129. The City also violated 835 Hinesburg's Due Process rights by failing to provide 835 Hinesburg with an opportunity to rebut its designation as a "Habitat Block" and by failing to give it an opportunity to show that the 100 foot buffer was unnecessary to protect the wetlands.

130. In addition, the City violated 835 Hinesburg's Due Process rights by allowing a City Councilor with a "conflict of interest" under its own ethics policy to vote on the Land Development Regulations.

131. The City also acted arbitrarily by imposing development restrictions on 835 Hinesburg's land, but leaving similarly situated parcels alone. For example, the City treated identical properties in the 3 of 5 category differently. The City failed to evaluate 835

Hinesburg's property as a 3 out of 5 property even though the City had concluded that it was a 3 out of 5 property. The other differential treatment discussed in the complaint shows further arbitrary behavior.

132. The City also placed an unconstitutional condition on 835 Hinesburg by requiring it to give up its development rights and right to just compensation in exchange for obtaining a land development permit.

COUNT III
Common Benefits Clause (Vermont Constitution)

133. Plaintiff realleges the previous paragraphs as if set out in full here.

134. Plaintiff is within the class of people disadvantaged by the law because the law prevents it from developing a part of its land. Plaintiff is excluded from the class of people who enjoy the benefit of the law without having to make any land sacrifices.

135. The purposes of the government in enacting the Habitat Block law bear no relationship to the inclusion of 835 Hinesburg in the class of people that have their land designated as a Habitat Block.

136. Being free from the land development restrictions has large significance to plaintiff because it is unable to develop its land the way it wants, which denies it both constitutional property rights and large amounts of money for its ability to create a profitable development of its land.

137. In omitting Plaintiff from the class of people that enjoy the benefit, the government is not advancing its stated goal of promoting habitat for animals. Plaintiff's property has extremely poor habitat for animals, which has been documented by expert opinion. The City refused to analyze this expert opinion. In addition, making Plaintiff's land attractive for animals

actually hurts the animals because of the risk of death from Interstate 89, which is directly north of the property and Route 116, which is directly to the east.

138. The creation of “Habitat Blocks” specifically benefitted people on already developed lots for three reasons. First, the LDRs makes no effort to correct destruction of habitat in previous developments. Second, the creation of Habitat Blocks categorically excluded any lots of 4 acres or smaller without regard to their importance in preserving habitat or routes to connect various habitat. Third, the LDRs exclude the University of Vermont from “Habitat Block” designation.

139. The classification of property as “Habitat Blocks” was both overinclusive and underinclusive. First, the inclusion of the lot on 835 Hinesburg’s land was overinclusive because there are no significant wild animals on 835 Hinesburg’s land and any wild animals on 835 Hinesburg’s land face an unacceptable level of risk of death. The classification was underinclusive because it categorically excluded already developed lots, lots of less than four acres, and all land owned by the University of Vermont.

140. The system for selecting the properties was wholly arbitrary and motivated by ill will against developers of land. With respect to 835 Hinesburg, the classification system arbitrarily included it in the class of people who received a check mark in 4 out of 5 categories when it should have been in the category of 3 out of 5. In that category, it should have received an analysis of whether it should be downgraded. The process was also wholly arbitrary because it did not include an actual site visit to the property to confirm the theoretical classification. Moreover, it was wholly arbitrary because 835 Hinesburg brought detailed information rebutting its classification in Habitat Blocks to the City Council and that information was completely ignored.

141. The development of “Habitat Blocks” grew out of prior efforts to keep land undeveloped in South Burlington. The goal of the opposition to development was to force the developer to sell its property to prevent any development on the property.

COUNT IV
Equal Protection Clause

142. Plaintiff realleges the previous paragraphs as if set out in full here.

143. The Fourteenth Amendment of the United States Constitution guarantees equal treatment under the law. Plaintiff seeks to enforce its federal constitutional rights through 42 U.S.C. § 1983.

144. 835 Hinesburg is in a class of one. The City treated it differently than other land owners in the City and had no rational basis for the differing treatment.

145. The City arbitrarily included 835 Hinesburg in the 4 out of 5 category when the City itself gave it a value of 3 out of 5.

146. 835 Hinesburg received differing treatment from other properties that received a 3 out of 5 rating in the final Interim Zoning Report. Other 3 out of 5 parcels received a second level of screening that led some of them to be left off the list of properties that the City determined to take their land.

147. The misclassification was no mistake because the City had a vested interest in forcing 835 Hinesburg to sell its land to the City. The City has a park on nearby land and hoped that it could join 835 Hinesburg’s land to it to increase the size of the park.

148. Both the City and local non-profits use a picture of 835 Hinesburg’s land to promote their organizations.

149. 835 Hinesburg was also in a class of land owners with undeveloped land. The City arbitrarily treated them differently from land owners that owned developed land.

150. There was no rational basis for doing so because the owners of developed land can contribute to reducing climate change and creating habitat corridors on their own land by restricting any further development on people's property.

151. 835 Hinesburg was in the class of land owners who have more than 4 acres. There is no rational basis for treating them differently than owners of less than four acres. The owners of property of less than four acres can contribute to environmental conservation in the same way that owners of more than four acres can.

152. Finally, the differing treatment of the City of South Burlington and University of Vermont had no rational basis. Their land can be just as important to the goals of "Habitat Blocks" as the owners of private property.

153. Because the discriminatory treatment involved fundamental rights like the Constitutionally protected right to exclude others from your property, the right to a fair and impartial decision maker, and the right to prevent illegal governmental takings, the Court must review any classification with strict scrutiny.

COUNT V

Declaratory Judgment – City Lacked Authority to Seize 835 Hinesburg's Property

154. Plaintiff realleges the previous paragraphs as if set out in full here.

155. The City lacked legal authority to designate 835 Hinesburg's land as a Habitat Block. The state statute creating forest blocks did not authorize the City to create "Habitat Blocks" for reasons different from the reasoning for forming Forest Blocks.

156. By deviating from the concept of “Forest Blocks,” the City exceeded the legislative granted authority to engage in zoning under Vermont law.

COUNT VI

Invalid Voting Because of Conflict of Interest and Lack of Notice

157. Plaintiff realleges the previous paragraphs as if set out in full here.

158. The City has its own ethics policy.

159. As an administrative agency, the City must follow its own regulations.

160. Under the City’s ethics policy, Meaghan Emery had a “conflict of interest.”

161. With a conflict of interest, Ms. Emery should not have voted on the Land Development Regulations. Her vote is invalid and cannot be counted.

162. Because South Burlington requires three votes for passage of any measure at the City Council, the disqualification of Ms. Emery means that there were only two votes in favor of the Land Development regulations and the measure should have failed.

COUNT VII

Illegal Reverse Spot Zoning

163. 835 Hinesburg was rezoned in a way that was unique or nearly unique in the creation of an entirely new zoning district for it alone.

164. The City discriminated against 835 Hinesburg in creating the new zoning district, especially when combined with the Habitat Block zoning changes.

Claims for Relief

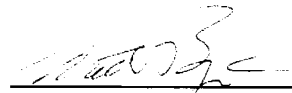
WHEREFORE, Plaintiff prays that judgment be entered in his favor for the following relief:

- A. A declaration that the resolution to authorize amendment to the Land Development Regulations failed;
- B. A declaration that the City lacked authority to seize 835 Hinesburg's property;
- C. A declaration that 835 Hinesburg may proceed with its application for development of the property under the previous version of the Land Development Regulations;
- D. An injunction barring the enforcement of the Land Development Regulations;
- E. An order barring the Individual Defendants from issuing a permit that would invade 835 Hinesburg's property rights;
- F. A declaration that the purported passage of the Land Development Regulations amounted to a taking under the United States and Vermont Constitutions;
- G. A declaration that the purported passage of the Land Development Regulations violated the Common Benefits Clause of the Vermont Constitution and the Equal Protection Clause of the United States Constitution;
- H. A declaration that the purported passage of the Land Development Regulations violated the Due Process Clause;
- I. Damages;
- J. Punitive Damages;
- K. An order awarding attorneys' fees and costs; and
- L. Such other and further legal and equitable relief as this Court deems just and proper.

JURY DEMAND

Plaintiff demands trial by jury of all issues so triable.

Dated: Burlington, Vermont
February 24, 2022



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(802) 658-0220
mbyrne@gravelshea.com
For Plaintiff

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

835 Hinesburg Road, LLC

(b) County of Residence of First Listed Plaintiff Chittenden
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Matthew B. Byrne, Esq., Gravel & Shea PC, P.O. Box 369
Burlington, VT 05402; 802-658-0220

DEFENDANTS

City of South Burlington, South Burlington City Council,
Meaghan Emery, Timothy Barritt, and Helen Riehle

County of Residence of First Listed Defendant Chittenden
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

Attorneys (If Known)

RECEIVED
BURLINGTON, VT
FEB 24 2022

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- (For Diversity Cases Only)
- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input checked="" type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 41 U.S.C. § 1983

Brief description of cause: Taking, Due Process and Equal Protection claims under Section 1983.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE [Signature] DOCKET NUMBER _____

DATE: February 24, 2022 SIGNATURE OF ATTORNEY OF RECORD: _____

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT \$402.00 APPLYING IFP N/A JUDGE 1013 MAG. JUDGE _____

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