# No. 14-2415

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARRIGONI ENTERPRISES, LLC,

Plaintiff-Appellant,

v.

TOWN OF DURHAM, TOWN OF DURHAM PLANNING AND ZONING COMMISSION, TOWN OF DURHAM ZONING BOARD OF APPEALS,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut
Honorable James Carr, District Judge

**APPELLANT'S OPENING BRIEF**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant hereby states that no publically traded corporation is involved in this case. Arrigoni Enterprises, LLC, is a limited liability company owned by Thomas C. Arrigoni and Michael P. Arrigoni.

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## INTRODUCTION

For a decade, Tom Arrigoni his small business, Arrigoni Enterprises LLC (Arrigoni), have been trying to get the Town of Durham (Town) to allow some economic use of an approximately nine acre parcel of land that has been in the Arrigoni family since the 1950's. Arrigoni has been through the local administrative process multiple times, state courts, and now the federal courts. During this decade, the land has sat economically idle due to the Town's repeated refusal to allow Arrigoni to develop a few light industrial buildings, consistent with the property's zoning. Indeed, under the Town's view of its rules, the land will have to remain in a natural state forever because excavation and rock crushing—an activity essential to any use of the land due to its nature—is totally barred on land zoned like Arrigoni's.

Or at least, it is barred for Arrigoni. Other property owners with land immediately around Arrigoni, and within the same zone, have received permission to excavate and crush rock, and to develop. A quarry directly next to Arrigoni's land regularly crushes rock. Just to the east, a corporation excavated and built an industrial building on land in the same zone as Arrigoni's. One street over from the Arrigoni property lies a parcel in the same zone that was excavated for an industrial building. But, according to the Town, Arrigoni may not do any of this.

Therefore, after exhausting the administrative process, and after seeking relief in the state courts, Arrigoni sued the Town in the district court on federal

constitutional grounds, including under federal takings, due process, and equal protection theories. The district court rendered judgment for the Town on claims arising under the first two theories, and a jury returned a verdict for the Town on the second. But all these rulings arose from errors of law.

Contrary to the district court's judgment, Arrigoni's takings claim is ripe, it has property interests in its land to support a due process claim, the Town's excavation regulations are fatally vague, and Arrigoni was entitled to introduce evidence of more favorably treated property owners to make its case to the jury. In the end, all Arrigoni wants is a day in court on the merits of its takings and due process claims, and a fair chance before the jury. Since the law entitles it to such relief, the case must be remanded.

## STATEMENT OF JURISDICTION

The district court had jurisdiction over the federal constitutional claims in this case under the United States Constitution, 42 U.S.C. § 1983, and 28 U.S.C. § 1331. It had jurisdiction over Arrigoni's claim for declaratory relief under 28 U.S.C. § 2201(a). The district court issued a final judgment disposing of all claims on June 6, 2014. 6 Joint Appendix (JA) 1522. Arrigoni timely filed this appeal on June 30, 2014. *Id.* at 1523. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE CASE

Arrigoni filed a complaint in Federal District Court for the District of Connecticut against the Town and Town agencies on April 8, 2008, alleging violations of its Fifth and Fourteenth Amendment rights under 42 U.S.C. § 1983. 1 JA 0023-38. It stated four separate counts: (1) denial of Equal Protection; (2) denial of substantive Due Process; (3) inverse condemnation or regulatory taking; and (4) declaratory judgment that Section 12.05 of Durham's Zoning Regulations is unconstitutionally vague. *Id*.

The court, Judge Alvin W. Thompson presiding, soon dismissed the takings claim on an FRCP Rule 12(b)(1) motion on ripeness grounds. 1 JA 0075-85. Arrigoni then filed an amended complaint, while preserving the right to appeal the takings claim. 1 JA 0097, 0115. After both parties moved for summary judgment, 1 JA 134-40; 2 JA 457-59, the lower court granted the Town's motion on Arrigoni's substantive Due Process claim.[1] 3 JA 0771. It denied both motions on Arrigoni's Equal Protection claim, finding that disputed issues of material fact precluded summary judgment. *Id.* at 0792.

District court Judge James G. Carr then assumed control of the case. 4 JA 0833. The Equal Protection claim then went to trial before Judge Carr, and a jury

[1] The court granted Arrigoni's motion as to the Town's affirmative defenses—including ripeness, collateral estoppel, failure to state a claim, and res judicata—because it deemed them abandoned. 1 JA 0131; 3 JA 0799.

returned a verdict for the Town. 6 JA 1491. After trial, Judge Carr considered and then dismissed Arrigoni's unconstitutional vagueness claim. 6 JA 1515; *Arrigoni Enterprises, LLC v. Town of Durham*, 18 F. Supp. 3d 188 (D. Conn. 2014). On June 6, 2014, the court issued a final judgment in favor of the Town on all claims. 6 JA 1522.

## STATEMENT OF THE ISSUES

1. Is Arrigoni's federal takings claim compliant with the prudential "state litigation" ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) where Arrigoni attempted to litigate a state constitutional takings claim in the state court system, but was rebuffed? If not, should the court use its prudential discretion to waive the requirement where the issues are fit for review now, and it would needlessly waste judicial and litigant resources and cause great hardship to require Arrigoni to file yet another state court action to secure merits review of its federal takings claim?

2. Does Arrigoni have a property interest sufficient to support its substantive due process claim where Arrigoni indisputably owns the real property burdened by the Town's irrational and capricious denial of the economic use of Arrigoni's land?

3. Did the trial court commit prejudicial error in refusing to allow Arrigoni to introduce updated evidence of similarly situated property owners in the equal

protection trial because Arrigoni had not previously relied upon those comparators, where Arrigoni's request was based on intervening precedent, *Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012), expanding the scope of permissible equal protection comparators?

4. Is Section 12.05 of the Town's Zoning Regulations [the Excavation Regulation] unconstitutionally vague on its face and as applied to Arrigoni, where (1) the Regulation does not identify the development activities to which it applies, (2) says a permit is required for all earth removal, when a permit is only required for removal of materials in excess of 1,000 cubic yards, and that removal processing of earth materials is categorically prohibited in most property zones, including Arrigoni's (except the Town "may" allow some types of processing), and (3) where the Town has historically construed the Regulation to allow excavation without a permit when carried out for site development, but adopted a different interpretation in Arrigoni's case?

## STANDARD OF REVIEW

This Court reviews the dismissal of Arrigoni's federal takings claim for lack of ripeness *de novo*, with the allegations of the complaint assumed true. *Connecticut v. Duncan*, 612 F.3d 107, 112 (2d Cir. 2010) ("A district court's ripeness determination is . . . a legal determination subject to *de novo* review."); *Sharkey v. Quarantillo*, 541 F.3d 75, 83 (2d Cir. 2008) ("At the pleading stage, general factual allegations . . . may

suffice [to establish jurisdiction], for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

The district court granted summary judgment to the Town on Arrigoni's substantive Due Process claim on a single ground: that Arrigoni lacked a constitutionally protected property interest sufficient to support the claim. 3 JA 0797. This issue implicates a legal question that is also reviewed *de novo*. *McPherson v. N.Y.C. Dep't of Educ.*, 457 F.3d 211, 213 (2d Cir. 2006). As a whole, the district court's due process ruling is also reviewed *de novo*, meaning that this Court may affirm the lower court's grant of summary judgment only where, "after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, . . . 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Silverman v. Teamsters Local 210 Affiliated Health & Ins. Fund.*, 761 F.3d 277, 284 (2d Cir. 2014) (quoting Fed. R. Civ. P. 56(a)).

This Court reviews Arrigoni's claim that the trial court erred in excluding its evidence in the equal protection trial for abuse of discretion. *Farganis v. Town of Montgomery*, 397 Fed. Appx. 666, 668 (2d Cir. 2010) ("We review evidentiary rulings under a deferential abuse of discretion standard and give district judges wide latitude

in determining whether evidence is admissible at trial.") (quotations and citations omitted).

Finally, the lower court's dismissal of Arrigoni's unconstitutional vagueness claim is reviewed *de novo*. *In re Joint E. & S. Dist. Asbestos Litig.*, 993 F.2d 313, 314 (2d Cir. 1993) ("A trial court's exercise of declaratory jurisdiction is both discretionary and subject to *de novo* review."); *Ramos v. Town of Vernon*, 353 F.3d 171, 174 (2d Cir. 2003) ("Challenges to the constitutionality of a local ordinance are subject to *de novo* review.").

## STATEMENT OF FACTS AND PROCEDURE

### A. The Property

Arrigoni Enterprises, LLC, (Arrigoni) is a small, family owned company organized under the laws of the State of Connecticut. 1 JA 0158; 4 JA 0996. The company owns a 9.1-acre parcel of undeveloped land (the property) along Mountain Road in Durham, Connecticut. 1 JA 0158, 0229. This land has been in the Arrigoni family since 1955. 1 JA 0159. It is wooded, sloped, and consists mainly of rock and ledge. *Id*. Due to the land's topography, it cannot be developed without first excavating, crushing, and removing rock in order to create level building pads. *Id.* at 0159-60. The Town's zoning laws classify the property as within the Design

Development District (DDD).[2] 1 JA 0159. The DDD zone allows certain light industrial uses with a special exception permit. 2 JA 0478-79; 4 JA 0808.

Arrigoni's parcel is surrounded by parcels that have been developed with excavation, including for light industrial, or industrial use. For example, the property is bordered to the northwest, west, and south by the Tilcon Quarry, an active, commercial quarry operation that excavates over a million cubic yards of rock per year. 2 JA 0374, 0391; 4 JA 0807, 0940; 6 JA 1372-74; 1 Exhibits Volume (EV) 003. Tilcon's land is zoned both Heavy Industrial District (HID) and DDD. 4 JA 807. Just to the east of Arrigoni's property is a parcel owned by Greenland Realty, LLC (Greenland) that is zoned DDD and developed with an industrial building. 1 JA 0234; 4 JA 811; 1 Exhibits Volume (EV) 003. Still another parcel (the Nosal land) zoned DDD and developed with an industrial building lies one street over from the Arrigoni

[2] Arrigoni's property was originally zoned Farm-Residential (FR), as were all of the other parcels in the DDD zone. 4 JA 0807. But in June 1986, the Commission changed the properties' zoning to the Light Industrial District (LID). *Id.* The zone change was intended to facilitate Durham's increasing residential and industrial growth. 2 JA 0405-06. In 1988, the Commission again changed the property's zoning from LID to the newly created DDD zone. 4 JA 807. In 1992, several of the property owners in the DDD zone, including the Arrigoni family, petitioned the Commission to re-zone their properties back to FR. *Id.*; 1 JA 0172, 1076. But the Commission refused, insisting that the DDD zone properties remain available for industrial development. 4 JA 0807-08; 1 JA 0172-77.

and Greenland properties. 4 JA 811; 1 EV 003; 1 JA 0236, 0266.[3] Also nearby is a property zoned FR (Morgenson) that was excavated to build a residential driveway. 1 EV 158-59; 4 JA 1048-50.

## B. Arrigoni's Attempts To Obtain Development Approvals

### 1. The Town Denies a 2005 Rezoning Request

In 2005, Arrigoni began seeking approval to build three, light industrial buildings on the property. 1 JA 0027, 0229; 4 JA 0808. Its intention is to use one of the buildings to house its own business and equipment, and to rent the other two buildings to compatible businesses. 4 JA 1011-13. This plan was fully permissible under the DDD zoning. 1 JA 0159, 0182-83, 0221. However, this proposed development—like any development of this particular land—required the excavation and processing and crushing of rock and gravel, 1 JA 0159-60; 4 JA 1025-26, which the Town's regulations appeared to prohibit in the DDD zone. 2 JA 0484; 1 EV 074-75. Consequently, Arrigoni applied to the Town to reclassify the property from DDD to the HID zone, which allows rock crushing as a permitted use. *Id.*; 1 JA 0178-80. On May 4, 2005, the Commission denied Arrigoni's HID rezoning request. 4 JA 0808.

[3] A residentially developed parcel also lies to the east of Arrigoni's property, within the DDD zone. 4 JA 0807; 1 EV 003. The residential use of that property is a non-conforming use under the DDD zoning regulations. 1 JA 0807.

### 2. The Town Requires, and Then Denies, Special Permits

Arrigoni next applied to the Commission for a special permit (the Development Special Permit) under Section 7.04.04 of the Zoning Regulations to construct the buildings on its property under the DDD zone and to carry out necessary excavation. 2 JA 0493; 4 JA 0809. As a part of that application, Arrigoni submitted an official site development plan. 1 JA 0229-33; 4 JA 1020. The Plan contemplated removal and processing of approximately 70,000 cubic yards of rock and gravel,[4] and complied with all relevant zoning requirements, including set-backs, building heights, a minimum square footage requirement of 5,000 square feet per building, and a maximum lot coverage of less than fifty percent.[5] 1 JA 0145-46, 0182-83, 0221, 0229; 1 VE 050.

At the Commission's October 5, 2005 meeting, the Commission ordered Arrigoni to apply for a second special permit (the Excavation Special Permit) under Section 12.05 of the Town's Zoning Regulations for the earth excavation, crushing, and removal associated with the site preparation. 4 JA 0809. Such a requirement was

[4] Approximately 75,000 cubic yards of rock would be crushed, with between 5,000 and 6,000 cubic yards remaining on the property and the rest being removed. 4 JA 1022.

[5] According to the plan and the application, the proposed three buildings comprise a total of 30,000 square feet for a total lot coverage ratio of 31.8 percent. 1 JA 0229.

contrary to the Commission's standard practice. 1 JA 0159, 0246, 0252[6] (Commissioner Eugene Riotte could not recall any other instance in his 15 years as a Commissioner when the Commission required an applicant to submit simultaneously separate special permit applications for development and excavation). For example, when Arrigoni's neighbors, Greenland and Nosal, sought to develop their DDD-zoned properties with industrial buildings, the Commission did not require them to file separate applications for excavation. 1 JA 0208-09, 0241-42, 0253, 0274-75, 0213.

Nevertheless, Arrigoni dutifully submitted the newly required Excavation Special Permit application along with its earth excavation plan on October 14, 2005. 2 JA 0450, 0496; 4 JA 0809. After reviewing the applications, the Town's engineer concluded that the proposed site excavation was not in excess of "that which appears to be required for construction of the proposed buildings, driveway, parking areas and detention basin." 2 JA 0380; 4 JA 0809.

The Commission was unmoved. On December 21, 2005, it denied both of Arrigoni's permit applications, concluding that the excavation needed for construction was prohibited in the DDD zone. 2 JA 0397; 4 JA 0809. Hence, the Commission's denial of permits to Arrigoni arose from the denial of the Excavation Special Permit, not any flaw with Arrigoni's construction plans. 1 JA 0193-95. In making its decision, the Commission did not explain how Arrigoni could make any economic use

[6] July 16, 2009 Deposition of Eugene Riotte, Jr., p. 16.

of its property when rock crushing and processing is required for any development of the land but the Town prohibits it. 2 JA 0396-97.

**C. The State Court Suit**

Following the Commission's December 2005 decisions, Arrigoni challenged the Development Special Permit and Excavation Special Permit denials in the Connecticut Superior Court. 1 JA 0045-57. Arrigoni's state court complaints arose in part under the administrative appeal provisions of Connecticut General Statute Section 8-8 and alleged that the Commission's denial of the permits was illegal, arbitrary, and an abuse of discretion. *Id.*; 1 JA 0030. But the complaint also alleged that the Town violated Arrigoni's federal and state constitutional rights, including its right to due process, equal protection, and its Fifth Amendment right to just compensation. 1 JA 0030, 0047, 0053-54.[7] Arrigoni's Fifth Amendment claim alleged that the Town's actions resulted in a "confiscation and an inverse condemnation of the Plaintiff's property," by denying Arrigoni all reasonable economic use of its property. 1 JA 0047, 0054. As a remedy for that constitutional violation, Arrigoni sought both declaratory relief and a declaration of just compensation. *Id.* Arrigoni later filed motions in the state court to introduce

[7] Arrigoni pleaded its constitutional claims in the alternative to the administrative appeal and sought separate, alternative relief to redress the alleged constitutional violations. 1 JA 0047, 0053-55.

additional evidence supporting its inverse condemnation and other constitutional claims. Conn. Gen. Stat. § 8-8(k). 1 JA 0059, 64-66.[8]

On February 15, 2007, the superior court rejected Arrigoni's appeals and upheld the Commission's denials. 1 JA 0030; 2 JA 0433-45. The court did not address any of Arrigoni's constitutional claims. 1 JA 0031; 2 JA 0433-45. Arrigoni accordingly filed a motion in the superior court to open and re-argue its constitutional claims, 1 JA 0031, but the court denied that motion. *Id.*; 2 JA 0446. Arrigoni then sought certification to the State of Connecticut Appellate Court to appeal the superior court's decision. 1 JA 0031; 2 JA 0422-31. The appellate court denied certification on May 23, 2007. 2 JA 0448.

**D. Arrigoni's Variance Application and Denial**

In 2007, after its state court suit failed, *see supra* Part C, Arrigoni sought a variance from the Town Board of Appeals for relief from the hardship caused by the Commission's rigid application of the rock-crushing prohibition to its property. 3 JA 0592-93; 4 JA 0810.[9] When the Commission learned of the variance application,

[8] The evidence included, "expert witness testimony to establish fair market value of the subject property and testimony by Plaintiff regarding its reasonable investment-backed expectations of its development of the subject property." 1 JA 0059, 0064.

[9] Arrigoni's application again noted that "[i]n order to develop any portion of this property the underlying rock must be excavated, crushed and removed." 3 JA 0593.

it took several steps to oppose it.[10] On August 9, 2007, the Board of Appeals held its public hearing on Arrigoni's variance application and denied it. 3 JA 0602-0607; 4 JA 0810.

**E. The Federal Suit**

Having already unsuccessfully tried the state-court system, Arrigoni turned to the Federal District Court for relief on April 8, 2008. 1 JA 0023-39. It filed a complaint alleging the Town violated Arrigoni's constitutional rights, as protected under 42 U.S.C. § 1983. *Id.*

The Town filed a 12(b)(1) Motion to Dismiss Arrigoni's takings claim as unripe under *Williamson County*, 473 U.S. at 173, 195. 1 JA 0039-40. The lower court granted that motion, on March 27, 2009. 1 JA 0075-85. Arrigoni then filed an Amended Complaint, to account for the court's ruling on its takings claim, 1 JA 0097-

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[10] The Commission passed a motion to send a letter to the Board of Appeals reiterating its position against rock crushing on Arrigoni's land. 2 JA 0377. The Commission also instructed one of its members, Mr. Riotte, to attend the variance hearing in order to oppose Arrigoni's application on behalf of the Commission. 1 JA 0200, 0201, 0258-61.

The Commission apparently viewed the possibility of the Board of Appeals granting Arrigoni a variance from the rock crushing prohibition as a reversal of its overall denial of permits. 2 JA 0377. In addition, the Commission was concerned that a variance grant would negate the money the Town had spent defending the Commission's permit denials against Arrigoni's state court challenges. *Id.* (Amended Minutes, 7/18/07 Planning & Zoning Comm'n Meeting, p. 6) (Sending a position statement to the Zoning Board of Appeals "is all the more important because of the costs involved in successfully defending the original decision of the Planning and Zoning Commission.").

118, while noting its intention to preserve that claim for appeal. *Id.* at 115. After the Town filed an Answer and Affirmative Defenses to Arrigoni's Amended Complaint, 1 JA 0119-0133, both sides moved for summary judgment. 1 JA 0134-20; 2 JA 0457-59.

The court granted both motions in part and denied them both in part. 3 JA 0771-72.[11] It granted the Town's motion as to Arrigoni's substantive Due Process claim on the sole ground that Arrigoni's claim did not implicate constitutionally protected property interests. 3 JA 0797. It granted Arrigoni's motion as to the Town's affirmative defenses. *Id.* at 0799. And it denied both motions as to Arrigoni's Equal Protection claim, finding that disputed issues of material fact precluded summary judgment. *Id.* at 0792. It did not rule on Arrigoni's unconstitutional vagueness, declaratory relief claim. *Id.* at 0797-98.

The equal protection claim then went to a jury trial, during which the jury was to consider (among other instructions) whether:

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[11] The lower court initially ruled in the Town's favor on its motion for summary judgment as to all claims against the Town, finding that the Planning & Zoning Commission and the Zoning Board of Appeals were the only proper defendants for Arrigoni's claims. 3 JA 0787. The Town filed a Motion for Reconsideration, in which it argued that neither of those defendants were legal entities amenable to suit. Docket Entry (DE) 98. The court granted that motion, after briefing, but rejected the Town's arguments and found that all three of the original named defendants in the case—the Planning & Zoning Commission, the Zoning Board of Appeals, and the Town itself—were proper defendants. 3 JA 0801-02.

> 1. There was an extremely high degree of similarity between [Arrigoni] and one or more persons, businesses, or other entities to which it compares itself;
>
> 2. The similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake . . .

6 JA 1479.

With respect to these issues, Arrigoni sought to introduce evidence of five similarly situated comparators to the jury, including three that had not been utilized in prior proceedings. 4 JA 0940-51. Those three new property-owning comparators were: The Tilcon Quarry, Coginchaug Regional High School, and Morgensen. *Id* at 0940-41. At a pre-trial conference on January 4, 2013, Arrigoni explained that a recent change in circuit equal protection law—one occurring after prior summary judgment proceedings in the case—expanded the range of possible comparators and opened the door for the admission of the additional comparators. *Id.* at 0942-43. The trial court nevertheless excluded the evidence pertaining to Tilcon Quarry and Coginchaug Regional High School on the ground that Arrigoni had failed to previously identify those as potential comparators.[12] *Id.* at 0947-51.

[12] The judge allowed in Morgensen as a comparator, even though Arrigoni had not previously identified it as such, because the lower court had referenced it in its ruling on summary judgment. 4 JA 0951. The excluded evidence consisted of seven trial exhibits, five relating to the Tilcon Quarry and two relating to the Coginchaug Regional High School. *Id.* at 0959-88, 0992.

The jury subsequently returned a verdict for the Town on the equal protection claim. 6 JA 1491. After the trial, the court issued an order rejecting the unconstitutional vagueness claim on the merits. *Id.* at 1515-22. On June 6, 2014, the court issued a final judgment in favor of the Town on all claims. *Id.* at 1522.

## SUMMARY OF ARGUMENT

The district court wrongly dismissed Arrigoni's takings claim as premature, incorrectly granted summary judgment on the substantive due process claim, and wrongly dismissed the vagueness claim. It prejudiced the equal protection trial by wrongly excluding evidence of similarly situated property owners, which the Town treated more favorably than Arrigoni in the excavation and development process.

First, the takings claim. The evidence is clear that Arrigoni's property cannot be developed without some rock crushing and excavation, 1 JA 0159-60, but the Town's rules will not allow such activities in the zone in which Arrigoni's property lies, 1 EV 047-75, and it won't allow Arrigoni to change zones. 4 JA 0808. The Town concedes its decisions are final. DE 12-2.[13] Arrigoni has thus asserted a textbook regulatory takings claim. 1 JA 0036; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017-19 (1992). In declining to review this claim on the merits, on the basis that Arrigoni had to litigate in state court (a second time) before its claim would

[13] Town's Memo. of Law in Supp. of Motion to Dismiss at 8 (Conceding the denials of Arrigoni's: rezoning application, permit applications, and variance application are all "'final decisions' for purposes of the first prong of the *Williamson* ripeness test.").

ripen, 1 JA 0081-85, the court applied a hyper-technical and incorrect view of *Williamson County*'s "state litigation" rule. 473 U.S. at 194-96. That rule is a flexible, discretionary doctrine, not a rigid, jurisdictional ripeness barrier. *Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014). In part for that reason, Arrigoni's takings claim is ripe now. Indeed, Arrigoni's initial, failed state court action should satisfy *Williamson County*. But if it doesn't, the Court should waive the state litigation requirement for prudential reasons; namely, because Arrigoni's takings claim is factually concrete, fit for review, and requiring further state court proceedings is wasteful and causes unnecessary hardship.

Arrigoni's substantive due process claim is predicated on the irregular, arbitrary, and irrational manner in which the Town denied its applications. 1 JA 0114-15; *see also* DE 66.[14] The district court also erred in avoiding the merits of this claim by concluding that Arrigoni lacked a property interest supporting a due process claim. 3 JA 0797. Arrigoni owns the land that the Town restricted and has pre-existing rights under Connecticut common law to put its land to legitimate use. Such rights are protected by the Due Process Clause. *See A. Gallo & Co. v. Comm'r of Envtl. Prot.*, 309 Conn. 810 (2013). Indeed, it is impossible to see how land interests could be "property" for the Takings Clause, which no one disputes, but not for due process.

[14] Plaintiff's Memo. of Law in Supp. of Motion for Summary Judgment at 18-26 (recounting a series of intentional and illegal actions the Town undertook to thwart Arrigoni's development plans).

Since the Town restricted Arrigoni's traditional, protected real property interests, the substantive due process claim is proper.

On the equal protection claim, the lower court wrongly failed to allow the jury to consider important evidence of similarly situated properties treated more favorably than Arrigoni. Arrigoni relied on a change in this Circuit's law regarding proper equal protection comparators in seeking to introduce the evidence prior to trial, *see Fortress Bible Church*, 694 F.3d at 222, but the trial court excluded the evidence because it might have delayed the trial and interfered with the judge's availability to conduct it. 4 JA 950. This was a prejudicial mistake because it went to the heart of Arrigoni's case.

The court also should not have dismissed Arrigoni's due process claim alleging that the Town's excavation regulations are unconstitutionally vague. The regulations are impossible to decipher, devoid of constraining standards, and invite arbitrary enforcement. *Contra 33 Seminary LLC v. City of Binghamton*, 869 F. Supp. 2d 282, 301 (2d Cir. 2012). This is aptly demonstrated by the Town's history of construing it in many instances to allow activities that it seems to preclude on its face (*i.e.*, rock crushing), 1 JA 0208-09, 0213, 0241-42, 0246-47, 0274-75, and to require no special permit for basic site development, *id.* at 0247, 0247-75, while construing it in other cases, such as Arrigoni's, to bar the same activity and to require special permits.

2 JA 0397; 4 JA 0809. The Court should grant Arrigoni judgment on the vagueness claim and remand the other claims.

## ARGUMENT

## I

## ARRIGONI'S FEDERAL TAKINGS CLAIM IS RIPE FOR ADJUDICATION WITHOUT FURTHER STATE COURT LITIGATION

It is aximotic that the government may not constitutionally deprive a property owner of all economically beneficial use of property for a public purpose unless it pays the owner just compensation. *See, e.g.*, *Lucas*, 505 U.S. at 1017-19. That is exactly what the Town has done here by making final decisions prohibiting all rock crushing, excavation, and earth processing on Arrigoni's land—activities absolutely necessary for any development. 1 JA 0159-60; 4 JA 1025-26. The district court concluded, however, that Arrigoni's takings claim would not ripen under *Williamson County* until Arrigoni engaged in a second round of state court litigation, ten years after the first. 1 JA 0085. This was wrong.

### A. Arrigoni's Prior State Court Suit Satisfies *Williamson County*'s State Litigation Requirement

*Williamson County* held that a property owner should seek and be denied compensation through the "procedures [a state] provides for obtaining just compensation" before resorting to federal court with a federal takings claim.

473 U.S. at 173, 195. The *Williamson County* Court did not elaborate on exactly what kind of procedures were sufficient to satisfy this rule, though it ultimately held that the takings claim in *Williamson County* was unripe in part because the claimant had failed to utilize an inverse condemnation action.[15] *Id.* The Court has since made clear that this doctrine, which has come to be known as the "state litigation" requirement, is a prudential ripeness doctrine, and not a jurisdictional predicate. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010). This Court has recently arrived at the same conclusion. *Sherman*, 752 F.3d at 561.

In this case, Arrigoni has complied with *Williamson County* by suing the Town in state court over its denial of development permits before filing any federal takings claim in federal court. 1 JA 0030-31, 0045-57. In the state court action, Arrigoni raised an inverse condemnation claim under the Connecticut Constitution's takings clause. 1 JA 0047, 0053-54. As a remedy, Arrigoni sought a declaration of its right to just compensation from the Town. *Id*. at 0047, 0054. The trial court refused to hear these constitutional claims, however, implicitly rejecting them. *Id.* at 0031; 2 JA 0433-45. Arrigoni pursued an appeal, but the state courts refused to adjudicate it. 1 JA 0031; 2 JA 0422-31, 0448.

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[15] The *Williamson County* Court also found the takings claim unripe in that case because the claimant had failed to obtain a final decision on its development plans. 473 U.S. at 194. Here, the Town concedes that Arrigoni satisfied *Williamson County*'s finality requirement. DE 12-2, at 8. *See supra*, p. 19, n.13. Therefore, the final decision ripeness question is not at issue.

The sufficiency of this litigation for ripeness purposes is demonstrated by considering the purpose of *Williamson County*'s state litigation doctrine: "to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy." *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 324 (2005); *Dodd v. Hood River County*, 59 F.3d 852, 860 (9th Cir. 1995) (*Williamson County* required state litigation to give courts a chance to "avoid or alter the constitutional [federal takings] question."). The state constitutional takings claim raised by Arrigoni in its state court litigation fits squarely within this purpose. Through that claim, the state courts could (and should) have declared that the Town had taken Arrigoni's property and owed it just compensation under state law. This would have mooted any federal takings issue and negated the need for a federal suit. Consequently, Arrigoni's state suit is enough to satisfy *Williamson County*. *San Remo Hotel, L.P.*, 545 U.S. at 324.

The Town believes, however, that Arrigoni simply could not raise a takings claim in its state court administrative appeal, as a matter of state law, and therefore that Arrigoni did not use any legitimate state takings procedure (one capable of mooting a federal takings suit). DE 12-2.[16] But the Town is wrong, largely because its position rests on a superficial and mistaken reading of *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (1998). *Id.* In *Cumberland Farms*, the Connecticut

[16] Town's Memo. of Law in Supp. of Motion to Dismiss at 9-14.

Supreme Court held that (1) a property owner may bring an inverse condemnation/state takings cause of action independently from an administrative appeal, and (2) the owner need not exhaust the administrative action before prosecuting the takings suit. 247 Conn. at 211, 217. But in so doing, *Cumberland Farms* did *not* conclude that a property owner *must* bring a takings action independently from a related administrative appeal, as the Town seems to believe. Nor did it *bar* a property owner from raising a state law takings claim in an administrative appeal.

Moreover, after the *Cumberland Farms* decision, the Connecticut Supreme Court reviewed and allowed a combined takings/administrative appeal suit. *Rural Water Co., Inc. v. Zoning Bd. of Appeals*, 287 Conn. 282, 290 (2008). Other Connecticut appellate courts have also sanctioned such joint actions. *A & F Const. Co., Inc. v. Zoning Bd. of Appeals*, 60 Conn. App. 273 (2000) (property owner brought inverse condemnation claim within administrative appeal of zoning board decision denying variance); *Bauer v. Waste Mgmt. of Conn., Inc.*, 234 Conn. 221, 227 (1995) (property owner, in administrative appeal from zoning commission decision, alleged newly adopted height limitation effected a taking of its property); *Francini v. Zoning Bd. of Appeals*, 228 Conn. 785 (1994) (property owner brought inverse condemnation claim within administrative appeal of zoning board decision denying variance).

Thus, Connecticut law gives property owners the option to raise a state takings claim with an administrative appeal or separately. *See id.* Therefore, when Arrigoni elected to raise a state law takings claim as part of its administrative appeal, rather than suffer the inefficiencies and costs of a separate suit, it acted consistent with state law, using a procedure that could have mooted the federal takings claim. In light of the propriety of this course, the fact that the state court chose not to hear the takings issue is not evidence that Arrigoni failed to utilize a state takings "procedure;" it just means that such procedures were unsuccessful and therefore, that Arrigoni's federal takings claim is ripe.

### B. This Court Should Waive the State Litigation Ripeness Doctrine Pursuant to Its Prudential Discretion

Even if Arrigoni's state court action does not satisfy *Williamson County*'s state litigation requirement for some technical reason, the court can and should exercise its discretion to waive the requirement for prudential reasons. There is no reason to impose further rounds of state court litigation on Arrigoni when the issues are sufficiently fit for review, the federal court is fully capable of resolving the takings claim, and a remand to state court at this point would waste litigant and court resources.

### 1. *Williamson County* Is a Prudential Doctrine and May Be Waived Where Appropriate

Ripeness rules are either grounded in constitutional case and controversy requirements or in prudential considerations governing the proper timing for federal adjudication. *See Simmonds v. I.N.S.*, 326 F.3d 351, 357-58 (2d Cir. 2003). Although *Williamson County*'s state litigation doctrine was once thought of as a jurisdictional rule, it no longer has that status. Instead, *Williamson County*'s ripeness rules are now prudential in nature. *Sherman*, 752 F.3d at 561 (" 'Because *Williamson County* is a prudential rather than a jurisdictional rule, we may determine that in some instances, the rule should not apply and we still have the power to decide the case.' " (quoting *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013))). *Horne v. Dep't of Agric.*, _ U.S. _ , 133 S. Ct. 2053, 2062 n.6 (2013) (describing *Williamson County*'s state litigation doctrine as "prudential 'ripeness,' " and "not, strictly speaking, jurisdictional"); *Stop the Beach Renourishment, Inc.*, 560 U.S. at 729 (finding the state litigation requirement is not "jurisdictional").[17]

The prudential character of the state litigation ripeness doctrine has important consequences. Unlike a constitutional rule, a prudential requirement is not automatically applied. Its application is dependent on whether, " 'as a matter of

[17] *See also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997) (*Williamson County* imposes "two independent *prudential* hurdles to a regulatory takings claim.") (emphasis added).

judicial self-restraint it seems wise not to entertain the case.'" *Lehn v. Holmes*, 364 F.3d 862, 870 (7th Cir. 2004) (quoting 13 Wright, Miller & Cooper, Federal Practice & Procedure § 3531 at 345 (2d ed. 1984)). In short, prudential ripeness rules, such as the state litigation rule, are discretionary. *Sherman*, 752 F.3d at 561; *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir. 2013).[18]

The court's prudential ripeness discretion is framed by various considerations designed to determine whether a case should be immediately adjudicated. In particular, courts often consider the fitness of the issues for review, and the hardship to the parties resulting from a delay of review. *Simmonds*, 326 F.3d at 359 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)). A court has "discretion . . . to proceed with the merits" of a takings case if there is a "clearly defined and concrete dispute." *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008) (abrogated on other grounds).

Courts also consider judicial economy. *See, e.g.*, *United States v. Wayne*, 591 F.3d 1326, 1329 n.1 (10th Cir. 2010) ("[A] finding of ripeness promotes judicial efficiency . . . [and] this court has an interest in expeditiously resolving this action, rather than remanding it . . . ."); *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990) (judicial economy favored review). In the takings ripeness context, this

[18] *See also*, *Simmonds*, 326 F.3d at 357 ("[W]hen a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay.").

consideration finds expression in the principle that "[a] property owner is . . . not required to resort to piecemeal litigation or otherwise unfair procedures" to ripen a takings claim. *MacDonald, Somner & Frates v. Yolo County*, 477 U.S. 340, 350 n.7 (1986) (citations omitted); *see also San Remo Hotel, L.P.*, 545 U.S. at 346.

**2. Prudential Considerations Confirm the State Litigation Rule Should Not Apply**

Application of prudential ripeness considerations to this case demonstrates that the federal takings claim at issue can and should be reviewed without further state proceedings.

First, the issue of whether the Town has taken Arrigoni's property by prohibiting rock crushing, excavation, and earth processing on Arrigoni's land is fit for review because no factual contingencies impede adjudication. *United States v. Santana*, 761 F. Supp. 2d 131, 138-39 (S.D.N.Y. 2011) (recognizing that a claim is fit for decision where an issue requires no "further factual development," at the administrative level); *see also Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 581 (1985). To be specific, it is undisputed that the Town has repeatedly denied development permits. 1 JA 0193-95; 4 JA 0809. It has rejected a variance request. 4 JA 0810. The Town does not contest that its decisions in this regard are final. DE 12-2.[19] The Town has also made clear by word and deed over the

[19] *See supra*, p. 19, n.13.

course of this almost ten-year dispute that it does not feel obligated to pay Arrigoni compensation, and it has not done so. *See, e.g.*, 1 JA 0391-97; 3 JA 0602-07. When Arrigoni resorted to the state court system for takings relief, the Town resisted. The facts necessary to decide if the Town's actions caused a taking through denial of economic use of Arrigoni's property have crystalized and the issue is therefore fit for review.

Further, it would be extremely inefficient and wasteful to require Arrigoni to file an entirely new state court suit at this point. Such a course would needlessly deplete litigant and judicial resources. It would require a state court to spend resources becoming familiar with and resolving a dispute that is already substantially litigated in the federal court and capable of speedy resolution there. If another state court suit was required to ripen Arrigoni's federal takings claim, Arrigoni's claims—arising from the same facts—would be diced up. Some would continue through the federal system, but the takings claims (at least a state law claim) would go to the state court system. But Arrigoni would have a federal takings claim waiting in the wings to go back the federal system again if the second state suit was unsuccessful. This scenario is not only uneconomical, it is contrary to the Court's admonition against "piecemeal" takings litigation. *Toloczko*, 728 F.3d at 399 (exercising discretion to hear takings claims "may be particularly appropriate to avoid 'piecemeal litigation'" (quoting *San Remo Hotel, L.P.*, 545 U.S. at 346)).

Finally, dismissal of the federal takings claim for additional state court procedures after nearly a decade of litigation would result in "direct and immediate" hardship to Arrigoni. *Simmonds*, 326 F.3d at 360; *see also Abbott Labs.*, 387 U.S. at 149. Arrigoni has suffered and continues to suffer from the constitutional taking of its property. The results of that taking include the inability to use its land for any reasonable purpose and the attendant financial damages. 1 JA 0162-63. In addition, it has spent hundreds of thousands of dollars, and a decade of time, trying to obtain the necessary development approvals from the Town, and then appealing the denials through the state court and now the federal court system. *See id.* Forcing Arrigoni to go back to state court to litigate an inverse condemnation action unfairly requires it to needlessly expend additional resources on more state court litigation when the federal district court can and should hear its takings claim now. In short, there is no reason to further duplicate judicial proceedings in this case where Arrigoni's claim is fully ripe for adjudication by the federal district court.

## II

## ARRIGONI HAS CONSTITUTIONALLY PROTECTED PROPERTY INTERESTS FOR DUE PROCESS PURPOSES BECAUSE IT OWNS THE REAL ESTATE RESTRICTED BY THE TOWN'S ACTIONS

On Arrigoni's substantive due process claim, the district court held that "the plaintiff does not have a constitutionally cognizable property interest," and therefore

that Arrigoni "cannot establish a violation of its right to substantive due process" stemming from the denial of the use of its land. 3 JA 0797. On this basis, it granted summary judgment to the Town on the due process claim. *Id.* Given Arrigoni's ownership of the property which the Town restricted, the lower court's conclusion cannot be upheld.

### A. Real Property—And Use Rights Incidental to Its Ownership—Are a Constitutionally Protected Property Interest Under State and Federal Law

A violation of the substantive protections of the Due Process Clause occurs when the government deprives a person of property in an irrational or arbitrary fashion. *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996). Thus, to make out a substantive due process claim, it must initially be clear that the challenged governmental action effected a property interest protected by the Due Process Clause. *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995). It is unclear whether courts resolve this issue under federal or state law. *Compare, Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) ("[F]ederal constitutional law" determines whether an alleged property interest is protected by the Due Process Clause.), *with Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."). However, any uncertainty on this issue is irrelevant here, as it is clear that the ownership and use of

real property is a protected property interest under both Connecticut and federal precedent, and thus that such interests are capable of supporting a due process challenge to land restrictions.

Connecticut state law has long recognized that rights attendant to the ownership of property, including the right to use real property, merit legal protection, including constitutional protection. *See A. Gallo & Co.*, 309 Conn. at 838 ("We also look for incidents of ownership to determine whether the plaintiffs had a property interest in the unclaimed deposits that warranted constitutional protection. Incidents of ownership include (1) *the right to use the property.*" (emphasis added) (citing *Smith v. Planning & Zoning Bd.*, 203 Conn. 317, 323 (1987))); *New England Sav. Bank v. Lopez*, 227 Conn. 270, 293 (1993) ("When a debtor's property is foreclosed upon, he has two constitutionally protected property interests potentially to lose: the real property (mortgage) [being one]."); *City of New Haven v. United Illuminating Co., Inc.*, 168 Conn. 478, 494 (1975) (" '[T]he property interests protected by [] due process extend well beyond actual ownership of real estate, chattels, or money.' " (quoting *Roth*, 408 U.S. at 571-72)).

Federal law is no different. It too has long recognized that real property ownership and use entitles the owner to constitutional protection against property restrictions. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire,

use, and dispose of it. The Constitution protects these essential attributes of property."); *Wash. ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) ("The right of [an owner] to devote [his] land to any legitimate use is properly within the protection of the Constitution."); *Lucas*, 505 U.S. at 1017-19 (right to make economically beneficial use of real property protected by the Takings Clause). Zoning decisions which limit the use of property are accordingly subject to Due Process review. *See Nectow v. Cambridge*, 277 U.S. 183, 187 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).

### B. Arrigoni Owns the Real Property Restricted by the Town and Can Therefore Maintain a Due Process Claim Against the Restrictions

There is no dispute that the Town has restricted Arrigoni's ability to use the land for a legitimate developmental purpose—a right recognized under state and federal law—by repeatedly denying development approvals. There is also no dispute that Arrigoni owns the real property at issue. 4 JA 0806. Because the Town's limitations impede Arrigoni's constitutional interest in real property use, they are subject to substantive due process review. *Crowley*, 76 F.3d at 52.

The Town is likely to argue, though, that Arrigoni must show it has a protected property interest in *the permits* it unsuccessfully sought in order to raise a due process challenge. But this is not the relevant question. The Due Process Clause does not say the government may not deprive a person of a *permit* without due process of law. It

says it may not deprive a person of "property." As shown above, Arrigoni's right to use its real property is a form of property covered by the Due Process Clause. Therefore, whether or not Arrigoni also has property interests in a permit is immaterial. Its real property interest is sufficient to trigger due process review.

It is true, of course, that some Second Circuit precedent states that a due process claimant can establish a protected property interest by showing an entitlement to a permit. These decisions trace to the *Roth* decision. *Roth* was not a real property case, but a public employment case in which the claimant asserted a property right in the benefit of continued employment. 408 U.S. at 566-68. In holding that the claimant could only state a "property"-based due process claim by showing an "entitlement" to continued employment, the Supreme Court intended to *expand* the possible range of protected interests beyond "old" property interests, like real property ownership, not negate them. *Roth*, 408 U.S. at 571-72 (due process protected property interests "extend well beyond actual *ownership of real estate*, chattels, or money") (emphasis added). Indeed, neither *Roth* nor any other Supreme Court case has abrogated decisions holding that real property ownership and use rights are protected interests. *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1200 (9th Cir. 1998) ("The *Roth* Court's recognition of the unremarkable proposition that state law may affirmatively create constitutionally protected 'new property' interests in no way implies that a State may by statute or regulation roll back or eliminate traditional 'old property' rights."

(citing Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 329 (1993))).

Similarly, this Circuit has never explicitly abandoned or repudiated decisions holding that real property ownership creates a protected property interest, so as to require permit entitlement even where, as here, state law recognizes a common law right of property use. Indeed, the Circuit could not adopt such a view, as it is contrary to Supreme Court precedent holding that real property use triggers constitutional protection. *See*, *e.g.*, *Lucas*, 505 U.S. at 1017-19. Ultimately, any tension in this area is reconciled by the recognition that a land use applicant has a protected property interest when he has either an ownership right, particularly the right to use land, *or* a right to a permit sanctioning a statutorily created benefit.

But by analyzing the denial of Arrigoni's applications to productively use its land like a denial of a gambling license, or any other form of novel, statutorily-created property, the district court overlooked the distinction between "old" property interests that are categorically protected, and "new" property interests hinging on the entitlement test. In seeking to develop its land, Arrigoni is not requesting a government-created benefit; it is seeking to exercise its pre-existing, common law right to use its land. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987). This is an "old," and automatically protected, interest. Therefore, regardless of whether the Town's regulations afford some discretion, its land use permit denials

must comport with due process because they impose restrictions on Arrigoni's common law right to use real property. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property."); *Euclid*, 272 U.S. at 386.

In sum, the Town's restrictions on its ability to use the property are subject to substantive due process attack. But since the district court did not pass on the merits of that claim, the claim should be remanded for that inquiry.[20] For present purposes, Arrigoni notes that the Town cannot survive the applicable rational basis test,[21] because it utilized fundamentally irregular procedures in considering Arrigoni's proposed land use, relied on illegitimate motivations, and denied the project simply to prevent Arrigoni from developing the property. *See* DE 66.[22]

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[20] If the Town insists on litigating the merits of the due process claim here in its Response Brief, Arrigoni respectfully reserves the right to more fully argue the merits in its reply.

[21] The Town is likely to argue that Arrigoni's substantive due process claim is judged under a "shocks the conscience" test. This is wrong. The test in the land use context is still a "rational basis" standard. *Crowley*, 76 F.3d at 52 ("[A] party asserting a deprivation of substantive due process must first establish a valid property interest . . . . Second, the party must demonstrate that the defendant acted in an arbitrary or irrational manner in depriving him of that property interest.").

[22] Plaintiff's Memo. in Support of Motion for Summary Judgment at 16-26.

## III

## ARRIGONI IS ENTITLED TO A NEW EQUAL PROTECTION TRIAL BECAUSE THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN EXCLUDING EVIDENCE OF SIMILARLY SITUATED PROPERTY OWNERS

The Town treated numerous people owning land similar to Arrigoni's far more favorably than Arrigoni, particularly by allowing excavation in similar circumstances, for no rational reason. 1 JA 0208-09, 0241-42, 0253, 0274-75, 0213; 2 JA 0398-99. Arrigoni is in fact literally surrounded by property owners who were not required to seek multiple permits simply to excavate for site development, as Arrigoni was, or who were allowed to excavate their land extensively for developmental purposes, unlike Arrigoni.[23] Arrigoni accordingly brought an equal protection claim against the Town. 1 JA 0097-118. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000). A jury returned a verdict in favor of the Town on this claim, but it did so without viewing critical evidence showing that two property owners with land located and zoned like Arrigoni's were allowed to engage in major excavation, while Arrigoni was denied. This evidence was withheld from the jury by the trial judge on an

[23] These include: Greenland (1 JA 0208, 0234-35, 0242-43, 0253-54, 0265-66, 0274-75; 2 JA 0293-97); Nosal (1 JA 0207, 0213, 0236-39, 0267); Morgensen (2 JA 0398-99); Tilcon (2 JA 0279, 0374, 0400-03; 4 JA 0963-72); Coginchaug Regional High School (4 JA 0977, 0988).

erroneous legal ground. Because this mistake was prejudicial, Arrigoni is entitled to a new trial.

**A. Standards and Background**

"A party is generally entitled to a new trial if the district court committed errors that were a 'clear abuse of discretion' that were 'clearly prejudicial to the outcome of the trial.' " *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 124 (2d Cir. 2005) (quoting *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 17 (2d Cir. 1996)). "A district court has abused its discretion if its ruling is based on an erroneous view of the law." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 123 (2d Cir. 2010) (quotations, citation, and ellipsis omitted). In this case, the trial court failed to apply circuit law in denying Arrigoni's request to submit seven exhibits to the jury relating to certain similarly situated, more favorably treated, property owners (comparators).

The error at issue arises from a pre-trial conference in which the Town objected to Arrigoni's proposed introduction of evidence relating to three equal protection comparators (Tilcon Quarry, Coginchaug Regional High School, and Morgensen) that had not been previously identified. 4 JA 0940-51, 0959-88, 0992. The exhibits showed that the Town allowed Tilcon to excavate property adjacent to Arrigoni's and

lying outside of the HID zone.[24] 4 JA 0943, 0959-76, 0992; 6 JA 1384-85.[25] Arrigoni was of course not permitted to do so. The exhibits also showed that the Town allowed the Regional High School to excavate its property, without having to obtain a separate excavation permit, as required of Arrigoni. 4 JA 0944, 0977-88.

The Town objected to this evidence on the basis that Arrigoni had not identified the relevant comparators in prior proceedings and adding them now would delay and complicate the trial. 4 JA 0939-42. Arrigoni explained that it was prompted to add the comparators due to a substantial change in this Circuit's standards for identifying "similarly situated" equal protection comparators, a change that had occurred after earlier ligation in this case. 4 JA 0888-94, 0942-45. Specifically, the 2012 *Fortress Bible Church* decision changed the calculus by holding that comparators need not be similar in all respects, but rather, only "with regard to discrete issues." 694 F.3d

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[24] The Court will recall that the HID zone is the only zone in which excavation is an automatically permitted use. 2 JA 0484; 1 EV 074-75.

[25] During the trial, Arrigoni's counsel explained:

> Exhibit 44, does show the mining activity by Tilcon extending into the farm residential zone, directly next to my client's property.
>
> The Court: Into it or going up to it?
>
> Mr. Carella: Into it.

6 JA 1384-85 [trans. pp. 492-94].

at 222. It thereby expanded the range of potential comparators.[26] *Id.*; 4 JA 0942-45. Given this intervening change in the law,[27] Arrigoni sought to add Tilcon and the High School because they were similarly situated in critical, though perhaps not all,[28] respects (Tilcon was outside the HID zone like Arrigoni but allowed to excavate; the High School sought and gained permission to excavate was but not required to obtain a second "special" permit). Nevertheless, the judge ultimately excluded the Tilcon Quarry and High School comparators because they had not been previously identified by Arrigoni in the earlier (pre-*Fortress Bible Church*) proceedings, and including them would delay the trial. 4 JA 0950 ("I think [allowing in the exhibits] would involve postponing the trial for a period of time, it would disrupt not only my

[26] The Town agreed with this view of *Fortress Bible Church*. 4 JA 0895.

[27] At the pretrial conference, Arrigoni also pointed out that the Town had been on notice of the relevance of these other comparators since: documents relating to them had been the subject of discovery; the Town's expert was the Town's engineer, who was aware of these other projects; issues related to them had come up in the context of Arrigoni's permit hearings; and, the documents were all public Town records. 4 JA 0942-48.

[28] Arrigoni had declined to fully rely on the comparators in prior proceedings out of concern they did not satisfy the pre-*Fortress Bible Church* similar "in all material respects" standard for comparators. *See Inturri v. City of Hartford, Conn.*, 365 F. Supp. 2d 240, 251 (2d Cir. 2005); 4 JA 0942-43.

calendar, possibly the court in Connecticut as well, depending upon my availability.").[29]

### 1. The Lower Court Erred in Declining To Allow New Comparators Based on the the Intervening *Fortress Bible Church* Case

The lower court erred in excluding Arrigoni's additional comparators from the jury, because that evidence had not been before the court on summary judgment, when an intervening decision from this Court allowed the evidence. The court had a duty to apply *Fortress Bible Church*, 694 F.3d at 222, and to allow Arrigoni to submit additional evidence under that decision.

Under the principle of " 'vertical *stare decisis*,' the decisions of an appellate court, *i.e.*, a circuit court of appeals or the Supreme Court, will have preclusive effect on subsequent decisions made by lower courts." *Panayoty v. Annucci*, 898 F. Supp. 2d 469, 479-80 (2d Cir. 2012) (quotations added). As such, "[n]o inferior court may ignore clear higher authority that itself has not been foreclosed by yet higher authority." *In re Arway*, 227 B.R. 216 (Bankr. W.D.N.Y. 1998); *see also Paredes-Silva v. United States*, 632 F. Supp. 2d 349, 352 (S.D.N.Y. 2009) ("[D]istrict courts . . . must abide by the decisions of the higher courts and cannot overrule them."). This is true even where the law changes during the course of litigation. As

[29] The judge allowed in the exhibit relating to Morgensen, 1 EV 158, because it was in the case from the beginning. 4 JA 0951; 3 JA 0789.

this Court has explained in *United States v. Plugh*, 648 F.3d 118, 124 (2d Cir. 2011), an "intervening change of controlling law" justifies and often compels reconsideration of an earlier evidentiary decision in the same litigation. *See also Doe v. N.Y.C. Dep't of Soc. Servs.*, 709 F.2d 782 (2d Cir. 1983) (citing one of "[t]he major grounds justifying reconsideration" as "'an intervening change of controlling law'" (citing 18 C. Wright, et al., Federal Practice & Procedure § 4478 at 790 (1981))).

*Plugh* is instructive here. In that criminal case, this Court initially affirmed a district court's ruling suppressing evidence. *Plugh*, 648 F.3d at 122. But before the case went to trial, the Supreme Court handed down a decision in a different case, explicitly rejecting the standard upon which this Court had relied in affirming the suppression of evidence. *Id.* at 124. This Court then agreed to reconsider its prior evidentiary ruling and reversed it, holding that the evidence was now admissible, in light of the intervening Supreme Court decision. *Id.* at 123, 128. Hence, a change in the law required overturning prior evidentiary decisions of both this Court and a district court. *Id.* at 123-24, 128. *See generally*, *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987) ("[C]ourt is required to apply the law in effect when it renders a decision . . . ."); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 27 (1940) ("[I]f, subsequent to the judgment, and before the decision of the appellate court, a law

intervenes and positively changes the rule which governs, the law must be obeyed . . . .") (quotations and citations omitted).

In short, an "intervening change in controlling law" is an exception to the rule that "a court, as a general matter will adhere to its own decision at an earlier stage of the litigation." *BanxCorp v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280 (S.D.N.Y. 2013) (quotations, citation and ellipsis omitted). But in this case, the district judge chose to stick to prior rulings and proceedings relating to similarly situated comparators rather than allowing Arrigoni to invoke the new principles of *Fortress Bible Church* to present two more comparators. There is little doubt that Tilcon Quarry and the Regional High School are proper comparators under *Fortress Bible Church* because both of those permitted projects were similar in important respects to Arrigoni's denied project. *Id.* at 223. Indeed, this proposition was largely uncontested by the Town or lower court; the court's concern was with potential litigation delay. 4 JA 0895, 0950. Unfortunately, fear of delay is not a sufficient reason to exclude relevant evidence. *Harris v. Chand*, 506 F.3d 1135, 1141 (8th Cir. 2007) ("Abuse [of discretion] may occur when a court excludes 'probative, noncumulative evidence simply because its introduction will cause delay.'" (quoting *Life Plus Int'l v. Brown*, 317 F.3d 799, 807 (8th Cir. 2003))); *Gen. Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500, 1509 (9th Cir. 1995) ("As a general rule,

evidence may not be excluded solely to avoid delay.").[30] Therefore, the court's exclusion ruling was in error.

### B. The Lower Court's Exclusion of Evidence Was Prejudicial to the Outcome of the Trial

The wrongful exclusion of evidence is prejudicial, and gives rise to a right to a new trial, if it "affects 'a substantial right' of one of the parties." *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 105 (2d Cir. 1995) (quoting Fed. R. Evid. 103(a)). This requires an "assessment of the likelihood that the error affected the outcome of the case." *Id.* (quoting *Malek v. Fed. Ins. Co.*, 994 F.2d 49, 55 (2d Cir. 1993)). "If one cannot say, with fair assurance, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Id.* (ellipsis omitted).

Here, one cannot say "with fair assurance" that the jury was not substantially swayed by the lower court's mistaken exclusion of evidence. *Phoenix Assocs. III*, 60 F.3d at 105. Had the jury heard that the Town gave Tilcon Quarry permission to excavate and crush rock outside of the Heavy Industrial Zone, on land immediately

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[30] *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 795 (1st Cir. 1991) ("Certainly, Rule 403 does not mean that a court may exclude evidence that will cause delay regardless of its probative value. If the evidence is crucial, the judge would abuse his discretion in excluding it." (quoting Weinstein's Evidence ¶ 403[6] at 403-99 (1990))); *see also id.* at 795 ("'[I]n no event at this pre-trial stage should witnesses be excluded because of mere numbers without reference to the relevancy of their testimony."' (quoting *Padovani v. Bruchhausen*, 293 F.2d 546, 550 (2d Cir. 1961))).

adjacent to Arrigoni's, it could have concluded that the Town treated Arrigoni unequally. It may have arrived at a similar conclusion if it had heard that the Regional High School was allowed to excavate land near Arrigoni's without obtaining a second "special" permit. Or the combined weight of the two excluded comparators' more favorable treatment may have led it to conclude that the Town discriminated against Arrigoni. *See Phoenix Assocs. III*, 60 F.3d at 105 (finding the "cumulative effect" of multiple erroneous exclusions of evidence not harmless error).

What is clear is that the court's decision to exclude Arrigoni's proposed comparators severely impacted witness testimony and the conduct of the entire trial, to Arrigoni's detriment. On multiple occasions when Arrigoni's counsel questioned witnesses about the Town's general practices regarding special excavation permits or the interpretation of its zoning regulations, the court sustained objections from the Town that such questions threatened to introduce additional comparators to the jury—the comparators the court had disallowed. For example, when questioning Patrick Benjamin, the engineer who created Arrigoni's site development plan, Arrigoni's counsel asked:

> Q: Are you aware of any other industrial developments in Durham that have been denied because of the amount of excavation of excess material from the site?
>
> A: No.

> Mr. Gerard (Counsel for the Town): I have an objection because it looks like we're getting into new comparators there.
>
> The Court: I would tend to agree. Where are you headed?
>
> Mr. Gerard: It's got to be Nosal or Greenland. If he's going to say globally, that's not right.
>
> The Court: I think we should stick with the two of them. They [the jury] should disregard the question.
>
> The Court: Ladies and gentlemen, I instruct you to disregard the last question and answer of his awareness of other circumstances. There are three comparators, as I defined them for you in the initial instructions at issue in this case, in this equal protection case. So just disregard the last question and answer.

5 JA 1165-66.

Similarly, when questioning witness Eugene Riotte, Arrigoni's counsel asked:

> Q: In your years as a commission member, other than Mr. Arrigoni's application, you don't recall any other instance where the commission has required an applicant to submit simultaneous applications in that manner?
>
> Mr. Gerard: Objection . . . You don't recall any other instance when anyone was required to submit two permits, we actually explained the reasons for that, it's in the exhibits, but there's now other comparators. . . .
>
> The Court: . . . [Y]ou're glancing in the direction of other applicants for what and under what circumstances they were applying to do whatever they applied to do . . . . And I think that, again, is looking outside the proper scope of reference, and it should be these two. Say, look, Greenland didn't have to do it, Nosal didn't have to do it, Morgenson[sic], whatever, didn't have [sic] do it, okay?

> Ladies and gentlemen, disregard the last question. What we're basically talking about in this case is whether . . . Arrigoni Enterprises, was treated differently . . . from the way in which the defendants treated the Greenland application and the Nosal application, Greenland or Nosal application and developments.

5 JA 1237-38.

By forcing the witnesses to limit their testimony to only three comparators, precluding them from answering questions about the Town's general historic practices out of fear they might mention other comparators, the trial court's ruling likely altered the outcome of the case.[31]

In short, Arrigoni's equal protection case was prejudiced by the incorrect decision to prohibit it from showing the jury that the Town treated the Tilcon Quarry and the Regional High School differently from Arrigoni on similar issues relating to excavation. Indeed, the trial judge himself seemed to recognize that the exclusion of the evidence harmed Arrigoni's case. 4 JA 0950 ("I noted your objection, I think it's preserved for the record, and I think the [sic] prejudice to your case if I don't let this in, but it is kind of a late comer in how the case [proceeded earlier]."). In any event, at the very least, one cannot say "with fair assurance that the judgment was not substantially swayed" by the lower court's error. *Phoenix Assocs. III*, 60 F.3d at 105.

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[31] The Judge did not even allow Arrigoni to use one of the exhibits, a map of the Tilcon quarry, 4 JA 0992, for purposes other than identifying Tilcon as a comparator, for fear that use of the map would inadvertently do so. 6 JA 1394.

The lower court's erroneous exclusion of evidence was thus harmful and Arrigoni is entitled to a new trial.

## IV

## SECTION 12.05 OF THE TOWN'S ZONING REGULATIONS IS UNCONSTITUTIONALLY VAGUE

Contrary to the district court's judgment, 6 JA 1515-22, the excavation rules in Section 12.05 of the Town's Zoning Regulations are unconstitutionally vague on their face and as applied to Arrigoni.

### A. Section 12.05 Is Vague on Its Face

A statute is unconstitutionally vague, and therefore violates due process, if either (1) "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Statutes must "provide explicit standards for those who apply" them to avoid "resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *See also 33 Seminary LLC v. City of Binghamton*, 869 F. Supp. 2d 282, 301 (2d Cir. 2012) ("Ordinances may be void for vagueness if their prohibitions are not clearly defined to provide fair warning and prevent unrestricted delegations of power

which facilitate arbitrary and discriminatory enforcement.") (quotations & citation omitted). The ordinance here fails both tests.

### 1. The Ordinance Fails To Provide People of Ordinary Intelligence a Reasonable Opportunity To Understand What Conduct It Prohibits

At the outset, it is unclear whether the Ordinance covers all properties, or only some. It is entitled "Sand and Gravel Pits," suggesting that it is designed to apply to only those type of properties. 2 JA 0480.[32] But later, the Ordinance states a permit is required for removal of earth materials from "any land." *Id.*[33] Still later, the ordinance states that "processing" (which is undefined) of earth material is permitted on property in one zone—the HID zone. *Id.* at 0484.[34]

The Ordinance is also unintelligible about what it prohibits or allows. It might be read to allow excavation and related activities with a permit, except it also states (as noted above) that no "processing" of earth materials is allowed in any zone except HID. The Ordinance does not define "processing," and the normal definition of the term is broad enough to cover the very things other sections of the Ordinance might

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[32] Town of Durham, Zoning Regulations § 12.05.

[33] *Id.* § 12.05.01.01.

[34] *Id.* § 12.05.03.01.03.B.

be read to permit: excavation and removal of earth products, 2 JA 0480,[35] or "screening and sifting of sand, sand and gravel or topsoil" in certain zones. *Id.* at 0483.[36] One can thus read the regulations to both allow and bar excavation activity in most property zones.

Finally, the Ordinance seems to allow excavation and removal of more than a 1,000 cubic yards of material (assuming one ignores the ban on "processing"). 2 JA 0480.[37] Yet, it provides no standards for granting such a permit, other than a generalized site plan requirement. *Id.* Does the Ordinance allow an unlimited amount of excavation over 1,000 cubic yard with a permit? If not, what guidelines constrain the amount that can be properly excavated or the granting of a permit? The Ordinance is silent on these important questions. All in all, the law does not "convey[] [a] sufficiently definite warning as to . . . proscribed conduct," *Rubin v. Garvin*, 544 F.3d 461, 467 (2d Cir. 2008), and is too convoluted and contradictory for a person of ordinary intelligence to understand. *See Hayes v. N.Y. Attorney Grievance Comm.*, 672 F.3d 158 (2d Cir. 2011) (finding regulation requiring disclaimers be "prominently made" unconstitutionally vague in part because "if administrators cannot determine

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[35] *Id.* § 12.05.01.01.

[36] *Id.* § 12.05.03.01.03.

[37] *Id.* § 12.05.01.02.

the meaning of a prohibition, those subject to it 'can hardly be expected to do so' " (internal punctuation omitted) (quoting *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010), *vacated on other grounds by FCC v. Fox Television Stations, Inc.*, _ U.S. _, 132 S. Ct. 2307 (2012))).

### 2. The Ordinance Authorizes and Encourages Arbitrary and Discriminatory Enforcement

In part because of its confusing and contradictory terms, Section 12.05 "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. As noted, there are no "explicit standards" for the Commission to apply, which leads to "resolution on an ad hoc and subjective basis," *Grayned*, 408 U.S. at 108-09, and "arbitrary and discriminatory enforcement." *33 Seminary LLC*, 869 F. Supp. 2d at 301. This is apparent from the Town's history of interpreting the Ordinance to allow earth excavation, including rock crushing (even though one part of the Ordinance appears to categorically bar it), for site development on some properties.[38] *See VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 192 (2d Cir.

[38] It is undisputed that the Town has authorized other permit applicants who own property in the DDD zone to excavate their land. In 2004, the Commission approved the construction of two industrial buildings by Nosal, which required extensive excavation to construct. 1 JA 0236-39, 0267. Nosal eventually crushed and processed an unknown amount of rock on its site. 4 JA 1048. In 2004 and 2005, the Commission granted two separate approvals to Greenland Realty to excavate its property, including the crushing, screening, and removal of 20,000 cubic yards of rock, in order to build one building. 1 JA 0234-35, 0241-42, 0265-66, 0274-75, 0293-

(continued...)

2010) (courts are authorized to consider how agencies have historically interpreted disputed statutes in facial vagueness analysis (quoting *Grayned*, 408 U.S. at 110)). Yet, in Arrigoni's case, it adheres to a literal interpretation that totally bars rock crushing—even for site development.

The Ordinance is also unclear as to what permits are needed to excavate. Does one simply need a general development permit, a single special permit, or two "special permits," as required of Arrigoni? It is hard to know from the Ordinance, particularly when one cannot be sure what and where the law regulates.[39] The law therefore

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[38] (...continued)
97. Greenland eventually excavated, crushed, and removed over 30,000 cubic yards of material from its site. *See id.*

[39] Moreover, it is obvious that members of the Commission disagree about the meaning of the regulation. For example, the minutes from the Commission's December 21, 2005 meeting state:

> Richard Eriksen, clarified that the removal of material is by right for up to 300 cubic yards and then up to 1,000 cubic yards as approved by the Zoning Enforcement Officer. Over 1,000 cubic yards requires a special permit from the Planning and Zoning Commission.

2 EV 247. Compared with:

> Brian Ameche indicated . . . that under 12.05.01.01 of the regulations, the Commission has the ability to consider the imposition of many conditions related to the removal of earth products. His interpretation of the language of this clause as well as 12.05.02 is that it allows the Commission the authority to require a special exception approval *regardless of the number of cubic yards being removed*.

(continued...)

"authorizes [and] encourages arbitrary and discriminatory enforcement," *Hill*, 530 U.S. at 732; *see 33 Seminary LLC*, 869 F. Supp. 2d at 301 (finding contradictory definitions within a land use ordinance evidence of "vagueness and the potential for arbitrary enforcement"), and is unconstitutional for that reason.

### B. Section 12.05 Is Vague as Applied to Arrigoni Because It Could Not Have Known That the Amount of Excavation Necessary To Develop Its Property Would Be Prohibited

In assessing an as applied vagueness claim, this Court must consider "actual conduct" vis-à-vis Section 12.05, rather than hypothesize about other potential permit applicants. *VIP of Berlin, LLC*, 593 F.3d at 189. Here, Arrigoni could not have known, and did not know, that its excavation permit would be denied under Section 12.05. It applied for an excavation permit, after the Town told it to do so, in order to develop its property. It had previously watched its direct neighbor, Greenland, obtain permission from the Commission to develop its property, without any requirement that it apply for a separate excavation permit. 1 JA 0265-66, 0274-75. It is evident from the face of Greenland's development plan, a plan which the Commission approved, that excavation would occur for site development. 1 JA 0234-35. Arrigoni then watched as Greenland obtained approvals to excavate and crush 30,000 yards of rock,

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[39] (...continued)
2 EV 249 (emphasis added).

and to remove 20,000 yards of stockpiled topsoil from its property. 1 JA 0241-42, 0265-66, 0274-75.

The Town knew, furthermore, that Arrigoni was not seeking to excavate its property any more than was necessary for construction of three industrial buildings. Brian Curtis, the Town's Engineer, reviewed Arrigoni's proposed plans and reported to the Commission that "[t]he site is not being excavated beyond that which appears to be required for construction of the proposed buildings." 2 JA 0380. The Town's Planner, Geoffrey Colegrove, testified that the final grades proposed on Arrigoni's excavation application matched those proposed in the development plan. 1 JA 0186-87. As a result, it was abundantly clear at the time that Arrigoni was only seeking to excavate the amount of material necessary to build its project. But in spite of that, the Commission denied its application, speculating without evidence that the project was really a covert "full scale quarry" operation. 2 JA 0377[40]

Given the Commission's history of allowing other applicants to excavate their property for site development, and without requiring a newly invented special excavation permit, and given that Section 12.05 does not specify what is "excessive" excavation, Arrigoni had no notice that the Town could apply the regulations as it

[40] Amended Minutes, 7/18/07 Commission Meeting, p. 6 ("[T]he real reason for the original application [was] not to construct several buildings (for which removal of bedrock was required) but, rather, the removal of 75,000 cubic tons of material—*i.e.*, a full-scale mining operation.").

ultimately did. Indeed, under the umbrella of the regulations, the Commission was able to simply make up and impose new requirements for Arrigoni as it went along. Because the regulation fails to "provide explicit standards," to put Arrigoni on notice of either the process or substantive result that its applications would likely trigger, Section 12.05 is unconstitutionally vague as applied to Arrigoni.

## CONCLUSION

For all of the foregoing reasons, this Court should reverse the lower court's Final Judgment and remand Arrigoni's takings claim, substantive Due Process claim, and Equal Protection Claim, and grant judgment as a matter of law on Arrigoni's declaratory relief claim.

DATED: January 13, 2015.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

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1. This APPELLANT'S OPENING BRIEF complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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DATED: January 13, 2015.

s/JENNIFER F. THOMPSON
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## CERTIFICATE OF SERVICE

I hereby certify that on January13, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/JENNIFER F. THOMPSON
JENNIFER F. THOMPSON