No. ____

In The
Supreme Court of the United States

835 HINESBURG ROAD, LLC,
Petitioner,

v.

CITY OF SOUTH BURLINGTON, et al.,
Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The City of South Burlington, Vermont, established "Habitat Blocks" where all development is banned to preserve open space. It enacted an "interim" land use ordinance that restricted development between 2018 and 2022 while it contemplated the location of its Habitat Blocks. During that period 835 Hinesburg Road, LLC, submitted a development proposal for the construction of commercial and light industrial buildings on its 113.8-acre parcel of undeveloped land, which complied with all elements of the interim ordinance. The City formally rejected the plan as intruding partially into potential future Habitat Blocks. 835 Hinesburg filed a federal lawsuit claiming the City's rejection effected an unconstitutional taking without compensation. The district court dismissed the takings claim as unripe because 835 Hinesburg did not submit a second development proposal under subsequently adopted regulations that included the Habitat Blocks. The Second Circuit affirmed.

The question presented is:

Whether a takings claim is ripe when a city makes a final decision under existing ordinances denying a land use permit, or whether a property owner is required to submit subsequent development proposals for consideration under future or later-adopted regulations to ripen the claim?

PARTIES TO THE PROCEEDINGS AND RULE 29.6

835 Hinesburg Road, LLC, was the Plaintiff and Appellant in all proceedings below. 835 Hinesburg Road, LLC, is a limited liability corporation organized under the laws of the State of Vermont. It has no parent corporation and issues no shares.

The City of South Burlington and the South Burlington City Council are public entities.

Meaghan Emery, Timothy Barritt, and Helen Riehle are members of the South Burlington City Council sued in their official capacities.

RELATED PROCEEDINGS

835 Hinesburg Road, LLC v. City of South Burlington, No. 23-218, 2023 WL 7383146 (2d Cir. Nov. 8, 2023)

835 Hinesburg Road, LLC v. City of South Burlington, No. 5:22-cv-58, 2023 WL 2169306 (D. Vt. Jan. 27, 2023)

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PETITION FOR A WRIT OF CERTIORARI

835 Hinesburg Road, LLC, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Second Circuit Court of Appeals is unpublished but can be found at *835 Hinesburg Road, LLC v. City of South Burlington*, No. 23-218, 2023 WL 738146 (2d Cir. Nov. 8, 2023), and is reprinted at Pet.App.1a–12a. The District Court's decision granting the City's motion to dismiss is unpublished but can be found at *835 Hinesburg Road, LLC v. City of South Burlington*, No. 5:22-cv-58, 2023 WL 2169306 (D. Vt. Jan. 27, 2023), and is reprinted at Pet.App.13a–43a.

STATEMENT OF JURISDICTION

The lower courts had jurisdiction over this case under the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1983, 28 U.S.C. § 1331 (district court) and 28 U.S.C. § 1291 (Second Circuit). The Second Circuit entered final judgment on November 8, 2023. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE AT ISSUE

The Fifth Amendment to the U.S. Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."

The City of South Burlington's Interim Bylaws, which were adopted November 13, 2018, and in place until February 7, 2022, are reprinted in relevant part at Pet.App.45a–49a.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

All property owners asserting their constitutional right to just compensation for a taking must establish Article III standing. Yet even when property owners demonstrate such standing, courts often decline to exercise jurisdiction "on grounds that are 'prudential,' rather than constitutional." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26 (2014). This Court has long understood that idea of "prudential ripeness" sits "in some tension with . . . the principle, that 'a federal court's obligation to hear and decide' cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (quoting *Lexmark*, 572 U.S. at 126). For many years, takings claims were subject to special ripeness rules. The Court ultimately determined, however, that these claims are not "second class" with respect to other civil rights. It swept away one of the main atypical ripeness requirements for federal takings cases—exhaustion of state administrative and judicial processes—in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019). Subsequently, it explained that property owners bear only a "relatively modest" burden to demonstrate that government has staked out a "final" position to enable judicial review of its actions. *Pakdel v. City & Cnty. of San Franciso*, 594 U.S. 474, 478 (2021). These cases made clear that a case is ripe upon the government's de facto determination "how the 'regulations at issue apply to the particular land in question.'" *Id.* (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)).

Despite these developments, many lower courts, including the Second Circuit in this case, continue to *expand* the prudential ripeness doctrine to bar property owners from federal court. These lower courts erect unique "ripeness" hurdles for property owners that extend far beyond the simple requirement that the government's initial decisionmaker take a definitive position as to the application of the challenged land-use regulations to the property. *Pakdel*, 594 U.S. at 478 (citing approvingly to Judge Bea's opinion that the "'finality requirement looks only to whether the *initial decisionmaker* has arrived at a definitive position on the issue.'") (quoting *Pakdel v. City & Cnty. of San Francisco*, 952 F.3d 1157, 1170 (9th Cir. 2020) (Bea, J., dissenting) (emphasis added). These unique hurdles afford the government extraordinary deference to hold takings cases hostage while demanding that property owners ask for one more variance, submit one more application, or try for one more building configuration, in the vain hope that this time might be different. *See, e.g., N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229, 1234 (10th Cir. 2021) (plaintiff whose development permit was denied met Article III standing and ripeness standards, but case was "not prudentially ripe" because it remained possible for the city to grant different requests). This is exhaustion by another name, and directly conflicts with this Court's precedents. *See Pakdel*, 594 U.S. at 480 ("Whatever policy virtues this doctrine might have, administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position.") (citing *Knick*, 139 S. Ct. at 2167).

As this case demonstrates, prudential ripeness is anything but modest in practice. The Second Circuit

held 835 Hinesburg's takings claim unripe despite a recorded City Council vote to reject its development proposal. To ripen this claim under the Court of Appeals' rule, 835 Hinesburg would have to expend enormous amounts of additional time and money in the unrealistic hope that South Burlington might—contrary to its own regulations—reverse itself. *See* Michael K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality's Ally and the Landowner's Nemesis*, 29 Urb. Law. 13, 39 (1997) (futility doctrine exists because "a plaintiff property owner should not be required to waste his time and resources in order to obtain an adverse decision that it can prove would have been made if subsequent application were made"). The time and expense required to endlessly pursue a final decision deters needed development of housing and commercial space and deprives property owners of their right to adjudication of constitutional rights. Worse, since local governments know that courts are receptive to expansive ripeness arguments, they have "no incentive to issue a final decision." *Bay-Houston Towing Co. v. United States*, 58 Fed. Cl. 462, 471 (2003).

Other courts, conflicting with the Second Circuit, have faithfully applied *Pakdel*. *See Catholic Healthcare International, Inc. v. Genoa Charter Township*, 82 F.4th 442, 448 (6th Cir. 2023) (A land-use case is ripe following "a 'relatively modest' showing that the 'government is committed to a position' as to the strictures its zoning ordinance imposes on a plaintiff's proposed land use.") (citing *Pakdel*, 594 U.S. at 478–79). This post-*Pakdel* circuit split heightens the need for this Court's intervention. The split between the Second Circuit (joined by the

First and Ninth Circuits)[1] and the Sixth Circuit demonstrates that, despite *Pakdel*, the issue of how prudential ripeness applies in takings cases is not settled. Without this Court's review, most property owners continue to face stalling tactics from local governments, draining the owners' resources and diminishing the chances that their takings claims ever will be heard on the merits. No other constitutional civil rights plaintiff faces this type of hurdle, highlighting that more is needed to ensure that property rights are not the "poor relation" of the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

This Court should grant 835 Hinesburg's petition for a writ of certiorari.

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[1] *See, e.g.*, *Haney as Trustee of Gooseberry Island Trust v. Town of Mashpee*, 70 F.4th 12 (1st Cir. 2023) (finding a takings claim unripe despite two variance denials from the town board); *Ralston v. Cnty. of San Mateo*, No. 21-16489, 2022 WL 16570800 (9th Cir. Nov. 1, 2022) (holding a property owner must present a futile application to ripen a takings claim even when applicable law confirms all development is precluded).

STATEMENT OF THE CASE

A. The City of South Burlington's Interim Bylaws and Designation of Habitat Blocks

To protect wildlife habitat and open space, the City of South Burlington adopted interim zoning bylaws in 2018. Pet.App.3a, 16a–17a, 45a–49a, 69a–70a. Where they applied, the interim bylaws prohibited new development. Pet.App.3a, 45a–49a. However, the City retained the authority to "authorize the issuance of permits for the development" that the interim bylaws otherwise prohibited "after public hearing preceded by notice" and "upon a finding by the [City] that the proposed use is consistent with the health, safety, and welfare of" South Burlington. Pet.App.3a, 48a–49a.

The City also formed the Open Space Interim Zoning Committee to consider "the prioritization for conservation of existing open spaces, forest blocks, and working landscapes in South Burlington in the sustenance of our natural ecosystem, scenic viewsheds, and river corridors." Pet.App.16a–18a, 45a–49a. The Committee assessed 190 parcels of undeveloped land and identified 25 highest priority parcels for conservation, Pet.App.3a, 17a–18a, 69a–74a, including 835 Hinesburg's 113.8-acre property. Pet.App.3a, 18a, 68a; JA.32.

Soon after, the City Council considered proposed amendments to the City's Land Development Regulations (LDRs) that established designated "Habitat Blocks" and "Habitat Connectors." Pet.App.18a–19a, 74a–75a. Under the proposed LDRs, all land labeled a "Habitat Blocks" or "Habitat Connectors," including those found within 835

Hinesburg's property and the other priority parcels, "must be left in an undisturbed, naturally vegetated condition." Pet.App.50a–61a, 68a–69a. On February 7, 2022, four years after it initially adopted the interim bylaws, the City voted to adopt the amended LDRs. Pet.App.5a, 68a.

B. 835 Hinesburg's Development Proposal

835 Hinesburg is a Vermont limited liability company that seeks to provide needed housing and commercial rental space in the fast-growing South Burlington metropolitan area. *See* Chelsea Edgar, *Despite a Housing Crisis, South Burlington's City Council Adopts Regs to Slow Rural Development*, Seven Days (Feb. 9, 2022).[2] It owns property in a developed area of South Burlington, with Interstate 89 and Burlington International Airport directly to the north of the property, heavy industrial development and State Route 116 directly to the east, a major sports complex and hundreds of homes to the west, and hundreds of additional homes to the south, as shown below.

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[2] https://www.sevendaysvt.com/news/despite-a-housing-crisis-south-burlingtons-city-council-adopts-regs-to-slow-rural-development-34854443 (noting that restricting housing development "outsource[s] the housing shortage to farther-flung communities").

JA.36. In short, 835 Hinesburg's proposal—initially proffered to the City's Planning Commission in 2015, Pet.App.68a—accommodates growth without sprawl.

As directly by the City's interim bylaws then in effect, 835 Hinesburg submitted a preliminary "sketch plan" for a planned unit development, Pet.App.77a; JA.44, consisting of the construction of twenty-four commercial and industrial buildings, along with necessary infrastructure, on its 113.8-acre parcel of undeveloped land in the Industrial/Open Space Zoning District. Pet.App.20a; JA.32, 36. Proposed uses include an animal shelter, community center, light manufacturing, office space, restaurants, and storage. JA.46. Although the interim bylaws allowed the City to permit development "consistent with the

health, safety, and welfare of" South Burlington, the City Council voted to reject 835 Hinesburg's proposal.[3]

The City Council noted that the area designated as Habitat Blocks in the then-draft LDRs "is located along the westerly, northwesterly and southwesterly boundaries of the subject property and extends easterly to varying degrees across the parcel. This area of the subject property lies under the Habitat Block and Habitat Connector Overly District." JA.35. Because "the proposed development include[d] several buildings and associated infrastructures within the proposed Habitat Block Overlay District"—an area where "development is generally prohibited" under the LDRs—the City Council concluded that "the proposed project will or could be contrary" to future ordinances. Pet.App.20a–21a, 77a; JA.34–36. The City Council thus treated the proposed project as subject to the prohibition on development in Habitat Blocks that it anticipated adopting in the final LDRs. Pet.App.20a–21a; JA.35 ("[b]ased on these unknowns and an initial review of the application of the draft amendments approved by the Planning Commission, . . . the proposed project will or could be contrary to the amendments to the Land Development Regulations that the City adopts."). Specifically, the City Council stated:

> Under the draft LDR, development is generally prohibited on lands within a Habitat Block. The application does not include any information regarding the location of this overlay district, but [*it*] *is*

[3] Three City Counselors voted "nay" on the proposal. One City Counselor voted "yea" on the proposal. And one City Counselor was marked "not present." Pet.App.20a, 77a; JA.36.

> *apparent that the proposed development includes several buildings and associated infrastructure within the proposed Habitat Block Overlay District*.

JA.35 (emphasis added).

C. The City's Habitat Block Land Development Regulations

As the City's rejection of 835 Hinesburg's proposal anticipated, the amended LDRs created a Habitat Block overlay district that categorically prohibits any commercial development within a Habitat Block.[4] 2022 LDR § 12.04(F), (H); Pet.App.57a–59a. Specifically, the regulations require that "all lands within a Habitat Block must be left in an undisturbed, naturally vegetated condition." 2022 LDR § 12.04(F). The LDRs also prohibit "[t]he encroachment of new development activities into, and the clearing of vegetation, establishment of lawn, or other similar activities in Habitat Blocks." 2022 LDR § 12.04(H); Pet.App.57a.

The amended LDRs include procedures for limited Habitat Block modification, none of which would have changed the outcome for 835 Hinesburg's proposed development. Pet.App.51a–55a. A Minor Habitat Block Boundary Adjustment allows the City to modify a Habitat Block by 50 feet in any direction, so long as

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[4] The only permitted uses within a Habitat Block are narrow, unpaved, non-motorized trails; removal of dead or dying plants and invasive species that pose an imminent threat to buildings or infrastructure; and construction of certain fences. 2022 LDRs §§ 12.01(C), 12.04(G). Additionally, the City alone may develop necessary infrastructure, facilitate outdoor recreational uses, or allow research or educational purposes within a Habitat Block. 2022 LDRs §§ 12.02(B), 12.04(H).

it offsets the adjustment elsewhere so that the total area remains the same. 2022 LDR § 12.04(D)(1); Pet.App.52a. The Small On-Site Habitat Block Exchange permits an applicant to exchange two acres or ten percent of the application's total land area for an equal amount of land within the bounds of the same planned unit development. 2022 LDR §§ 12.04(D)(1), (2); Pet.App.52a–53a. Again, the total area of the Habitat Block remains the same. A Larger Area Habitat Block Exchange permits an exchange of a portion of Habitat Block for an equal amount of contiguous land within the same habitat block, once again preventing development on 835 Hinesburg's property. 2022 LDR § 12.04(D)(1)–(3); Pet.App.53a–55a. Finally, 835 Hinesburg is not eligible for the relief enumerated for lots with at least a 70% Habitat Block overlay, 2022 LDR § 12.04(E), as only 37.7% of its property is listed as Habitat Block. Pet.App.55a–56a.

D. Procedural History

Having received a formal City Council "no" vote on its development proposal, 835 Hinesburg sued the City and members of the City Council in federal court. Pet.App.64a–87a. It alleged that the denial violated the Takings Clause and the Due Process Clause, among other claims. Pet.App.83a–87a.[5] The district court granted the City's motion to dismiss the takings claims on ripeness grounds. Pet.App.35a–38a, 43a. The district court held the takings claims unripe because 835 Hinesburg's development proposal was

[5] 835 Hinesburg raised additional claims under Vermont's Common Benefits Clause, both the federal and Vermont Equal Protection Clauses, and several other state constitutional claims. Only the federal takings claims are at issue here.

insufficiently comprehensive. Pet.App.35a–38a. Although submitting the proposal was a required step under the City's own regulations, 2022 LDR § 15A.05A., Pet.App.62a–63a, the district court reasoned that 835 Hinesburg could have applied for a variance to adjust the Habitat Block overlay, under one of the modification procedures noted above. Pet.App.31a–32a. Thus, despite the formal "no" vote, the district court perceived "considerable uncertainty about how South Burlington will apply the 'Habitat Block' provisions of the amended LDRs." Pet.App.31a.

The Second Circuit affirmed. Pet.App.3a–12a. It held that the City was within its rights to demand that 835 Hinesburg pursue another development proposal under its newly adopted LDRs. Pet.App.7a–8a. Because 835 Hinesburg submitted its required "sketch plan" development proposal under the interim bylaws, "the City Council did 'not yet know for certain' how the proposed Amended LDRs would apply to the Property," and could conduct only a "'minimal' assessment" of the proposed development Pet.App.7a–8a. The panel also concluded that it would not be futile for 835 Hinesburg to submit a new application because, in its view, the possibility for modification under the LDRs meant that the court could not assess the effect of the regulations on the property until such modifications were made or denied. Pet.App.7a–8a. Consequently, the Second Circuit discounted the City Council's formal vote and held 835 Hinesburg's takings claim unripe. Pet.App.7a–9a, 12a. This petition follows.

REASONS FOR GRANTING THE PETITION

The doctrines of standing and ripeness originate from the same Article III limitation that federal courts may entertain only "case[s] or controvers[ies]." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006). They ultimately "boil down to the same question" of whether the plaintiff properly alleged an injury. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007). In the land use context, a takings claim is ripe when "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). "Finality" in as-applied regulatory takings cases allows courts to ascertain the "extent of permitted development" on the land in question. *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 351 (1986). This pleading requirement is "relatively modest," and demands that property owners show only that the "initial decisionmaker" made a final determination as to "how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 594 U.S. at 478 (citation omitted). Landowners needn't "submit applications for their own sake," or engage in futile acts. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 622, 626 (2001).

This Court has never addressed whether rejected property owners must reapply under subsequently adopted laws to ripen a takings claim that arose when the government rejected a development proposal under a previous legislative regime. Property owners submit development applications under the laws applicable at the time. They don't propose

development to comply with repealed laws or potential future laws. When the government says "no," thwarting development of private property to achieve a public purpose such as conservation, a property owner may pursue a takings claim in federal court. *See, e.g., Pakdel*, 594 U.S. at 475. Whether land use laws, the composition of a city council, or any other factor may change in the future should be of no consequence. *See McKeithen, Trustee of Craig E. Caldwell Trust v. City of Richmond*, 893 S.E.2d 369, 378 (Va. 2023) (a takings claim cannot be thwarted by the potential that, "under no compulsion of law, [it] might show mercy . . . at some unspecified future date").

I. Lower Courts Conflict as to What *Pakdel* Requires, with Most Imposing an Improper Exhaustion Requirement on Property Owners

This Court consistently reinforces the rule that plaintiffs need not exhaust administrative remedies before asserting their federal rights in federal court via 42 U.S.C. § 1983. By the time this Court directly so held in *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982), it had already declined to require exhaustion several times, *see id.* at 500 (collecting cases). The unbroken line of precedent reflects the purpose of Section 1983: "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

But even as this Court cleared the way for access to federal court for most constitutional claims, it continued to erect barriers for property owners seeking to vindicate their Fifth Amendment rights.

Not long after *Patsy*, the Court held that a takings claim is not ripe in federal court until the property owner "has used" the State's "adequate procedure for seeking just compensation" and "been denied just compensation." *Williamson Cnty.*, 473 U.S. at 195. Recognizing the stark contradiction between *Patsy* and *Williamson County*, the Court later repudiated *Williamson County*'s state-litigation rule, describing it as an impermissible "exhaustion requirement." *Knick*, 139 S. Ct. at 2173.

Knick promised to reopen the federal courthouse doors to takings claims. *Id.* at 2177. But it left *Williamson County*'s "finality" requirement untouched. *Id.* at 2177–79. The Court acknowledged that the line between finality and exhaustion is blurry and the concepts "often overlap," but noted that "whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable." *Williamson Cnty.*, 473 U.S. at 192–93. "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury," *id.* at 193, in contrast to "administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate" *Id.* As an example, the Court explained that property owners need not appeal an initial decision-maker's rejection of a development proposal when the reviewing board cannot itself engage in decision-making. *Id.* However, this minimal guidance left substantial room for both lower courts and creative local governments to stave off the moment a takings claim becomes ripe.

This Court rejected the conflation of finality and exhaustion in *Pakdel*. There, owners of apartments in a San Francisco row house held their interest as a tenancy-in-common that they sought to convert into individually-owned condominiums. 952 F. 3d at 1160. One set of apartment owners, the Pakdels, leased to a tenant and, as a condition for the condo conversion, San Francisco required them to grant the tenant a lifetime lease, a requirement the Pakdels challenged as an unconstitutional taking. *Id.* at 1160–62. The district court originally dismissed the case because *Williamson County* required the Pakdels to exhaust state litigation procedures. *Id.* at 1161. When the case reached the Ninth Circuit, *Knick* had eliminated that hurdle. The Ninth Circuit majority pivoted and held the case unripe for lack of finality. *Id.* at 1163–64. It faulted the property owners for failing to pursue an exemption to the lifetime lease requirement. *See id.* at 1165–66. The panel majority's interpretation of finality amounted to an administrative exhaustion requirement—precisely what *Knick* had disavowed.

This Court squarely rejected the Ninth Circuit's new exhaustion rule. The unanimous per curiam opinion declared that the Ninth Circuit's approach "mirrors our administrative-exhaustion doctrine" and is thus "inconsistent with the ordinary operation of civil-rights suits." *Pakdel*, 594 U.S. at 478–79. *Pakdel* clarified that local governments may not avoid takings lawsuits by requiring property owners to jump through administrative hoops to "ripen" a claim. Instead, "administrative missteps do not defeat ripeness once the government has adopted its final position." *Id.* at 480–81. Because the City had plainly imposed the lifetime lease requirement, the property

owners achieved "de facto finality" and their challenge was ripe. *Id.* at 478–79.

A. Lower Courts Conflict as to When Finality Morphs into Exhaustion

Pakdel clarified that takings claims, like all other constitutional claims, are not subject to an impermissible exhaustion requirement under the guise of "finality." *Id.* Yet many lower courts marginalize *Pakdel* by limiting it to its facts and continue to require administrative exhaustion. Property owners are thus barred even from seeking vindication of their constitutional rights in federal court.

Here, the Second Circuit failed to apply the "de facto finality" standard, instead holding that the development prohibition was not final because 835 Hinesburg had not submitted a formal application under the now-permanent LDRs. Pet.App.6a–9a. But requiring a developer to pursue procedures after the initial decision-maker formally rejects a proposal—as the City Council did when it voted on 835 Hinesburg's plan—is administrative exhaustion. All that is required for a final decision is that the government "is committed to a position," *Pakdel*, 594 U.S. at 478–79, and the City Council's decision is as final as can be. It refused to permit 835 Hinesburg's development because a substantial portion of the land the property owner seeks to develop is inside a Habitat Block. Whether the Habitat Block can be minimally modified in its coverage may affect the size or valuation of the taking, but under no circumstances will the City approve a development proposal that eliminates the Habitat Block overlay entirely.

So long as the overlay exists in any configuration, preventing any development within its boundaries, so does the property owner's takings claim. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 & n.29 (1974) ("where the inevitability of the operation of a statute against certain individuals is patent," particular future contingency was "irrelevant to the existence of a justiciable controversy"). The City lacked discretion under its own ordinances to reconsider its decision halting 835 Hinesburg's project. Worse, the Second Circuit decision pointlessly demands that 835 Hinesburg seek reconsideration from the same body that already voted to reject the proposed development and subsequently finalized regulations permanently banning development on a portion of the property. Pet.App.6a–9a. Even before *Pakdel*, this sort of exhaustion was not required. "Ripeness doctrine does not require a landowner to submit applications for their own sake." *Palazzolo*, 533 U.S. at 622.

Unfortunately, 835 Hinesburg is far from the only landowner kept out of court on these grounds since *Pakdel*. In *Haney*, 70 F.4th 12, the First Circuit held a takings challenge unripe despite *two* variance denials from the Town Board that precluded the owner from building a single-family home. Despite *Pakdel*'s insistence that the finality burden is "modest," 594 U.S. at 478–79, the First Circuit faulted the property owner for not seeking approval from a different body for a separate matter related to the proposed construction of the house. *See Haney*, 70 F.4th at 21–22. Despite the obvious effect of the Town's two denials, the First Circuit required the property owner to jump through still more administrative hoops—before an entirely different

government agency—before it could "ripen" a takings claim against the Town for the Town's actions. *Id.* Although the court cited *Pakdel*, the rule the court actually applied was akin to an exhaustion requirement. *Id.* A final "no" on the variance requests was not good enough.

The Fifth Circuit also retains an exhaustion requirement in the guise of finality. *Beach v. City of Galveston*, No. 21-40321, 2022 WL 996432 (5th Cir. Apr. 4, 2022), like the Ninth Circuit in *Pakdel*, relied on older circuit precedent to hold that a property owner waived his takings claim by failing to appeal the loss of the property's grandfather status—which had allowed a previous multi-family development on the land—and by failing to *reapply* after his application for a special use permit was denied by the city council. *Id.* at *3. Just as in *Pakdel*, neither of these failures were relevant to whether the City's decision to refuse continued use of the property for multi-family housing was *final*. The City had committed to a position, but the Fifth Circuit required compliance with an administrative appeals process that amounted to a request for reconsideration to the city council. Once again, that is not finality, but exhaustion.

Similarly, in *Ralston*, 2022 WL 16570800, the Ninth Circuit failed to apply *Pakdel*'s "*de facto* finality" standard, demanding that a property owner present a futile application for a Coastal Development Permit to build a single-family home when applicable law required denial *and* the county planning director, in consultation with county counsel, confirmed that no home could be built. *See id.* at *2; *Ralston v. Cnty. of San Mateo*, No. 21-16489, Excerpts of Record at 12–21

(9th Cir. Nov. 1, 2022). This result conflicts with *Pakdel* as well as a long line of this Court's precedent confirming that property owners need not file applications for their own sake. *See, e.g.*, *Palazzolo*, 533 U.S. at 620; *Suitum*, 520 U.S. at 739 (agency made a final decision by determining that the subject was within a Stream Environment Zone that permitted no development).

In *North Mill St.*, 6 F.4th at 1229, a property owner's plan for a "combined use" of the subject property required rezoning, which was denied. But the court held the takings claim was prudentially unripe because "[a]lthough its rezoning application was denied, 'avenues still remain for the government to clarify or change its decision.'" *Id.* at 1230–31 (quoting *Pakdel*, 594 U.S. at 480–81). The owner might have "submitted a development proposal for [Planned Development] review" which would eliminate the need for rezoning. *Id.* Thus, the only way an owner can demonstrate a final decision in the Tenth Circuit is to submit a formal proposal that is then formally denied, and then pursue every other possible option that conceivably could lead to approval. *Id.* at 1233. Similarly, in *Willan v. Dane County*, No. 21-1617, 2021 WL 4269922, at *3 (7th Cir. Sept. 20, 2021), the Seventh Circuit held that takings claims were not ripe because the owners had not sought a conditional use permit exempting their property from a recent rezoning. *See also Barlow & Haun, Inc. v. United States*, 805 F.3d 1049, 1059 (Fed. Cir. 2015) (requiring formal application even where likelihood of approval is "not high").

Contrary to the cases above, other Circuits faithfully follow this Court's "de facto" approach to

finality. In *Catholic Healthcare International, Inc. v. Genoa Charter Township*, 82 F.4th 442 (6th Cir. 2023), a religious organization sought to create a prayer trail on 40 acres of undeveloped wooded property. *Id.* at 445. The government treated the prayer trail as a church, which required special land use and site plan approval. *Id.* The organization submitted two separate unsuccessful permit applications—one before and one after it filed suit. *Id.* at 446. The district court dismissed the organization's suit under the Religious Land Use and Institutionalized Persons Act (RLUIPA) as unripe. *Id.* at 447. The Sixth Circuit reversed. Citing *Pakdel*, the panel held the district court had conflated ripeness with exhaustion. *Id.* at 448. It explained that a land-use case is ripe following "a 'relatively modest' showing that the 'government is committed to a position' as to the strictures its zoning ordinance imposes on a plaintiff's proposed land use." *Id.* (citing *Pakdel*, 594 U.S. at 478–79). Importantly, the court emphasized that "[r]ipeness does *not* require a showing that 'the plaintiff also complied with administrative process in obtaining that decision.'" *Id.* (emphasis added). Because the Township clearly refused to grant Catholic Healthcare a permit for its prayer trail, Catholic Healthcare's RLUIPA claim was ripe under *Pakdel*.

The Eleventh Circuit also does not require denial of a formal application to understand the permissible uses of the property to a reasonable degree of certainty. In *South Grande View Dev. Co., Inc. v. City of Alabaster*, 1 F.4th 1299 (11th Cir. 2021), the city rezoned 142 acres of a 547-acre property that had been developed pursuant to a master plan approved by the city. *Id.* at 1302. The rezoning affected only a single owner. *Id.* The court held that the takings claim was

ripe because "the zoning ordinance itself was the City's final decision on the matter." *Id.* at 1307. The court distinguished "between a targeted zoning ordinance where the plaintiff contested the application to his or her land, and a general ordinance where a plaintiff has not asked the city to rezone his or her property," holding that no applications need be made in the former situation. *Id. See also, Acorn Land, LLC v. Baltimore Cnty.*, 402 F. App'x 809, 815 (4th Cir. 2010) (where targeted rezoning "cut the property's maximum residential density by half and placed the property in the lowest water/sewer classification," landowner need not seek a variance to ripen takings claim).

By taking *Pakdel*'s directives seriously, these Circuits conflict with the First, Second, Seventh, Ninth, and Tenth Circuits. While this Court granted certiorari in *Pakdel* to confirm the modest nature of the ripeness requirement, already a new split has developed. Despite this Court's guidance, lower courts continue to impose barriers on property owners seeking access to federal courts. Making matters worse, many of these decisions are unpublished—which permits incorrect, poorly reasoned decisions to fly under the radar, eluding en banc rehearing or this Court's review. *See, e.g.*, Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am. U. L. Rev. 757, 799–800 (1995) (unpublished opinions "give the impression of arbitrary, cavalier action by the appellate court and threaten confidence in the judicial process"). Without this Court's intervention, property owners and governments will be subject to wildly different ripeness rules. This

Court should grant the petition to ensure that the lower courts adhere to the same modest rules allowing property owners their day in court to challenge land use regulations.

B. Extensive Negotiation with the Government Is Not a Prerequisite to Finality

In *Village Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 297–98 (2d Cir. 2022), the Second Circuit held that a property owner's takings claim was ripe after years of fruitless negotiations even without an up-or-down council vote. The Court should grant this petition to clarify that constitutional standing and ripeness does not depend on property owners' engaging in a years-long back-and-forth dialogue with a governmental entity that plainly forbids a proposed project. Nothing in this Court's precedent suggests that such "give-and-take negotiation," *see id.* at 297 (quoting *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 124 (2d Cir. 2014)), is required to satisfy the final decision requirement. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 698–721 (1999) (appellant did not have to go through with a protracted application process to meet the final decision requirement). Instead, finality is a "modest" requirement, and all that is necessary to ripen a claim is for the government to have "committed to a position." *Pakdel*, 594 U.S. at 478–79.

Cases like *Village Green* show developers' overwhelming efforts to gain approval before resorting to a lawsuit. For example, the developer in *Del Monte Dunes* went back and forth with the government for years as it sought to reach a position acceptable to the City. *See Del Monte Dunes at Monterey, Ltd. v. City of*

Monterey, 920 F.2d 1496, 1503–06 (9th Cir. 1990) (detailing *19* iterations of proposals prior to suing). But *Village Green* and *Del Monte Dunes* cannot exemplify what developers *must* do to ripen a regulatory takings claim, when this Court describes the finality requirement as "modest." Lower courts adopting this standard are not demanding finality, but exhaustion of both available processes and the property owner's resources. *See City of Sherman v. Wayne*, 266 S.W.3d 34, 42 (Tex. App. 2008) ("[W]e are mindful that 'government can use [the] ripeness requirement to whipsaw a landowner. Ripening a regulatory-takings claim thus becomes a costly game of 'Mother, May I', in which the landowner is allowed to take only small steps forwards and backwards until exhausted.") (citation omitted).

Lower courts demanding that property owners continually return to government decisionmakers with altered plans apparently fear that enforcing a "modest" ripeness requirement will flood the federal courts with takings cases. *See, e.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 562–63 (2d Cir. 2014) (town "engaged in a war of attrition" after repeatedly changing the zoning laws, rejecting landowner's proposals, and forcing him to spend millions of dollars over the course of 10 years); *Laredo Vapor Land, LLC v. City of Laredo*, No. 5:19-CV-00138, 2022 WL 791660, at *4–*5 (S.D. Tex. Feb. 18, 2022) (takings case unripe where plaintiff failed to seek variance or make "alternative proposal" or "obtain a proportionality review" or "engag[e] in back-and-forth conversations with City officials" to pursue every possible alternative). But developers want to *build*, not litigate. They are generally willing to engage in negotiation and compromise when they have reason to

believe the government ultimately will permit them to make productive use of their property.

Give-and-take exhaustion also improperly conflates ripeness with the merits of regulatory takings claims. Whether the denial of a development permit has deprived the owner of all economically beneficial use of his land or has otherwise gone too far in regulating away the owner's right to use his land are difficult questions in many cases. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). But these are merits questions to be resolved typically after substantial factfinding. Such questions are distinct from whether the government has in fact decided to limit an owner's use by denying permission to develop his land. J. David Breemer, *Ripening Federal Property Rights Claims*, 10 Engage: J. Federalist Soc'y Prac. Groups 50, 55 (2009) ("Final decision ripeness is not concerned with whether a property owner has a winning [denial of all use] claim; it is simply concerned with ensuring that a land use decision is concrete enough to allow a court to even consider whether it [causes] a taking."). Requiring exhaustion through substantial negotiation effectively prevents property owners from asserting their rights on the theory that perhaps the government will permit some lesser development that would avoid takings liability. This not only outsources the merits determination to the local governments, but presents the risk that the property owner will be subject to undue delay or unfair procedures as he tries to ripen his claim. *See Del Monte Dunes*, 920 F.2d at 1501.

C. Without This Court's Intervention, Property Owners Are Uniquely Deprived of Federal Court Adjudication of Constitutional Claims

Local governments have every incentive to avoid reaching "merits" decisions. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting) (quoting article advising city attorneys on legal tactics to avoid judicial resolution of regulatory takings claims). Delay in decision-making benefits only the government, with its deep pockets and endless time, while grinding down property owners' monetary and spiritual resources. *Towing Co.*, 58 Fed. Cl. at 471 ("[A] strict interpretation of the ripeness doctrine would provide agencies with no incentive to issue a final decision."); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 98 (1995) ("[M]unicipalities may have an incentive to exacerbate this problem [of the delay inherent in 'ripening' a case], as stalling is often the functional equivalent of winning on the merits."); Luke A. Wake, *Righting a Wrong: Assessing the Implications of* Knick v. Township of Scott, 14 Charleston L. Rev. 205, 214 (2020) ("agency staff can often threaten permit denial without actually pulling the trigger").

The effect is well known to this Court and others, which decry the "shell game" and "shifting goal post" manipulations incentivized by the existing ripeness doctrine. *See Donnelly v. Maryland*, 602 F. Supp. 3d 836, 842 (D. Md. 2022) ("As Plaintiffs see things, the protracted history of the County's and State's maneuvers seems to be little more than a governmental shell game."); *State ex rel. AWMS Water*

Solutions, L.L.C. v. Mertz, 162 Ohio St. 3d 400, 410 (2020) (after a property owner twice submitted applications that were rejected, and the state suggested a third application to meet newly adopted standards, the court "decline[d] the state's invitation to issue a decision establishing precedent permitting the state to create moving targets"); *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 572 (S.D.N.Y. 2006) (finding that any successive applications or modifications would simply waste time and delay justice). If this Court fails to reinvigorate *Pakdel*, one can expect these "shell games" to continue. *But see Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.").

II. The Petition Raises the Important, Unsettled Question of Whether Property Owners Whose Land Use Application Is Rejected Must Reapply Under Later-Adopted Regulations to Ripen a Takings Claim

Many local governments enact interim land use regulations for long periods of time while future permanent regulations are drafted and adopted. A constitutional problem arises when property owners submit development proposals that comply with the interim rules, only to be denied because the government anticipates future regulation that would ban the proposed use. The court below, and some others, tacitly approve this approach by holding that a property owner's takings claim is unripe if he fails to reapply pursuant to the later-adopted regulations.

In this case, such reapplication would be futile because the language of the regulations plainly forbids any development in a Habitat Block. In a larger sense, this application of ripeness doctrine bars property owners from federal court to challenge any project denials under so-called interim regulations.

Governments have long used this tactic to try and avoid liability. In *Gabric v. City of Rancho Palos Verdes*, 73 Cal. App. 3d 183, 189 (1977), a property owner applied to build a home under interim regulations that permitted such use. The City denied the permit on the grounds that it could, and probably would, in the future, enact zoning laws that would prohibit the development of any and all buildings. *Id.* at 188–89. The California appellate court disagreed, holding the City's probable future, yet undetermined, zoning action could not justify denying the permit under the current regulations. *Id.* at 189; *see also, Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 126 (1973) (examining and concluding that when an applicant complies with all of the requirements for a building permit the applicable law is the law at the time when the application was made, even if the law has been changed prior to the decision). And yet the Second Circuit would hold the opposite here, conflating "legislative authority with administrative duty," *Gabric,* 73 Cal. App. 3d at 192, by requiring 835 Hinesburg to comply with future law and not the law at hand. This cannot be the case. *See Gramatan Hills Manor, Inc. v. Manganiello*, 213 N.Y.S.2d 617, 620–21 (1961) (finding a property owner was entitled to pursue development under the existing ordinance not a future nonadopted ordinance).

Some courts agree with *Gabric*. The Louisiana Supreme Court examined whether the government and later a reviewing court should utilize existing or future law when examining development permits. *A to Z Paper Co. v. Carlo Ditta, Inc.*, 775 So. 2d 42, 46–47 (La. 2000). And just as California did, Louisiana held that "[t]he issuance of a permit must be determined with reference to the existing [law], not one that is planned for the future." *Id.* at 47; *see also, Zachary Hous. Partners, L.L.C. v. City of Zachary*, 185 So. 3d 1, 7–9 (La. App. 2013) (finding the City Council's reliance on a future master plan over its existing zoning ordinance "teeters dangerously on the edge of becoming an unconstitutional taking of property and a due process violation."). Idaho, too, has followed suit, holding in *Canal/Norcrest/Columbus Action Committee v. City of Boise* that "to permit retroactive [or future] application of an ordinance would allow a zoning authority to change or enact a zoning law merely to defeat an application, which would result in giving immediate effect to a future or proposed ordinance before that ordinance was properly enacted." 137 Idaho 377, 379 (2002); *see also, Bracken v. City of Ketchum*, 537 P.3d 44, 49–58 (Idaho 2023) (same).

Although *Pakdel* offered apparently clear guidance, property owners continue to struggle to gain access to federal courts, while facing often opaque and shifting regulations that local governments and courts may invoke to avoid deciding takings claims on the merits. Here, the South Burlington City Council enacted interim regulations that permitted development, reviewed an application submitted in compliance with those regulations, and rejected the application in anticipation of new regulations flatly

prohibiting any development over a significant portion of 835 Hinesburg's property. Pet.App.68a–69a; JA.34–36, 42–43, 51. The courts below nonetheless require 835 Hinesburg to apply under a newly-adopted regulatory scheme. Pet.App.6a–9a. The City's vote to deny the application made its position clear. It denied the project because no development would, in the future, be permitted in Habitat Blocks and now the Habitat Blocks are in place. Pet.App.57a–59a; JA.35–36. There should be no impediment to a federal court ascertaining whether this effected a taking without just compensation.

CONCLUSION

This Court should grant the petition.

DATED: March 2024.

Respectfully submitted,

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Appendix

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23-218 (*Filed November 8, 2023*)
835 Hinesburg Rd., LLC v. City of S. Burlington

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

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

PRESENT:

AMALYA L. KEARSE,
SUSAN L. CARNEY,
MYRNA PÉREZ,
Circuit Judges.

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835 HINESBURG ROAD, LLC,

Plaintiff-Appellant,

v. No. 23-218

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

Defendants-Appellees.

FOR APPELLANT:	KATHRYN D. VALOIS, Pacific Legal Foundation, Palm Beach Gardens, FL (Christopher M. Kieser, Pacific Legal Foundation, Sacramento, CA; Matthew B. Byrne, Gravel & Shea PC, Burlington, VT, *on the brief*).
FOR APPELLEES:	PIETRO J. LYNN, Lynn, Lynn, Blackman & Manitsky, P.C., Burlington, VT.

Appeal from a judgment of the United States District Court for the District of Vermont (Crawford, *Chief Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on January 27, 2023, is **AFFIRMED.**

Plaintiff-Appellant 835 Hinesburg Road, LLC ("835 Hinesburg") appeals from a judgment of the United States District Court for the District of Vermont (Crawford, *Chief Judge*) dismissing as unripe its regulatory takings and due process claims against the City of South Burlington (the "City"), South Burlington City Council (the "City Council"), and City Councilors Meaghan Emery, Timothy Barritt, and Helen Riehle. Its claims arise from zoning changes covering its 113.8-acre parcel of undeveloped land within City limits (the "Property"). We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

In November 2018, the City Council adopted Interim Bylaws that required it to prioritize undeveloped open spaces for conservation and to assess whether and how to amend the existing Land Development Regulations (the "LDRs"). The Interim Bylaws facially prohibited new planned unit developments, but also empowered the City Council in its discretion to "authorize the issuance of permits" for development. App'x at 51–52. In March 2020, a City Council committee identified twenty-five "highest priority parcels for conservation," *id.* at 97, to be designated as "Habitat Blocks." These parcels include

a portion—around 38%—of the Property. Meanwhile, the City Council continued its efforts to draft amendments to the LDRs.

In August 2021, while the Interim Bylaws were still in effect and before the City Council finalized any proposed amendments to the LDRs, 835 Hinesburg submitted a "sketch plan" application (the "sketch plan" or "sketch plan application") to the City Council, requesting a permit for commercial development of the Property under the Interim Bylaws. In November 2021, the City Council met regarding the proposed amendments to the LDRs and voted to authorize hearings on those changes. At the same meeting, the City Council denied 835 Hinesburg's sketch plan application. In its written decision, the City Council noted that the City had identified a portion of the Property as a "Habitat Block," which—if the City Council were to adopt the proposed amendments to the LDRs—could be subject to a ban on development. The City Council explained that, because it "ha[d] not completed the preparation of these amendments, the City Council d[id] not yet know for certain the standards that will apply to development of the subject [P]roperty[.]" *Id.* at 34. It further advised that, although its review reflected "a minimal assessment of the proposed development under the draft LDR amendments, . . . it is very likely that" the proposed development "would not comply with the [draft] LDR amendments." *Id.* The City Council also pointed out that the sketch plan was missing important information relevant to an eventual decision. The sketch plan failed to note the precise location of the Habitat Block on the Property, the presence or absence of any Class III wetlands on the Property, and the impact of the proposed development on any 500-

year floodplain areas on the Property. "Based on these unknowns and an initial review of the application of the draft amendments [to the LDRs]," the City Council concluded, "the proposed development will or could be contrary to the amendments to the [LDRs] that the City adopts." *Id.* at 35.

In December 2021, the South Burlington Development Review Board (the "DRB") also reviewed 835 Hinesburg's sketch plan. Without rendering a decision on the sketch plan, the DRB elected to "conclude the Sketch Plan meeting." *Id.* at 42. It explained that "significant modifications to the [sketch] plan are necessary in order to meet the draft regulations, which would require re-warning."[1] *Id.* The DRB invited 835 Hinesburg to "return with a revised sketch under the Draft LDR[s]," *id.*, but 835 Hinesburg never did so.

On February 7, 2022, by a three-to-two vote, the City Council adopted amendments to the LDRs (the "Amended LDRs"). The Amended LDRs included, among other things, a requirement that "all lands within a Habitat Block" be "left in an undisturbed, naturally vegetated condition," subject to certain exemptions and potential modifications. Amended LDRs § 12.04(F)(1). 835 Hinesburg did not submit an application for development of the Property under the Amended LDRs. Instead, on February 24, 2022, it filed this suit.

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[1] Vermont law mandates "a warned public hearing" for all development review applications submitted to the appropriate municipal entity, subject to specific notice requirements. 24 V.S.A. § 4464.

I.

835 Hinesburg first challenges the District Court's determination that its Fifth Amendment regulatory takings claim is unripe and therefore fails to satisfy Article III's "case or controversy" requirement, *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005). The District Court concluded that 835 Hinesburg was "jumping the gun," reasoning that neither the City Council nor the DRB has "ruled in any comprehensive way on [835 Hinesburg]'s proposal under the LDRs now in effect." *835 Hinesburg Rd., LLC v. City of S. Burlington*, No. 22-cv-58, 2023 WL 2169306, at *9 (D. Vt. Jan. 27, 2023). The District Court also observed that the Amended LDRs "indicate that the DRB may exercise discretionary authority in locating and enforcing the 'Habitat Blocks' on undeveloped parcels." *Id.* Upon due consideration, we agree with the District Court that 835 Hinesburg's claim is unripe.

The Supreme Court has instructed that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *overruled in part on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019). To meet the final-decision requirement, a plaintiff must show that "the government is committed to a position." *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2230 (2021). In the land use context, we have emphasized that the need for finality is "especially pronounced," in order to avoid courts' premature involvement in essentially

local disputes. *Vill. Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 293 (2d Cir. 2022). Indeed, the final-decision requirement "evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution." *Murphy*, 402 F.3d at 348 (citations omitted).

At the same time, the final-decision requirement is "relatively modest," and "nothing more than *de facto* finality is necessary" to satisfy Article III. *Pakdel*, 141 S. Ct. at 2230. And the requirement "is not mechanically applied." *Murphy*, 402 F.3d at 349. Property owners may be excused from pursuing applications for a variance, for example, "when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied," i.e., when making such applications would be futile. *Id.* (citations omitted).

Here, the City Council has not reached a final decision on any specific proposed development of the Property by 835 Hinesburg. To begin, 835 Hinesburg concedes that it has not submitted an application under the Amended LDRs; the City has thus not rendered a final decision on any submission made by 835 Hinesburg under the applicable regulatory regime. And the application that 835 Hinesburg *did* file—the sketch plan—was both preliminary and incomplete. Because the Amended LDRs were still in draft form, and the City Council did "not yet know for certain" how the proposed Amended LDRs would apply to the Property, the City Council could conduct only a "minimal" assessment of 835 Hinesburg's sketch plan, it explained. App'x at 34. Moreover, the sketch plan lacked information that the City Council

advised that it needed to conduct a meaningful evaluation of 835 Hinesburg's preliminary proposal, such as information about wetland buffers, floodplains, and the precise location of the Habitat Block relative to the proposed development. In sum, the City Council's November 2021 decision was not a "final decision regarding the application of the regulations to the property at issue." *Williamson Cnty.*, 473 U.S. at 186.[2]

835 Hinesburg attempts to sidestep the final-decision requirement, contending that to submit an application under the Amended LDRs would have been "futile." Appellant's Br. at 22. It accuses the District Court of "speculat[ing]" that "835 Hinesburg may get what it wants through a land exchange or boundary adjustment reached through agreement with the zoning authority" and asserts that the Amended LDRs "leave no room for the City to consider, or issue, a development permit." *Id.* at 13–14 (citation omitted). But these assertions are merely 835 Hinesburg's predictions regarding the City's final position on the application of the Amended LDRs to the Property. As the District Court commented, the Habitat Block located within the Property *may* preclude any commercially viable development, "[b]ut that is just it—the court does not yet know." 2023 WL 2169306, at *9.

Contrary to 835 Hinesburg's assertions, the Amended LDRs offer the City several options to shape how it applies the regulations to a given parcel,

[2] Consistent with our understanding that the City Council's November 2021 decision was not final, the DRB subsequently invited 835 Hinesburg to "return with a revised sketch under the Draft LDR[s]." App'x at 42.

whether under the provisions governing Habitat Blocks, Amended LDRs § 12.04(D)(1)–(3); wetlands, *id.* § 12.06(D)(1), (F); or planned unit developments, *id.* §§ 15.C.04(C)(3), 15.C.06(G)(2). For example, on certain conditions, 835 Hinesburg may apply to exchange a portion of a Habitat Block on the Property for an equal amount of contiguous land. *Id.* § 12.04(D)(3). Because 835 Hinesburg has not yet submitted a complete application under the Amended LDRs—let alone a request for a modification—the City has not been in a position to render "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 348 (1986).

For all these reasons, at this point, we simply do not "know[] how far the regulation goes." *Id.* Accordingly, the District Court properly dismissed 835 Hinesburg's regulatory takings claim as unripe.

II.

835 Hinesburg also argues that the District Court erred by dismissing its substantive due process claim. It asserts that City Councilor Emery's allegedly conflicted vote to adopt the Amended LDRs violated its due process right to an unbiased determination on the general zoning regime by a neutral municipal decisionmaker. Relying primarily on *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), the District Court rejected this claim and applied the *Williamson County* final-decision requirement to bar 835 Hinesburg's due process claim in addition to its takings claim.

In the past, we have applied the final-decision requirement "to land use disputes implicating more than just Fifth Amendment takings claims," *Murphy*, 402 F.3d at 349–50, including to substantive due process claims stemming from a zoning decision. In *Southview Associates*, we held that the plaintiff's "substantive due process claim premised on arbitrary and capricious government conduct" in denying a permit for development was subject to the *Williamson County* final-decision requirement. 980 F.2d at 96–99. More recently, in *Kurtz v. Verizon New York, Inc.*, we explained that applying the *Williamson County* test to due process claims "arising from the same nucleus of facts as a takings claim" serves to "prevent[] evasion of the ripeness test by artful pleading of a takings claim as a due process claim." 758 F.3d 506, 515–16 (2d Cir. 2014).

835 Hinesburg attempts to distinguish its due process claim from that asserted in *Southview Associates* by contending that its own challenge is to the very enactment of the Amended LDRs, not to the application of the Amended LDRs to the Property. It argues that its due process claim ripened when Emery—who 835 Hinesburg alleges is biased simply due to her employment as a professor at the University of Vermont, a large landowner in the City—voted on and the City Council enacted the Amended LDRs. In support of its argument that Emery's alleged bias supports a constitutionally cognizable claim, 835 Hinesburg relies primarily on *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

We are not persuaded. Even accepting *arguendo* 835 Hinesburg's characterization of its claim, the claim fails because 835 Hinesburg does not plausibly

allege that "the probability of actual bias" on Emery's part was "too high to be constitutionally tolerable." *Caperton*, 556 U.S. at 872 (citation omitted).[3] *Caperton* involved matters of *judicial* disqualification and an individual's right to a fair trial: There, the Supreme Court found a due process violation when a justice of West Virginia's highest court denied a recusal motion, on the basis that he had received "an extraordinary amount" in campaign contributions from the principal officer of one of the parties in the case—"an extraordinary situation where the Constitution requires recusal." *Id.* at 872–73, 887. We have nothing like that situation here. 835 Hinesburg's sole allegations regarding Emery's alleged bias are that she "struggled under heavy conflicts of interest that violated the City of South Burlington's 'Conflict of Interest and Ethics Policy,'" and that her "employer, the University of Vermont, had a direct financial interest in the outcome of the consideration of the [LDRs]." Compl. ¶¶ 2, 25. These conclusory assertions, without more, do not plausibly suggest that Emery's risk of actual bias was "sufficiently substantial" that her involvement "must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 U.S. at 885 (citation omitted); *cf. id.* at 884 ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." (citations omitted)).

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[3] "We may affirm on any ground with support in the record, . . . including grounds upon which the district court did not rely." *Jusino v. Fed'n of Catholic Teachers, Inc.*, 54 F.4th 95, 100 (2d Cir. 2022) (citations omitted).

Because 835 Hinesburg's perfunctory allegations fail to render plausible its assertion that Emery's risk of bias in casting her vote as a member of the City Council worked a constitutional harm, we identify no error in the District Court's dismissal of this substantive due process claim.

* * *

We have considered 835 Hinesburg's remaining arguments and conclude that they are without merit. Accordingly, the District Court's judgment is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of Court

s/Catherine O'Hagan Wolfe

SEAL:
United States Second Circuit Court of Appeals

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

ORDER ON MOTION TO DISMISS
(Doc. 4)

This case concerns federal constitutional and state law challenges to land use regulations recently adopted by the City Council of South Burlington, Vermont. The regulations designate portions of certain parcels of land in South Burlington as "Habitat Blocks," and limit development thereon to preserve open space for a variety of reasons. Plaintiff owns a 113.8-acre parcel of undeveloped property in

South Burlington, portions of which are designated as Habitat Blocks. Plaintiff objects to having certain portions designated as "Habitat Blocks" and alleges that the designation prevents it from using the property as it wishes or developing it in the future.

Plaintiff's primary claim is an inverse condemnation claim—that in enacting its land use regulations, South Burlington has taken property rights without compensation in violation of the Fifth Amendment to the United States Constitution (Count One). Plaintiff also asserts federal constitutional claims under the Due Process Clause and Equal Protection Clause (Counts Two & Four). In addition, Plaintiff makes similar claims under the Vermont Constitution, including under the Takings, Due Process, and Common Benefits clauses of the Vermont Constitution (Counts One–Three). Separate from the constitutional claims, Plaintiff asserts a declaratory ruling under state law that South Burlington "lacked legal authority to designate Plaintiffs land as a 'Habitat Block' under 'the state statute creating forest blocks" (Count Five). (Doc. 1 ¶ 155.) Plaintiff also makes a claim under municipal law that one of the city councilors who voted to adopt the regulations should have disqualified herself because she was employed by the University of Vermont which received favorable treatment under these provisions (Count Six). Lastly, Plaintiff claims that South Burlington "discriminated against 835 Hinesburg in creating the new zoning district, especially when combined with the Habitat Block zoning changes" (Count Seven). (Doc. 1 ¶ 164.) The complaint does not state whether this is a federal or a state law claim. (*See id.*)

Defendants filed a motion to dismiss all seven counts in the complaint. (Doc. 4.) For the reasons that follow, the court grants Defendants' motion.

Factual Background

The court draws the following facts from the complaint, the exhibits attached to the parties memoranda, and certain publicly available information.[1] These exhibits consist of public records such as the South Burlington City Council's Decision regarding Plaintiffs Interim Zoning Application (Doc. 5-2), the South Burlington Development Review Board's ("DRB") decision on Plaintiffs sketch plan application (Doc. 5-3), and the South Burlington Interim Bylaws at issue here (Doc. 9-1). In addition, the court draws from the Land Development Regulations ("LDRs") formally adopted by the South Burlington City Council on February 7, 2022 and the LDRs in effect prior to that.[2]

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[1] In ruling on a 12(b)(6) motion to dismiss, a court may consider the complaint, any writing attached to it as an exhibit, any statements or documents incorporated in the complaint by reference, and matters that may be judicially noticed. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); *Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130 (2d Cir. 2001).

[2] S. Burlington Planning Comm'n & S. Burlington City Council, Land Development Regulations 1 (Dec. 7, 2020), https://cms6.revize.com/revize/southburlington/Planning/Regulations%20&%20Plans/Current%20LDRs%20effective%202020-12-28%20USE.pdf [hereinafter Prior LDRs]; S. Burlington Planning Comm'n & S. Burlington City Council, Land Development Regulations 1 (Feb. 7, 2022), https://cms6.revize.com/revize/southburlington/Planning/Regulations%20&%20Plans/LDRs%20adopted%2020222-02-07%20FinalFull.pdf [hereinafter 2022 LDRs].

I. Interim Bylaws and Amended Land Development Regulations

On November 13, 2018, the South Burlington City Council adopted Interim Zoning Bylaws. (Doc. 1 ¶ 27; Doc. 9-1.) Interim Zoning ("IZ") is permitted by 24 V.S.A. § 4415(a). The statute authorizes a municipality to adopt interim bylaws for a maximum of three years while it considers revisions to its zoning bylaws or municipal plan. *See id.* The City Council initially authorized the Interim Bylaws for nine months, subject to extension for up to two years. The City Council ultimately authorized them for a total of three years. (Doc. 9-1 at 5.)

The Interim Bylaws recognized that South Burlington "values a balance among our natural, open spaces and our developed, residential and commercial, spaces so that the flora and fauna co-exist alongside human dwellings, schools, industries and services." (Doc. 9-1 at 1.) With that in mind, the City Council "adopted a small growth strategy in its policy initiatives, including the preservation of open spaces, forest blocks, and working landscapes." (*Id.*) The Interim Bylaws expressed the City Council's determination that "[t]he City needs to review developable lands outside of the Transit Overlay District and certain business park areas, including undeveloped open space, forest blocks and working landscapes such as the City's remaining farms and parcels in the Institutional & Agricultural District." (*Id.*) The Interim Bylaws contemplate the completion of an "extensive study of Planned Unit Developments and Master Plans" by the Planning Commission as well as a "cost-benefit analysis of hypothetical development ... on existing developable open spaces,

forest blocks, and working landscapes." (*Id.* at 2.) For the land areas to which the new Interim Bylaws applied, the City Council outlawed new planned unit developments, new subdivisions, new principal buildings, and amendments to certain master plans, site plans, or plats. (*Id.* at 3 § IV.) Nevertheless, the City Council retained the authority to "authorize the issuance of permits for the development" that the Interim Bylaws otherwise prohibited "after public hearing preceded by notice" and "only upon a finding by the [City] Council that the proposed use is consistent with the health, safety, and welfare of South Burlington." (*Id.* at 3–4 § V.) The Interim Bylaws also identified five standards under which to analyze such proposals. (*Id.* at 4.)

On December 17, 2018, the City Council formed an Open Space Interim Zoning Committee to consider "the prioritization for conservation of existing open spaces, forest blocks, and working landscapes in South Burlington in the sustenance of our natural ecosystem, scenic viewsheds, and river corridors." S. Burlington Interim Zoning Committee, Final Report, 1, 2 (Mar. 6, 2020).[3] On March 6, 2020, the Committee released its final report. *Id.* The Open Space Committee assessed 190 parcels of open, undeveloped land using a two-tiered evaluation process. The first tier identified parcels of more than four acres, covered by less than 10% of impervious surface, and within the Vermont Agency of Natural Resources BioFinder marked as "highest priority" and "priority." *Id.* The

[3] Available at https://cms6.revize.com/revize/southburlington/Planning/Regulations%20&%20Plans/FinalIZOpenSpaceReport_6Mar2020.pdf.

Committee excluded parcels that did not meet these standards. The second tier scored the remaining parcels on the basis of five criteria: water resources, wildlife habitat, forest resources, aesthetics, and agriculture. *Id.* Each criterion counted for one point. The Committee removed from the evaluation process parcels that were already conserved, such as parks, and parcels that were relatively small, already approved for development, contained a single family home, or excluded for other reasons. The Committee's report identified 25 "highest priority parcels for conservation." *Id.* Twenty parcels, including Plaintiff's parcel, were privately owned; five belonged to the University of Vermont. *Id.* at 23.

Plaintiff's real property consists of 113.8 acres close to the overpass of Hinesburg Road (Vermont Route 116) over interstate I-89. (Doc. 5-3 at 2, 4.) The Open Space Report gave the parcel a score of 4 out of 5 possible points. Final Report at 50. The relatively high score identified it as subject to potential restrictions on development. *Id.* Plaintiff takes issue with the scoring of its property. (Doc. 1 ¶¶ 38–46.) It alleges that the parcel should have scored only 1 out of 5—resulting in its exclusion from the properties to be considered for zoning protection.

At its November 8, 2021 meeting, the City Council considered the proposed amendments to the LDRs. It voted to authorize hearings to consider these changes. (Doc. 1 ¶ 57.) In January 2022, the City Council released a redline draft showing proposed changes. *See generally* S. Burlington Planning Comm'n & S. Burlington City Council, Proposed Land Development

Regulations (Jan. 18, 2022).[4] These amended LDRs contained provisions implementing aspects of the Open Space Report. The changes relevant to this case include the recognition of "Habitat Blocks" and "Habitat Connectors" within the permitting criteria. These were identified as "Level 1 Resources" subject to protection as "significant wildlife habitat" and identified on a "Habitat Block and Habitat Connector Overlay District Map." *See, e.g., id.* at 21, 24, 39, 57, 226. Designation as a Habitat Block or Habitat Connector triggered land use restrictions including a general requirement that "all lands within a Habitat Block must be left in an undisturbed, naturally vegetated condition." *Id.* at 229 § 12.04(F)(l). The amended LDRs forbid development within Habitat Blocks with minor exceptions not relevant here for features such as trails. This protection also applied to Habitat Connectors joining nearby Habitat Blocks. *Id.* at 231–32 § 12.05.

On February 7, 2022, the City Council voted to adopt the amendments to the Land Development Regulations, including the provisions concerning the protection of Habitat Blocks. *See generally* 2022 LDRs.

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[4] Available at https://cms6.revize.com/revize/southburlington/Planning/LDR%20 Amendments/2021-10%20Full/For%20Council%20Hearing%202022-02-07/LDR%20Draft%202022-01- l 8%20Complete%20Redline.pdf.

II. Plaintiff's Petitions and Sketch Plans

Plaintiff frequently registered its objections to the changes to the LDRs contemplated by the Open Zoning Committee. In a letter dated in February 2020, Plaintiff objected to the possible designation of its entire parcel and, instead, urged that environmentally sensitive features be protected through buffers and delineation within the parcel itself. (Doc. 1 ¶¶ 66–68.) Plaintiff renewed its objections in letters sent on August 31, 2021 and November 2, 2021. (*Id.* ¶¶ 69–71.)

On August 31, 2021, while the Interim Bylaws remained in effect and before the City Council finalized the proposed amendments to the LDRs, Plaintiff submitted a "sketch plan" to the City Council. (Doc. 1 ¶¶ 80–82.) Plaintiff's sketch plan proposed the construction of 24 commercial buildings, serving retail, service, and light industrial business use. (*See* Doc. 5-2 at 1.) After a public hearing on November 8, 2021, the same meeting in which it considered the proposed amendments to the LDRs, the City Council denied Plaintiff's sketch plan and application. (Doc. 1 ¶ 82; Doc. 5-2.)

The City Council explained that Plaintiff's sketch plan was subject to the prohibition on development for Habitat Block of the Interim Bylaws, which the City Council was considering as permanent amendments to the LDRs. (Doc. 5-2 at 3; *see* Doc. 9-1 at 3, ¶ IV.) As the City Council explained, it had "not completed the preparation of these amendments, [so] the City Council does not yet know for certain the standards that will apply to development of the subject property." (Doc. 5-2 at 3.) In addition, the City Council clarified that it had conducted no more than a

"minimal assessment of the proposed development" and noted that "[w]hile not a complete assessment, it is very likely that development of this ... parcel ... would not comply with the LDR amendments approved by the planning commission." (*Id.*) As a result, the City Council concluded that "[b]ased on these unknowns and an initial review of the application of the draft amendments approved by the Planning Commission, ... the proposed project will or could be contrary to the amendments to the [LDRs] that the City adopts." (*Id.* at 4.)

On December 21, 2021, the DRB also reviewed Plaintiffs sketch plan and, on December 21, 2021, recommended that DRB "conclude the Sketch Plan meeting" because "significant modifications to the plan are necessary to meet the draft regulations, which would require re-warning" and explained that Plaintiff "may return with a revised sketch under the Draft LDR." (Doc. 5-3 at 5.)

On January 6, 2022, Plaintiff forwarded an expert report criticizing the designation of a Habitat Block within its parcel. (Doc. 1 ¶¶ 72–79.) Plaintiff's expert opined on the suitability of the land for habitat and concluded that the "City Council had no rational basis" for designating Plaintiff's property as a Habitat Block. (*Id.* ¶ 79.)

In the complaint, Plaintiff takes particular issue with several provisions of the Habitat Block regulations. These include the general ban on development ("all lands within a Habitat Block must be left in an undisturbed, naturally vegetated condition"), the curtailment of "traditional property rights" such as the clearing of trees, the creation of new lawn areas, and storage of snow, and the right to

exclude humans or wild animals by building fences. (Doc. 1 ¶¶ 18–20.)

Beyond its complaints about the LDRs, Plaintiff complains about the participation of city councilor Meaghan Emery in the process of developing and adopting the amendments. This allegation requires a brief explanation. In addition to her duties as a municipal leader, Ms. Emery serves as an adjunct professor at the University of Vermont. (*Id.* 123.) After UVM objected to the designation of property it planned to develop as a protected habitat block, the land use regulations were revised to recognize that "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." 2022 LDRs at 54, § 3.04(H). Plaintiff asserts that UVM received unfair special treatment in the development of the LDRs, that Ms. Emery should have disqualified herself from voting on the amended regulations due to her employment by UVM and that, if she had, the vote would have come out differently. (Doc. 1 ¶¶ 25–26.)

This factual summary does not recount every criticism levied by Plaintiff against the amended LDRs. Plaintiff takes issue with the methodology employed in creating the "Habitat Block" designation and questions its utility in protecting and conserving wildlife. Plaintiff alleges that the Open Space Committee's designation of its property as one of the 25 large blocks eligible for open space protection was conducted in error. Plaintiff takes the DRB to task for denying approval of its sketch plan application for

development of the parcel. These more specific complaints about the municipal planning process are complaints that the LDRs are the result of poor policy decisions or that the municipal regulators have applied the LDRs incorrectly. They are distinct from the federal constitutional claims which are the focus of this decision.

Plaintiff filed suit on February 24, 2022, after the City Council adopted the amended Land Development Regulations on February 7, 2022. (Doc. 1.) Plaintiff sued the City of South Burlington, the South Burlington City Council, and City Councilors Meaghan Emery, Timothy Barritt, and Helen Riehle (collectively "Defendants"). (*Id.* ¶¶ 6–11.)

Defendants move to dismiss Plaintiff's complaint, arguing that its federal-law causes of action are not yet ripe and, if dismissed, the court should decline to exercise supplemental jurisdiction over its state-law causes of action. (*See* Doc. 4.) Plaintiff filed its response, and Defendants replied. (Docs. 5, 9.) The court heard oral argument on August 3, 2022 and took the matter under advisement at that time.

Legal Standard

In ruling on a motion to dismiss, the court accepts as true the allegations of the complaint and draws all reasonable inferences in favor of the non-moving party. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Matson v. Bd. of Educ.*, 63l F.3d 57, 63 (2d Cir. 2011). The complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* Fed. R. Civ. P. 8(a)(2). A claim is

plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Matson*, 631 F.3d at 63 (quoting *Iqbal*, 556 U.S. at 678). Dismissal is appropriate when "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Conopco, Inc. v. Roll Int'l,* 231 F.3d 82, 86 (2d Cir. 2000).

Analysis

Plaintiff brings claims under 42 U.S.C. § 1983 for deprivation of its protected constitutional rights, a claim under the Declaratory Judgment Act, 28 U.S.C. § 2202, claims under the Vermont Constitution, and claims without a specified federal or state cause of action.

Defendants seek dismissal of the federal constitutional claims on grounds of ripeness. They invoke the "final-decision rule." In their view, Plaintiff has never "submitted to the DRB a complete application to develop its prope1iy or to modify its Habitat Block designation since the amended LDRs took effect." (Doc. 4 at 5.) According to Defendants, in the absence of such an submission, "the application of the LDRs to Plaintiffs property is presently unclear: the LDRs give the DRB substantial discretion to allow development on Plaintiffs property." (*Id.*) Defendants argue that Plaintiffs claims of unconstitutional taking, violation of due process, equal protection, and reverse spot zoning should be dismissed on prudential ripeness grounds.

Plaintiff responds that the City Council and the DRB have already rejected its proposal to develop the

property when the council members rejected its proposal under the IZ procedures in November 2018. In Plaintiffs view, its "facial" challenges to the LDRs are already ripe because Defendants have conducted a "physical invasion" of its property and the LDRs prevent it from developing property due to the designation of portions of the acreage as "Habitat Blocks" or "Habitat Corridors." (*See* Doc. 5 at 19.)

I. Taking Claim

In Count One, Plaintiff alleges that the amended LDRs permit the designation of Habitat Blocks and increase the buffer zones around wetlands from 50 to 100 feet, both of which impose restrictions on Plaintiffs use of its property for which it has not received compensation as required by both the United States and Vermont Constitutions. Plaintiff alleges that it cannot fence the property to exclude human trespassers or "animals that are to inhabit the land designated as a 'Habitat Block.'" (Doc. 1 ¶ 116.) Plaintiff alleges that it purchased the land for development purposes and that the amended LDRs defeat this legitimate plan. In addition, Plaintiff decries the use of "Habitat Blocks" as "a guise to allow anti-property rights advocates to prevent further development" at the behest of "a small group of private citizens" in violation of the broader public interest. (*Id.* ¶ 118.)

A. Ripeness Requirements for Federal Takings Claims

The ripening of fruit and vegetables has long provided a metaphor for life's passages. William Shakespeare, *King Lear,* act 5, sc. 2, 12 ("Ripeness is all"); John Keats, *To Autumn* ("And fill all fruit with

ripeness to the core."). The fundamental issue is "whether the case has been brought at a point so early that it is not yet clear whether a real dispute to be resolved exists between the parties." 15 Moore's Fed. Prac.–Civil § 101.70.

Federal jurisdiction is limited to resolving cases and controversies. U.S. Const. art. III. § 2. Ripeness doctrine requires courts to consider whether it is premature to decide that the parties have a live dispute that satisfies this constitutional standard. "A claim is not ripe if it depends upon 'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.'" *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). "The doctrine's major purpose is to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Id.* (quoting *Abbot Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)).

Federal courts have long recognized that a decision about ripeness has both a constitutional and a prudential dimension. *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) ("[The] ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." (collecting cases)). Recent decisions of the Supreme Court have cast doubt on the viability of the prudential ripeness doctrine. *See Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.3 (2014)

(prudential standing); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014).

A federal court's concern about adjudicating a case before it is ripe is "especially pronounced in the land-use context." *Vill. Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 293 (2d Cir. 2022). There are several reasons for the prominence of the ripeness doctrine in these cases. One is that whether a taking has occurred depends upon factors such as "the economic impact of the state's actions and its interference with investment-backed expectations." *Kurtz v. Verizon NY, Inc.*, 758 F.3d 506, 512 (2d Cir. 2014), *abrogated on other grounds by Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019)). A second reason is that after review of an application, a municipal zoning board may remove an obstacle to a proposed development through discretionary decision-making. When, as here, the case concerns judicial review of another branch of government, the ripeness requirement reduces the risk of interference in the executive or legislative functions. If judicial review is later appropriate, the court may be better informed on a complete record after the zoning board issues a final decision. *See id.*

Because of the importance of ripeness in constitutional takings challenges to zoning regulations, courts must apply the final-decision rule regardless of whether ripeness is described as jurisdictional or prudential. *See Vill. Green at Sayville, LLC* 43 F.4th at 293–94; *see also Pakdel v. City & Cnty. of San Francisco, Cal.*, 141 S. Ct. 2226, 2228, 2230 (2021) (per curiam) (discussing final decision rule for takings challenges without differentiating between prudential or constitutional

ripeness). This rule asks whether the "government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Vill. Green at Sayville, LLC*, 43 F.4th at 294 (internal quotations omitted). While the requirement is "relatively modest[,]" a plaintiff "must show ... that 'there [is] no question ... about how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 141 S. Ct. at 2230 (quoting *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997).)

Like most rules, there are exceptions to the rule where a property owner's appeal to a zoning board of appeals of request for a variance would be futile or where a policy is facially discriminatory. *Vill. Green at Sayville, LLC*, 43 F.4th at 294. As a result, the rule cannot be "mechanically applied." *Id.* (internal quotation marks omitted).

With these general principles in mind, the court begins by reviewing the arguments and legal positions of both sides.

B. No Plausible Allegation of a Physical Taking

Plaintiff seeks to define the taking here as a physical taking. According to Plaintiff, the amended LDRs "take[] away [its] rights to possess, control and dispose of its property." (Doc. 5 at 20.) Plaintiff also describes its challenge as "facial," meaning that the LDRs result in a taking of its property rights regardless of how the DRB may apply them to a particular proposal. (*See id.* at 14.) For this reason, Plaintiff contends that the court does not need to wait for a final decision from the DRB and instead should

strike down the amended LDRs as violating the Fifth Amendment now because it is unconstitutional under any interpretation by the zoning authorities.

In the court's view, the complaint contains no plausible allegation of a physical taking. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property"). Examples of physical takings include the forced installation of utility equipment, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), permanent flooding due to construction of a dam, *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871), seizure of a mine during wartime, *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), and entry of union representatives, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). As these examples suggest, a physical taking is "relatively rare" and "easily identified." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 (2002). In *Yee v. City of Escondido, Cal.*, *for* example, the Supreme Court rejected the property owner's claim that rent restrictions amounted to a physical invasion of the owner's rights, explaining that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." 503 U.S. 519, 527 (1992).

Plaintiff alleges no physical entry or occupation of its land. Plaintiff also does not allege that the amended LDRs require the landowner to submit to

the physical occupation of its land.[5] Instead, the complaint alleges that the LDRs restrict its planned development and include restrictions such as a prohibition on fencing Habitat Blocks. These are conventional grounds for claims of regulatory taking and inverse condemnation. They do not amount to a physical taking.

C. No Plausible Allegation of a Deprivation of All Economically Beneficial Use of the Property

There is a second exception to the rule that takings claims are not ripe unless the zoning board issues a final decision. These are cases in which the regulation is both confiscatory and certain in its

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[5] According to Plaintiff, it has suffered a physical taking because it cannot build a fence to exclude people or animals from entering its property, meaning people and animals are physically occupying its land. (Doc. 5 at 20 (citing Doc. 1 ¶¶ 18–20, 116).) But the amended LDRs contain an explicit exemption for fencing. *Cf. Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 94 (2d Cir. 1992), *abrogated on other grounds by Knick*, 139 S. Ct. at 2169 (noting plaintiff could possibly exclude deer using a fence). Section 12.04(G) explains that certain uses of property designated as a "Habitat Block" do not require application and review by the Land Development Board. One of those is the uses and activities listed in Section 12.01(C). 2022 LDRs § 12.04(G)(3). Section 12.01(C) explicitly permits the construction of fences that are "lower than 4 feet and that have at least 16 inches of clearance between the lowest horizontal part of the fence and the ground," subject to the portion of the LDRs further regulating fences. 2022 LDRs § 12.01(C)(1). Plus, Plaintiff "retains the right to exclude any persons from the land, perhaps by posting 'No Trespassing' signs." *Southview Assocs., Ltd.*, 980 F.2d at 94. The limits on fencing provides a good example of an issue that will be far better developed after submission of an application to the DRB.

application such that a court may proceed directly to the takings issue before a final decision. In *Lucas v. South Carolina Coastal Council*, for example, state legislation barred any development of the plaintiff's residential lots on a barrier island. 505 U.S. 1003, 1008–09 (1992). The Supreme Court held that such a "total deprivation of beneficial use" gave rise to a takings claim that was not subject to the final decision rule. *Id.* at 1017, 1019. The Supreme Court reached similar decisions in *Suitum*, 520 U.S. at 739 ("The demand for finality is satisfied by [property owner's] claim, however, there being no question here about how the regulations at issue apply to the particular land in question." (cleaned up) and *Pakdel*, 141 S. Ct. at 2230 ("In this case, there is no question about the city's position ....").

In this case, there is considerable uncertainty about how South Burlington will apply the "Habitat Block" provisions of the amended LDRs. The LDRs include provisions for variance and for adjustments of the location and boundaries of the Habitat Blocks. Having read the complaint and reviewed the LDRs, the court has no prediction about how Plaintiffs application may fare—in large part because Plaintiff has not submitted an application directed to the amended LDRs.

Both the City Council's explanation for its denial of Plaintiffs sketch plan and the DRB's explanation for denying the same support this conclusion. For example, the City Council's November 8, 2021 denial of its sketch plan explains:

> Under the draft [Land Development Regulations], development is generally prohibited on lands within a Habitat Block.

> The application does not include any information regarding the location of this overlay district, but it is apparent that the proposed development includes several buildings and associated infrastructure within the proposed Habitat Block Overlay district.

(Doc. 5-2 at 4.) This does not say that Plaintiff may not develop the land at all or that it may not develop in the designated "Habitat Block." Instead, it states that Plaintiffs application included development within a "Habitat Block" and that Plaintiff did not attempt to comply with the draft LDRs. The City Council went on to note the number of unknowns presented by Plaintiffs sketch plan. (*Id.* at 5). The number of unanswered questions that the City Council identified means Plaintiff has not shown that "there [is] no question ... about how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 141 S. Ct. at 2230 (quoting *Suitum*, 520 U.S. at 739).

The DRB's denial identified many of the same uncertainties. The DRB explained that "significant modifications to the plan are necessary in order to meet the draft regulations" and that Plaintiff could "return with a revised sketch under the Draft LDRs." (Doc. 5-3 at 5.) Like the above, the court cannot say as a matter of law that no questions remain as to how the amended LDRs would apply to Plaintiff's proposal.

The court also finds that none of the exceptions to the final-decision rule apply here. That is because the amended LDRs explained that the goal of the Habitat Block Overlay District is to "to avoid undue adverse effects from development on these resources, promote

the natural succession of vegetated areas of native vegetation in order to support wildlife habitat and movement, promote carbon sequestration, filter air, and increase infiltration and base flows in the City's streams and Lake Champlain." 2022 LDRs § 12.04(A). To accomplish this end, the regulations create an overlay map that identifies the "Habitat Blocks." The blocks can be modified through minor boundary adjustments, exchanges of land within a parcel, and other adjustments. The blocks must be left in an "undisturbed, naturally vegetated condition." Tree clearing, lawns, and encroachment by structures are prohibited. The regulations provide similar protection and modifications for "Habitat Connectors" which are 150 foot wide strips between "Habitat Blocks."

As in many regulatory takings cases, the critical question is how much has the property owner actually lost? This question cannot be answered in the abstract in this case. The identification of a "Habitat Block" does not foreclose all opportunities for development. It limits the use of a portion of the parcel. Here, the DRB estimated that approximately 43 acres of Plaintiffs 113.8-acre parcel falls within a Habitat Block. (Doc. 5-3 at 2, 4.) The LDRs anticipate that parcels that include "Habitat Blocks" or "Habitat Connectors" will be developed with limitations to protect wildlife. It is possible that the "Habitat Block" located on Plaintiff's property may preclude any commercially viable development plan. Or the "Habitat Block" may be no more than one consideration among others in a relatively flexible planning process. Or the owner's needs may be met through a land exchange or boundary adjustment reached through agreement with the zoning authority. But that is just it—the court does not yet know. In the absence of a concrete

plan, submitted to the DRB and a final decision from the DRB, it is not possible to tell how far the regulations encroach on the Plaintiffs right to develop its property. With these possibilities, Plaintiff has not demonstrated that an appropriate application would be futile. *Vill. Green at Sayville, LLC*, 43 F.4th at 294.

The same considerations apply to the increase in the wetland buffer zone. Wetlands have long received protection. Increasing this protection may prevent development or it may have no practical impact.

D. Facial or As-Applied Challenge

Plaintiff seeks to avoid the application of the ripeness requirement by characterizing its claim as a facial challenge to any application of the LDRs to private property. In fact, Plaintiff makes both a facial and an as-applied challenge. (*See* Doc. 5 at 14.) The facial challenge is based on a claim that the enactment of the LDRs was itself a constitutional violation which was complete when the LDRs came into effect. Plaintiff takes a pessimistic view of its prospects before the DRB. At the oral argument on this motion, Plaintiff explained that "on the question of de facto finality, it is de facto final. They told us we can't build in a habitat block. So, no matter what we propose, it's going to be rejected." (Tr. of Hr'g Aug. 3, 2022, Doc. 12 at 16:10–13; *see also* Doc. 5 at 2 (similar).) The as-applied claim concerns the rejection of Plaintiffs proposed development under the IZ bylaws. (Doc. 12 at 27:4–10.)

The court concludes that Plaintiff is jumping the gun. Neither the City Council in applying the IZ zoning procedures nor the DRB in reviewing Plaintiffs sketch plan have ruled in any comprehensive way on

Plaintiffs proposal under the LDRs now in effect. Further, these regulations indicate that the DRB may exercise discretionary authority in locating and enforcing the "Habitat Blocks" on undeveloped parcels. The final-decision rule prevents courts from striking down a zoning provision as unconstitutional without a full understanding how the provision functioned in the particular case. So too here.

E. Application of the Final-Decision Rule

Defendants seek dismissal of Count One on ripeness grounds because South Burlington has never made a final decision about Plaintiffs plans to develop the parcel. (Doc. 4 at 11 (citing *Pakdel*, 141 S. Ct. at 2230 and *Suitum*, 520 U.S. at 739).) Defendants contend that without a request for a permit or variance, "it is entirely speculative how [municipal] discretion would be exercised with respect to Plaintiff's parcel." (*Id.*)

Plaintiff characterizes the issue as one of exhaustion of remedies. (Doc. 5 at 4–12.) Relying on *Knick* and *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982), Plaintiff argues that its case became ripe as soon as South Burlington adopted the LDRs. (Doc. 5 at 4–5.)

It is true that, prior to the Supreme Court's decision in *Knick*, property owners aggrieved by a governmental taking were required to exhaust administrative and state court compensation remedies before filing a federal lawsuit. A constitutional tort claim under 42 U.S.C. § 1983 was the last stop on the line and frequently subject to res judicata for issues already litigated in state court. Plaintiff relies on *Knick* as a basis for seeking judicial

relief before receiving a final decision on a specific development proposal.

But exhaustion of remedies and ripeness are not the same. It is now well-settled law that there is no exhaustion requirement in § 1983 cases (except for statutory exceptions not relevant here). *Patsy*, 457 U.S. at 516 ("[W]e conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."); *Heck v. Humphrey*, 512 U.S. 477 (1994). As plaintiff observes, in *Knick*, the Supreme Court extended this principle to takings claims, overruling that portion of its decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Knick*, 139 S. Ct. at 2167, 2169–70. Federal takings claims asserted under § 1983 are no longer subject to a requirement that plaintiffs file first for compensation in state court. *See id.*

Demolishing the straw man of exhaustion of remedies does not also remove the requirement of ripeness. The constitutional requirement of ripeness continues to apply to all federal cases, including § 1983 claims. In regulatory taking cases, the ripeness requirement asks whether the government "has reached a 'final' decision. After all, until the government makes up its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation." *Pakdel*, 141 S. Ct. at 2228 (internal citation omitted).

Although the *Williamson County* holding on exhaustion of remedies was overruled by the *Knick* decision, it remains the leading case on ripeness in land use disputes. It continues to require a final

decision regarding the application of the regulations to the property at issue. *See Vill. Green at Sayville*, 43 F.4th at 287 ("Accordingly, federal courts adhere to specific ripeness requirements applicable to land use disputes. *Williamson County* is the foundational case." (cleaned up)). In cases in which the local planning board retains discretion in fashioning its ruling on a zoning application, the final decision rule remains good law. The *Suitum* decision recognizes the continuing viability of Supreme Court cases that found claims unripe when property owners had not submitted plans, *Agins v. City of Tiburon*, 447 U.S. 255 (1980); had failed to request a variance, *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264 (1981); or additional factors remained to be presented to the municipal decisionmaker that might allow the project to proceed, *Williamson County* 473 U.S. 172; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986). *See Suitum*, 520 U.S. at 735–39.

The ripeness question in this case is similar to that faced by the courts in *Suitum* and its predecessors. Has there been a physical invasion of the property by the municipality for which compensation is due as a matter of course? No. While there are zoning restrictions on Plaintiffs use of its property, there is no claim that municipal workers have built a road or in some other way invaded the property. Do the new regulations permanently remove all value from the property so as to amount to a *per se* taking? No again. The LDRs anticipate that open land in South Burlington, including parcels containing "Habitat Blocks," may be developed subject to restrictions. Under these circumstances, a final decision by the zoning agency remains a prerequisite

for a constitutional takings claim. *See Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 124 (2d Cir. 2014); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 352–54 (2d Cir. 2005).[6]

II. Other Federal Constitutional Claims

Federal courts have also applied the final decision rule to claims that zoning regulations violate constitutional guarantees of substantive due process and equal protection.

Starting with Plaintiff's claims under the Due Process Clause, the same final-decision rule means that this claim, too, is not yet ripe. In *Southview*

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[6] Decisions concerning the ripeness of takings claims may address only jurisdictional ripeness or may also apply prudential ripeness concerns. In *Williamson County*, for example, the Supreme Court concluded that the factors governing what constitutes a taking "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. This sounds like constitutional ripeness since it is impossible—not just unwise or inefficient—to evaluate the plaintiff's claim without a final decision. In a more recent case, *Murphy v. New Milford Zoning Comm'n*, the court based its decision on both aspects of the doctrine, explaining that "[the two-prong ripeness analysis] in some ways tracks both the doctrine's Article III and prudential underpinnings." 402 F.3d at 347. With serious doubt now cast on the viability of the prudential prong, this court relies on the jurisdictional basis for ripeness. The case is not ripe because in the words of *Williamson*, we simply do not know whether the plaintiff will be hampered and constrained in its development plans at a level sufficient to support a takings claim. That is a concern about jurisdictional ripeness, specifically whether there will later be a real dispute in the case at all. To the extent it remains alive, the prudential concern over the inadequate factual record at this time and the entanglement of the court in municipal government provide subsidiary support for dismissal.

Associates, Ltd., the Second Circuit held that a substantive due process challenge to Vermont's Act 250, 10 V.S.A. § 6001 *et seq.*, limiting development across the state was not yet ripe. 980 F.2d at 99. In that case, the developer challenged the protection of a winter deeryard as violating principles of due process because it was arbitrary and capricious and because it was the equivalent of a taking by eminent domain, making it beyond the limits of the state's police power. *Id.* at 96. The panel, chaired by Chief Judge Oakes, held in relevant part that the due process (and a related equal protection claim) were subject to *Williamson* principles of exhaustion and ripeness. *See id.* at 97, 99, 103 n.10. As we have seen, the exhaustion requirement is no longer good law. But the ripeness requirement remains very much alive, and that portion of *Southview* is binding authority today.

Southview requires a developer who seeks to strike down a state land use law to obtain a final ruling from the regulator. Without such a decision, "a court cannot determine adequately the economic loss—a central factor in inquiry—occasioned by the application of the regulatory restrictions." *Id.* at 96. As *Southview* makes clear, this requirement applies to substantive due process claims that a statute is arbitrary and capricious or exceeds the legislative authority in the same manner that it applies to the Fifth Amendment taking claim. *Id.* at 99; *see also Herrington v. Cnty. of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988) ("Our decisions in this area have also clarified that we will apply the same ripeness standards to equal protection and substantive due process claims."); *Unity Ventures v. Cnty. of Lake*, 841 F.2d 770, 776 (7th Cir. 1988) (finding plaintiff's equal

protection and due process claims based on application for a sewer connection were not yet ripe).

Turning to Plaintiff's claim under the Equal Protection Clause, it is also not yet ripe. Plaintiff alleges that South Burlington's amended LDRs treated its land differently than others similarly situated in the town of South Burlington. (Doc. 1 ¶¶ 142–153.) This is based on Plaintiff's contention that it should have received a different rating in the Open Space Interim Zoning Committee's final report (*Id.* 145–146.) In addition, Plaintiff alleges that it was treated differently than landowners with already developed land, that it should have been treated the same as landowners with less than four acres, and there was no rational basis for treating it differently than UVM. (*Id.* ¶¶ 149–152.)

At base, these allegations depend on how the LDRs are applied to Plaintiff's land. Like Plaintiff's due process claim, its equal protection claim is subject to the same final-decision requirement. *See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88–89 (2d Cir. 2002) (affirming district court that *Williamson County* finality rule applies to equal protection claims in the context of land use challenges and affirming dismissal for lack of ripeness), *abrogated on other grounds by Knick*, 139 S. Ct. at 2169; *Nenninger v. Village of Port Jefferson*, 509 F. App'x 36, 38–39 (2d Cir. 2013) (summary order) (affirming dismissal of equal protection and due process claims relating to a subdivision proposal as unripe); *see also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990) ("In evaluating the ripeness of ... equal protection claims arising out of the application of land use

regulations, [courts] employ the same final decision requirement that applies to regulatory taking claims."). Therefore, the court dismisses this claim as unripe.

III. Remaining Claims

Having dismissed all of Plaintiffs claims that explicitly involve a federal-law claim, the court turns to the remaining causes of action. Where a federal court dismisses the only federal-law causes of action, it may, in its discretion, decline to continue to exercise supplemental jurisdiction over the remaining state-law causes of action. 28 U.S.C. § 1367(c)(4); *Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006). In making that discretionary decision, a district court must balance judicial economy, convenience, fairness, and comity. *Id.* "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* (quoting *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n.7 (1988)); *see also United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal law claims are dismissed before trial ... the state claims should be dismissed as well.").

The court turns first to Plaintiff's claims under the Vermont Constitution, including the taking claim in Count One, due process claims in Count Two, and Common Benefits Clause claim in Count Three. All three are state-law causes of action. Here, the court will dismiss the federal-law claims at the motion to dismiss stage. The parties have not yet begun discovery. Therefore, the court declines to exercise

supplemental jurisdiction and dismisses the three state law claims, all without prejudice.

Turning next to Count Seven for illegal reverse spot zoning, Plaintiff has not articulated whether this claim is under federal law or Vermont law. To the extent it is brought under Vermont state law, the court declines to exercise supplemental jurisdiction for the same reasons just articulated. *See, e.g., N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1235 (10th Cir. 2021). To the extent it is brought under federal law, it is not ripe for the same reasons already explained.

Turning finally to Count Five, Plaintiff seeks declaratory judgment that the South Burlington City Council lacked the statutory authority to designate a portion of its land as a Habitat Block. (Doc. 1 ¶¶ 155–156.) According to Plaintiff, "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." (*Id.* ¶ 155.)

Even though Plaintiff alleges this claim under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, that alone does not provide a federal ingredient sufficient for federal question jurisdiction. That is because Plaintiff requests the court to grant declaratory judgment on a matter of state law, not federal law. An action under the Declaratory Judgment Act alone does not create the requisite federal ingredient. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–73 (1950) (explaining that the Declaratory Judgment Act does not expand the subject matter jurisdiction of federal courts); *Freeman v. Burlington Broad., Inc.*, 204 F.3d 311, 318 n.4 (2d Cir. 2000) (similar). As a result, this claim falls under the court's supplemental

jurisdiction. Like the other non-federal claims, the court declines to exercise its supplemental jurisdiction over this claim and dismisses it.

Conclusion

For the foregoing reasons, the court GRANTS Defendants' motion to dismiss (Doc. 4). The dismissal is without prejudice.

Dated at Rutland, in the District of Vermont, this 27th day of January, 2023.

s/ Geoffrey W. Crawford
Geoffrey W. Crawford, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

835 HINESBURG ROAD, LLC,	)	
	)	
Plaintiff,	)	
v.	)	Case No.
CITY OF SOUTH BURLINGTON,	)	5:22-cv-58
SOUTH BURLINGTON CITY	)	
COUNCIL, MEAGHAN EMERGY,	)	
TIMOTHY BARRITT, and	)	
HELEN RIEHLE,	)	
	)	
Defendants.	)	

JUDGMENT IN A CIVIL ACTION

☐Jury Verdict

☒Decision by Court.

IT IS ORDERED AND ADJUDGED that pursuant to the court's Order (Document No. 13) filed January 27, 2023, defendants' Motion to Dismiss (Document No. 4) is GRANTED. The case is hereby DISMISSED without prejudice.

Date: January 27, 2023

JEFFREY S. EATON
CLERK OF COURT

JUDGMENT ENTERED
ON DOCKET
DATE ENTERED: 1/27/2023

/s/ Elizabeth Morris
Signature of Clerk

Excerpts of City of South Burlington Interim Bylaws, Adopted November 13, 2018

I. PURPOSE

Our community values a balance among our natural, open spaces and our developed, residential and commercial, spaces so that the flora and fauna co-exist alongside human dwellings, schools, industries and services. All of these spaces will sustain our economic viability going forward. Together these spaces provide, for the benefit of our residents and visitors, clean, fresh air to breathe, clean water to drink and swim in, recreational opportunities, homes, jobs, and valuable industries and services. As more homes are built in South Burlington, we must examine carefully the intensity and nature of development and its potential impacts on the balance that we seek to maintain. Based on previous studies, the City needs to review developable lands outside of the Transit Overlay District and certain business park areas, including undeveloped open spaces, forest blocks and working landscapes such as the City's remaining large farms and parcels in the Institutional & Agricultural District.

City staff regularly considers the infrastructure and staffing needs, short and long term, of the community. For the past three years, some City department heads have raised concerns about an ongoing strain on City resources. In the face of ongoing development, South Burlington must continue to safeguard against the possibility that the costs of emergency services and construction and maintenance of sewers and roads will outstrip City revenues such that City residents and business will

face the prospect of an acute increase in their tax burden.

For all these reasons, the City Council has adopted a smart growth strategy in its policy initiatives, including the preservation of open spaces, forest blocks and working landscapes, and amended the Land Development Regulations to encourage dense development in our urban core, which includes City Center and the Shelburne Road corridor. We also have sought to encourage commercial development and construction of affordable housing. However, the pace of residential development has outstripped the planning tools and processes intended to ensure sustainability and encourage affordability.

With the delicate ecosystems and preparedness of both our natural and constructed infrastructure in mind, the City needs to determine what locations, types, and densities of development are most desirable in order to maintain the balance between natural and developed spaces and sustainability and to avoid a fiscal crisis -- not when it is upon us, but before we reach that point.

For all these reasons, the City Council considers it necessary to preserve temporarily the land development that currently exists outside of the Transit Overlay District and certain business parks in order to accomplish the following tasks:

> Undertake an analysis of undeveloped open spaces, forest blocks and working landscapes and update the prioritization of these lands for conservation, permanent open space, and/or recreation.

Give the Planning Commission time to complete its extensive study of Planned Unit Developments and Master Plans, which necessarily includes the study of density of development and open space.

Undertake an analysis of the program for the Transfer of Development Rights established in and by the Land Development Regulations and recommend options for its implementation.

Conduct a cost-benefit analysis of hypothetical development, including density and type, on existing developable open spaces, forest blocks, and working landscapes.

Once the City has determined which parcels in South Burlington are most critical to our environmental and economic goals, the City can assess whether, and possibly how, the current Land Development Regulations or tools, regulatory or nonregulatory, require amendment and act accordingly.

II. LANDS TO WHICH THE INTERIM BYLAWS APPLY

These Interim Bylaws shall apply to all lands in the City of South Burlington as depicted on the Interim Zoning map, except for those lands depicted on the Interim Zoning map as Exempt Areas. The Interim Zoning map describes the areas to which these Interim Bylaws apply and the Exempt Areas to which these Interim Bylaws do not apply, and is incorporated herein by reference.

* * *

IV. LIMITATIONS ON LAND DEVELOPMENT

Within the areas to which these Interim Bylaws apply, the following shall not be allowed:

A. New Planned Unit Developments.

B. New Subdivisions.

C. New Principal Buildings.

D. Amendment of a master plan or any related site plans or plats that deviates from an approved Master Plan in one of the respects set forth in Article 15.07(D)(3)(a)-(e) of the South Burlington Land Development Regulations.

V. REVIEW OF APPLICATIONS

Upon application, the City Council may authorize the issuance of permits for the development prohibited in Section IV, above, after public hearing preceded by notice in accordance with 24 V.S.A. section 4464, but only upon a finding by the Council that the proposed use is consistent with the health, safety, and welfare of the City of South Burlington and the following standards:

A. The capacity of existing or planned community facilities, services, or lands.

B. The existing patterns and uses of development in the area.

C. Traffic on roads and highways in the vicinity.

D. Environmental limitations of the site or area and significant natural resource areas and sites.

E. Utilization of renewable energy resources.

F. Municipal plans and other municipal bylaws, ordinances, or regulations in effect

The applicant and all abutting property owners shall be notified in writing of the date of the hearing and of the City Council's final determination.

Excerpts of City of South Burlington Land Development Regulations (Adopted May 12, 2003; Amendments Adopted Nov. 20, 2023)

12 ENVIRONMENTAL PROTECTION STANDARDS

12.04 Habitat Block Overlay District

A. Purpose.

With the main goals of identifying habitat resources that meet the needs of a wide variety of wildlife species and provide opportunities for some species to access several habitat areas, the City engaged a consultant to conduct a City-wide habitat assessment. The "City of South Burlington Habitat Block Assessment & Ranking 2020" prepared by Arrowwood Environmental, LLC, locates and ranks certain contiguous forested areas and adjacent unmanaged shrubby areas of old field, young forest and unmanaged wetlands. Based on the information in that report, the City has designated certain areas permanently as Habitat Blocks. It is the purpose of the Habitat Block Overlay District standards to avoid undue adverse effects from development on these resources, promote the natural succession of vegetated areas of native vegetation in order to support wildlife habitat and movement, promote carbon sequestration, filter air, and increase infiltration and base flows in the City's streams and Lake Champlain.

B. Applicability.

The requirements of this Section apply to all areas indicated as "Habitat Blocks" on the Habitat Block

and Habitat Connector Overlay District Map, except as follows:

(1) On lots less than one (1) acre in size existing as of November 10, 2021;

(2) On land located within a 50-foot horizontal distance of a principal building existing on the same parcel as of the effective date of these regulations;

(3) On land authorized by the Development Review Board to be removed from or added to a Habitat Block pursuant to the modification options of this section or as part of a Conservation Planned Unit Development.

C. Application Submittal Requirements.

Submittal of a preliminary and/or complete Site Conditions Map (as applicable to the stage of application) pursuant to Appendix E. Where an applicant elects to perform a Habitat Disturbance Assessment, the submittal requirements of Section 12.04J shall apply.

D. Modification of Habitat Block.

An applicant may request approval from the Development Review Board to modify a Habitat Block in any of the following manners. An applicant may select any one of the three modification options below. A development application may not include more than one option for any applications.

Land located within the SEQ-NRP zoning sub-district, Hazards, or Level I Resources, previously approved as open space or converted land, subject to a deed restriction prohibiting development, subject to a

conservation or density reduction easement, or owned by the City of South Burlington or the Winooski Valley Parks District and designated as a park or conservation parcel shall not be eligible for any of the three options to modify a Habitat Block.

(1) Minor Habitat Block Boundary Adjustment. An applicant may apply to modify the boundary of a Habitat Block by up to fifty (50) feet in any direction to account for site-specific conditions, upon written request by the applicant as part of the requisite application. Any proposed reduction in Habitat Block area must be offset with an equal addition elsewhere within the same subject parcel or Planned Unit Development. The land to be protected through the modification of the Habitat Block boundary must be contiguous to the Habitat Block. In no case shall the Development Review Board approve a net reduction of the area of a Habitat Block.

(2) Small On-Site Habitat Block Exchange. An applicant may apply to exchange a portion of a Habitat Block not to exceed two (2) acres or ten (10) percent of the application's total land area, whichever is less, for an equal amount of land within the same Planned Unit Development or Site Plan upon written request, without requiring a Habitat and Disturbance Assessment. Such land exchange must not include Core Habitat Block Areas and shall not eliminate existing Habitat Connectors. The land to be protected through the exchange may be located separate from the Habitat Block. To approve a small on-site habitat

block exchange, the Development Review Board shall require the applicant to:

(a) Retain a similar or greater quality and maturity of vegetation within the proposed areas for exchange; and

(b) Prioritize the retention of forest stands that include trees measuring 9 inches diameter at breast height (dbh) within the exchange area.

(3) Larger Area Habitat Block Exchange. An applicant may apply to exchange a portion of a Habitat Block for the addition of an equal amount of contiguous land within the same Habitat Block upon written request, and pursuant to the standards of this Section. The exchange of land within the same Habitat Block may occur within one parcel or on separate parcels.

(a) **Supplemental Submittal Requirements.**

(i) Indicate, on the Master Plan and all subsequent plans, all proposed alterations to the Habitat Block.

(ii) Submit, as part of the preliminary plat application, a Habitat and Disturbance Assessment (HDA) pursuant to Section 12.04(J) and a written assessment of compliance with the standards contained within this subsection.

(b) **Supplemental Standards of Review.** The Development Review Board may approve a re-designation of a portion of a Habitat Block if it finds that all of the criteria below are met:

(i) The HDA demonstrates that the alternation will not result in a reduction in the Habitat Block's function as a Significant Wildlife Habitat;

(ii) Wildlife movement and connectivity between Habitat Blocks will be retained; and,

(iii) Development and infrastructure proposed to be located adjacent to the Habitat Block must be designated to have no undue adverse effects on habitat functions; and

(iv) The land that will be added to the Habitat Block is contiguous to the land that will not be removed from the Habitat Block, such that the modified Habitat Block is a contiguous whole that is not interrupted or separated by roadways, railways, or other impending infrastructure.

(c) **Exchange Land.** Land to be added to the Habitat Block pursuant to this subsection must be identified on the subdivision plat that is recorded, and in associated legal documents, for the purposes of subsection 12.04(I), below.

(i) Any land proposed to be added shall be accompanied by a restoration plan, prepared by a landscape architect, professional wildlife biologist, or equivalent, that will result in the land functioning as a Significant Wildlife Habitat within a period of ten (10) years

and being classified as transitional forest / forest by a land use / land cover assessment at that time.

E. <u>Substantially-Habitat Block-Covered Lots.</u>

A lot containing a combination of Hazards and Level I Resources exceeding seventy (70) percent of the total lot area is eligible for relief from Habitat Block standards in the following manners:

(1) As a Conservation Planned Unit Development, subject to the standards of Section 15.C.05; and,

(2) The applicant is entitled to re-designate a portion of the Habitat Block, to allow for thirty (30) percent of the total parcel area as Buildable Area. The applicant shall provide a proposed redesignation to the Development Review Board with land designated as, and added to, the parcel's Buildable Area in the following order:

- First: Land not a Hazard or Level I Resource;
- Second: Land that is not characterized by a preponderance of mature trees;
- Third: Land within Habitat Blocks, excluding Core Habitat Block Areas or areas which would sever a Habitat Connector.
- Fourth: Land within Habitat Blocks, avoiding Core Habitat Block Areas to the greatest extent possible;

(a) **Calculation:** Land shall be selected from first to fourth. If all applicable land on the lot from one category is designated as Buildable Area, and the allotment of thirty (30) percent of the

total parcel area has not been reached, then land from the next category shall be selected.

(b) **Special Circumstances:** Where the DRB finds that designation of land as Buildable Area pursuant to the priority order above is in conflict with the purposes of this section, or where it finds that strict adherence to the priority order does not allow for a unified PUD consistent with the purposes or intent of these regulations, it may approve modifications to the land selected. Any such modification shall be minimized in terms of land area and changes to, or reordering, the priority order.

(c) Any land excluded from Habitat Blocks regulated under this subsection and redesignated as Buildable Area shall remain subject to all other provisions of these Regulations.

F. <u>Standards for Habitat Block Protection.</u>

(1) General Standards. Except as specifically exempted pursuant to Subsections 12.04(G)(1) and (2) below, approved by the DRB pursuant to subsection 12.04(G)(3) below, or modified in accordance with Section 12.04(D) above, all lands within a Habitat Block must be left in an undisturbed, naturally vegetated condition. Specifically:

(a) The clearing of trees and understory vegetation is prohibited except as specified in this section.

(b) The creation of new lawn areas is prohibited.

(c) Snow storage areas are prohibited.

(d) Habitat Blocks must be clearly indicated on all plans and demarked as such. Any building envelopes shall not contain any land located within Habitat Blocks.

(e) Supplemental planting and landscaping with appropriate species of vegetation to achieve the objectives of this Section is permitted.

G. Exempted Uses and Activities.

The following uses and activities are exempt from review under this section:

(1) Establishment and maintenance of unpaved, non-motorized trails not to exceed ten (10) feet in width, or their width prior to adoption of these regulations, whichever is greater;

(2) Removal of invasive species, removal of diseased vegetation, and removal of dead or dying trees posing an imminent threat to buildings or infrastructure; and,

(3) Uses and activities enumerated in Section 12.01(C).

Nothing in this subsection shall be construed to modify the boundary of a Habitat Block as shown on the Habitat Block and Habitat Connector Overlay Districts Map.

H. Development within Habitat Blocks.

The encroachment of new development activities into, and the clearing of vegetation, establishment of lawn, or other similar activities in Habitat Blocks is prohibited. However, the DRB may allow the

following types of development within a Habitat Block pursuant to the standards contained herein:

(1) Restricted Infrastructure Encroachment, pursuant to Section 12.02 and the following supplemental standards:

(a) The facility shall be strictly limited to the minimum width necessary to function for its intended purposes;

(b) The clearing of vegetation adjacent to the facility shall be strictly limited to the minimum width necessary for the facility to function for its intended purposes (street tree requirements shall not apply in these areas). Street lighting shall be prohibited in these areas except as necessary to meet State or Federal law; and,

(c) Appropriate measures shall be taken to promote safe wildlife passage, including the reduction or elimination of curbs, reduced speed limits, and/or signage users, and underpasses or culverts.

(2) Outdoor recreation uses, provided any building, parking and/or driveways appurtenant to such use are located outside the Habitat Block.

(a) Within a public park, structures not exceeding 500 square feet gross floor area are permitted. All such structures must be consistent with the adopted management plan for the park, if one exists.

(3) Research and educational activities, provided any building or structure (including parking and

driveways) appurtenant to such use is located outside the Habitat Block.

(a) Research and educational structures not exceeding 500 square feet gross floor area, such as seating areas made of natural materials, storage sheds, or climbing structures, may be allowed within a Habitat Block.

I. Habitat Block and Habitat Connector Overlay District Map.

The approval of a modification of a Habitat Block pursuant to Section 12.03D, above, or of the exclusion of an area of land from a Habitat Block pursuant to Section 12.04E, above, shall, without further action, revise the Habitat Block and Habitat Connector Overlay Districts Map accordingly. After the effective date of these regulations, the Habitat Block and Habitat Connector Overlay Districts Map may be revised only once for each Substantially-Habitat Block-Covered lot from which a portion of the land within the Habitat Block has been excluded.

J. Habitat and Disturbance Assessment (HDA).

(1) Purpose. The Habitat and Disturbance Assessment (HDA) is a tool to inventory and quantify significant wildlife habitat, and the existence of rare, threatened and endangered species (RTEs), within subject properties within Habitat Blocks and Habitat Connectors (Section 12.04 and Section 12.05) where an applicant is seeking to relocate and/or redesignate a portion of the Habitat Block or Habitat Connector.

(2) HDA Content Requirements. Where an HDA is required by these regulations, the applicant shall contract with a qualified wildlife biologist or ecologist to prepare the HDA. The HDA prepared for the Development Review Board shall include the following information:

(a) Site Conditions Map including all Habitat Blocks and Habitat Connectors on or within 200 feet of the project site.

(b) An inventory of existing (pre-developed) wildlife habitat found on the site, including the presence of rare, threatened, and/or endangered species and significant wildlife habitat, and an inventory of the specific habitat types found on the parcel and their relative importance to the various wildlife species that rely on that habitat for one or more life-cycle function;

(c) An assessment of the relationship of the habitat found on the site relative to other significant wildlife habitat present in the City (e.g., does habitat found on the parcel provide for connectivity between mapped habitat blocks; is the parcel located contiguous to other significant wildlife habitat, or part of a habitat block);

(d) Identification of the distance of all proposed development activities (as permitted), including clearing, driveways, and infrastructure, and areas of disturbance, from the significant wildlife habitat and, if significant wildlife habitat is proposed to be

disturbed, the total area of disturbance and the total area of the remaining (undisturbed) habitat;

(e) An assessment of the likely impact of the proposed development, including associated activities (e.g., introduction of domestic pets, operation of vehicles and equipment, exterior lighting, introduction of non-native species for landscaping) on the ecological function of the significant wildlife habitat found on the site. This shall include an assessment of whether travel between Core Habitat Block Areas will be disrupted; and

(f) An assessment of the anticipated functionality of the Habitat Block with proposed mitigation measures and a statement identifying specific mitigation measures taken to avoid or minimize the proposed development's impact on the habitat, including buffers of or from habitat for specific identified species, possible replacement or provisions for substitute habitats that serve a comparable ecological function to the impacted habitat, and/or physical design elements to incorporate into the project.

* * *

Appendix 62a

14 SITE PLAN AND CONDITIONAL USE REVIEW

14.05 Application Review Procedure

A. Pre-Submission Meeting.

Prior to a formal submission, the applicant should meet in person with the Administrative Officer and other City officials as desired to discuss the proposed site plan. The intent of such a conference is to enable the applicant to inform the Department of Planning and Zoning of the proposal prior to the preparation of a detailed site plan and for said Department to review the basic design concept, advise the applicant as to potential problems and concerns, and to determine generally the type of information to be shown on and submitted with the site plan.

15.A SUBDIVISION REVIEW

15.A.05 Pre-Application Sketch Plan Review

A. Purpose.

The purpose of a pre-application sketch plan review, required for any proposed subdivision of land, is to acquaint the DRB (Development Review Board) with the subdivision proposal at a conceptual stage in the design process, prior to the submission of a formal application for master plan, preliminary or final subdivision review. Sketch plan review offers the applicant and DRB the opportunity to consider and discuss a conceptual subdivision plan under relevant regulations, prior to incurring the expense of

preparing a complete application and surveyed subdivision plat. Sketch plan review while required, is advisory in nature, intended only to guide the application and review process.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

835 HINESBURG ROAD, LLC,	)	
	)	
Plaintiff,	)	
	)	Case No.
v.	)	5:22-cv-58
	)	
CITY OF SOUTH BURLINGTON, SOUTH BURLINGTON CITY COUNCIL, MEAGHAN EMERY, TIMOTHY BARRITT, and HELEN RIEHLE,	)	JURY TRIAL DEMANDED
Defendants	)	

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 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 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[ly] 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 [out] 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.

* * *

<u>835 Hinesburg Objected To The Process At The City Of South Burlington</u>

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, Rout[e] 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 chose 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.

l05. The zoning district took away 835 Hinesburg's right to develop the property as an industrial area under the former zoning.

l06. 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.

l07. The City's own Affordable Housing Committee opposed the passage of the Land Development Regulations.

l08. 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 these 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.

* * *

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

s/Matthew B. Byrne
Matthew B. Byrne, Esq.
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(802) 658-0220
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For Plaintiff

No. _____

In The
Supreme Court of the United States

835 HINESBURG ROAD, LLC,

Petitioner,

v.

CITY OF SOUTH BURLINGTON, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR A WRIT OF CERTIORARI contains 7,375 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 19, 2024.

s/ Mark Miller
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Counsel for Petitioner

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No.

----------X

835 HINESBURG ROAD, LLC,

Petitioner,

v.

CITY OF SOUTH BURLINGTON, ET AL.,

Respondents,

----------X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Simone Cintron, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Petitioner*.

That on the 19th day of March, 2024, I served the within *Petition for a Writ of Certiorari* in the above-captioned matter upon:

Pietro J. Lynn, Esq.
Lynn, Lynn, Blackman & Manitsky, P.C.
76 St. Paul Street, Suite 400
Burlington, VT 05401
Telephone: (802) 860-1500
plynn@lynnlawvt.com
Attorneys for Defendants/Appellees City of South Burlington, South Burlington City Council, Meaghan Emery, Timothy Barritt and Helen Riehle

by sending three copies of same, addressed to each individual respectively, through the United States Postal Service, by Priority Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies of the within *Petition for a Writ of Certiorari* and three hundred dollar filing fee check through the Overnight Next Day Federal Express, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of March, 2024.

Simone Cintron

Sworn to and subscribed before me
this 19th day of March, 2024.

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026
#115024