

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

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MATTHEW DeANGELIS,)	
<i>Plaintiff</i>)	
)	
VS.)	CIVIL ACTION NO. 3:06CV01877 (SRU)
)	
TOWN OF NEWTOWN ET AL.,)	JANUARY 24, 2007
<i>Defendants</i>)	
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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT AND
MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS TOWN OF NEWTOWN,
HERBERT ROSENTHAL, WILLIAM A. BRIMMER, JR., JOSEPH H. BOJNOWSKI,
AMY DENT, ROBERT GECKLE, JOHN REED, MOIRA RODGERS, DONALD
STUDLEY AND WALTER MOTYKA**

The Town of Newtown (the “Town”), Herbert Rosenthal, William A. Brimmer, Jr., Joseph H. Bojnowski, Amy Dent, Robert Geckle, John Reed, Moira Rodgers, Donald Studley and Walter Motyka (collectively “Defendants”) submit this memorandum in support of their Motion to Dismiss and Motion for Summary Judgment because: (1) this court lacks subject matter jurisdiction over a challenge to the master plan of development for the Fairfield Hills property; (2) Mathew DeAngelis (“Plaintiff”) has failed to state a claim upon which relief may

be granted; and (3) even if Plaintiff states a claim upon which relief can be granted, there is no genuine issue as to any material fact and Defendants are entitled to judgment as a matter of law.

In a nutshell, Plaintiff, a resident of the Town of Newtown, is unhappy with the development plans for a certain Town – owned property known as Fairfield Hills, and is improperly seeking to have this Court review the Town’s development plan and expenditures in connection with the Fairfield Hills property under the guise of 42 U.S.C. § 1983. In the first instance, this Court lacks subject matter jurisdiction to hear Plaintiff’s gripes with the master plan of development. However, even if it did, the claims made do not constitute a violation of § 1983, and, therefore, the Complaint fails to state a claim upon which relief may be granted. Finally, based on the Affidavit of First Selectman Herbert Rosenthal, Defendants are entitled to summary judgment because the Town diligently followed the procedures required by the Town Charter, and applicable regulations, ordinances and statutes.

I. STATEMENT OF FACTS

For many years the State of Connecticut owned and operated a mental hospital in Newtown, Connecticut. In 1997, the State declared the hospital and the land on which it sits as surplus property. (Affidavit of Herbert Rosenthal, ¶ 6.) The hospital property was originally comprised of approximately 800 acres; however, various portions of it were transferred to other entities including the Department of Agriculture, Department of Corrections, the Newtown

Housing for the Elderly and the Town. (Id. at ¶ 7.) The portion of the property that remained after the transfer of it to other entities is hereinafter referred to as the “Fairfield Hills Campus.” It consists of approximately 189 +/- acres of land including a number of structures. (Id. at ¶¶ 6-8; Exhibit C¹.) A water supply system which was previously operated by the State (the “Water Assets”) is located on the Fairfield Hills Campus. (Affidavit of Herbert Rosenthal, ¶ 17; Exhibit E.)

In an effort to sell the Fairfield Hills Campus, the State sought requests for proposals from private developers for the sale of the Fairfield Hills Campus to them. In response to the anticipated sale of the Fairfield Hills Campus, the Newtown Planning and Zoning Commission sought to create an Adaptive Reuse Zone for the property. (Affidavit of Herbert Rosenthal, ¶ 9.) At that time, private development was contemplated, and the Planning and Zoning Commission wanted to preserve the character of the “campus.” (Id. at ¶ 11.)

On May 7, 1998, the Newtown Planning and Zoning Commission, in accordance with the Town Charter and the Connecticut General Statutes, created the Fairfield Hills Adaptive Reuse Zone (“FHAR Zone”) (Affidavit of Herbert Rosenthal, ¶ 12; Exhibit D.) The Regulations pertaining to the FHAR Zone were later amended by the Newtown Planning and Zoning

¹ All exhibits cited in this Memorandum (except Exhibits W-X) refer to the Exhibits attached to the Affidavit of Herbert Rosenthal.

Commission in January of 2005. (Affidavit of Herbert Rosenthal, ¶ 12; Exhibit E.) The intent of the FHAR Zone is “to focus on a campus setting and encourage use of the property, existing buildings and new structures that will reinforce and contribute to the overall cohesiveness of the area”. (Affidavit of Herbert Rosenthal, ¶ 13; Exhibit D.)

In response to the State’s request for proposal, approximately 80 developers toured the Fairfield Hills Campus. Of these, approximately a dozen submitted their qualifications. Of these dozen developers, four were selected to submit requests for proposals. Three developers submitted requests for proposals on or about July of 1999. (Affidavit of Herbert Rosenthal, ¶ 14.) The Town held a public informational meeting to discuss the three proposals. At this meeting approximately 400 residents attended and many in attendance voiced concerns about the three proposals. Two concerns dominated the discussion. Citizens believed that the proposals contained too much residential development for the Fairfield Hills Campus and more generally, residents did not like the prospect of having private developers controlling the development of the property. (Id. at ¶ 15.)

At this time, the Town began to consider purchasing the Fairfield Hills Campus for itself, as it had a statutory right to do so. See Conn. Gen. Stat. § 3-14b. (Affidavit of Herbert Rosenthal, ¶ 16.) On or about March 3, 2000, the Town sent a letter expressing its interest in

purchasing the Fairfield Hills Campus from the State along with the Water Assets. (Id. at ¶ 17; Exhibit F.)

Initially, the State asked in excess of \$5 million for the Fairfield Hills Campus; however, as a result of the negotiations concerning environmental clean-up and demolition required to be performed by the purchaser, the Town and State entered into a written agreement on May 21, 2001 for the Town to purchase the Fairfield Hills Campus at a purchase price of \$3.9 million. (Affidavit of Herbert Rosenthal, ¶¶ 18-19; Exhibit G.)

On May 21, 2001, at a publicly noticed meeting of the Town's Board of Selectman, it unanimously passed four resolutions: (1) recommending the acquisition of the Fairfield Hills Campus in accordance with the terms of the document entitled "Negotiated Terms and Conditions of Sale Fairfield Hills" dated May 21, 2001; (2) requesting funding for the capital projects as listed on the Cost Estimate page of the Fairfield Hills Campus Proposed Work Program and Cost Estimates prepared by Harrall-Michawloski Associates, Inc., dated May 21, 2001 ("Harrall-Michawloski Report") in the total amount of \$21,723,600; (3) recommending that the Town authorize the sale of six town-owned houses on Queen Street, which were part of the original hospital property and were previously given to the Town; and (4) making a referral to the Planning & Zoning Commission for resolutions numbered (1), (2) and (3) in accordance with Conn. Gen. Stat. § 8-24. (Affidavit of Herbert Rosenthal, ¶ 20; Exhibit H.)

Then, on May 23, 2001, at a publicly noticed special meeting of the Legislative Council of the Town of Newtown, it unanimously passed a resolution recommending the acquisition of the Fairfield Hills Campus in accordance with the terms of the document entitled “Negotiated Terms and Conditions of Sale Fairfield Hills” dated May 21, 2001. At this meeting the Legislative Council also unanimously passed a resolution instructing bond counsel to draft a bonding resolution using the parameters set out in Phase I, Phase II and Phase III of the Harrall-Michawloski Report without any prices, or dollar amounts, save for the caps of \$1 million for the Edmond Town Hall, \$600,000 for playing fields at the high school, \$1.4 million for the rest of the fields, and a total bond authorization of \$21,850,000. (Affidavit of Herbert Rosenthal, ¶ 21; Exhibit I.)

On June 6, 2001, at a publicly noticed Special Town Meeting, the Town approved the bonding of \$21,850,000 for the purchase of the Fairfield Hills Campus and renovation and improvements to various buildings thereon, the planning, design and construction of renovations and code updates to Edmond Town Hall, and for various other public improvements. The Special Town Meeting also authorized the issuance of \$21,850,000 of bonds for the foregoing purposes. (Affidavit of Herbert Rosenthal, ¶ 22; Exhibit J.)

On November 12, 2003 the Town and the State entered a more formal agreement for the purchase of the Fairfield Hills Campus. (Affidavit of Herbert Rosenthal, ¶ 23; Exhibit G.) As

part of the negotiations for the purchase of the Fairfield Hills Campus, the State transferred to the Town some additional property which is not part of the Fairfield Hills Campus. This additional property had previously been conveyed to the Town, but title had not formally transferred. On February 2, 2004, the Board of Selectmen unanimously resolved to accept from the State this additional property consisting of 21 acres along Deep Brook, 37.5 acres on Commerce Road, 4 acres on Oakview Road and five houses on Mile Hill Road South. As part of this resolution the Board of Selectmen made a mandatory referral to the Planning and Zoning Commission. (Affidavit of Herbert Rosenthal, ¶ 24; Exhibit K.)

On February 5, 2004, pursuant to Conn. Gen. Stat. § 8-24, at a publicly noticed meeting of the Planning and Zoning Commission, it unanimously resolved to accept this additional property from the State. (Affidavit of Herbert Rosenthal, ¶ 25; Exhibit L.) Likewise, on February 18, 2004 at a publicly noticed meeting of the Legislative Council, it unanimously resolved to accept this property. (Affidavit of Herbert Rosenthal, ¶ 26; Exhibit M.) During June and July of 2004, the State and Town entered into a number of agreements for the Town to purchase the Water Assets. (Affidavit of Herbert Rosenthal, ¶¶ 27-29; Exhibit N-P.)

On July 16, 2004 the Town acquired the Fairfield Hills Campus by way of Quit Claim Deed. (Affidavit of Herbert Rosenthal, ¶ 30; Exhibit Q.) The acquisition of Fairfield Hills

Campus was funded in accordance with the June 6, 2001 authorization provided at the Special Town Meeting. (Affidavit of Herbert Rosenthal, ¶ 31.)

Prior to the purchase, the Board of Selectmen created a preliminary plan for the future re-use of the Fairfield Hills Campus (the “BOS Plan”). (*Id.* at ¶ 33.) The Board of Selectmen decided to seek input from voters with respect to the BOS Plan through a *non-binding advisory* question. (*Id.* at ¶ 34.) On August 12, 2003 a *non-binding* advisory machine vote was held as to the BOS Plan. The turnout for this vote was dismal with only 15% of the registered voters actually voting. (*Id.* at ¶ 35.) In fact, Plaintiff did not even vote; nor did he speak out in objection to any of the actions of the Board of Selectmen, Legislative Council or Planning and Zoning Commission concerning the acquisition of the Fairfield Hills Campus, the BOS Plan, or the proposed expenditure of municipal funds on the project. (*Id.* at ¶ 36.) Of those who voted in the non-binding vote, 1204 voted against the BOS Plan and 1050 voted in favor of it. (*Id.* at ¶ 35.)

Following the non-binding advisory vote, the Board of Selectmen authorized the First Selectman to hire the University of Connecticut to conduct a scientific public opinion survey to better understand the aspects of the BOS Plan that the voters liked and did not like. (*Id.* at ¶ 37.) After reviewing the results of the University of Connecticut survey, a master plan of development was prepared (“Master Plan of Development”) and submitted to the Planning and

Zoning Commission in compliance with the procedures required by Section 4.23.200 of the Planning and Zoning Regulations. (Id. at ¶ 38; Exhibits D-E.)

The Planning and Zoning Commission held a noticed public hearing on February 17, 2005, and on March 17, 2005, it approved the Master Plan of Development, effective as of March 28, 2005. (Affidavit of Herbert Rosenthal, ¶¶ 39-40; Exhibits R-S.) Notice of the Planning and Zoning Commission's approval of the Master Plan of Development was published in the Newtown Bee on March 25, 2005. (Affidavit of Herbert Rosenthal, ¶ 41; Exhibit T.) No appeal of the approval of the Master Plan of Development was taken. (Affidavit of Herbert Rosenthal, ¶ 45.)

After acquisition of the Fairfield Hills Campus and adoption of the Master Plan of Development, the Board of Selectmen further determined that a new political entity was necessary to implement the Master Plan of Development, and requested that the Connecticut General Assembly create legislation to enable the creation of such an entity. (Id. at ¶ 42.) As a result, on May 17, 2005, the Connecticut General Assembly enacted Public Act No. 05-33, effective July 1, 2005. Public Act No. 05-33 permits the Town by:

ordinance adopted by its legislative body, establish an authority to oversee development or redevelopment of a specified area or parcel of land that is located in and owned by the municipality. Such ordinance shall prescribe the boundaries of the area or parcel of land within the jurisdiction of the authority; the method of appointment and terms of office of members of the authority; the powers and duties of the authority which shall

include implementation of a master plan of development, hiring employees, building, maintaining and operating improvements to the land in accordance with such master plan and negotiating and entering into leases for any part of the land and improvements thereon. . . no master plan of development may be implemented by the authority unless there has been opportunity for public comment on such master plan of development at a properly-noticed public hearing in the municipality.

Public Act No. 05-33; (Affidavit of Herbert Rosenthal, ¶ 43.)

On July 6, 2005, at a publicly noticed meeting of the Legislative Council, pursuant to Public Act No. 05-33, it adopted an ordinance establishing the Fairfield Hills Authority. (Id. at ¶ 44; Exhibit U.) No appeal of the aforementioned actions of the Planning and Zoning Commission, Board of Selectmen or Legislative Council was ever brought by Mathew DeAngelis or anyone else. (Affidavit of Herbert Rosenthal, ¶ 45.)

Every dollar of tax money spent for Fairfield Hills has been approved by the taxpayers at the June, 2001 special Town Meeting, the Town has included the amount and purpose for the borrowing and resulting debt service expenditures in the annual budgets approved by the Selectmen, Board of Finance, Legislative Council and by the taxpayers at the annual budget referenda. Subsequent expenses resulting from the issuance of bonds were approved at the Town's annual budget referenda and all payments resulting from the June 6, 2001 bonding authorization (e.g. interest) were approved at the annual budget referenda. (Id. at ¶¶ 46, 32.)

All of the expenditures by the Fairfield Hills Authority, both for operations as well as from borrowing for capital projects, have been reported each month at public meetings of the Fairfield Hills Authority. Expenditures have not exceeded those authorized on June 6, 2001 at the special Town Meeting. (Id. at ¶ 49.) Every dollar of tax money spent for Fairfield Hills has been approved and spent in accordance with the Town Charter, Town ordinances and regulations and the Connecticut General Statutes. (Id. at ¶ 50.)

Likewise the Master Plan of Development has been approved in accordance with the Town's Planning and Zoning Commission's regulations, which are the only approval required for it, and in accordance with P.A. 05-33. (Id. at ¶ 51.) It is worth repeating that the Town Charter does not require or authorize a master plan of development to be approved by the voters at either a town meeting or referendum. The Town Charter does not provide a means for holding either a binding town meeting or a binding referendum to adopt a master plan of development. (Id. at ¶¶ 47-48; Exhibit A-B.)

Since the filing of this lawsuit, Plaintiff has made a number of admissions and clarifications on his website concerning the legal basis for his lawsuit and the relief he seeks. He summarizes his claim by stating:

In a nutshell, my lawsuit says that if there is an established process for spending tax money that includes getting approval at a Town Meeting or Referendum, not following

that process for Fairfield Hills violates the civil rights of all taxpayers by taking our tax money and spending it without following the process or ‘Due Process.’

(Affidavit of Herbert Rosenthal, ¶ 52; Exhibit V.) Plaintiff states in another posting, “[i]n other words, if they take my property (my taxes), they have to be fair in the process of taking it, and they have to follow the rules that a reasonable person would expect them to follow.” (Affidavit of Herbert Rosenthal, ¶ 52; Exhibit V.)

In explaining his failure to speak out against the acquisition and development of the Fairfield Hills Campus he states:

“[t]hroughout this entire process I’ve been hearing that we and the Legislative Council have had many, many opportunities to stop the actions at Fairfield Hills, and because we took so long to speak up our objections don’t count for much. Strangely enough, I’ve heard something similar from members of the media — ‘if you think this is so wrong, why didn’t you attend a meeting, speak up, yada yada yada.’ Well, we’re busy, and we trusted Herb and his pals to do what was in the best interest of the town.”

(Affidavit of Herbert Rosenthal, ¶ 52; Exhibit V.) Plaintiff further makes clear that his claim is less about due process and more about imposing his will over the Town as he states:

The new Town Hall is a symbol of all that is wrong with our town government. When we’re facing \$100 million in capital expenses the first thing these guys think we should build is a monument to themselves in the middle of Fairfield Hills, arguably the most valuable piece of real estate in town. . . .Who is running this place, and what the **HELL** are they doing? . . . I’ve said it in private to many of you and now I’m saying it in public — that Town Hall will go up at Fairfield Hills **OVER MY DEAD BODY**. Period.

(Affidavit of Herbert Rosenthal, ¶ 52; Exhibit V.)

As explained below, Plaintiff's personal disdain for the Town's lawful acquisition and development of the Fairfield Hills Campus does not make the Town's actions a due process violation.

II. ARGUMENT

The Complaint sounds in one count for injunctive relief. It appears that Plaintiff is challenging: (1) the approval of the Master Plan of Development for the Fairfield Hills Campus; and (2) the expenditure of certain funds in connection with the Fairfield Hills Campus. The gravamen of the Complaint is the erroneous belief that a binding referendum is required for certain approvals and expenditures in connection with the Fairfield Hills Campus. There is no basis for this claim, and, to the contrary, all of the requirements for approval of the Master Plan of Development, and for the expenditure of funds by the Town in connection with the Fairfield Hills Campus, have been met. Accordingly, this case should be dismissed and/or summary judgment should enter in favor of Defendants.

First, this action should be dismissed, pursuant to Fed. R. Civ. P. 12(b)(1), to the extent that Plaintiff is challenging the approval of the Master Plan of Development for the Fairfield Hills Campus as this court lacks subject matter jurisdiction because of lack of standing (aggrievement).

Second, Plaintiff has failed to state a claim under 42 U.S.C. § 1983 upon which relief may be granted in that: (1) Plaintiff does not have a property right protected by the due process clause; (2) an adequate state law remedy exists for Plaintiff to contest Defendants' action; and (3) Plaintiff's allegations do not "shock the conscience," or egregiously transcend the "decencies of civilized conduct." As such, Plaintiff fails to present either a procedural or substantive due process violation, and this case should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Third, even if Plaintiff could survive this motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6), there is no genuine issue as to any material fact and Defendants are entitled to judgment as a matter of law. Plaintiff argues that the expenditures are not permissible because an approved master plan does not exist. If he is challenging the validity of the Master Plan of Development, he does not have standing. If, instead, he believes that an approved master plan does not exist, he is wrong, and his claims fail. To the extent Plaintiff is making a more general attack on the approvals and expenditures as they relate to the Fairfield Hills Campus, based on the Affidavit of Herbert Rosenthal, and the public record documents, Defendants acted in conformity with the Town Charter and all applicable ordinances, regulations and statutes. However, even if Plaintiff can prove otherwise (which Defendants vigorously deny) no reasonable jury could infer that Defendants acted for an irrational or invidious purpose. Accordingly, Defendants are entitled to summary judgment.

For these reasons, the Town and the individual municipal defendants respectfully request that the court dismiss this case, under Fed. R. Civ. P 12(b)(1) and (6), and/or grant summary judgment pursuant to Fed. R. Civ. P 56.

A. PLAINTIFF DOES NOT HAVE STANDING TO CHALLENGE THE NEWTOWN PLANNING & ZONING COMMISSION'S APPROVAL OF THE MASTER PLAN OF DEVELOPMENT.

A central tenet of Plaintiff's Complaint is the allegation that Defendants are moving ahead with its plans for the Fairfield Hills Campus without authority. In particular, Plaintiff claims that certain actions have been taken without an approved master plan. (Complaint, ¶ 45). The only approval or requirement necessary for a master plan of development is a zoning requirement. (Affidavit of Herbert Rosenthal, ¶ 51; Exhibits D-E.) In addition, P.A. 05-33 requires an opportunity for public comment prior to implementation. The Planning & Zoning Commission approved a master plan for the Fairfield Hills Campus on March 17, 2005, after a properly noticed public hearing during which opportunity for public comment was allowed. (Affidavit of Herbert Rosenthal, ¶¶ 39-41; Exhibits R-S.). That approval is final by operation of law. Either Plaintiff is unaware that the master plan was approved, in which case summary judgment should enter as set forth in Section C below, or he is seeking to attack the approval itself. An aggrieved party may appeal the approval pursuant to Conn. Gen. Stat. § 8-8. As Plaintiff is not aggrieved,

however, to the extent that his Complaint seeks to attack the approval of the master plan, he may not do so.

Federal Rule of Civil Procedure 12(b)(1) authorizes motions to dismiss for lack of subject matter jurisdiction. See Scherer v. Equitable Life Assurance Society, 347 F.3d 394, 397 (2nd Cir. 2003). On a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff must establish by a preponderance of the evidence that the court has subject matter jurisdiction over the complaint. Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000); see also Malik v. Meissner, 82 F.3d 560, 562 (2d Cir.1996); In re Joint E. & So. Dist. Asbestos Litig., 14 F.3d 726, 730 (2d Cir.1993). Courts evaluating Rule 12(b)(1) motions “may resolve the disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits.” Zappia Middle East Constr. Co. Ltd. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir.2000).

In order for a party to have standing to invoke the jurisdiction of the court, that party must be aggrieved, i.e., the party must have standing. Standing is established by showing that the party claiming a right to sue is authorized by statute to bring suit – statutory aggrievement, Edgewood Village, Inc. v. Housing Authority, 265 Conn. 280, 288 (2003), or that the party claiming a right to sue is classically aggrieved.

Conn. Gen. Stat. § 8-8(a)(1) provides the basis for statutory aggrievement. It states, “[i]n the case of a decision by a zoning commission, planning commission, combined planning and

zoning commission or zoning board of appeals, ‘aggrieved person’ includes any person owning land that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board.” Id.

Classical aggrievement requires the person challenging the decision to prove both a specific, personal and legal interest in the subject matter of the decision as distinguished from a general interest such as is the concern of all members of the community and that he was specially and injuriously affected in his property or other legal rights. See Walls v. Planning and Zoning Commission of Town of Avon, 176 Conn. 475, 478 (1979).

Plaintiff does not meet either of these aggrievement standards. His property neither abuts nor is within one hundred feet of the Fairfield Hills Campus. (Affidavit of Herbert Rosenthal, ¶ 5.) Moreover, Plaintiff’s interest in the Master Plan of Development is no different from the concern of all members in the community and, therefore, is general in nature. He cannot claim a “specific, personal and legal” interest.

Plaintiff suggests in the Complaint that his status as a taxpayer is sufficient to establish aggrievement. However, in Bell v. Planning & Zoning Com., 174 Conn. 493 (1978), the plaintiff argued that he was “aggrieved” because the decision of the planning and zoning commission which concerned a change in the town’s comprehensive zoning and development plan adversely affected him as a taxpayer of the town. Additionally, he argued that as a taxpayer of the town,

the proposed project approved by the planning and zoning commission adversely affected him because it purported to authorize “the expenditure of municipal and state funds in an illegal, unconstitutional, and discriminatory manner.” Id. at 495. The Supreme Court dismissed the appeal for lack of subject matter jurisdiction, finding the plaintiff not an aggrieved person and stating, in the context of an appeal of a planning and zoning commission action, “[t]he plaintiff’s claim that as a taxpayer he is ‘aggrieved’ by the alleged unconstitutional expenditure of state and municipal funds on the approved project is equally without merit. . . . the plaintiff’s interest is no greater than that of any resident and taxpayer of the town concerned with zoning decisions as they affect the general welfare of the community. Such an interest does not rise to the level of ‘aggrievement’ required by §§ 8-8 and 8-9.” Id. at 497-99.

Accordingly, to the extent that Plaintiff is challenging the approval of the Master Plan of Development, he is not aggrieved and lacks standing. A challenge to the actions of the Planning and Zoning Commission’s approving the Master Plan of Development could only have been brought pursuant to Conn. Gen. Stat. § 8-8, by an “aggrieved” person. Plaintiff is not “aggrieved”, and therefore lacks standing to challenge the Commission’s actions.

B. PLAINTIFF’S CLAIM OF A § 1983 VIOLATION BASED UPON A DUE PROCESS VIOLATION SHOULD BE DISMISSED AS IT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.²

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). “[W]hile the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice.” Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996).

Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. In order to state a claim under 42 U.S.C. § 1983, a plaintiff must first set forth factual allegations which if proved would establish that the defendant has deprived him of a right secured by the Constitution and laws of the United States. Katz v. Stannard Beach Ass’n, 95 F. Supp. 2d 90, 94 (D. Conn. 2000).

A court’s first step in analyzing any action under § 1983 is to “identify the exact contours of the underlying right said to have been violated.” County of Sacramento v. Lewis, 523 U.S. 833, 841, n.5 (1998). Plaintiff’s single count Complaint alleges a § 1983 violation predicated upon Defendants’ alleged denial of due process in violation of the Fourteenth Amendment of the United States Constitution. (Complaint, ¶ 47.) Plaintiff explains that this claimed due process

² This section does not incorporate the statement of facts section of this memorandum, Affidavit of Herbert Rosenthal, Local Rule 56(a)(1) Statement or any extrinsic documents. The legal arguments in this section are based solely on the Complaint. Nonetheless, pursuant to Fed. R. C. P. 12(c), the Court may treat this section as a motion for summary judgment to the extent matters outside the Complaint are considered.

violation stems from Defendants' alleged expenditure of Town moneys in violation of the Town Charter. (Id., at ¶ 46.) Plaintiff complains that these actions have resulted in a deprivation of his property. (Id., at ¶ 47.) These allegations do not support a procedural due process violation or a substantive due process violation under the Fourteenth Amendment.

1. PLAINTIFF DOES NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN THE EXPENDITURE OF TAX DOLLARS.

Not every interest is a protected interest under the due process clause. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570 (1972). A court's first step in deciding whether actions of a municipality or its agents constitute substantive due process violations or procedural due process violations is to determine whether the plaintiff has established that the interest sought to be protected is a recognized property interest. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, n.3 (1985) (stating that when analyzing a procedural due process claim the court first must determine whether the plaintiff has a protected property or liberty interest); Cybulski v. Cooper, 891 F. Supp. 68, 71 (D. Conn. 1995) (stating that a plaintiff "must demonstrate deprivation of a protected property interest to bring a substantive due process claim.") Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Id. at 538 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577, (1972)). A property interest may be created or defined by state law. Board of Regents v. Roth, 408 U.S. at 577.

Plaintiffs do not have a property interest:

for purposes of due process analysis simply because state common law affords them a remedy against abusive and arbitrary local government decisions. The federal courts do not, nor does the Fourteenth Amendment's Due Process Clause, function as a general overseer of arbitrariness in state and local land-use decisions.

City-Wide Asphalt Paving, Inc. v. Alamance County, 966 F. Supp. 395, 402 (M. Dist. N.C., 1997); see also Gardner v. City of Baltimore Mayor, 969 F.2d 63, 69 (4th Cir. 1992).

The law is clear that a § 1983 suit cannot be based upon a municipality's tax expenditures even when those expenditures are a violation of state law because a taxpayer's "interest as a municipal taxpayer in having [his] moneys expended according [to] the procedure provided for under state law simply does not rise to the level of a constitutionally protectable property right." (Emphasis added.) Katz v. Stannard Beach Ass'n, 95 F. Supp.2d 90, 97 (D. Conn. 2000) (Arterton, J.); see also ATC Partnership v. Town of Windham, 251 Conn. at 609 (finding that economic harm fails to rise to the conscience shocking level required for a substantive due process violation); Fennell v. City of Hartford, 238 Conn. 809, 819-20 (1996) (finding city employees' claim to pension benefits not a protected property interest); Wood v. Rendell, 1995 U.S. Dist. LEXIS 3574, *22 (E.D. Penn. 1995) (Padova, J.)³ (applying Pennsylvania law to procedural due process claim of taxpayer and

³ Copies of all unreported decisions are attached hereto as Exhibit X

holding that a taxpayer does not have a protected property interest to challenge allege violation of municipal charter.)⁴

In Stannard Beach Ass'n, plaintiffs were voting members of a political subdivision, created under Connecticut state law (known as the “SBA”). Id. at 92. Plaintiffs maintained that the SBA violated terms of its by-laws, and brought a § 1983 claim based upon, among other things, an allegation that their municipal taxes were being used for private benefit in violation of the substantive and procedural due process clauses under the federal constitution. Id. at 93. Judge Arterton dismissed plaintiffs § 1983 claims alleging substantive and procedural due process violations finding no constitutionally protectable property right exists in having municipal taxes expended in accordance with state law. Id. at 95-97.

The present case cannot be distinguished from Stannard Beach Ass'n, *supra*. Plaintiff alleges a § 1983 violation predicated upon Defendants’ alleged denial of due process. (Complaint, ¶ 47.) Plaintiff explains that this purported due process violation stems from Defendants alleged expending of Town moneys in violation of the municipal charter. (Id., at ¶ 46.) However, Plaintiff does not specify which charter provision, rule, ordinance or state statute Defendants’ conduct is alleged to have violated. Plaintiff complains that these actions have

⁴ A cause of action alleging a § 1983 violation based upon a due process claim which, itself, is premised upon an alleged state law violation may also be dismissed pursuant to Fed. R. Civ. P. 12(h)(3). See Kampfer v. Gokey, 955 F. Supp. 167 (N.D.N.Y. 1997) (dismissing § 1983 claim alleging a violation of state law against municipality and certain of its employees for lack of subject matter jurisdiction).

resulted in a deprivation of his property, i.e., tax dollars. (Id., at ¶ 47.) These allegations mirror those in Stannard Beach Ass'n, and do not amount to a cognizable § 1983 claim for violation of Plaintiff's due process rights.

Plaintiff's allegations that his tax dollars were improperly spent does not give rise to a protected property interest under the protections afforded by the Fourteenth Amendment of the United States Constitution concerning procedural due process and substantive due process and, therefore; Plaintiff's claim should be dismissed just as the plaintiff's claims were dismissed by Judge Arterton in Katz v. Stannard Beach Ass'n, *supra*.

2. PLAINTIFF FAILS TO STATE A CLAIM FOR PROCEDURAL DUE PROCESS.

The first step in determining whether a plaintiff has stated a procedural due process claim is to determine whether the plaintiff has a constitutionally protected property or liberty interest. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, n.3 (1985). Next the court must determine whether that interest was deprived by government action. Rivera v. City of New York, 392 F. Supp. 2d. 644, 651 (S.D.N.Y. 2005); Lewis v. Town of Waterford, 2006 U.S. Dist. LEXIS 58227 (D. Conn. 2006). Finally the court must determine what process is due. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 541; see Lewis v. Town of Waterford, 2006 U.S. Dist. LEXIS 58227 (D. Conn. 2006) (stating that the court must find, "that the deprivation occurred without adequate pre- or post-deprivation process.")

As discussed above, Plaintiff does not have a protected property interest and, for this reason alone, his procedural due process claim fails.

Second, the Complaint fails to state what process was due, and whether it was denied. To the contrary, the Complaint speaks of many meetings, including the Board of Selectmen, Legislative Council, and the Fairfield Hills Authority. There is not a single allegation that Plaintiff was denied the opportunity to participate in the municipal process which culminated with the Planning and Zoning Commission's approval of the Master Plan of Development. In fact, Plaintiff does not even allege that he attempted to do so. Instead, Plaintiff makes a conclusory statement that he was denied due process. "[W]hile the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996).

Moreover, in procedural due process cases, an available and adequate state remedy eliminates an essential element of the claim because a claim of procedural due process is valid only in the absence of a fair procedure in which to contest the state's action or to obtain redress for actions taken. McClary v. O'Hare, 786 F.2d 83, 86 n.3 (2d Cir. 1986); Stanulonis v. Marzec, 649 F. Supp. 1536, 1540 (D. Conn. 1986); see also Rustici v. Malloy, 2004 Conn. Super. LEXIS 1734, *43 (Conn. Supp. July 1, 2004) (Schuman, J.) ("There is no violation of due process when

a party in interest is given the opportunity of a meaningful time for a court hearing to litigate the question.”)

Connecticut courts have long recognized the capacity of taxpayers of towns and cities to challenge the legality of the actions of their municipal officers by seeking injunctive relief against such action in state court. See Highgate Condominium Association v. Watertown Fire District, 210 Conn. 6, 7-8, 16-17 (1989) (stating that plaintiff-taxpayers have standing to bring a declaratory judgment action and seek injunctive relief and damages in challenging the actions of the defendant Fire District as an unauthorized and illegal method of imposing sewer use charges); Jade Aircraft Sales v. Crystal, 236 Conn. 701, 708 (1996) (finding that where statute provides a basis for recovery and voters have standing to seek injunctive relief and writs of mandamus to prevent municipality from acting in contravention of state law under that statute, they are precluded from recovering under § 1983).

Connecticut state court provides an adequate remedy for Plaintiff’s challenge to what he contends are acts in violation of the Town Charter (as opposed to § 1983 claims).⁵ Accordingly, Plaintiff’s procedural due process claim fails

⁵ While Plaintiff may have standing to bring an action in state court to challenge certain acts he claims violates the Town Charter (and not based on §1983), for the reasons set forth herein, Defendants are also requesting summary judgment because there is no genuine issue of material fact and Plaintiff’s challenge fails as a matter of law.

3. PLAINTIFF FAILS TO STATE A CLAIM FOR SUBSTANTIVE DUE PROCESS.

To state a valid cause of action for a violation of substantive due process a plaintiff must: (1) allege a deprivation of a protected property interest; Cybulski v. Cooper, 891 F. Supp. 68, 71 (D. Conn. 1995); (2) allege the defendants engaged in arbitrary and conscious shocking conduct. ATC Partnership, 251 Conn. at 606; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850 (1992); and (3) allege that the defendants conduct egregiously transcends the “decencies of civilized conduct.” Rochin v. California, 342 U.S. 165, 173 (1952).

“Despite the important role of substantive due process in securing our fundamental liberties, that guarantee ‘does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.’” ATC Partnership v. Town of Windham, 251 Conn. 597, 606 (1999) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998)). “*A substantive due process claim is not established simply by proving that one did not obtain what he is entitled to under state law.*” (Emphasis added; internal citations and quotations omitted.) Lynch v. McNamara, 342 F. Supp. 2d 59, 68 (D. Conn. Oct. 13, 2004); Natale v. Town of Ridgefield, 170 F.3d 258, 262 (2d Cir. 1999).

A violation of state law, even if proven, does not support a substantive due process violation. Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999); see Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58 (2d Cir. 1985) (“even an outright violation of state law . . . will

not necessarily provide the basis for a federal claim.”) In Natale, the plaintiff challenged the town’s planning and zoning commission’s denial of his zoning and building permit application. The plaintiff claimed these actions were a violation of his substantive due process rights. The trial court charged the jury that the plaintiff only needed to prove that the municipal defendants violated state law to prove a substantive due process violation. The Court of Appeals found that the trial court should have required plaintiff to prove the defendants’ action was “so outrageously arbitrary as to constitute a gross abuse of governmental authority.” Id. at 262. However, the Court of Appeals found retrial unnecessary because, “as a matter of law, [plaintiff] does not have a federally protectable property right in the permits for which he applied.” Id. at 263.

“[S]ubstantive due process has been held to protect against only the most arbitrary and conscience shocking governmental intrusions into the personal realm.” ATC Partnership, 251 Conn. at 606 (citing Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)). Governmental conduct does not violate substantive due process unless it “shocks the conscience”; County of Sacramento v. Lewis, 523 U.S. 846; see Rochin v. California, 342 U.S. 165, 172 (1952) (finding the forced pumping of a suspect’s stomach to retrieve evidence shocked the conscience); and egregiously transcends the “decencies of civilized conduct.” Rochin, 342 U.S. at 173.

“Where the plaintiff has not been physically abused, detained, prosecuted due to racial or political motivation or otherwise deprived of equal protection of the law, courts are reluctant to

find conscience-shocking conduct that would implicate a constitutional violation.” Hepburn v. City of Torrington, 2004 U.S. Dist. LEXIS 15163 (D. Conn. Aug. 4, 2004); Richards v. Conn. Dep’t of Corr., 349 F. Supp. 2d 278, 292 (D. Conn. Dec. 10, 2004) (Squatrito, J.); see e.g., County of Sacramento v. Lewis, 523 U.S. 833, 854 (1998) (holding that Sacramento police officers' actions failed to shock the conscience when the officers engaged in a high speed chase of a motorcycle, contrary to department policy, that resulted in the death of the motorcycle's sixteen year-old passenger.)

First, as discussed above, Plaintiff does not have a protected property interest and, for this reason alone, Plaintiff’s substantive due process claim fails.

Second, Plaintiff’s bare bones Complaint alleges that Defendants have taken actions and expended Town moneys with respect to the Fairfield Hills Campus in violation of certain unspecified provisions of the Town Charter and “other applicable legislation.” (See Complaint, ¶ 46.) Plaintiff goes on in conclusory fashion stating that these actions were “malicious, intention, willful, wanton, and/or in reckless disregard of plaintiff’s rights.” (See id., ¶ 47.)

The essence of Plaintiff’s Complaint is that Defendants violated the Town Charter with respect to actions taken by the Fairfield Hills Authority and that Plaintiff does not wish for his tax money to be expended on any project approved in violation of the Town Charter. Plaintiff does not cite a single provision of the Town Charter that he alleges was violated by the

Defendants; nor does he cite any other local, state or federal legislation which Defendants' actions are alleged to have violated. Plaintiff simply makes legal conclusions.

Additionally, Plaintiff provides only bald assertions that Defendants' actions, even if in violation of the Town Charter (which Defendants deny), were in any way intentional violations of the Town Charter. As stated previously, when ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) "bald assertions and conclusions of law will not suffice." Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996). Furthermore, these allegations do not "shock the conscience," or egregiously transcend the "decencies of civilized conduct," and therefore Plaintiff fails to state a substantive due process claim upon which relief may be granted.

C. SUMMARY JUDGMENT SHOULD ENTER AGAINST PLAINTIFF AS THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). A court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact. Torres v. Stewart, 263 F. Supp. 2d 463, 465 (D. Conn. 2003) (Underhill, J.)

A dispute regarding a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” (Internal citations and quotations omitted.) Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) “To defeat a motion for summary judgment that is supported by documentary evidence and sworn affidavits, a plaintiff must do more than simply show that there is some metaphysical doubt as to the material facts.” (Internal citations and quotations omitted.) Torres v. Stewart, 263 F. Supp. at 465. He “must come forward with enough evidence to support a jury verdict in [his] favor, and the motion will not be defeated merely . . . on the basis of conjecture or surmise.” (Internal citations and quotations omitted.) Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188 (2d Cir.1992). A party may not rest on the “mere allegations or denials” contained in his pleadings. Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995). See also Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993) (holding that party may not rely on conclusory statements or an argument that the affidavits in support of the motion for summary judgment are not credible).

1. PLAINTIFF’S CLAIM OF A DUE PROCESS VIOLATION FAILS AS DEFENDANTS HAVE NOT VIOLATED THE TOWN CHARTER OR ANY STATE STATUTES.

Plaintiff’s Complaint is premised on the notion that the Town has moved forward with its plans for the Fairfield Hills Campus without a master plan of development. Plaintiff argues that the master plan of development is a cornerstone upon which the Town and its municipal officials

must base its decisions. However, Plaintiff fails to acknowledge in his Complaint that the Town received approval of the Master Plan of Development for the Fairfield Hills Campus on March 17, 2005, by action of its Planning and Zoning Commission. Plaintiff also claims that the expenditures as to the Fairfield Hills Campus were unauthorized. To the contrary, the Town authorized the expenditures for the Fairfield Hills Campus at the June, 2001 special Town Meeting.

a. *The Town properly approved the Master Plan of Development for the Fairfield Hills Campus.*

In Newtown, the only requirement for approval of a master plan of development is a zoning regulation. (Affidavit of Herbert Rosenthal, ¶ 51; Exhibits D-E.) P.A. 05-33 requires a public hearing prior to implementation of a master plan. These requirements have been met as to the Master Plan of Development.

(i) *The Planning and Zoning Commission Properly Approved the Master Plan of Development at a Public Hearing.*

On July 16, 2004, the Town acquired the Fairfield Hills Campus. (Affidavit of Herbert Rosenthal, ¶ 30; Exhibit Q.) The Fairfield Hills Campus is located in the FHAR Zone. (Affidavit of Herbert Rosenthal, ¶ 8; Exhibit C.) As a result, development must be in accordance with the Planning and Zoning regulations concerning the FHAR Zone. (Affidavit of

Herbert Rosenthal, ¶ 12; Exhibits D-E.) These regulations and P.A. 05-33 contain the only requirements for development of the property. (Affidavit of Herbert Rosenthal, ¶ 51.)

The Master Plan of Development was promulgated and enacted in accordance with the zoning regulations. Under § 4.23, a master plan of development must be created and submitted to the Planning and Zoning Commission. (Exhibits D-E.) The Master Plan of Development was submitted to the Planning and Zoning Commission. (Affidavit of Herbert Rosenthal, ¶ 38.) All of the procedures required by § 4.23.200 were completed. (Id.) The Planning and Zoning Commission held a properly noticed public hearing on February 17, 2005 for it to receive public comment on the Master Plan of Development. (Id. at ¶ 39; Exhibit R.) After the public hearing the Commission approved the Master Plan of Development, effective as of March 28, 2005. (Affidavit of Herbert Rosenthal, ¶ 40; Exhibit S.) Notice of the Planning and Zoning Commission's approval of the Master Plan of Development was published in the Newtown Bee on March 25, 2005. (Affidavit of Herbert Rosenthal, ¶ 41; Exhibit T.) No appeal of the approval of the Master Plan of Development was taken. (Affidavit of Herbert Rosenthal, ¶ 45.)

(ii) A Town Meeting and referendum is not required for a master plan.

The thrust of Plaintiff's § 1983 claim is that his due process rights were violated because the Town did not hold a town-wide binding referendum to approve the Master Plan of

Development. (Complaint, ¶¶ 42-45.) However, there is no requirement in the Town Charter, Planning and Zoning Regulations or state statute which require such a referendum. (Affidavit of Herbert Rosenthal, ¶¶ 47-48; Exhibit A-B.)

Plaintiff's argument that a town-wide vote is required is premised upon a single sentence from the Harrall-Michawloski Report. In the section of the report entitled "Background" the author states that a master plan for re-use of the property would go through all appropriate approval process including approval by the Planning and Zoning Commission, Board of Selectmen, Legislative Counsel and a Town Meeting prior to implementation of the plan." (Exhibit H.) Significantly, the Town's resolutions and authorizations with respect to the Fairfield Hills Campus never incorporate the "Background" section of the Harrall-Michawloski Report.

- On May 21, 2001, the Board of Selectman unanimously passed a resolution recommending the acquisition of the Fairfield Hills Campus and requesting funding for the capital projects as listed on the *Cost Estimate page* of the Harrall-Michawloski Report in the total amount of \$21,723,600. (Affidavit of Herbert Rosenthal, ¶ 20; Exhibit H.)
- On May 23, 2001, the Legislative Council unanimously passed a resolution instructing bond counsel to draft a bonding resolution using the parameters set out in

Phase I, Phase II and Phase III of the Harrall-Michawloski Report. (Affidavit of Herbert Rosenthal, ¶ 21; Exhibit I.) Again, notably absent from this resolution was any adoption of the report's author's suggestions as to Town procedure.

- On June 6, 2001, at a Special Town Meeting, the Town approved the bonding of \$21,850,000 for various public improvement projects, all to be completed in substantial accordance with the Harrall-Michalowski Report and the document entitled, "Negotiated Terms and Conditions of Sale of Fairfield Hills." (Affidavit of Herbert Rosenthal, ¶ 22; Exhibit J.)

As is clear from this history, the Town adopted the Cost Estimate page and parameters set out in Phase I, Phase II and Phase III of the Harrall-Michawloski Report and was required to complete the various public improvement projects in substantial accordance with the Harrall-Michawloski Report. The Town has followed the Cost Estimate page, the parameters set out in the three Phases of the Harrall-Michawloski Report and all of the improvement projects have proceeded in substantial accordance with the Harrall-Michawloski Report.

Even if the Town had somehow, inadvertently, adopted the Harrell-Michawloski Report in its entirety (which it did not), Plaintiff's claim still fails. The Board of Selectmen, Legislative Council and Town Referendum can not revise the Town Charter or Planning and Zoning regulations simply by adopting a consultant's report. (See Exhibits A-B, § 8-50(a), stating

“[t]his Charter may only be amended in the manner prescribed by the General Statutes.”); (See Exhibit W⁶, §§ 11.06 et seq., stating “[t]hese regulations may be amended . . . in accordance with the procedure established by the General Statutes of Connecticut.”); Conn. Gen. Stat. §§ 8-3 et seq. (governing changes to zoning regulations); Conn. Gen. Stat. §§ 7-187 et seq. (governing changes to municipal charter).

The Town was neither required, nor authorized, to hold a binding town wide vote to approve the Master Plan of Development. (Affidavit of Herbert Rosenthal, ¶¶ 47-48; Exhibit A-B.) Plaintiff’s claims to the contrary are wholly unsubstantiated in fact and law.

(iii) Plaintiff’s Request For Injunctive Relief Has No Basis.

Plaintiff asks this Court for an order preventing the Town from any further construction and/or development activities at the Fairfield Hills Campus unless and until a master plan is approved at a duly noticed Town meeting and referendum using machine counted votes. As previously explained, a town meeting and referendum is neither necessary nor even permitted. The Master Plan of Development has received all necessary approvals. Accordingly, injunctive relief is not warranted.

⁶ Exhibit W is not an exhibit to the Affidavit of Herbert Rosenthal, it is solely an exhibit to this memorandum.

- b. *The Town authorized all of the expenditures for the Fairfield Hill Campus in accordance with the Town Charter, Town ordinances and regulations, and the General Statutes.***

The appropriate town boards and commissions and the Town Meeting properly approved the bonding of \$21,850,000 for the purchase of the Fairfield Hills Campus and renovation and improvements to various buildings thereon, the planning, design and construction of renovations and code updates to Edmond Town Hall, and for various other public improvements. All expenditures on the Fairfield Hills Campus have been in accordance with the duly approved bonding appropriation.

- (i) **The Town followed all applicable requirements with respect to the financing of the Fairfield Hills Campus.****

Plaintiff's claim that the bond authorization approving the purchase of the Fairfield Hills Campus and renovations and improvements to the property is somehow in violation of his due process rights is without any factual basis. With respect to the bond authorization, the Town followed all applicable Charter provisions and State statutes.

The procedure for approving bonding authorizations in the Town is governed by Chapter 109 of the Connecticut General Statutes, Conn. Gen. Stat. § 8-24 and §§ 6-30 et seq. of the Town's Charter. (See Exhibit A, § 6-40; Exhibit B, § 6-30.) These provisions require:

- that the Legislative Council approve the proposed bond authorization;
- that the Board of Selectmen meet to consider and act upon the bond authorization;

- that notice of the Special Town Meeting be published in a newspaper of general circulation in the Town, and posted on the Town signpost;
- that the Special Town Meeting be held, and the bond authorization be considered and voted upon; and
- once approved, approval by the Planning and Zoning Commission must be had.

As described in the attached Affidavit of Herbert Rosenthal, the Legislative Council, Board of Selectmen and Planning and Zoning Commission all acted upon the proposed bond authorization in accordance with the Charter and applicable State statute. (Affidavit of Herbert Rosenthal, ¶¶ 20-21, 26; Exhibits H-I, M.) The Special Town Meeting properly approved the bonding of \$21,850,000 for the purchase of the Fairfield Hills Campus and renovation and improvements to various buildings thereon, the planning, design and construction of renovations and code updates to Edmond Town Hall, and for various other public improvements. (Affidavit of Herbert Rosenthal, ¶ 22; Exhibit J.) Plaintiff's vague claims to the contrary are once again wholly unsubstantiated in fact and law; therefore, as there is no genuine issue of material fact, this Court should grant summary judgment in favor of the Defendants.

(ii) Plaintiff is not entitled to the injunctive relief he seeks.

Plaintiff seeks injunctive relief in the form of a restraining order barring Defendants from expending any Town monies. Additionally, Plaintiff seeks a full accounting and reconciliation

of any and all Town monies expended in connection with the Fairfield Hills Campus from any source. As explained above, the Town properly authorized the bonding and expenditure of all funds for the Fairfield Hills Campus and therefore, no injunctive relief is warranted.

2. PLAINTIFF’S CLAIM OF A DUE PROCESS VIOLATION FAILS AS DEFENDANTS HAD NO INTENT TO DEPRIVE PLAINTIFF OF ANY DUE PROCESS RIGHTS.

To recover under § 1983, Plaintiff must show more than inadvertent and negligent conduct which caused his injury. “Instead, it is when a government official acts with deliberate indifference to the consequences of his action that a claim may be supported under section 1983. (Internal citations and quotations omitted.) Rivera v. McKenna, 2004 U.S. Dist. LEXIS 1559, 5-6 (D. Conn. Feb. 5, 2004) (Underhill, J.) (finding allegations amounted to no more than a state law negligence claim against prison warden for failing to provide a means for an inmate to climb down from the top bunk or up from the bottom bunk.) Likewise, to prove an underlying substantive due process violation a plaintiff must prove that the defendant acted for a private, irrational or invidious purpose. South Farms of Middletown v. City of Middletown, 1994 U.S. Dist. LEXIS 20159 (D. Conn. Nov. 16, 1994) (Covello, J.)

Even if this court were to find Defendants’ actions in contravention of the Town Charter, Plaintiff has not put forward anything other than a bare assertion that Defendants’ conduct was willful. This allegation is untrue and is without any factual support. To the contrary, as Herbert Rosenthal’s affidavit makes clear, Defendants believe their actions were not in any way in

contravention of the Town's Charter, ordinances or regulations. (See generally, Affidavit of Herbert Rosenthal.)

This is not a § 1983 case. It is simply a case of a dissident taxpayer seeking to impose his will upon an entire town. Plaintiff objects to a new town hall being built on the Fairfield Hills Campus. He has taken his hostility towards this project and attempted to manufacture a § 1983 claim to assist him in his crusade. As this memorandum and the supporting affidavit make clear, Plaintiff has suffered no § 1983 violation. His objective is not to vindicate any constitutional rights, but plainly and simply, to prevent his tax money from being spent on a project that he now opposes – the construction of a new town hall. As Plaintiff states:

The new Town Hall is a symbol of all that is wrong with our town government. When we're facing \$100 million in capital expenses the first thing these guys think we should build is a monument to themselves in the middle of Fairfield Hills, arguably the most valuable piece of real estate in town. . . .Who is running this place, and what the **HELL** are they doing? . . . I've said it in private to many of you and now I'm saying it in public — that Town Hall will go up at Fairfield Hills **OVER MY DEAD BODY**. Period.

(Affidavit of Herbert Rosenthal, ¶ 52; Exhibit V.) While government aims to serve its citizens as best it can, it can not please all the people all the time; this, however, does not provide those who are unhappy with a § 1983 claim.

Plaintiff's attempt to impose his will over the Town is clear. Equally clear is the total absence of facts to support his claim that Defendants have intentionally violated his due process

rights. As there is no issue as to any material fact, summary judgment should enter in favor of Defendants.

III. CONCLUSION

For the aforementioned reasons, this court should dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) and grant summary judgment pursuant to Fed. R. Civ. P. 56.

THE DEFENDANTS,
TOWN OF NEWTOWN, HERBERT ROSENTHAL,
WILLIAM A. BRIMMER, JR., JOSEPH H.
BOJNOWSKI, AMY DENT, ROBERT GECKLE, JOHN
REED, MOIRA RODGERS, DONALD STUDLEY AND
WALTER MOTYKA

By /s/ Adam J. Blank _____
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CERTIFICATION

I hereby certify that on January 24, 2007, a copy of the foregoing Memorandum of Law in Support of Motion to Dismiss and Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Adam J. Blank _____

Adam J. Blank