UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARTONE PLACE, L.L.C. AND HDC FOUR, L.L.C.,	)	
Plaintiffs	)	
v.	)	
	)	Civil Action No. 3:16-cv-30170-MAP
CITY OF SPRINGFIELD, CHRISTOPHER CIGNOLI, PHILIP DROMEY, STEVE DESILETS, AND ALLAN CHWALEK,	)	
Defendants	)	

REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION TO DISMISS
(Dkt. No. 10)

ROBERTSON, U.S.M.J.

I. INTRODUCTION

Plaintiffs Martone Place, L.L.C. ("Martone") and HDC Four, L.L.C. ("HDC") (collectively "Plaintiffs") own abutting properties at 36 and 60 Martone Place and 575 St. James Avenue in Springfield, Massachusetts. Martone contracted with the Massachusetts Department of Transportation ("MassDOT") to construct a building at 36 Martone Place and to lease it to MassDOT for a new Registry of Motor Vehicles building ("RMV"). In the aftermath of the cancellation of the contract, Plaintiffs have sued the City of Springfield, and its Department of Public Works ("DPW") director Christopher Cignoli, Office of Planning and Economic Development ("OPED") director Philip Dromey, Building Commissioner Steve Desilets, and former DPW director Allan R. Chwalek (collectively referenced herein as "City Officials" or "Defendants") individually and in their official capacities alleging that they "intentionally and

maliciously intended to injure [Plaintiffs] to prevent the development of the RMV and cause the termination of [Plaintiffs'] lease with MassDOT" (Dkt. No. 1 ¶ 129).

The six count complaint presents two federal causes of action: a claim under 42 U.S.C. § 1983 for violating the Fifth and Fourteenth Amendments to the United States Constitution based on Defendants' conspiracy to deprive Plaintiffs of their procedural and substantive due process rights (Count I); and a claim under 42 U.S.C. §§ 1983 and 1985 for conspiring to violate the Equal Protection Clause (Count II). Plaintiffs' pendant state law claims allege a violation of the Massachusetts Civil Rights Act ("MCRA"), Mass Gen. Laws ch. 12, §§ 11H, 11I (Count III), tortious interference with contractual relations (Count IV), and a constructive taking (Count VI). In addition, Plaintiffs seek a declaratory judgment (Count V).[1]

Defendants' motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) has been referred to this court for a report and recommendation (Dkt. Nos. 10, 22 at 4). *See* 28 U.S.C. §636(b)(1)(b); Fed. R. Civ. P. 72. For the reasons detailed below, this court recommends that Defendants' motion be GRANTED as to Counts I and II, which are the only federal claims asserted in the complaint. If the recommendation to dismiss Counts I and II is adopted, the presiding District Judge may choose, in his discretion, to dismiss the remaining state law claims without prejudice to their refiling in state court. *See* 28 U.S.C. § 1367(c)(3). In the event that the presiding District Judge does not adopt the recommendation to dismiss Counts I and II, or

[1] The complaint asserts claims for deprivation of procedural and substantive due process against all Defendants (Count I). Plaintiff brings the following claims against Cignoli, Dromey, Desilets, and Chwalek individually: conspiracy to deprive Plaintiffs of the equal protection of the laws (Count II); deprivation of rights protected by the MCRA (Count III); and tortious interference with contractual relations (Count IV). Plaintiffs seek a declaratory judgment against the city and Cignoli in his official capacity (Count V). The claim for a constructive taking is asserted against the city (Count VI) (Dkt. No. 1 at 17-21).

elects to retain jurisdiction of the remaining state law claims, this court recommends that Defendants' motion to dismiss be GRANTED as to Counts III, V, and VI and DENIED as to Count IV.

II. BACKGROUND[2]

[2] The facts are taken from the complaint, Dkt. No. 1, and certain materials Defendants submitted in support of their motion to dismiss to which Plaintiffs have not lodged an objection. "On a motion to dismiss, the court may properly take into account four types of documents outside the complaint without converting the motion into one for summary judgment: (1) documents of undisputed authenticity; (2) documents that are official public records; (3) documents that are central to plaintiff's claim; and (4) documents that are sufficiently referred to in the complaint." *Doe v. Brandeis Univ.*, Civil Action No. 15-11557-FDS, 2016 WL 1274533, at *6 n.1 (D. Mass. Mar. 31, 2016) (citing *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993)). Defendants submitted the following court records: the docket of the Massachusetts Supreme Judicial Court for Suffolk County in HDC Four, L.L.C. v. Building Comm'r of Springfield, SJ-2014-0316 (Dkt. No. 23-1 at 3); the Order of Transfer to the Superior Court Department of the Trial Court for the County of Hampden for Civil Business (Botsford, J.) in SJ-2014-0316 (Dkt. No. 23-1 at 4); the docket of the Massachusetts Superior Court Department of the Trial Court for the County of Hampden in HDC Four, L.L.C. v. Building Comm'r. of Springfield, Civil Action No. 1479CV00627 (Dkt. No. 23-1 at 2); Memorandum of Decision on Verified Emergency Petition for Mandamus Relief of September 25, 2014 (Josephson, J.), in HDC Four L.L.C. v. Building Comm'r of Springfield, Hampden Superior Court Department Civil Action No. 1479CV00627 (Dkt. No. 23-5 at 3-8); complaint and exhibit filed in Hunter Dev. Co., L.L.C. v. Benjamin Swan, Jr., et al., Massachusetts Land Court Department of the Trial Court, docket number 15 MISC 000257 (Dkt. No. 23-4 at 3-11); docket of the Massachusetts Land Court Department of the Trial Court in No. 15 MISC 00257; Stipulation of Dismissal without Prejudice of May 3, 2016 in Massachusetts Land Court docket number 15 MISC 000257 (Dkt. No. 23-2 at 11-12). *See Giragosian v. Ryan*, 547 F.3d 59, 66 (1st Cir. 2008) ("A court may consider matters of public record in resolving a Rule 12(b)(6) motion to dismiss. Matters of public record ordinarily include 'documents from prior state court adjudications.'") (quoting *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 60 (1st Cir. 2000) (citation omitted)). The court also considers the following documents, whose authenticity is not disputed, as they are public records, *see Watterson*, 987 F.2d at 3: Springfield City Clerk's correspondence of December 27, 2005 regarding special permits for 36 Martone Place, 559 St. James Avenue, and 11-13 Tapley Street (Dkt. No. 23-7 at 10-15). In addition, the following documents are "sufficiently referred to in the complaint," *id.*: the OPED's Administrative Site Plan Review (Tier 1) – Supplemental Review of July 30, 2014 (Dkt. No. 23-6 at 2-3); comments by City Engineer James J. Czach of the DPW, dated July 31, 2014 (Dkt. No. 23-6 at 4-15); OPED's Administrative Site Plan Review (Tier 1) of May 5, 2015 (Dkt. No. 23-7 at 2-4, 16-31); and provisions of the Springfield Zoning Ordinance, amended to March 19, 2014 (Dkt. No. 30-1). The following documents fall outside the purview of categories of documents that the court is permitted to consider: HDC Two, L.L.C.'s petition to the Springfield City Council to amend an existing special permit, OPED's analysis and approval of the proposed

A. Springfield's Zoning Ordinance

A description of the pertinent provisions of Springfield's Zoning Ordinance ("Zoning Ordinance") is fundamental to the court's discussion. The property at 36 Martone Place is located in a Business B zone where non-medical office buildings, such as the one Plaintiffs proposed for the RMV project, are permitted as of right (Dkt. No. 1 ¶¶ 40, 41; Dkt. No. 30-1 at 90). Because the proposed building's area was to be under 20,000 square feet, § 12.1.21B of the Zoning Ordinance required Plaintiffs to submit a Tier 1 Administrative Site Plan to OPED for review (Dkt. No. 1 ¶¶ 41, 42; Dkt. No. 30-1 at 81, 269).[3]

Sections 12.0 to 12.2 of Article 12 of the Zoning Ordinance address the procedures and criteria for the administrative site plan reviews that OPED conducts (Dkt. No. 1 ¶ 43; Dkt. No. 30-1 at 269-74). Section 12.2.11 requires a complete application for administrative site plan review to include "a plan of the subject parcel on a location map (i.e. a tax map) showing boundaries and dimensions of the parcel and identifying contiguous properties and streets that are within fifty (50) feet of a proposed structure as well as any easements or rights-of-way" (Dkt. No. 30-1 at 271).[4] In addition, § 12.2.12B gives OPED discretion to require a site plan subject

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amendment of the special permit, and HDC Two, L.L.C.'s withdrawal of the request to amend the special permit on November 24, 2014 (Dkt. No. 23-3); a letter to the Springfield City Solicitor regarding the ownership of Martone Place and related materials (Dkt. No. 23-7 at 5-9); application for a Tier 1 Administrative Site Plan Review for proposed RMV at Martone Place, and revisions (Dkt. No. 23-7 at 16-31); and a letter of February 8, 2016 from an abutter on Martone Place (Dkt. No. 23-8).

[3] The Zoning Ordinance establishes "Review Tiers" (Tiers 1, 2, and 3) "based on the scale and potential impact of a particular use" (Dkt. No. 30-1 at 77).

[4] The Zoning Ordinance uses all upper case letters for words that are defined in its definition section. For clarity, the court does not follow this format when quoting portions of the Zoning Ordinance (Dkt. No. 30-1 at 21).

to Tier 1 review to include "[t]he proposed location and arrangements of structures and uses on the site, including means of ingress and egress, parking, circulation of traffic, and outdoor refuse storage areas" (*id.*).

Section 12.2.32 of the Zoning Ordinance mandates that OPED review an application and notify an applicant whether its application is complete or incomplete within five (5) business days of submission (*id.* at 273). OPED is required by § 12.2 to conduct administrative site plan reviews "in cooperation with the building commissioner's office, Department of Public Works, and other departments that have jurisdiction" (*id.* at 271). Accordingly, once OPED determines that the application is complete, OPED "shall circulate it to other agencies and departments that have jurisdiction over the application as determined by . . . [OPED]" (*id.* at 273). Section 12.2.34 requires the other city departments to comment on the application within twenty days and requires OPED to complete its administrative site plan review within thirty days of determining that the application is complete (*id.* at 273).

Sections 12.2.20 – 12.2.24 of the Zoning Ordinance state the following administrative site plan review criteria:

§ 12.2.21	In order to grant administrative approval of a site plan, . . . [OPED] must find that the application complies with this Ordinance and other applicable laws, including applicable overlay districts, site and use standards.
§ 12.2.22	In making its decision, . . . [OPED] may refer for guidance to the review criteria in Section 12.3.[5]0 Planning Board Site Plan Review Criteria.
§ 12.2.23	[OPED] shall not deny approval of an application that meets all applicable requirements.
§ 12.2.24	[OPED] may impose reasonable conditions that are reasonably necessary, to ensure compliance with applicable standards and any other applicable provisions of this Ordinance, consistent with the limitations set forth in Section 12.3.70. These conditions shall be incorporated into the building permit conditions or other approval issued by the City related to the proposed development.

(*id.* at 272). Section 12.2.22 refers OPED to the "Planning Board Site Plan Review Criteria," §§ 12.3.50 – 12.3.51, which lists seven criteria to be used when reviewing a site plan (*id.* at 272, 278-79). Section 12.3.51 permits the imposition of conditions, including those designed to ensure that the proposed use, development, or structure will "[n]ot impair pedestrian safety or overload existing roads, considering their current width, surfacing, and condition" (*id.* at 278-79). Section 12.2.24 directs OPED to §§ 12.3.70 - 12.3.71, which describe limits on the conditions that OPED can impose on a site plan (*id.* at 272). These provisions state:

> In granting approval of an application, [OPED] may impose reasonable conditions, limitations and safeguards which shall be in writing and shall be part of such approval. Such conditions shall be limited to those necessary to ensure compliance with the review criteria in Section 12.3.51, to ensure access to the site and to minimize off-site impacts on traffic and water quality both during and after construction.

(*id.* at 280).

According to § 12.2.51, "[a]n applicant may appeal a decision of . . . [OPED] to the Planning Board by filing a request for review within ten (10) business days of the filing of . . . [OPED's] decision in the City Clerk's Office" (*id.* at 274). The Zoning Ordinance designates the Planning Board as a "special permit granting authority" (*id.* at 57). Section 17 of Mass. Gen. Laws ch. 40A ("the Zoning Act") permits "[a]ny person aggrieved by a decision of . . . any special permit granting authority" to appeal to the land court, the superior court, or the housing court departments of the Massachusetts Trial Court. Mass. Gen. Laws ch. 40A, § 17.

According to Zoning Ordinance § 12.1.21C, after OPED reviews and approves a site plan, the applicant submits a building permit application to the building commissioner's office, "consistent with all conditions and requirements of such approval. The building commissioner, in reviewing the application, shall insure that all such conditions and requirements have been satisfied . . . and shall process the application as provided in Section 11.1.1[4]" (*id.* at 269).

Section 11.1.14 mandates that the building commissioner grant or deny a building permit "as soon as practical, but in no event in more than thirty (30) days of receiving a complete application, and shall inform the applicant by sending the permit or denial by mail, or by delivering it in person to the applicant at the building commissioner's office, within that thirty (30) day period" (*id.* at 263). If the building commissioner decides not to issue a building permit, the applicant can appeal the decision to the Zoning Board of Appeals in accordance with § 11.2.11 (*id.* at 264). Section 17 of the Zoning Act permits an appeal of the Zoning Board of Appeals' decision to the Massachusetts superior court, land court, or the Hampden County Division of the housing court within twenty days of the Zoning Board's filing of its decision with the Springfield City Clerk (*id.* at 267). *See* Mass. Gen. Laws ch. 40A, § 17.

B. Facts

Because this is a motion to dismiss, "the court accepts as true the well-pleaded factual allegations contained in the complaint, drawing reasonable inferences in the Plaintiffs' favor." *S. Commons Condo. Ass'n v. City of Springfield*, 967 F. Supp. 2d 457, 460 (D. Mass. 2013), *aff'd sub nom. S. Commons Condo. Ass'n v. Charlie Arment Trucking, Inc.*, 775 F.3d 82 (1st Cir. 2014).

This law suit involves Plaintiffs' parcel of land that includes 36 and 60 Martone Place and 559 St. James Avenue (Dkt. No. 1 ¶¶ 9, 10, 11).[5] The relocated Martone Place ("new Martone Place") is a private way that meets St. James Avenue, a public way, near the intersection of

[5] HDC owns 36 Martone Place and 575 St. James Avenue and Martone owns 60 Martone Place (Dkt. No. 1 ¶¶ 9, 10). According to the complaint, "Martone is controlled by the principals of HDC and, as a legal and practical matter, has control of the title to and development of 36 Martone Place and 575 St. James Avenue" (*id.* ¶ 11).

Tapley Street, also a public way (Dkt. No. 23-5 at 3).[6] On December 27, 2005, the city council issued special permits for HDC's construction of a car wash at 36 Martone Place and a gas station/Dunkin Donuts with a drive-up window at HDC's contiguous properties at 559 St. James Avenue and 11-13 Tapley Street (Dkt. No. 23-5 at 3; Dkt. No. 23-7 at 10-15).[7] The special permits imposed specific conditions on the developments, including converting the new Martone Place from a private way to a public way and obtaining DPW's approval prior to applying for building permits (Dkt. No. 23-5 at 3; Dkt. No. 23-7 at 10 ¶¶ 4, 5). HDC abandoned its plan to build the car wash at 36 Martone Place (Dkt. No. 23-5 at 3; Dkt. No. 23-7 at 10-15).

In 2013, the Massachusetts Division of Capital Asset Management and Maintenance ("DCAMM") sought proposals for the construction and lease to MassDOT of an approximately

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[6] "If a road has never been dedicated and accepted, laid out by public authority, or established by prescription, such road is private." *W.D. Cowls, Inc. v. Woicekoski*, 385 N.E.2d 521, 522 (Mass. App. Ct. 1979). The court can take judicial notice of the facts that St. James Avenue and Tapley Street are public ways within Springfield. *See United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999) ("'official government maps have long been held proper subjects of judicial notice'") (quoting *Gov't of Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979)); *see also* Fed. R. Evid. § 201(b).

[7] Section 9 of the Massachusetts Zoning Act addresses special permits as follows: "Zoning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit. Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use." Mass. Gen. Laws ch. 40A, § 9. "Special permit procedures have long been used to bring flexibility to the fairly rigid use classifications of Euclidean zoning schemes[,] [*see Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926),] by providing for specific uses which are deemed necessary or desirable but which are not allowed as of right because of their potential for incompatibility with the characteristics of the district." *SCIT, Inc. v. Planning Bd. of Braintree*, 472 N.E.2d 269, 274 (Mass. App. Ct. 1984). In Springfield, the city council, the planning board, and the board of appeals are authorized to issue special permits (Dkt. No. 30-1 at 57).

14,000 square foot office building to replace the "aged and obsolete" RMV building on Liberty Street in Springfield (Dkt. No. 1 ¶¶ 12, 13). DCAMM awarded Martone the contract to construct the building on its property at 36 Martone Place with parking at Plaintiffs' adjacent properties (*id.* ¶¶ 14, 18). On February 26, 2014, Martone and MassDOT entered into a ten-year lease with rental payments of $625,600 per year (*id.* ¶¶ 19, 20). Plaintiffs anticipated that the lease would extend into the "2050's" (*id.* ¶ 21). The lease required "substantial completion" of the building within about seven months (*id.* ¶ 22). The RMV's urgent need to replace its Liberty Street facility dictated the accelerated timeline (*id.* ¶ 23).

In March 2014, Michael Frisbie ("Frisbie"), a principal of both Plaintiffs, and his attorney met with Dromey of OPED and Cignoli of DPW to discuss the RMV project (*id.* ¶¶ 44, 47). According to the complaint, Dromey and Cignoli displayed "immediate hostility" toward the project during the meeting and Cignoli contested Plaintiffs' ownership of part of the site of the proposed development (*id.* ¶¶ 48, 49). Plaintiffs allege that Cignoli's contention was erroneous (*id.* ¶ 49). Chwalek's, Cignoli's, and Dromey's antagonism toward the project was allegedly apparent a month later during a meeting they attended with Frisbie, Plaintiffs' traffic and civil engineers, and representatives of MassDOT and the RMV (*id.* ¶¶ 50, 51). Plaintiffs claim that, during the meeting, Chwalek, who was DPW director at the time, "angrily pounded on the plan showing the proposed location of the new RMV [facility] and shouted, '[I]t's not going there!'" (*id.* ¶ 52). After the meeting, Dromey purportedly told Frisbie that unsatisfied conditions on the special permits that were issued for the earlier projects on the property (the gas station, drive-up window, and car wash) would prevent the RMV project from advancing, despite the city's failure to cite Plaintiffs for any noncompliance or violations (*id.* ¶¶ 54, 55; Dkt. No. 23-7 at 10-15).

On May 6, 2014, HDC filed with OPED an application for "Administrative Site Plan Review (Tier 1)" for construction of a 14,300 square foot office building and parking lot at 36 Martone Place and Plaintiffs' neighboring properties (Dkt. No. 1 ¶ 59). According to Plaintiffs, Dromey called their counsel on the day they filed the application complaining that the filing was premature and that it "start[ed] the clock running" on OPED's thirty-day deadline to complete the approval process (*id.* ¶ 60). The next day, Dromey notified Plaintiffs that the application was incomplete (*id.* ¶ 63). HDC submitted a complete application for "Administrate Site Plan Review (Tier 1)" on or about June 12, 2014 (*id.* ¶¶ 65, 66). On that day, Dromey notified HDC that "'a full separate submission to DPW, for their review and approval, [would] still be required'" (*id.* ¶ 67). Plaintiffs assert that, when questioned, Dromey could not cite the provisions of the Zoning Ordinance that required the DPW's review and approval of the site plan and Cignoli did not respond to Plaintiffs' questions about the DPW's "'approval process'" (*id.* ¶¶ 68, 69, 78). Plaintiffs contend that, consistent with Cignoli's practice to exert control over city development, he unlawfully erased the street number for 36 Martone Place after the existing building was demolished and, without a street number, the building commissioner would not issue a building permit (*id.* ¶¶ 80-85).

On June 13, 2014, after Cignoli told Plaintiffs that he had not received any information about the project, they submitted the site plan, including the traffic impact and drainage analyses, in order for Cignoli to assign a street number to the property at 36 Martone Place (*id.* ¶¶ 73, 85, 88). Five days later, Cignoli told Plaintiffs that DPW had begun reviewing their traffic impact analysis (*id.* ¶ 89).

On July 1, 2014, OPED issued its Administrative Site Plan Review Conditional Approval imposing "over a dozen conditions [that had] to be met before the building permit could be

issued" (Dkt. No. 1 ¶ 90; Dkt. No. 23-5 at 4). At least four of the conditions involved DPW's review or approval (Dkt. No. 23-5 at 4). Specifically, OPED directed HDC to "obtain all 'reviews/approvals required by . . . [DPW]'" (Dkt. No. 1 ¶ 91; Dkt. No. 23-5 at 4).[8]

On July 18, 2014, HDC applied to Desilets, the building commissioner, for a building permit for the RMV project at 36 Martone Place notwithstanding its failure to comply with the DPW-related conditions included in OPED's site plan conditional approval (Dkt. No. 1 ¶ 101; Dkt. No. 23-5 at 4). HDC's contractors began site work at 36 Martone Place based on a deputy building commissioner's verbal representation that the building permit would be issued within a week and that Plaintiffs could begin site work "immediately" (Dkt. No. 1 ¶¶ 104, 105). On July 23, 2014, Cignoli who, according to Plaintiffs, purported "to speak on behalf of the [c]ity," sent

[8] OPED imposed the following conditions involving the DPW that Plaintiffs were required to satisfy before applying for a building permit:

> 6. Any and all reviews/approvals required by . . . [DPW] shall be obtained prior to the issuance of a building permit. As part of that review, a final determination shall be made regarding the status of the new Martone Place.
>
> 7. If the final DPW review results in a change to the approved site plan, a revised site plan shall be submitted to . . . [OPED] for review and approval prior to issuing a building permit.
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> 8. If the determination is made that Martone Place is to remain a private way and is approved as such by DPW, the petitioner shall apply to the City Council to amend the existing special permits granted December 27, 2005 . . . requiring that the newly laid out Martone Place become a public way . . . .
>
> 9. If the determination is made that Martone Place is to become a public way and is approved as such by DPW, all required material shall be submitted to the Board of Public Works for the acceptance of Martone Place as a public way prior to issuing a building permit.

(Dkt. No. 23-5 at 4).

an "unsolicited" email message to MassDOT telling them that the city and Plaintiffs were "'miles apart'" and the project's timeline would be affected (Dkt. No. 1 ¶ 106).

Six days later on July 29, 2014, the building department and Commissioner Desilets notified Frisbie that Desilets would not issue a building permit without first obtaining DPW's approval (Dkt. No. 1 ¶¶ 108, 109, 112; Dkt. No. 23-5 at 5). A deputy building commissioner told Plaintiffs that DPW "had an issue" that was preventing the issuance of the building permit (Dkt. No. 1 ¶¶ 110, 111, 112).

Plaintiffs responded to the conditions imposed by DPW regarding the status of the new Martone Place, which were included in the OPED's conditional site plan approval, by revising the site plan to reflect that the new Martone Place would remain a private way (Dkt. No. 23-6 at 2-3). On July 30, 2014, OPED answered this change by supplementing its administrative site plan review conditional approval with three conditions that had to be satisfied prior to Plaintiffs' application for a building permit (Dkt. No. 23-6 at 2-3).[9] These requirements and other conditions, including required revisions of proposed traffic patterns and parking, were reflected

[9] Plaintiffs were required to:

1. Amend the special permits granted by the city council on December 27, 2005 for 36 Martone Place, 559 St. James Avenue, and 11-13 Tapley Street to reflect that Martone Place would not become a public way as originally planned when the special permits were granted.

2. Obtain a variance from the Zoning Board of Appeals because the proposed RMV building's frontage on private property (Martone Place) [would] not meet the requirements of section 7.1.52 of the Zoning Ordinance, which require frontage on a public way.

3. Submit a revised site plan to OPED if "the continued DPW review results in a change to the approved site plan and/or the submission of additional information."

(Dkt. No. 23-6 at 2-3).

in the July 31, 2014 report of a DPW engineer who studied Plaintiffs' project and denied approval of the site plan pending Plaintiffs addressing the comments to DPW's "satisfaction" (Dkt. No. 1 ¶¶ 95, 114; Dkt. No. 23-5 at 4-5; Dkt. No. 23-6 at 4-15).

Desilets and Cignoli issued cease and desist orders for the site work that began after HDC applied for the building permit and obtained verbal approval to commence work (Dkt. No. 1 ¶ 116). According to Plaintiffs, Desilets and Cignoli "or their representatives" told HDC's site contractor "that he would never work in Springfield again" and DPW's employees told the site contractor's workers, "'[N]ow we have your neck in a noose'" (*id.* ¶¶ 117, 118).[10]

Notwithstanding Plaintiffs' alleged compliance with all DPW's conditions, DPW issued "scores of more comments" that Plaintiffs were required to address in order to obtain a building permit and Desilets continued to refuse to issue the permit (*id.* ¶¶ 99, 100, 119). Cignoli allegedly made the removal of Frisbie and Plaintiffs' legal counsel conditions precedent to further discussions (*id.* ¶ 120). Plaintiffs agreed to Cignoli's purported demands, hired a consultant to negotiate with Cignoli, and obtained "numerous additional traffic studies, all of

[10] On July 31, 2014, Plaintiffs filed a "Verified Emergency Petition for Mandamus Relief" in the Supreme Judicial Court for Suffolk County, docket number SJ-2014-0316 (Dkt. No. 23-1 at 3). After a telephonic hearing on August 6, 2014, the single justice of the Massachusetts Supreme Judicial Court transferred the case to the Superior Court Department of the Trial Court for Hampden County for Civil Business (Dkt. No. 23-1 at 3, 4). There, Plaintiffs sought mandamus relief in the form of a court order directing the Springfield building commissioner to issue the building permit (Dkt. No. 23-5 at 3). On September 25, 2014, Massachusetts Superior Court Judge Bertha D. Josephson denied Plaintiffs' petition for mandamus relief finding that: (1) under the Zoning Ordinance, the building commissioner did not have the authority to issue the building permit because Plaintiffs had not complied with the conditions imposed by the administrative site plan conditional approval; and (2) Plaintiffs had not exhausted their administrative remedies because the Zoning Act, Mass. Gen. Laws ch. 40A, § 8, provides for an appeal of the denial of a building permit (Dkt. No. 23-5 at 5-7). Judge Josephson determined that there was no support for Plaintiffs' argument that the building commissioner's failure to issue the building permit was "due to improper DPW interference" (*id.* at 6).

which resulted in the conclusion that the project design was appropriate" (*id.* ¶¶ 119, 122). Cignoli, however, withheld his approval (*id.* ¶ 121). Although Plaintiffs were "legally required" to keep open a right of way onto Tapley Street, they allege that Cignoli indicated that he would not approve "*any plan for any use*" of the site that permitted RMV customers to use a right of way to access Tapley Street and to turn left onto Tapley Street (*id.* ¶¶ 123, 124) (emphasis original).

In 2015, Plaintiffs submitted another site plan for OPED's review and approval (*id.* ¶ 127).[11] This plan included relocating the proposed RMV building to 60 and 70 Martone Place with parking at 36 Martone Place and 575 St. James Avenue (Dkt. No. 1 ¶ 127; Dkt. No. 23-7 at 2). On May 1, 2015, OPED determined that the site plan did not comply with the Zoning Ordinance (Dkt. No. 23-7 at 2-4). One reason for OPED's rejection of the site plan was the fact that "the plans continue to show a connection to Tapley Street which has previously been identified by DPW as having significant existing traffic related safety concerns" (*id.* at 4). Plaintiffs appealed OPED's decision to the Planning Board, which denied the appeal on June 19, 2015 (Dkt. No. 23-4 at 7). On July 7, 2015, Plaintiffs' appeal of the Planning Board's decision was entered onto the docket of the Land Court Department of the Massachusetts Trial Court (Dkt. No. 23-2 at 2). *See* Mass. Gen. Laws ch. 40A, § 17. The parties entered into a stipulation of dismissal of the case without prejudice on May 3, 2016 (*id.* at 11-12).

[11]Although the date Plaintiff submitted the second site plan is absent from the complaint, the court infers that it was submitted in 2015 based on the requirement that OPED act on a complete site plan within thirty days of its submission and OPED's rejection of the site plan on May 1, 2015 (Dkt. No. 1 ¶ 2-4; Dkt. No. 30-1 at 273). The exact date of Plaintiffs' submission is inconsequential because the allegations in the complaint stem from the site plan that was submitted on or about June 12, 2014 (Dkt. No. 1 ¶ 65, 66).

Meanwhile, on May 21, 2015, after OPED rejected Plaintiffs' second site plan, Albany Road-St. James Avenue, L.L.C. in partnership with Davenport Advisors, L.L.C. ("Davenport Advisors") purchased the building at 1250 St. James Avenue in Springfield (Dkt. No. 1 ¶¶ 28, 125, 126). The next day, MassDOT terminated the lease with Martone based on its failure to substantially complete the RMV project on time (*id.* ¶ 125).

The Davenport Companies are partners with MGM Springfield ("MGM") for the development of MGM's casino in Springfield (*id.* ¶¶ 7, 25).[12] Plaintiffs describe themselves as "outsiders," in contrast to the Davenport Companies who Plaintiffs contend are "insider[s]" and the city's "preferred developers" (*id.* ¶¶ 45, 46). According to the complaint, Springfield's mayor praised the Davenport Companies "for their 'belief and investment in Springfield [that] has been [an] integral part of the Springfield renaissance'" (*id.* ¶ 31). The Davenport Companies formed Davenport Advisors in May 2014 "to provide advisory services and operate real estate" (*id.* ¶ 27). Davenport Advisors was ultimately awarded the RMV lease for a building at 1250 St. James Avenue (*id.* ¶ 128).[13]

[12] According to Plaintiffs, in February 2015, after Chwalek's retirement as DPW director in May 2014, the Springfield Redevelopment Authority hired him to be a "consultant liason" to MGM "to assist MGM by expediting the casino construction process" (Dkt. No. 1 ¶ 7).

[13] Plaintiffs allege that an unidentified "politically connected and influential Springfield businessman," whose property was not chosen for the casino project, expressed an interest in the RMV project after MassDOT had awarded the lease to Plaintiffs (Dkt. No. 1 ¶¶ 32-34). When DCAMM told the unidentified businessman's representative that it was "too late" to bid on the RMV project because Plaintiffs and RMV had signed a lease, the representative allegedly told DCAMM, "'[T]hat doesn't matter. [A] signed lease doesn't mean anything in the City of Springfield" (*id.* ¶¶ 35, 37, 39). Plaintiffs interpret this comment as conveying the message to DCAMM "that the Springfield businessman had sufficient influence over city officials to ensure that Martone's development plans would be quashed by the [c]ity, such that MassDOT and DCAMM would have to move on to others to insure timely construction of the new RMV" (*id.* ¶ 139). However, Plaintiffs do not allege that this businessman bid for the RMV project or was connected to Davenport Advisors.

III. STANDARD OF REVIEW

All the claims in Plaintiffs' complaint are related to their applications for site plan review and a building permit in 2014. Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) (Dkt. No. 10). "Motions to dismiss under Rule 12(b)(6) . . . test the sufficiency of the pleadings." *Hagenah v. Cmty. Enters., Inc.*, Case No. 15-cv-30036-KAR, 2016 WL 1170963, at *3 (D. Mass. Mar. 23, 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim [for] relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Plausibility does not demand a showing that the claim is likely to succeed. It does, however, demand a showing of 'more than a sheer possibility' of success." *Butler v. Balolia*, 736 F.3d 609, 616 (1st Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). In order to meet the plausibility standard, "[t]he plaintiff must proffer more than mere 'labels and conclusions' or 'naked assertions devoid of further factual enhancement.'" *Garrity, Levin & Muir, LLP v. United States*, CIVIL ACTION NO. 15-11405-RGS, 2015 WL 6126816, at *2 (D. Mass. Oct. 16, 2015) (quoting *Iqbal*, 556 U.S. at 678). "Dismissal is appropriate if the complaint does not set forth '"factual allegations, either direct or inferential, respecting each element necessary to sustain recovery under some actionable legal theory."'" *S. Commons Condo. Ass'n*, 967 F. Supp. 2d at 463 (quoting *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir. 2005)).

IV. DISCUSSION

A. Section 1983 Procedural and Substantive Due Process Claims Against All Defendants (Count I)

Plaintiffs' due process claims are brought against all Defendants pursuant to 42 U.S.C. § 1983 (Dkt. No. 1 at 17). *See Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011) ("'Section

1983 supplies a private right of action against a person who, under color of state law, deprives another of rights secured by the Constitution or by federal law.'") (quoting *Redondo-Borges v. U.S. Dep't of HUD*, 421 F.3d 1, 7 (1st Cir. 2005)). "The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving any person of 'life, liberty, or property, without due process of law.'" *Harron v. Town of Franklin*, 660 F.3d 531, 535 (1st Cir. 2011) (quoting U.S. Const. amend. XIV, § 1). "This prohibition guards against 'the arbitrary exercise of the powers of government.'" *Id.* (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)). It "applies fully to a state's political subdivisions, including municipalities and municipal agencies." *DePoutot v. Raffaelly*, 424 F.3d 112, 117 (1st Cir. 2005) (citing *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 286–87 (1913)). Plaintiffs claim Defendants violated the procedural and substantive components of the Due Process Clause.

1. Procedural Due Process

Plaintiffs allege that Defendants impermissibly imposed conditions on the issuance of the building permit for the 2014 RMV project with the intent of preventing Plaintiffs from meeting the deadline for completion under their contract with MassDOT (Dkt. No. 1 ¶ 64). According to Plaintiffs, by requiring DPW's review and approval as a condition precedent to obtaining a building permit, OPED created "a separate DPW process," which deprived Plaintiffs of their property without due process because they had no available means to challenge DPW's decisions (Dkt. No. 20 at 4). Defendants rejoin that Plaintiffs failed to avail themselves of the avenues of relief afforded by the Zoning Ordinance and Zoning Act (Dkt. No. 22 at 17). For the reasons stated below, Defendants' contention is persuasive as a matter of law.

"Procedural due process guarantees that a state proceeding which results in a deprivation of property is fair . . . ." *Licari v. Ferruzzi*, 22 F.3d 344, 347 (1st Cir. 1994).

> The First Circuit generally approaches procedural due process challenges to local land-use and zoning decisions with considerable skepticism: "where . . . the state has erected a complex statutory scheme and provided for avenues of appeal to the state courts, property is not denied without due process simply because a local [authority] rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes."

Brockton Power LLC v. City of Brockton, 948 F. Supp. 2d 48, 67 (D. Mass. 2013) (quoting *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir. 1982)). "The First Circuit's concern is that without a high bar to such claims, federal courts would 'sit as a "zoning board of appeals" . . . [involved] in political disputes better left to local governments.'" *Mongeau v. City of Marlborough*, 462 F. Supp. 2d 144, 149 (D. Mass. 2006), *aff'd*, 492 F.3d 14 (1st Cir. 2007) (quoting *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 46 (1st Cir. 1992)). *See also Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985). "To allege a procedural due process claim under 42 U.S.C. § 1983, a plaintiff must allege: '(1) that it had a property interest defined by state law; and (2) that defendants, acting under color of state law, deprived it of that interest without adequate process.'" *Brockton Power LLC*, 948 F. Supp. 2d at 67 (quoting *Licari*, 33 F.3d at 347).

Defendants do not dispute that they acted under color of state law (Dkt. No. 22 at 17-19). HDC, the owner of 36 Martone Place, and Martone, the lessor under the MassDOT lease, had a protected property interest (Dkt. No. 1 ¶¶ 9, 11, 19; Dkt. No. 22 at 17 & n.1).[14] The central

[14] Without citation to authority in support of their position, Defendants apparently dispute -- mostly in a footnote -- whether Plaintiffs adequately pled HDC's protected property interest in Martone's lease "with a third party in a proposed building not yet constructed" (Dkt. No. 22 at 17 & n.1). *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999) ("We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived."). The court, however, need not resolve this question because "[i]n section 1983 claims brought in the context of land-use disputes, the First Circuit has invariably assumed *arguendo* that there was a property interest and examined whether there was sufficient *process* afforded the would-be property developers." *Mongeau*, 462 F. Supp. 2d at 150. The court follows this

question for resolution is whether, when the smoke created by Plaintiffs' allegations of Defendants' improper motives is cleared from the complaint, *see, e.g., Iqbal*, 556 U.S. at 678, OPED's imposition of the condition requiring Plaintiffs to obtain "[a]ny and all reviews/approvals required by DPW . . . prior to the issuance of a building permit" for the RMV project created a discrete and "fictitious" DPW approval process that evaded review, thereby depriving Plaintiffs of their property without due process (Dkt. No. 1 ¶¶ 74, 75, 76, 91, 132).

The answer to the question posed lies in an analysis of Plaintiffs' allegations within the framework of the Zoning Ordinance and the Zoning Act. Because Plaintiffs' proposed project was a use permitted by right under the Zoning Ordinance, Plaintiffs were required to apply to OPED for site plan review before applying for a building permit (Dkt. No. 1 ¶¶ 40-43; Dkt. No. 30-1 at 269). "The Zoning Act . . . does not specifically recognize site plans as an independent method of regulation. However, the use of site plan approval as a permissible regulatory tool for controlling the aesthetics and environmental impacts of land use has been recognized [in Massachusetts] since [1970]." *Dufault v. Millennium Power Partners, LP*, 727 N.E.2d 87, 89 (Mass. App. Ct. 2000) (citations omitted). "Site plan review . . . occurs with respect to preliminary plans submitted by a developer, and the review requires the municipal [agency] to assess the project's impact on the city or town (and the area where it will be located) with respect to a variety of issues." *St. Botolph Citizens Comm., Inc. v. Bos. Redevelopment Auth.*, 705 N.E.2d 617, 622 (Mass. 1999). The local reviewing agency is permitted to impose reasonable terms and conditions on the anticipated project that are designed to protect the public. *See id.* (citing *Y.D. Dugout, Inc. v. Bd. of Appeals of Canton*, 255 N.E.2d 732, 736-37 (Mass. 1970)).

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approach and assumes, for purposes of this motion, that both Plaintiffs have sufficient property interests.

See also Castle Hill Apartments Ltd. P'ship v. Planning Bd. of Holyoke, 844 N.E.2d 1098, 1103 (Mass. App. Ct. 2006) ("Site plan review . . . is not without some teeth. 'A board . . . possesses discretion to impose reasonable conditions under a by-law's requirements in connection with approval of a site plan, even if the conditions are objected to by the owner or are the cause of added expense to the owner.'") (quoting *Prudential Ins. Co. of Am. v. Bd. of Appeals of Westwood*, 502 N.E.2d 137, 141 n.9 (Mass. App. Ct. 1986)).

Section 12.2 of the Zoning Ordinance mandated DPW's involvement in OPED's administrative site plan review, and §§ 12.2.24 and 12.2.35 permitted OPED to impose reasonable conditions precedent to obtaining a building permit (Dkt. No. 30-1 at 271-273). Plaintiffs do not challenge the facial adequacy of these provisions. Because OPED was required to conduct its site plan review in cooperation with DPW and because OPED was permitted to impose reasonable conditions, including those designed to ensure that "existing roads" were not "overload[ed] . . . considering their current width, surfacing and condition," the Zoning Ordinance permitted OPED to impose DPW-related conditions (*id.* at 271-273, 279).

Plaintiffs' contention – that DPW's comments and conditions should have been submitted to OPED and included in its conditional approval – is based on a misreading of provisions of the Zoning Ordinance (Dkt. No. 1 ¶ 97). Section 12.2 says: "Administrative Site Plan Review *shall* be conducted by . . . [OPED] in cooperation with the building commissioner's office, Department of Public Works, and other departments that have jurisdiction" (Dkt. No. 30-1 at 271) (emphasis added). Section 12.2.32 directs OPED to circulate a complete application for administrative site plan review to "all other agencies and departments that have jurisdiction over the application as determined by . . . [OPED]" (*id.* at 273). The "other city departments" have twenty days to comment on the application (*id.*). While §§ 12.2 and 12.2.32 give OPED discretion to determine

the other departments that have jurisdiction, the mandatory language of § 12.2 requires OPED to include DPW in the application review process (*id.* at 271, 273). OPED included four DPW-related conditions in its site plan approval (Dkt. No. 23-5 at 4).

Even if DPW's comments should have been submitted to OPED within twenty days, the procedure used did not cause undue delay. Plaintiffs submitted their site plan to OPED on June 12, 2014 (Dkt. No. 1 ¶ 66). DPW began its review six days later (*id.* ¶ 89). OPED approved the site plan on July 1, 2014, with conditions that included DPW's review or approval (*id.* ¶ 90). Thereafter, Plaintiffs revised their site plan, OPED reviewed and approved the revisions, with conditions, on July 30, 2014, and DPW issued its report and comments the next day denying approval of the site plan pending Plaintiffs' addressing DPW's comments (Dkt. No. 1 ¶ 95; Dkt. No. 23-6 at 2-15).

In order to determine whether Plaintiffs were deprived of procedural due process, the court focuses on "what process the [s]tate provided and whether it was constitutionally adequate." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). This inquiry "examine[s] the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." *Id.*

Here, the Zoning Ordinance and state law satisfied procedural due process by providing adequate post-deprivation procedures that afforded Plaintiffs the opportunity to rectify what they perceived to be DPW's unlawful conditions that resulted in delay of the RMV project. *See Mongeau*, 462 F. Supp. 2d at 150 ("The First Circuit has affirmed the adequacy of the post-deprivation remedies available under Massachusetts zoning law."). "The First Circuit has declared that 'where . . . the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by

means of 42 U.S.C. § 1983.'" *Id.* (quoting *Raskiewicz*, 754 F.2d at 44); *see also Chongris v. Bd. of Appeals of Andover*, 811 F.2d 36, 41–42 (1st Cir. 1987); *Creative Env'ts, Inc.*, 680 F.2d at 832 n.9. Plaintiffs, although they fail to acknowledge this fact, had an adequate administrative and judicial remedy. They applied for a building permit prior to obtaining DPW's review and approval, which violated OPED's site plan approval conditions (Dkt. No. 23-5 at 4). When Desilets refused to issue the permit due to Plaintiffs' failure to comply with the DPW-related conditions that OPED imposed, Plaintiffs could have appealed the building commissioner's decision to the Zoning Board of Appeals pursuant to § 11.2.11 (Dkt. No. 30-1 at 264 ["An appeal to the Zoning Board of Appeals may be taken by any person aggrieved by reason of his inability to obtain a permit . . . ."]). *See* Mass. Gen. Laws ch. 41A, §§ 8, 14. If dissatisfied with the Zoning Board of Appeals' decision, Plaintiffs had the opportunity to seek review by the state land court, superior court, or housing court, which all had authority to award most, if not all, of the relief Plaintiffs seek in this court; that is, money damages for unlawful conduct. *See Sheppard v. Zoning Bd. of Appeal of Bos.*, 963 N.E.2d 748, 757 (Mass. App. Ct. 2012) (money damages may be an appropriate remedy for a zoning law violation); Mass. Gen. Laws ch. 41A, § 17. *Compare Licari*, 22 F.3d at 348-49 (rejecting a developer's procedural due process claim based on delay of the project where "the state provided adequate remedies"); *Amsden v. Moran*, 904 F.2d 748, 755 (1st Cir. 1990) ("The availability of judicial review is an especially salient consideration in situations where permits and licenses have been denied or revoked by state or local authorities in alleged derogation of procedural due process."). HDC's failure to exhaust

available administrative remedies is a reason for the Superior Court's denial of mandamus relief in September 2014 (Dkt. No. 23-5).[15]

In addition, Plaintiffs acknowledge that § 12.2.51 of the Zoning Ordinance permits an applicant for site plan review to appeal to the planning board the "reasonableness of any conditions" OPED imposes (Dkt. No. 20 at 4; Dkt. No. 30-1 at 274). Plaintiffs contend that this remedy was not available to them because DPW's requirements were somehow "outside [OPED's] site plan approval process" (Dkt. No. 20 at 4). Based on the record, this contention is unavailing. OPED imposed compliance with DPW's requirements as "conditions" required to be satisfied before a building permit issued (Dkt. No. 23-5 at 4). Because OPED imposed DPW's requirements as "conditions," their reasonableness was immediately appealable to the planning board pursuant to § 12.2.51 of the Zoning Ordinance (Dkt. No. 30-1 at 274).

Plaintiffs had more than one adequate means of obtaining relief from OPED's allegedly unlawful requirement that they comply with the conditions imposed by DPW prior to obtaining a permit. *See Licari*, 22 F.3d at 348-49. Accordingly, the court recommends dismissal of Plaintiffs' procedural due process claim.

2. Substantive Due Process

Plaintiffs support their substantive due process violation claim with allegations that: Defendants engaged in (1) a "deliberate and premeditated plan to stall [the project] and cause the termination of the lease;" and (2) threatening behavior "in order to kill the project" (Dkt. No. 1 ¶¶ 64, 85, 88; Dkt. No. 20 at 9-10). Defendants counter that the complaint lacks allegations of conscious shocking behavior (Dkt. No. 22 at 19-20). When measured against the standards

[15] HDC's petition for mandamus relief in the Massachusetts Superior Court Department of the Trial Court for the County of Hampden sought an order directing Desilets to issue the building permit (Dkt. No. 23-1 at 2; Dkt. No. 23-5).

previously articulated by the courts of this circuit, Plaintiffs' allegations -- even if proven at trial -- fall short of stating a viable substantive due process claim.

"As distinguished from its procedural cousin, . . . a substantive due process inquiry focuses on 'what' the government has done, as opposed to 'how and when' the government did it." *Amsden*, 904 F.2d at 754. "'[S]ubstantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests."'" *PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991), *overruled on other grounds by San Geronimo Caribe Project, Inc. v. Acevedo-Vila*, 687 F.3d 465 (1st Cir. 2012) (quoting *U.S. Citizens in Nicaragua v. Regan*, 859 F.2d 929, 943 (D.C. Cir. 1988)). *See Licari*, 22 F.3d at 347 ("[S]ubstantive due process ensures that [a state proceeding which results in deprivation of property] is not arbitrary and capricious."). "For Plaintiffs to adequately allege a claim for violation of substantive due process [in the land-use context], they must show that (1) Defendants violated a right protected by the substantive Due Process Clause and (2) Defendants' actions 'shock the conscience.'" *S. Commons Condo. Ass'n*, 967 F. Supp. 2d at 468 (quoting *Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010)). *See also Mongeau v. City of Marlborough*, 492 F.3d 14, 19 (1st Cir. 2007). Defendants challenge the adequacy of the pleadings as to the second element (Dkt. No. 22 at 19-20).[16]

"There is no precise formula for determining when [government] conduct rises to the level of the conscience shocking behavior necessary to sustain a substantive due process claim." *Wyrostek v. Nash*, 984 F. Supp. 2d 22, 27 (D.R.I. 2013) (citing *Pagán v. Calderón*, 448 F.3d 16,

[16] Unlike a procedural due process claim, Plaintiffs are not required to demonstrate a property interest to assert a substantive due process claim. *See Mongeau*, 462 F. Supp. 2d at 151.

32 (1st Cir. 2006)). Courts have described conscience shocking behavior as "extreme and egregious," "truly outrageous, uncivilized and intolerable," and "stunning." *Pagán*, 448 F.3d at 32). *See Harron*, 660 F.3d at 536. "[T]he First Circuit has long been reluctant to apply substantive due process analysis to alleged violations in the local planning and development process," *Collier v. Town of Harvard*, No. Civ.A.95-11652-DPW, 1997 WL 33781338, at *5 (D. Mass. Mar. 28, 1997), but has left "the door to substantive due process claims in the land use context . . . 'slightly ajar' for 'truly horrendous situations.'" *Glob. Tower Assets, LLC v. Town of Rome*, 810 F.3d 77, 90 (1st Cir. 2016) (quoting *Licari*, 22 F.3d at 350). *See Licari*, 22 F.3d at 349 ("'rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process'") (quoting *PFZ Props., Inc.*, 928 F.2d at 31). Courts in this circuit have indicated that "truly horrendous" government behavior in the land-use context may include: "racial animus, political discrimination, or fundamental procedural irregularity in the processing of the projects," *PFZ Props., Inc.*, 739 F. Supp. at 72; bribing or threatening municipal officials involved in the permitting process, *Nestor Colon Medina & Sucesores, Inc.*, 964 F.2d at 47; and an overall "corruption of the process," *Collier*, 1997 WL 33781338, at *7. *See also Brockton Power LLC*, 948 F. Supp. 2d at 69.

Plaintiffs' substantive due process claim is based on their inability to obtain the building permit due to the allegedly "fictitious" DPW approval process OPED imposed as a condition precedent to the permit's issuance (Dkt. No. 1 ¶¶ 74, 75, 91, 132, 133; Dkt. No. 20 at 9; Dkt. No. 23-5 at 4). Plaintiffs allege that Cignoli, knowing of Plaintiffs' deadline for substantial completion of the RMV project and using the authority Dromey unlawfully granted him,

imposed obstacles to Desilets's issuance of the building permit (Dkt. No. 1 ¶¶ 95, 99, 100, 109, 110, 112, 121-124).[17]

Taking these allegations as true, Plaintiffs allege that Dromey, Cignoli, and Desilets abused their authority. Abuse of authority, however, is not the type of egregious behavior that deprives developers of substantive due process. *See Hasenfus v. LaJeunesse*, 175 F.3d 68, 72 (1st Cir. 1999). "Every appeal by a disappointed developer from an adverse ruling by a local Massachusetts [official] necessarily involves some claim that the [official] exceeded, abused or 'distorted' [his] legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason." *Creative Env'ts, Inc.*, 680 F.2d at 833. Consequently, federal courts have rejected claims involving "'the rights and wrongs of local planning disputes' unless there is a 'truly horrendous situation[].'" *Mongeau*, 492 F.3d at 19 (quoting *Nestor Colon Medina & Sucesores, Inc.*, 964 F.2d at 45). Plaintiffs have not alleged facts that meet that strict standard. *Compare Gianfrancesco v. Town of Wrentham*, 712 F.3d 634, 639 (1st Cir. 2013) ("a pattern of selective and excessive enforcement of municipal regulations" did not "plausibly allege" a substantive due process violation); *Licari*, 22 F.3d at 346, 349-50 (holding that "a regulatory board does not transgress constitutional due process requirements merely by making decisions for erroneous reasons or by making demands which arguably exceed its authority under the relevant state statutes" and rejecting a substantive due process claim based on delays in processing and approval of developer's application for an amended building permit); *PFZ Props.*,

[17] According to the complaint, Cignoli intended to "extort compliance with his illegal approval process" when he erased the street number of the building at 36 Martone Place after its demolition and refused to issue another number, thereby preventing Plaintiffs from securing the building permit (Dkt. No. 1 ¶¶ 80-85; Dkt. No. 20 at 9 ¶ 85). Plaintiffs do not allege, however, that the building permit was denied due to the absence of a street number, nor can such an inference reasonably be drawn from the complaint.

Inc., 928 F.2d at 32 ("Even assuming that [the permitting authority] engaged in delaying tactics and refused to issue permits for the . . . project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label."); *cf. Cloutier v. Town of Epping*, 714 F.2d 1184, 1190 (1st Cir. 1983) ("[P]laintiffs' long list of harassing actions reveals not the type of egregious behavior that might violate the due process clause [because they involved] further disputes over the interpretation of the state and town zoning laws."). Moreover, the fact that "the allegations underlying Plaintiffs' substantive due process claims are to a very large extent indistinguishable from those underlying Plaintiffs' procedural due process claim . . . is usually the hallmark of a weak substantive due process claim." *S. Commons Condo. Ass'n*, 967 F. Supp. 2d at 469.

Plaintiffs fare no better with their allegations that Defendants' "threats" deprived them of their constitutional rights by intentionally obstructing the RMV project and causing MassDOT to cancel the lease with Plaintiffs for noncompliance with the deadline (Dkt. No. 20 at 10). To support this claim, Plaintiffs point to Chwalek's statement – "'[I]t's not going there!'" – as he pounded the project's plan, Cignoli's communication with MassDOT in July 2014, alleged threats to workers preparing the site, the cease and desist orders that Cignoli and Desilets issued, and Cignoli's refusal to discuss the project with Frisbie and HDC's attorney (Dkt. No. 20 at 10 ¶¶ 52, 106, 116, 118, 120). Viewing the allegations in the complaint in the light most favorable to Plaintiffs, Defendants' words and actions are inadequate to sustain a successful substantive due process claim because they are similar to challenges that courts have rejected in other land-use cases. *Compare Mongeau*, 492 F.3d at 19 (upholding dismissal of a substantive due process claim based on defendant's alleged "'hostility and animus'" that motivated his denial of a building

permit and interference with the zoning process) (quoting *Licari*, 22 F.3d at 349); *Nestor Colon Medina & Sucesores, Inc.*, 964 F.2d at 46 (rejecting a substantive due process claim based on "political interference with the permitting process alone"); *Raskiewicz*, 754 F.2d at 45 (permitting authority's alleged lack of cooperation and official's statement that plaintiff "'would never be given a . . . permit'" was insufficient to support a substantive due process claim).

This case lacks the characteristics of viable substantive due process claims. *See González–Fuentes v. Molina*, 607 F.3d 864, 881 (1st Cir. 2010) ("A hallmark of successful [substantive due process] challenges is an extreme lack of proportionality, as the test is primarily concerned with 'violations of personal rights . . . so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'") (quoting *Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002) (en banc)). *See Brockton Power LLC*, 948 F. Supp. 2d at 69-70 (developers stated a valid claim where defendants "often acted against the advice of legal counsel, to further their own personal interests, and while knowing that there was no legal justification for their actions" and essentially deprived plaintiffs of the ability "to develop their land for any purpose"); *Collier*, 1997 WL 33781338, at **5-7 (denying defendants' motion for summary judgment based on evidence of defendants' attempt to extort an easement from the landowner for the personal benefit of a local official). Here, there is no allegation that Defendants sought to extort money from Plaintiffs and their acts were not comparably conscience shocking. Plaintiffs' completion of the RMV project within seven months was complicated by its location, including the new Martone Place's status as a private way and the related conditions imposed by the 2005 special permit, with which Plaintiffs had failed to comply. The city had a legitimate interest in compliance with the Zoning

Ordinance's DPW-related provisions addressing pedestrian safety and traffic flow (Dkt. No. 30-1 at 278-79, 280). *See González–Fuentes,* 607 F.3d at 883 ("[T]he executive actions most likely to shock the conscience are those that are 'intended to injure in some way unjustifiable by any government interest.'") (quoting *Lewis*, 523 U.S. at 849).

Because the facts alleged in the complaint fail to demonstrate that this case differs from the "'run of the mill' land-use claims often brought by disappointed developers and rejected by federal courts in this jurisdiction," *Brockton Power LLC*, 948 F. Supp. 2d at 69, the court recommends dismissal of the substantive due process claim.[18]

B. Sections 1983 and 1985(3) Equal Protection Claim Against City Officials Individually (Count II).

Count II of the complaint alleges that the City Officials, who were "motivated by a malicious and bad faith intent . . . to benefit a similarly situated competing developer who is more influential and politically connected in the city" than Plaintiffs, conspired to deprive Plaintiffs of their constitutional right to the equal protection of the laws by "intentionally and wrongfully singl[ing] [them] out for unfavorable treatment in the RMV development process without any rational basis for the difference in treatment" (Dkt. No. 1 at 18). The City Officials counter that the complaint fails to allege sufficient facts to establish (1) the substantial similarity requirement for a plausible equal protection violation, and (2) the existence of a conspiracy to deprive Plaintiffs of their constitutional rights (Dkt. No. 22 at 20-24). The City Officials' arguments are persuasive. Indeed, Plaintiffs do not dispute the absence of facts to support a conspiracy.

[18] Without expressly alleging a violation of 42 U.S.C. § 1985(3), the complaint makes a passing reference to a conspiracy to deprive them of their due process rights (Dkt. No. 1 ¶ 131). As explained more fully below, Plaintiffs do not dispute Defendants' argument that the complaint fails to state a claim for conspiracy.

1. Equal Protection

"The Equal Protection Clause of the Fourteenth Amendment provides that similarly situated persons are to receive substantially similar treatment from governmental authorities." *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 539 F. Supp. 2d 513, 522 (D.R.I. 2008) (citing *Tapalian v. Tusino*, 377 F.3d 1, 5 (1st Cir. 2004)). Plaintiffs assert a "'class of one'" equal protection claim. *Cordi–Allen v. Conlon*, 494 F.3d 245, 250 (1st Cir. 2007) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). To prevail on a "class of one" equal protection violation, a plaintiff must prove all of these four elements: "'1) that [they were] intentionally treated differently 2) from others similarly situated 3) without a rational basis for that difference in treatment *and* 4) that the difference in treatment was due to malicious or bad faith intent on the part of the defendants to injure [the plaintiff].'" *Priolo v. Town of Kingston*, 839 F. Supp. 2d 454, 460 (D. Mass. 2014) (quoting *Walsh v. Town of Lakeville*, 431 F. Supp. 2d 134, 145 (D. Mass. 2006)). *See also Brockton Power, LLC*, 948 F. Supp. 2d at 70; *Mimeault v. Peabody*, Civil Action No. 08-11909-TSH, 2010 WL 2724002, at *4 (D. Mass. July 8, 2010).

Plaintiffs' claim is doomed by their failure to meet their "significant burden" of identifying a similarly situated project that was treated differently. *Bos. Exec. Helicopters, LLC v. Maguire*, 196 F. Supp. 3d 134, 144 (D. Mass. 2016). "'The "similarly situated" requirement [is] enforced with particular rigor in the land-use context' to prevent disappointed developers from elevating 'every zoning decision' to a federal constitutional claim." *Brockton Power, LLC*, 948 F. Supp. 2d at 70 (quoting *Cordi–Allen*, 494 F.3d at 251). *See also Torromeo v. Town Of Fremont*, 438 F.3d 113, 118 (1st Cir. 2006) ("[O]nly in 'extreme circumstances' will a land-use dispute give rise to an equal protection claim.") (citation omitted). "Two persons or entities are similarly situated if 'a prudent person, looking objectively at the incidents [complained of],

would think them roughly equivalent and the protagonists similarly situated . . . "in all relevant respects."'" *Clark v. Boscher*, 514 F.3d 107, 114 (1st Cir. 2008) (quoting *Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001)). *See Cordi-Allen*, 494 F.3d at 251 (requiring "an extremely high degree of similarity"). "'Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.'" *Barrington Cove Ltd. P'ship*, 246 F.3d at 8 (citation omitted).

Although Plaintiffs identify Davenport Advisors' RMV project at 1250 St. James Avenue as a comparator, Plaintiffs fail to establish the requisite degree of similarity between the two projects. *See Bos. Exec. Helicopters, LLC*, 196 F. Supp. 3d at 144. In fact, Plaintiffs fail to identify any similarities, but, instead, apparently seek to rely on discovery to develop "the requirements placed on the MGM developer" (Dkt. No. 20 at 11). Such conclusory allegations are insufficient, even at this early stage of the litigation. *See id.* Davenport Advisors purchased its property in May 2015 (Dkt. No. 1 ¶ 28). Plaintiffs filed suit more than a year later, in October 2016, giving them the opportunity to visually examine Davenport Advisors' site for similarities, such as the obvious impediment of a private way. *Compare Freeman v. Town of Hudson*, 714 F.3d 29, 39-40 (1st Cir. 2013) ("The complaint's failure to do more than conclusorily state that the [plaintiffs] were both similarly situated to and treated differently from unspecified 'other contractors' is insufficient to survive the defendants' motion to dismiss."); *Gianfrancesco*, 712 F.3d at 640 (affirming dismissal of class of one claim where the complaint made "no effort to establish how or why [an identified comparator was] similarly situated to [plaintiff's business] in any relevant way," and failed to mention "any other putative comparator"); *Cordi-Allen*, 494 F.3d at 251 ("[T]he proponent of the equal protection violation must show that the parties with whom he seeks to be compared have engaged in the same activity vis-à-vis the government

entity without such distinguishing or mitigating circumstances as would render the comparison inutile."); *Rubinovitz v. Rogato,* 60 F.3d 906, 910 (1st Cir. 1995) ("Plaintiffs claiming an equal protection violation must first 'identify and relate specific instances where persons situated similarly "in all relevant aspects" were treated differently, instances which have the capacity to demonstrate that [plaintiffs] were "singled . . . out for unlawful oppression."'") (quoting *Dartmouth Review v. Dartmouth Coll.,* 889 F.2d 13, 19 (1st Cir. 1989), *overruled on other grounds by Educadores Puertorriqueños en Acción v. Hernández,* 367 F.3d 61 (1st Cir. 2004)). *Contrast SBT Holdings, LLC v. Town of Westminster,* 547 F.3d 28, 34-35 (1st Cir. 2008) (in an action by condominium developers alleging an equal protection violation, the complaint survived dismissal because condominiums that were developed and sold by plaintiffs as part of the same project were the identified comparators); *Brockton Power, LLC,* 948 F. Supp. 2d at 71 (plaintiffs' complaint alleged facts to show that another project was "'virtually identical' to the plaintiffs' project 'in all material respects'").

Because Plaintiffs fail to adequately identify a comparable project, they also fail to adequately allege different treatment and the concomitant lack of a rational basis for the difference in treatment. *See Priolo*, 839 F. Supp. 2d at 460; *Trafford v. Penno,* 800 F. Supp. 1052, 1057 (D.R.I. 1992) ("Absent proof of differing treatment, an equal protection claim must fail."). The complaint's failure to meet the "similarly situated" requirement eliminates the need to consider Plaintiffs' allegations of bad faith. *See Freeman v. Town of Hudson*, 849 F. Supp. 2d 138, 152 n.8 (D. Mass. 2012), *aff'd*, 714 F.3d 29 (1st Cir. 2013) (citing *Barrington Cove*, 246 F.3d at 10). Consequently, the complaint fails to state a claim for relief as a matter of law and the court recommends dismissal of Count II.

2. Conspiracy

Plaintiffs allege that Chwalek and Cignoli of DPW conspired with Dromey, the OPED director, and Desilets, the building commissioner, to "scuttle" Plaintiffs' project because they favored another developer (Dkt. No. 1 ¶¶ 113, 115). The City Officials argue that the complaint fails to state an actionable claim for a conspiracy to harm Plaintiffs or to discriminate against them and Plaintiffs have waived opposition to this claim by failing to address it in their opposition to the motion to dismiss (Dkt. No. 20 at 11; Dkt. No. 22 at 23-24). *See Perkins v. City of Attleboro*, 969 F. Supp. 2d 158, 177 (D. Mass. 2013).[19] Consequently, the court recommends dismissal of so much of Count II as alleges conspiracy.

C. Federal Immunity

The City Officials argue that, insofar as the complaint alleges valid causes of action under 42 U.S.C. § 1983 and to the extent they are sued in their individual capacities, they are entitled to absolute immunity based on their quasi-judicial functions and to qualified immunity (Dkt. No. 22 at 24-25). The court will discuss these two theories of immunity in turn.[20]

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[19] The complaint fails to allege a cognizable conspiracy claim. "[T]he complaint must allege facts showing that the defendants conspired against the plaintiffs because of their membership in a class and that the criteria defining the class were invidious." *Harrison v. Brooks*, 519 F.2d 1358, 1360 (1st Cir. 1975). Even reading the complaint under the deferential standard afforded to motions to dismiss and reasonably inferring from the individual City Officials' statements that they conspired to delay Plaintiffs' project, the complaint is devoid of allegations of "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus'" (Dkt. No. 1 at 17-18). *Aulson v. Blanchard,* 83 F.3d 1, 3 (1st Cir. 1996) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

[20] To the extent the City Officials are sued in their official capacities, they contend that these claims are duplicative of the claims against the city and should be dismissed (Dkt. No. 22 at 25). The court agrees. "A suit against a municipal official in his or her official capacity is considered a suit against the municipality itself." *Diaz-Garcia v. Surillo-Ruiz*, Civil No. 13-1473 (FAB), 2014 WL 4403363, at *5 (D.P.R. Sept. 8, 2014) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Surprenant v. Rivas*, 424 F.3d 5, 19 (1st Cir. 2005)). "A municipality can be sued directly under section 1983 for monetary, declaratory, and injunctive relief." *Id.* (citing *Monell v. Dep't. of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 (1978)). "When a municipality is sued directly, claims against municipal employees in their official capacities are redundant and may

1. Quasi-Judicial Immunity

The City Officials allege that the doctrine of quasi-judicial immunity renders them absolutely immune from liability because they performed quasi-judicial functions (Dkt. No. 22 at 25-26). *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993). Quasi-judicial immunity applies to "certain 'quasi-judicial' agency officials who, irrespective of their *title*, perform *functions* essentially similar to those of judges or prosecutors in a setting similar to that of a court." *Bettencourt v. Bd. of Registration in Med. of Com. of Mass.*, 904 F.2d 772, 782 (1st Cir. 1990).

The First Circuit's analysis for determining whether an official has engaged in a quasi-judicial act "'involves answering three questions, each designed to determine how closely analogous the adjudicatory experience of a Board member is to that of a judge.'" *Diva's Inc. v. City of Bangor*, 411 F.3d 30, 41 (1st Cir. 2005) (quoting *Bettencourt*, 904 F.2d at 783).

> First, does a Board member, like a judge, perform a traditional "adjudicatory" function, in that he decides facts, applies law, and otherwise resolves disputes on the merits (free from direct political influence)? Second, does a Board member, like a judge, decide cases sufficiently controversial that, in the absence of absolute immunity, he would be subject to numerous damages actions? Third, does a Board member, like a judge, adjudicate disputes against a backdrop of multiple safeguards designed to protect [the complaining party's] rights?

Bettencourt, 904 F.2d at 783. Applying this test here, the City Officials' decisions were not made under traditional adjudicative-type circumstances. *Compare Cutting v. Muzzey*, 724 F.2d 259, 260 & n.1, 262 (1st Cir. 1984) (denying quasi-judicial immunity to members of a town planning board's "routine exercise of administrative discretion;" they conditioned approval of plaintiff's development on the completion of a road); *Brockton Power, LLC*, 948 F. Supp. 2d at

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be dismissed." *Id. See Decotiis v. Whittemore*, 635 F.3d 22, 26, 38 (1st Cir. 2011) (affirming dismissal of official-capacity defendant as redundant of the suit against local government agency).

65-66) (planning board members were not entitled to quasi-judicial immunity for their "plainly administrative" decisions). Accordingly, the City Officials are not entitled to quasi-judicial immunity.

2. Qualified Immunity

On the other hand, in the court's view, if the complaint states viable claims, the City Officials are entitled to qualified immunity. "Qualified immunity is a judge-made doctrine created to limit the exposure of public officials to damages actions, thereby fostering the effective performance of discretionary functions in the public sector." *Pagán*, 448 F.3d at 31 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)). The qualified immunity doctrine shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818; *see also Pagán*, 448 F.3d at 31 (qualified immunity "protects all but 'the plainly incompetent [and] those who knowingly violate the law'") (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1982)). Relying on Supreme Court precedent, the First Circuit has "developed a three-step algorithm for the determination of whether a state actor is entitled to qualified immunity." *Pagán*, 448 F.3d at 31 (citing *Limone v. Condon*, 372 F.3d 39, 44 (1st Cir. 2004)).

> In sequential order, "[courts] consider (i) whether the plaintiff's allegations, if true, establish a constitutional violation; (ii) whether the constitutional right at issue was clearly established at the time of the putative violation; and (iii) whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right."

Id. (quoting *Limone*, 372 F.3d at 44).

Notwithstanding that the constitutional right to use and enjoy property is "clearly established," even if the complaint had sufficiently alleged that the individual defendants

violated Plaintiffs' due process or equal protection rights -- which it does not -- it cannot be said that similarly situated city officials would have understood that their actions deprived Plaintiffs of these rights based on the First Circuit's long-standing reluctance to find constitutional violations in the land-use and zoning contexts. *Id. See, e.g., Chiplin Enters., Inc. v. City of Lebanon*, 712 F.2d 1524, 1527-28 (1st Cir. 1983); *Creative Env'ts., Inc.*, 680 F.2d at 833; *Carter v. Rollins Cablevision of Mass., Inc.*, 618 F. Supp. 425, 429 (D. Mass. 1985) ("[D]isappointed parties involved in land use disputes alleging violations of their rights of due process and equal protection may not invoke federal jurisdiction pursuant to 42 U.S.C. § 1983."). Similarly, based on Plaintiffs' project's site at a busy intersection in Springfield, a reasonable person would not have known that DPW conditions and approval as a condition precedent to the issuance or denial of a building permit could amount to a constitutional infringement. *See Cotnoir v. Univ. of Me. Sys.*, 35 F.3d 6, 10 (1st Cir. 1994) ("[T]he [qualified immunity] inquiry focuses on the objective reasonableness of a defendant's actions, in light of whether the plaintiff's rights were clearly established, and whether the contours of that right were sufficiently clear such that a reasonable official would have understood that the actions he took violated that right."); *Bourne v. Town of Madison*, 494 F. Supp. 2d 80, 93–94 (D.N.H. 2007).

D. State Law Claims

The remaining counts in Plaintiff's complaint are state law claims over which the court has pendant jurisdiction. "Once a case is properly before a federal district court, however, that court has broad authority to retain jurisdiction over pendant state law claims even if the federal claim[s are] . . . dismissed." *Delgado v. Pawtucket Police Dep't*, 668 F.3d 42, 48 (1st Cir. 2012). *See Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256–57 (1st Cir. 1996); 28 U.S.C. § 1367(c)(3). "In determining whether to retain jurisdiction on such an occasion, the court must

take into account considerations of judicial economy, convenience, fairness to the litigants, and comity." *Delgado*, 668 F.3d at 48. Because the court has discretion to hear the claims, this court analyzes the state law claims and, with the exception of Count IV, recommends that the district court dismiss them.

1. MCRA Claim Against the City Officials Individually (Count III)

In Count III, Plaintiffs allege that the City Officials, individually "and in conspiracy with each other" interfered with Plaintiffs' rights under the Constitution and laws of Massachusetts "including their property rights and due process rights in connection with the use and development of 36 Martone Place . . . through threats, intimidation or coercion" (Dkt. No. 1 at 18-19). In their opposition to the motion to dismiss, Plaintiffs refer only to economic coercion (Dkt. No. 20 at 11). The City Officials argue that the complaint fails to state an actionable claim for an MCRA violation due to the absence of: (1) Plaintiffs' property interest in a building permit that was never issued; and (2) the necessary element of coercion, including economic coercion (Dkt. No. 22 at 26-27).

The City Officials' first argument fails because the cases upon which they rely for their position that Plaintiffs did not have a property right are distinguishable (*id.* at 27). In *Roslindale Motor Sales v. Police Comm'r of Bos.*, 538 N.E.2d 312 (Mass. 1989), the court addressed the denial of plaintiff's license to buy and sell used motor vehicles. *Id*. at 314-15. *K. Hovnanian at Taunton, Inc. v. Taunton*, 642 N.E.2d 1044 (Mass. App. Ct. 1994), analyzed a subdivision developer's right to connect to a sewer line. *Id*. at 1049-50. On the other hand, this case addresses Plaintiffs' right to develop the new RMV building on their property pursuant to their contract with MassDOT. *See Swanset Dev. Corp. v. Taunton*, 668 N.E.2d 333, 338 (Mass. 1996) ("[A]n owner of real property has a constitutional right to use and improve that property, subject,

of course, to limitations on development lawfully imposed by [s]tate law or by municipal regulation.").

The court, however, agrees with the City Officials' contention that Plaintiffs fail to allege sufficient facts to show that their rights were impaired by coercion. Section 11I of the MCRA, incorporating § 11H, states:

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, [by any person by means of threats, intimidation, or coercion,] may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief . . . including the award of compensatory money damages.

Mass. Gen. Laws Ann. ch. 12, §§ 11H, 11I. "To establish a claim under the [MCRA] the plaintiffs must prove that (1) their exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by 'threats, intimidation or coercion.'" *Swanset Dev. Corp.*, 668 N.E.2d at 337 (quoting Mass. Gen. Laws ch. 12, § 11I). "The MCRA is coextensive with 42 U.S.C. § 1983, except that the Federal statute requires [s]tate action whereas its [s]tate counterpart does not, and the derogation of secured rights must occur by threats, intimidation or coercion." *Sietins v. Joseph*, 238 F. Supp. 2d 366, 377–78 (D. Mass. 2003) (quotations and citations omitted).

"[B]y the Civil Rights Act, 'the Legislature did not intend to create "a vast constitutional [and statutory] tort,"' and . . . the insertion by the Legislature of the requirement of threats, intimidation or coercion was specifically intended to limit liability under the Act." *Freeman v. Planning Bd. of W. Boylston*, 646 N.E.2d 139, 149 (Mass. 1995) (quoting *Bally v. Ne. Univ.*, 532 N.E.2d 49, 52 (Mass. 1989)).

> For purposes of the MCRA, "a '[t]hreat' . . . involves the intentional exertion of pressure to make another fearful or apprehensive of injury or harm. . . . 'Intimidation' involves

> putting in fear for the purpose of compelling or deterring conduct. . . . ['Coercion' involves] 'the application to another of such force, either physical or moral, as to constrain [a person] to do against his will something he would not otherwise have done.'"

Bos. Exec. Helicopters, LLC, 196 F. Supp. 3d at 145 (quoting *Planned Parenthood League of Mass., Inc. v. Blake*, 631 N.E.2d 985, 990 (Mass. 1994)). *See Farrah v. Gondella*, 725 F. Supp. 2d 238, 247 (D. Mass. 2010).

Because Plaintiffs fail to allege that they were placed in fear, the court focuses its analysis on coercion; that is, whether Plaintiffs have alleged that the City Officials sought to compel them "to do or not to do" something. *Pheasant Ridge Assoc. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1158 (Mass. 1987). In support of their claim of coercion, Plaintiffs cite: (1) Dromey's and Cignoli's "immediate hostility toward the project" at their first meeting with Frisbie in March 2014, after Martone had secured the MassDOT lease, and their continued animus toward "the RMV project" a month later during a meeting with representatives of MassDOT and RMV; (2) Chwalek's "[p]ounding on the plan" and vocally disapproving the project's location before his retirement in May 2014; (3) Cignoli's e-mail message notifying MassDOT of the delay caused by the absence of DPW's approval; (4) Desilets's and Cignoli's issuance of cease and desist orders requiring Plaintiffs to stop all site work; (5) Desilets's and Cignoli's or their representatives' threatening that an HDC site contractor "would never work in Springfield again;" (6) DPW employees telling HDC's site contractor's employees, "'Now we have your neck in a noose;'" (7) Cignoli's refusal to discuss the project with Frisbie and Plaintiff's attorney, and requiring Plaintiffs to hire a consultant; (8) Cignoli's repeated refusals to approve the project thereby compelling Plaintiffs to comply with the DPW-related conditions or risk losing the MassDOT lease; (9) Desilets's denial of the building permit based on Cignoli's failure to approve the project; and (10) a political insider's statement to DCAMM from which it could

be reasonably inferred that the city had the ability to "quash" Martone's development plans (Dkt. No. 1 ¶¶ 7, 47, 48, 50-52, 54, 106, 107, 80-85, 106, 108, 109, 116-124, 139, 141).[21]

Although "purely economic pressures may constitute actionable coercion under the MCRA . . . ." *Nolan v. CN8*, 656 F.3d 71, 77 (1st Cir. 2011) (citing *Buster v. George W. Moore, Inc.*, 783 N.E.2d 399, 410 & n.17 (Mass. 2003)), these facts do not establish a viable claim of coercion, even under the Plaintiff-friendly standard applicable to motions to dismiss. *See Meuser v. Fed. Express Corp.*, 524 F. Supp. 2d 142, 147 (D. Mass. 2007), *aff'd*, 564 F.3d 507 (1st Cir. 2009) ("the exception for claims based on non-physical coercion remains a narrow one"). It is not alleged that the City Officials sought to "force the [P]laintiffs to do something against their will that they would not have done otherwise." *Kennie v. Nat. Res. Dept. of Dennis*, 889 N.E.2d 936, 945 (Mass. 2008). There is no plausible allegation that the City Officials sought to coerce Plaintiffs to withdraw from their contract with MassDOT, to use their property for some other purpose, or to meet conditions unrelated to DPW's legitimate areas of concern (e.g., traffic and pedestrian safety) that were imposed through an allegedly illegal process. Instead, MassDOT cancelled the lease in May 2015, which was nine months beyond the original substantial completion date, due to the project's delay (Dkt. No.1 ¶¶ 22, 125). *Compare Swanset Dev. Corp.*, 668 N.E.2d at 338 ("While the plaintiffs allege that the defendants acted in concert to delay and impede the development of their property, they do not allege that any defendant sought to persuade them to alter or to amend their plans to conform with conditions which the defendants sought to impose illegally on the plaintiffs."); *Freeman*, 646 N.E.2d at 150 & n.18 (planning board's attempts to impose an unlawful condition related to its legitimate concerns

[21] Count III also references "threats of fines and unjustified fines," without any supporting factual allegations (Dkt. No. 1 ¶ 141).

about safety did not interfere with the plaintiffs' rights in the land by coercion). *Contrast Kennie*, 889 N.E.2d at 944-45 (shellfish constable's actions could be viewed as sufficiently coercive under the MCRA to survive a motion for summary judgment where constable's actions could be construed as aimed at coercing plaintiffs to withdraw their permit request for their preferred location for a dock); *Pheasant Ridge Assoc. Ltd. P'ship*, 506 N.E.2d at 1159 ("If the trier of fact concludes that the selectmen's words could reasonably be understood only to express an intention to use lawful means to block the development, those words would not be a threat, intimidation, or coercion actionable under § 11I."); *Tortora v. Inspector of Bldgs. of Tewksbury*, 668 N.E.2d 876, 878 (Mass. App. Ct. 1996) (town officials were not entitled to summary judgment where they "sought to cause the plaintiffs to cease attempts to pursue lawful avenues to use and enlarge their property").

Fairly read, Plaintiffs' complaint alleges that the City Officials intentionally delayed Plaintiffs' project so that they would lose their contract with MassDOT (Dkt. No. 1 ¶¶ 56, 62, 98, 129). This, however, is an allegation of a direct deprivation of rights that is not actionable under the MCRA. "[A] direct deprivation of rights, even if unlawful, is not coercive because it is not an attempt to force someone to do something the person is not lawfully required to do." *Freeman*, 646 N.E.2d at 149. *See Swanset Dev. Corp.*, 668 N.E.2d at 338 ("[T]o the extent that the plaintiffs allege that various delays were a deliberate attempt to frustrate their development plans, they have alleged a direct deprivation of rights rather than an attempt at coercion.").

In the land-use context, the line between direct deprivation and coercion is not necessarily a bright line. Adverse administrative action may "rise to the level of . . . coercion" if it is "part of a scheme of harassment." *Murphy v. Town of Duxbury*, 665 N.E.2d 1014, 1018 (Mass. App. Ct. 1996) (citing *Smith v. Longmeadow*, 563 N.E.2d 697, 699 (Mass. App. Ct.

1990)). "In order to establish a 'scheme of harassment' there must be some evidence of animus against the plaintiffs or their project and an attempt to thwart the project through adverse administrative action unrelated to the board's legitimate concerns." *Id.* (citing *Freeman*, 646 N.E.2d at 149 n.17). Even if these elements are present, the alleged "scheme of harassment" must be designed to force a property owner to forgo development in order to constitute coercion that is actionable under the MCRA. *See Kennie*, 889 N.E.2d at 944-45. Because Plaintiffs in this case had a contract with a third party – MassDOT – and there is no allegation that the City Officials used delay to coerce Plaintiffs to withdraw from that contract, as opposed to delaying the project to cause its failure, this case falls into the category of those in which plaintiffs have alleged a direct deprivation of rights.

Plaintiffs' allegations are not sufficient to state a claim for relief against the City Officials for violating the MCRA. Accordingly, the court recommends that Defendants' motion to dismiss Count III be allowed. [22]

2. Martone's Tortious Interference with Contractual Relations Claim Against the City Officials Individually (Count IV)

The City Officials seek dismissal of Martone's allegation that they improperly interfered with its contract with MassDOT by "preventing the issuance of permits in time for substantial completion of the RMV [project] required by the lease" (Dkt. No. 20 at 12). The City Officials contend that they did not act with the requisite improper motive or means and that the alleged harm they caused is "too speculative" (Dkt. No. 22 at 28). The court disagrees with these contentions.

[22] The qualified immunity principles developed under § 1983 apply equally to claims under the MCRA. *See Duarte v. Healy*, 537 N.E.2d 1230, 1232-33 (Mass. 1989). Because Plaintiffs have failed to state a viable MCRA claim, the court does not reach the issue of qualified immunity.

As a preliminary matter, the City Officials' argument that Martone's claim of damages is "too speculative" is wholly unpersuasive. Martone's ten-year lease with MassDOT provided for rent of $625,600 per year (Dkt. No. 1 ¶ 20). *See O'Brien v. Pearson*, 868 N.E.2d 118, 127 (Mass. 2007) ("'Prospective profits may be recovered in an appropriate action when the loss of them appears to be the direct result of the wrong complained of . . . .'") (quoting *Lowrie v. Castle*, 113 N.E. 206, 210 (Mass. 1916)).

As to the elements of the claim, a claim for tortious interference is established only "when interference resulting in injury to another is wrongful by some measure beyond the fact of interference itself." *United Truck Leasing Corp. v. Geltman*, 533 N.E.2d 647, 650 n.2 (Mass. App. Ct. 1989), *rev'd in part by* 551 N.E.2d 20 (Mass. 1990). *Accord James L. Miniter Ins. Agency, Inc. v. Ohio Indem. Co.*, 112 F.3d 1240, 1250 (1st Cir. 1997). To establish a claim of intentional interference with contractual relations, Martone must prove that "(1) [it] had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *G.S. Enters., Inc. v. Falmouth Marine, Inc.*, 571 N.E.2d 1363, 1369 (Mass. 1991). As to the third prong, which is at issue here, Martone need only establish either improper means or motive, not both, to sustain a claim of tortious interference. *See Cavicchi v. Koski*, 855 N.E.2d 1137, 1142 (Mass. App. Ct. 2006).

"The propriety of an actor's motives in a particular setting necessarily depends on the attending circumstances, and must be evaluated on a case-by-case basis." *G.S. Enters., Inc.*, 571 N.E.2d at 1370. Some factors that are considered in determining whether or not an actor improperly interfered with contractual relations are: "the nature of the actor's conduct, . . . the

actor's motive, . . . the proximity or remoteness of the defendant[s'] conduct to the interference and . . . the relations between the parties." *Pine Polly, Inc. v. Integrated Packaging Films IPF, Inc.*, Civil Action No. 13-11302-NMG, 2014 WL 1203106, at *6 (D. Mass. Mar. 19, 2014) (quoting Restatement (Second) of Torts § 767(a), (b), (f), (g)).

Applying these factors and drawing all reasonable inferences in Martone's favor, the City Officials' statements and acts sufficiently demonstrate the officials' potential liability for improperly interfering with Martone's contract with MassDOT by delaying the RMV project thereby preventing Martone from delivering it on time. The City Officials knew the substantial completion date under Martone's contract and controlled the timing of the issuance of the permits that Martone required to meet the completion deadline. The officials' purported statements, which conveyed their ill will toward Martone or its project from its inception, in combination with their dilatory acts are sufficient to support the inference that they intended to injure Martone. In fact, MassDOT cancelled the contract with Martone based on its failure to meet the substantial completion date under the contract (Dkt. No. 1 ¶ 125). *Compare Brockton Power, LLC*, 948 F. Supp. 2d at 75 (defendants' "concerted efforts to destroy the project out of malice directed at the plaintiffs and their project" warranted denial of the motion to dismiss); *Petricca v. City of Gardner*, 429 F. Supp. 2d 216, 225 (D. Mass. 2006) (finding liability for intentional interference based on city official's false statements and other evidence of improper motive for preventing plaintiff from selling his properties); *cf. Draghetti v. Chmielewski*, 626 N.E.2d 862, 869 (1994) (a history of "strained relations" between a police officer and his chief of police together with evidence of a physical confrontation between them and severe disparate treatment of the officer by the chief was sufficient to demonstrate that the chief acted with improper motives in interfering with the officer's part-time employment at a police training academy).

Given that questions of motive and intent are not conducive to resolution at this stage of the litigation, *see, e.g., Getty Petroleum Mktg., Inc. v. 2211 Realty, LLC,* Civil Action No. 11-40003-FDS, 2012 WL 527655, at *6 (D. Mass. Feb. 16, 2012), the complaint contains sufficient factual allegations to state a plausible claim for relief for intentional interference with Martone's contractual relations. *See United Truck Leasing Corp.*, 551 N.E.2d at 24 (suggesting that a motive to injure plaintiff would sustain an intentional interference action); *Cavicchi,* 855 N.E.2d at 1142 ("As to improper motive, evidence of retaliation or ill will toward the plaintiff will support the claim."). Accordingly, the court recommends that the City Officials' motion to dismiss Count IV be denied.

3. HDC's Request for Declaratory Judgment Against Cignoli in his Official Capacity and the City of Springfield (Count V)

Under the court's pendant jurisdiction, HDC seeks declaratory relief pursuant to the Massachusetts declaratory judgment statute. Section 1 of Mass. Gen. Laws ch. 231A states:

> The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not . . . .

Mass. Gen. Laws Ann. ch. 231A, § 1 (Dkt. No. 1 at 19-20; Dkt. No. 20 at 12-13).[23] HDC asks the court to: (1) declare that prospective developers do not have to comply with a separate DPW

[23] According to § 2:

> The procedure under section one may be used to secure determinations of right, duty, status or other legal relations under . . . a charter, statute, municipal ordinance or by-law, or administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination. Said procedure under section one may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the

approval process prior to obtaining a building permit; (2) permanently enjoin the building commissioner from requiring an applicant for a building permit to obtain DPW approval; (3) declare that Cignoli and DPW have no legal authority to eliminate or withhold street numbers; and (4) permanently enjoin Cignoli and DPW from eliminating and withholding street numbers (Dkt. No. 1 at 20).

This court has jurisdiction to evaluate a claim under the Massachusetts statute and to award relief. *See, e.g., Traincroft v. Ins. Co. of Pa.*, Civil No. 14-10551-FDS, 2014 WL 2865907, at *5 n.5 (D. Mass. June 23, 2014) (citing cases). The purpose of the statute is "to remove, and afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations." Mass. Gen. Laws ch. 231A, § 9. *See also LeBeau v. Town of Spencer*, 190 F. Supp. 2d 131, 137 (D. Mass. 2002). It "is to be liberally construed and administered." Mass. Gen. Laws ch. 231A, § 9.

HDC fails to satisfy the requirement for obtaining declaratory relief because its requests do not apply to any pending development, but are merely speculative. Declaratory judgment actions "are concerned with the resolution of real, not hypothetical, controversies." *Mass. Ass'n. of Indep. Ins. Agents & Brokers, Inc. v. Comm'r of Ins.*, 367 N.E.2d 796, 799 (Mass. 1977). "Parties are not entitled to decisions upon abstract propositions of law unrelated to some live controversy." *Cole v. Chief of Police*, 45 N.E.2d 400, 401 (Mass. 1942). Accordingly, "[i]n order for a declaratory judgment to issue under G.L. c. 231A, the plaintiff must demonstrate [1]

> Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated . . . .

Mass. Gen. Laws Ann. ch. 231A, § 2.

that an actual controversy exists and [2] that he has legal standing to sue." *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1280 (Mass. 1980) (citing *Mass. Ass'n of Indep. Ins. Agents & Brokers, Inc.*, 367 N.E.2d at 799. *See also Villages Dev. Co. v. Sec'y of the Exec. Office of Envtl. Affairs*, 571 N.E.2d 361, 366 (Mass. 1991). An actual controversy within the meaning of G.L. c. 231A, § 1, is "a real dispute . . . where the circumstances . . . indicate that, unless a determination is had, subsequent litigation as to the identical subject matter will ensue." *City of Boston v. Keene Corp.*, 547 N.E.2d 328, 330 (Mass. 1989), quoting *Hogan v. Hogan*, 70 N.E.2d 821, 824 (Mass. 1947). *See also Dist. Attorney for Suffolk Dist.*, 411 N.E.2d at 1280. In order to have standing, the plaintiffs must be "in danger of suffering legal harm." *Tax Equity All. for Mass. v. Comm'r of Rev.*, 672 N.E.2d 504, 509 (Mass. 1996) (citing *Doe v. The Governor*, 412 N.E.2d 325, 326 (Mass. 1980)). *See Town of Burlington v. Town of Bedford*, 628 N.E.2d 1280, 1282 (Mass. 1994) ("Only persons who have themselves suffered, or who are in danger of suffering" have standing). "Alleged injury that is 'speculative, remote, and indirect' will not suffice to confer standing." *Brantley v. Hampden Div. of the Probate and Family Ct. Dept.*, 929 N.E.2d 272, 280 (Mass. 2010) (quoting *Ginther v. Comm'r of Ins.*, 693 N.E.2d 153, 157 (Mass. 1998)).

Because HDC fails to allege that it has a pending application for site plan review to which its requested rulings would apply, it lacks an actual controversy and standing. Accordingly, the court recommends dismissal of Count V.

4. Constructive Taking Claim Against the City of Springfield (Count VI)

Finally, HDC and Martone allege that the city's "misuse" of the Zoning Ordinance "deprived them of all practical value of their land" by "denying any use of the site that accesses Tapley Street" (Dkt. No. 1 at 20-21). Plaintiffs' claim is based on Cignoli's alleged statement

that "he would not approve *any plan for any use* of the site that allowed customers of the RMV to use a right of way to access Tapley Street and take a left turn onto Tapley Street" (*id.* ¶ 123) (emphasis original). According to Plaintiffs, HDC is "legally required to keep the right of way onto Tapley Street open" (*id.* ¶ 124). The city persuasively counters that, as a matter of law, the denial of the building permit for the RMV project did not foreclose the property's use for other development (Dkt. No. 22 at 29-30).

"Article 10 of the Massachusetts Declaration of Rights and the Fifth and Fourteenth Amendments to the United States Constitution prohibit the taking of private property for public use without just or reasonable compensation." *Fitchburg Gas & Elec. Light Co. v. Dep't of Pub. Utils.*, 7 N.E.3d 1045, 1052 (Mass. 2014). Takings in the land-use context are categorized as either per se or regulatory takings. *See id.* "Government regulatory actions may be deemed per se takings if a regulation causes a permanent physical invasion, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426–428 (1982), or if the regulation deprives a property owner of any viable economic use of the property." *Fitchburg Gas & Elec. Light Co.*, 7 N.E.3d at 1052 (citing *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992); *Blair v. Dep't of Conservation & Recreation*, 932 N.E.2d 267, 272 (Mass. 2010)). "A regulatory action also may constitute a taking if it interferes too significantly with one's property use on balance with the legitimate public purpose the interference serves." *Id.* (citing *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978)). *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In determining the degree of a regulation's interference with use of the property, courts apply a three-pronged test. *See Penn Cent. Trasp. Co.*, 438 U.S. at 124-25. The courts consider: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the

governmental action." *Blair*, 932 N.E.2d at 273 (quoting *Leonard v. Brimfield,* 666 N.E.2d 1300, 1302 (Mass. 1996)). Plaintiffs appear to be advancing a per se taking claim (Dkt. No. 1 at 20-21).

Plaintiffs' contention is flawed in several respects. As a preliminary matter, there is a procedural defect: Plaintiffs rely on Cignoli's statement, but fail to identify the regulation that they allege deprived them of the use of their property. Instead, they take issue with the city's interpretation of the Zoning Ordinance, which does not support a cause of action for a constructive taking. *See Fitchburg Gas & Elec. Light Co.*, 7 N.E.3d at 1052. Consequently, the complaint fails to provide the court or the city with fair notice as to the basis of the claim. *See Twombly,* 550 U.S. at 1964 (complaint needs to "'give the defendants fair notice of what the . . . claim is and the grounds upon which it rests.'") (citation omitted); Fed. R. Civ. P. 8(a)(2); *see also Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir. 2008).

If this procedural misstep is ignored and Plaintiffs are deemed to object to the sections of the Zoning Ordinance that require DPW to participate in OPED's site plan review and permit OPED to impose conditions on the issuance of a building permit, the court agrees with the city's contention that Plaintiffs fail to demonstrate a viable cause of action based on either a per se or a regulatory taking. The ordinance did not constitute a per se taking because Plaintiffs have not adequately alleged that they were denied all economically beneficial use of the property. *See Lucas*, 505 U.S. at 1015-16.[24] Even viewed under the plaintiff-favorable standard applicable to motions to dismiss, Cignoli's comment, as stated in the complaint, cannot reasonably be construed to bar all uses of the property because it was specifically directed at the RMV project

[24] Plaintiffs do not contend that the city physically occupied the property. *See Lucas*, 505 U.S. at 1028.

(Dkt. No. 1 ¶ 123). In addition, Cignoli only purported to prohibit left turns onto Tapley Street; he did not purport to preclude other means of ingress and egress (*id.*). Moreover, the property was in a zone that permitted non-medical office buildings as of right and in 2005 Plaintiffs were granted a special permit for the construction of a car wash on the site (Dkt. No. 1 ¶ 41; Dkt. No. 23-7 at 10-11). These facts support the city's contention that the Zoning Ordinance did not "strip [the] property 'of all practical value to [Plaintiffs] or to anyone acquiring it, leaving them only with the burden of paying taxes on it.'" *Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858, 866 (Mass. 1979) (quoting *MacGibbon v. Bd. of Appeals of Duxbury*, 340 N.E.2d 487, 490 (Mass. 1976)).

These facts also buttress the city's position that Plaintiffs fail to establish the three factors necessary to support a claim for a constructive taking. "To determine the economic impact of the [Zoning Ordinance] on the [P]laintiff's property, the first of the *Penn Central* factors, [courts] consider the value of the property 'before and after the alleged taking.'" *Blair*, 932 N.E.2d at 276 (citing *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 725 (Mass. 2006)). Plaintiffs fail to allege any diminution in value. *See id.* Similarly, Plaintiffs' inability to develop the RMV project "did not interfere substantially with [their] investment-backed expectations," *Blair*, 932 N.E.2d at 276, because, in considering a motion to dismiss, the court is not permitted to consider their conclusory allegation that other development was foreclosed (Dkt. No. 1 at 20-21). *See Iqbal*, 556 U.S. at 678. *Compare Daddario v. Cape Cod Comm'n*, 681 N.E.2d 833, 838 (Mass. 1997) ("The denial of a particular plan cannot be equated with a refusal to permit any development."); *Lovequist*, 393 N.E.2d at 866 ("[G]overnmental decisions may deprive an owner of a beneficial property use even the most beneficial such use without rendering the regulation an unconstitutional taking.") (citing *Penn Cent. Transp. Co.*, 438 U.S. at 123-128). Finally, turning

to the last element -- the "character of the government action" -- the plaintiffs do not dispute that the provisions of the Zoning Ordinance . . . were adopted for a legitimate purpose. *Blair*, 932 N.E.2d at 277. "[T]he avoidance of undue concentration and congestion of vehicular traffic of any kind . . . [is a] valid interest[] which a zoning by-law is entitled to recognize and enforce . . . ." *Davis v. Zoning Bd. of Chatham*, 754 N.E.2d 101, 108 (Mass. App. Ct. 2001).

The provisions of the Zoning Ordinance that permitted DPW's involvement in the permitting process did not deprive Plaintiffs of their land without just compensation. Consequently, the court recommends dismissal of Count VI.

V. CONCLUSION

For the above-stated reasons, the undersigned recommends that Defendants' motion to dismiss (Dkt. No. 10) be granted as to Counts I and II, which are the only federal claims asserted in the complaint. If the presiding District Judge adopts this court's recommendation to dismiss Counts I and II, he may choose, in his discretion, to dismiss the remaining state law claims without prejudice to their refiling in state court. In the event that the presiding District Judge does not adopt the recommendation to dismiss Counts I and II, or elects to retain jurisdiction over the remaining state law claims, this court recommends that Defendants' motion to dismiss be granted as to Counts III, V, and VI and denied as to Count IV. [25]

Dated: August 22, 2017

/s/ Katherine A. Robertson
KATHERINE A. ROBERTSON
UNITED STATES MAGISTRATE JUDGE

[25] The parties are advised that under the provisions of Fed. R. Civ. P. 72(b) or Fed. R. Crim. P. 59(b), any party who objects to these findings and recommendations must file a written objection with the Clerk of this Court **within fourteen (14) days** of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the proposed findings or recommendations to which objection is made and the basis for such objection. The parties are further advised that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court order entered pursuant to this Report and Recommendation. *See Keating v. Sec'y of Health & Human Servs.*, 848 F.2d 271, 275 (1st Cir. 1988); *United States v. Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-79 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 604 (1st Cir. 1980). *See also Thomas v. Arn*, 474 U.S. 140, 154-55 (1985). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.