UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

S.TINNERELLO & SONS, INC.,	:	CIVIL ACTION NO.
Plaintiff,	:	3:97-CV-01273 (RNC)
	:	
vs.	:	
	:	
TOWN OF STONINGTON, ET AL.,	:	
Defendants.	:	MARCH 29, 1999

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff submits the following memorandum of law in opposition to defendants' Motion for Summary Judgment dated February 25, 1999. As set forth herein, defendants have failed to establish either that they are entitled to judgment on each of plaintiff's constitutional and statutory claims, or that they are entitled to immunity.

II. STATEMENT OF FACTS

The Tinnerello family, owners of plaintiff S.Tinnerello & Sons, Inc., has engaged in the business of garbage collection in the Town of Stonington under various names since 1970. 06/28/97 Affidavit of Marsha Tinnerello, ¶ 2, attached hereto as Exhibit A; Affidavit of Salvatore Tinnerello, ¶ 2, attached hereto as Exhibit B.[1] As of July 1, 1997, the plaintiff had at least eighty-six commercial customers for whom it collected garbage in the town of Stonington ("the Town."), including a contract to collect garbage from the Stonington Public Schools at

1/ The Tinnerellos formerly conducted business under the name of S. Tinnerello & Sons Disposal, Inc. In 1993, the Tinnerellos filed a certificate of incorporation to change the name of their company to S. Tinnerello & Son, Inc. Defendants' Exhibits 17 & 18 (hereinafter "Def. Exs. __"). Plaintiff continues to occasionally do business under the name of S. Tinnerello & Sons, Disposal Inc. Def. Ex. 20. Unless otherwise indicated, all references to Defendants' Exhibits herein are to exhibits submitted during the July 10, 1997 hearing regarding plaintiff's Motion for Preliminary Injunction before this court, or in support of defendants' Motion for Summary Judgment, and all transcript references are to the transcript of the July 10, 1997 hearing.

seven separate locations. Def. Ex. 19. The plaintiff also had contracts to collect demolition debris, known as "roll off" contracts. Exhibit B, ¶ 5; Exhibit B(1) thereto.[2] Only one (1) of plaintiff's contracts was due to expire on July 1, 1997. Def. Ex. 20, Bates Stamp ST&S 0384.

On April 21, 1997, the Town enacted an ordinance, effective July 1, 1997, that created a Town "Resource Recovery Authority" ("the Authority") and rendered the private collection and disposal of waste illegal. Def. Ex. 13, Section 3. The impetus for the Ordinance was the Town's inability to meet its commitment to deliver municipal waste to an incinerator in Preston, Connecticut. Defendants' Local Rule 9(c)(1) Statement, ¶¶ 27-31. The implementing regulations, however, also rendered illegal the collection of demolition debris, which is not processible at the Preston facility, and thus does not assist the Town to meet its minimum commitment. Def. Ex. 13, p.13, ¶ b; p.15, ¶ c; Def. Ex. 14, §§ 1.1, 7.1; Tr. at p.124:24-125:3. The Ordinance, and implementing regulations established that "unauthorized collection,

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2/ At least forty-two of plaintiff's contracts were in written form. Pl. Ex. 1, 2; Def. Ex. 20. The remaining contracts were pursuant to oral agreements. Def. Ex. 19. All of the contracts automatically renewed for at least one year terms on the date of their expiration, with the exception of the public school contracts. Def. Ex. 20; Pl. Exs. 1, 2. The public schools had renewed their contracts each year since 1991. Def. Ex. 20, ST&S 0418. Plaintiff also had a number of contracts to collect demolition debris, including one with Turner Construction, to collect all demolition debris from a construction project they had obtained at Mystic Aquarium. Tr. at pp.16-17; Exhibit B hereto, ¶ 5, Exhibit B(1), thereto. The contract extended for the entire life of the project. Exhibit B(1) hereto. Based on an estimated one to two year construction, plaintiff valued the contract at approximately $50,000.00. Tr. at pp.16-17. Three years later, the project is still ongoing. Exhibit B hereto, ¶ 5,

transport and/or disposal of Solid Waste generated within the Town shall be punishable by a fine of up to $5,000.00 per violation." Def. Ex. 14, Article XI, Section 11.1(A), (B).

Thereafter, the Authority submitted a Request for Proposals ("RFP") to select haulers to provide waste collection services. Tr. at pp.78-80, 84; Def. Exs. 6 & 7. The Town provided written answers to questions regarding the RFP. Def. Ex. 8. In response to the question "How will the Authority determine the successful bidder?" the Town referred bidders to sections 1.3.2 and 1.4 of the RFP. Id. The Commercial Solid Waste RFP, Sections 1.3.2 and 1.4, set forth the requirements to complete the application as well as a list of criteria which related to a hauler's ability to meet the Town's collection requirements such as "equipment available" and "capacity of each vehicle." Def. Ex. 6, pp.5-6, 8. Section 1.4 of the RFP also set forth basis for rejection of a hauler's proposal, which related to the inability to meet the Town's collection requirements such as "lack of [financial] competency." Id., p.9.

At this time, USA Waste had brought an action to challenge the constitutionality of the Ordinance and Regulations. Tr. at pp.35:7-36:10, 37:21-38:7, 47:5-48:5; 125:4-7. Plaintiff believed that it was a participant in the USA Waste action. Tr. at pp.35:7-36:10, 37:21-38:7, 47:5-48:5; Exhibit B hereto, ¶ 7. In response to the lawsuit, defendant Donald Maranell ("Maranell"), as the "Chief elected official of the Town of Stonington" unilaterally adopted a policy, unstated in the RFP, and not subject to Committee vote, public notice or publication,[3] that "the Town of Stonington does not do business with people that are suing them":

3/ In addition to being the Town's First Selectman, the Authority named Maranell as the Chairman of the Authority. As such, however, Maranell did not have absolute autonomy. The Regulations created a board of three (3) members, of which Maranell was one, and provided that "no vote shall be adopted by

fewer than two (2) affirmative votes.". Def. Ex. 14, Article II, Sections 2.1, 2.2. Moreover, the RFP provided that all explanations regarding RFP terms shall be in writing "made in the form of an Addendum, a copy of which will be forwarded to each prospective Proposer known to the authority" and that "any verbal statements regarding same by any person prior to the award are unauthorized." Def. Ex. 6, p.7, § 1.3.3.

A: Yes, the Town of Stonington does not do business with people that are suing them on the very aspect that they want to have a contract with. So if Conn. Carting wanted to continue in a process, it was their decision whether to continue with a lawsuit or to negotiate for the contract.

Q: Is this a policy that's in writing of the Town of Stonington?

A: No, its my policy as the Chief elected official of the Town of Stonington.

Q: When did this policy come into effect?

A: When I set it.

Q: When did you set it?

A: During the RFP process. When the lawsuit was filed and they continued on in the process and submitted, I made it very clear to them if they wanted to negotiate with the Town of Stonington on this, that it could not be. How can you negotiate and have a lawsuit at the same time? It can't be done and won't be done in the Town of Stonington.

Deposition of Donald R. Maranell (hereinafter "Maranell Depo."), p.84:4-25, attached hereto as Exhibit C .

Other haulers, including plaintiff, were aware of this unwritten policy. Tr., at p.125:12-15 (affirming that "the Town made it clear that they would not negotiate a contract with any company which was suing them."); Exhibit B hereto, ¶ 8. Consequently, plaintiff did not submit a bid. Exhibit B hereto, ¶ 9. USA Waste, however, subsequently agreed to dismiss the lawsuit in order to obtain the Town contract. Exhibit C, hereto (Maranell Depo., pp.84:17-85:2, 85:12-86:25); Tr. at pp.82:20-83:23, 125:8-15.[4] In addition to hiring USA waste to collect commercial and residential waste, the Town granted USA Waste the exclusive right to collect demolition debris. Def. Ex. 11, § 3.2.9; Tr. at pp.124:9-125:3.

4/ The defendants entered a contract with USA Waste on June 20, 1997. Def. Exs. 9, 11.

Had the plaintiff submitted a bid, it probably would have received a contract, and the contract would have increased the plaintiff's existing business. Exhibit C hereto (Maranell Depo., pp.61:10-23; 73:6-17); Tr. at p.138:10-18. After USA Waste dismissed the lawsuit, however, the plaintiff chose to stand on its constitutional rights and instituted the above captioned action. Two days after plaintiff filed action, Maranell represented to a hauler with whom the Authority had already contracted, but who was contemplating joining in plaintiff's legal challenge, that if his company did so, the Authority would revoke the contract and prevent the hauler from ever working the Town again. Exhibit B, ¶ 20. As a direct consequence of Maranell's representation, the hauler chose not to join in plaintiff's lawsuit. Id. The defendants' conduct has thus required plaintiff to litigate the challenge by itself.

Plaintiff maintained approximately 250 dumpsters on private property within the Town, with the consent of the owners or lessees, for which it paid a property tax to the Town. Exhibit B hereto, ¶ 12. Maranell understood that plaintiff had installed and owned the cement pads on which some of its dumpsters were located. Exhibit C, hereto (Maranell Depo. at pp.72:15-73:3). Nevertheless, on June 25, 1997, Maranell demanded that plaintiff remove its dumpsters from the private property on which they were located by July 1, 1997 so that the spaces they occupied would be available for use by USA Waste. Exhibit B hereto, ¶ 13; 06/25/97 letter from Maranell to Tinnerello, attached thereto as Exhibit B(2).

During the pendency of this Court's Temporary Restraining Order, USA Waste moved plaintiff's containers and placed its own dumpsters alongside plaintiff's. Exhibit B hereto, ¶ 14. On October 8, 1997, after the Court removed the restraining order, Maranell again demanded that plaintiff remove its dumpsters from the property on which they were located, and entirely

from the Town. Exhibit B hereto, ¶ 15; 10/08/97 letter from Maranell to Tinnerello, attached thereto as Exhibit B(3). Mr. Maranell claimed that "[s]ince your firm is not the Authority's contractor with regard to the removal of non-processable and non-acceptable waste, **having your containers within the town constitutes a violation of the ordinance and regulations** . . . The Authority is giving you one week from the date of this letter to remove all containers. Failure to do so will expose your firm to the penalties set forth above" (i.e. $5,000.00 penalty per violation). Id. (emphasis added).

Neither the Ordinance nor the Regulation rendered the storage of privately owned dumpsters on private property within the Town illegal. Def. Exs. 13, 14. The property owners had made no demand that plaintiff remove its dumpsters. Exhibit B hereto, ¶ 18. Nevertheless, to avoid the risk of substantial fines, and at considerable expense, plaintiff moved its dumpsters to another location within the Town. Id., ¶¶ 16-17. The Town then threatened to fine the owner of the property on which plaintiff had stored its dumpsters, claiming that their presence in the Town was illegal. Id. Plaintiff has since moved the dumpsters to a storage space outside of the Town. Id. The defendants and USA Waste have been in possession and use of the property on which plaintiff's dumpsters were located. Defendants have not paid or offered to pay plaintiff any compensation for their appropriation of plaintiff's storage space. Id., ¶ 19.

III. ARGUMENT

A. COUNT ONE (Contract Clause)

The Contract Clause prohibits the state from imposing a substantial impairment on private contracts unless such action is necessary to serve a legitimate public interest, and is upon reasonable conditions. Sanitation and Recycling Indust. v. City of New York, 107 F.3d 985, 993

(2d Cir. 1997). Contrary to defendants' claim, the evidence supports that defendants substantially impaired plaintiff's contracts and that they did so unreasonably.

1. Defendants Substantially Impaired Plaintiffs' Contracts.

As defendants recognize, neither this Court nor the Second Circuit reached the issue of whether defendants substantially impaired plaintiff's contracts. See Defendants' Memorandum of Law in Support of their Motion for Summary Judgment, p. 6 ("hereinafter "Def. Br., p._"); Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46, 53-54 (2d Cir. 1998). Both the law and the facts support a finding of substantial impairment. The defendants rendered the conduct of plaintiff's business illegal. Def. Exs. 13, 14, 19, 20. The defendants' complete invalidation of plaintiff's existing contracts constitutes a "substantial impairment" within the meaning of the Contract Clause. See, United States Trust Co. v. New Jersey, 431 U.S. 1, 26-27, 97 S.Ct. 1505, pet. reh'g. den'd, 431 U.S. 975, 97 S.Ct. 2942 (1977) (complete destruction of contracts is "outer limit" of the proscriptions of the Contract Clause); W.B. Worthen Co. v. Kavenaugh, 295 U.S. 56, 60, 55 S.Ct. 555 (1935). Further, the defendants did so with two (2) months notice, enacting the Ordinance on April 21, 1997, effective July 1, 1997. Def. Exs. 13, 14. This minuscule grace period further supports a finding of substantial impairment. See Tr. at p.124:24-125:3 (admitting that the ordinance and regulations contained no grace period); Sanitation and Recycling Indus., 107 F.3d at 994 (finding gradual applicability of grace periods relevant to substantiality of impairment); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247, 98 S.Ct. 2716, 2721 (1978) (same); Tinnerello, 141 F.3d at 53 (noting that a lack of grace period is a relevant factor in this case).[5]

5/ No other case provided such a minimal grace period. See e.g. Sanitation and Recycling Indus.,107

F.3d at 990-91(grace period to apply for new licenses and contracts continued until either they expired by their terms or two years after enactment of the law.); USA Recycling v. Town of Babylon, 66 F.3d 1272, 1279 (2d Cir. 1995), cert. den'd, 1996 U.S.Lexis 2432, 116 S.Ct. 1419 (1996) (town refused to renew licenses but permitted existing licenses to remain in effect until their natural expiration.) Further, while defendants make much of the terms of plaintiff's contracts, Def. Br., p.4, citing, Def. Local Rule 9(c)(1) Statement, ¶¶ 85-87 & n.8, these contracts were automatically renewable and the possibility of renewal is a valuable property right. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474, 93 S.Ct. 791 (1973).

Moreover, plaintiff was not on notice that defendants would declare its business illegal. While the Second Circuit opined that certain statutes might have placed plaintiff on notice, a review of the relevant statutes, case-law, and facts establishes that this claim by defendants is nothing more than a fiction. See Tinnerello, 141 F.3d at 53. First, the Connecticut General Assembly has specifically limited the power of municipalities to "prohibit the carrying on within the municipality of any trade," to circumstances where the trade "is, or may be, so carried on as to become prejudicial to public health, conducive to fraud and cheating, or dangerous to, or constituting an unreasonable annoyance to, those living or owning property in the vicinity." C.G.S. § 7-148(c)(7)(H)(ii).[6] As the testimony has established, the conduct of waste hauling in Stonington, and particularly by plaintiff, did not meet any of these criteria to justify a complete prohibition. Tr., pp.38:8-39:13, 97:1-17 ("Q: Was there any specific safety or health problem . . ." "A: No safety or health that I know of, no."), 102:21-103:6, 138:10-18; Exhibit C hereto (Maranell Depo., p.14:9-12). Thus, plaintiffs were not on notice that defendants would do so.

General Statute § 7-148(c)(4)(H), which only authorizes municipalities to "provide for or regulate the collection and disposal of garbage," and upon which defendants rely, must be read in conjunction with C.G.S. § 7-148(c)(7)(H)(ii), and in a manner which will not render that section nugatory. The power to regulate is not the power to prohibit absolutely all existing

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6/ In determining the scope of municipal regulatory authority, the court does "not search for a statutory prohibition against such an enactment; rather [it] must search for the statutory authority for the enactment." Buonocore v. Town of Bransford et al., 192 Conn. 399, 401-402, 471 A.2d 961 (1984). The legislature has been very specific in enumerating those powers it grants municipalities, and "[a]n enumeration of powers in a statute is uniformly held to forbid the things not enumerated." Id. Statutes conferring authority to a municipality are strictly construed, and, in determining the scope of authority granted, the court looks at the statutory scheme together to make one consistent body of law. See Pepin v. City of Danbury, 171 Conn. 74, 83, 368 A.2d 88 (1976).

private business and create a municipal monopoly, particularly in light of C.G.S. § 7-148(c)(7)(H)(ii). "The purpose of regulation is to **permit** the conduct or activity within limits or restrictions." Mashantucket Pequot Tribe v. McGuigan, 626 F.Supp. 245, 249 (D.Conn. 1986) (emphasis added). Similarly, the power to "provide" garbage collection services, or in the case of C.G.S. § 7-273bb "waste management services," is not the power to create a municipal monopoly. See e.g. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 414, 98 S.Ct. 1123 (1978) (power to provide service is not authority to engage in anti-competitive conduct).

Where the General Assembly desired to grant a municipality both the power to "regulate" or "provide," and the power to "prohibit," it did so expressly. See C.G.S. §§ 7-148(c)(7)(H)(ii) (power to "regulate and prohibit"); C.G.S. § 7-148(c)(6)(B)(iv) (power to "prohibit and regulate");[7] See, e.g., Babylon, 66 F.3d at 1278, n.5 (noting New York statute that explicitly authorized county to "displace competition with . . . monopoly" and "exclusively control all solid waste"). The Court cannot conclude that the power to "regulate" encompasses the power to "prohibit" absolutely without rendering the General Assembly's use of the term "prohibit" in all of the above cited sections, entirely superfluous.

Further, neither C.G.S. 7-273aa *et seq.*, nor the Statewide Solid Waste Management Act, which relates solely to waste disposal, authorize the creation of a municipal monopoly for waste collection. These statutes, pursuant to which the Town created its Resource Recovery Authority, contemplate "the conduct of a comprehensive program for solid waste **disposal** and

7/ See also C.G.S. §§ 7-148(c)(6)(C)(iv) (power to "regulate and prohibit"); 7-148(c)(7)(A)(iii), (vi), (viii) (same); 7-148(c)(7)(B)(i) (same); 7-148(c)(7)(C) (same), 7-148(c)(7)(D)(i) (same), 7-148(c)(7)(H)(ii), (iv), (v), (vii), (same)

resources recovery, and for solid waste **management** services." C.G.S. § 7-273bb(a)(12). The legislature specifically set forth the powers of municipal resource recovery authorities and did not include the power to prohibit private waste collection or to create a municipal monopoly. C.G.S. § 7-273bb. Rather, as defendants recognize, these statutes contemplate the creation of municipal authorities to "develop an infrastructure of waste-to-energy facilities," no more. Tr. at pp.53:16-56:6; C.G.S. §§ 7-273aa, 7-273bb; Defendants Local Rule 9(c)(1) Statement, ¶¶ 2-3.

Second, the legislature has explicitly excluded demolition debris from municipal authority, and thus plaintiff could not have been on notice that defendants would render its "roll off" contracts invalid. See C.G.S. § 22a-207 (23) (excluding "demolition debris" from the definition of "municipal solid waste"); C.G.S. § 22a-220(a) (omitting "demolition debris" from the list of "solid waste" which a municipality may regulate); C.G.S. §§22a-221; 7-273ee(d) (authorizing municipalities to enter contracts whereby they agree to "furnish municipal solid wastes for disposal."). The state has undertaken to regulate the disposal of demolition debris. See C.G.S. § 22a-208x; Def. Ex. 15, p.2 (Statewide Solid Waste Management Plan ["the Plan"] specifically excluding "demolition debris" from the definition of "municipal solid waste"); Id., pp.20, 32 (identifying "bulky waste disposal" [e.g. demolition debris] as "one of the Major components of the State's Solid Waste Management Plan.") Id., p.32 (indicating that "a regional approach to managing bulky waste will have to be developed."); See also e.g., Babylon, 66 F.3d at 1279, n. 8 (noting that town monopoly did not extend to demolition debris collection and transportation).

Third, even assuming *arguendo* that defendants' conduct was authorized by statute, as a matter of law, the mere potential for regulation, where as here, it has not previously been exercised, is insufficient to establish notice for purposes of a substantial impairment analysis under the Contract Clause. Exhibit B, hereto ¶ 6; Veix v. Sixth Ward Building & Loan Assoc., 310 U.S. 32, 38, 60 S.Ct. 792 (1940) (to place plaintiff on notice, the regulation must occur in "industry that is **already** highly regulated **in the particular** to which [the plaintiff] now objects.") (emphasis added); Holiday Inns Franchising, Inc. v. Steven Nelson and Tass Enterprises, Inc., 29 F.3d 383 (8th Cir. 1994), cert. denied, 513 U.S. 1032, 115 S.Ct. 613 (previous regulation on different subject matter insufficient); cf. Sanitation and Recycling Indus., 107 F.3d at 994 (where city had regulated waste hauling industry for past forty years).

Finally, as a matter of fact, Connecticut haulers were not on notice that Towns could render their businesses illegal to appropriate them as municipal monopolies. See Exhibit B hereto, ¶ 6. Consequently, the statutes cannot be construed to authorize the Town to create a municipal monopoly or control demolition debris such that plaintiff was on notice of this power.

2. The Means Chosen Were Neither Reasonable Nor Appropriate.

"A law that works substantial impairment of contractual relations must be specifically tailored to meet the social ill it is supposedly designed to ameliorate." Sanitation and Recycling, 107 F.3d at 993, citing, Spannaus, 438 U.S. at 243. The state is "not free to impose a drastic impairment when an evident and more moderate course would serve its purpose equally well." United States Trust Co., 431 U.S. at 31. The defendants' complete destruction of plaintiff's demolition debris contracts, which the Second Circuit did not address, was entirely unnecessary to accomplish defendants' alleged purpose to "provid[e] for safe and efficient collection and

disposal of solid waste on an equitable user-fee basis." Def. Br., p.5; Tinnerello, 141 F.3d at 54.

The Second Circuit concluded that the Town's control of municipal solid waste met the legitimate goals of imposing equitable user-fees, avoiding CERCLA liability and avoiding a government subsidy of the Preston facility. Tinnerello, 141 F.3d at 54. However, none of these grounds support the Town's take-over of plaintiff's roll-off work. First, demolition debris is not processible at the CRRA incinerator facility in Preston, Connecticut and thus does not assist the Town to achieve its "minimum commitment" to that facility. Def. Ex. 3, p.13, ¶ b; p.15, ¶ c; Def. Ex. 11, p.2, "Non-Processible Waste." Second, demolition debris does not include hazardous waste. Def. Ex. 11, p.2 (definitions "hazardous waste" and "non-processible waste.") Finally, because demolition debris cannot be disposed of at the Preston facility, its private collection and disposal is unrelated to the "residential user fee system" implemented by the Town to support the Preston facility, and does not require any Town subsidization. Tr. 73-74, 77-78, 90-92, 130-131. See Def. Ex. 11, p.2.

As is evident in defendants' Local Rule 9(c)(1) statement, demolition debris was not even considered as an issue when the defendants adopted the Ordinance. See Def. Local Rule 9(c)(1) Statement, ¶¶ 27-37, 40-58. Thus, the Town's grant of a monopoly on "roll off" work to USA Waste bears no rational relation to the stated purposes of the ordinance and regulations and is designed to impermissibly benefit the special interests of USA Waste alone. See e.g. Spannaus, 438 U.S. at 247-48; Sanitation and Recycling Indus., 107 F.3d at 993 (law must be "aimed at remedying an important general social or economic problem rather than providing a benefit to special interests.")

Further, the Town applied its law in a manner that was neither reasonable nor appropriate when it only permitted haulers that agreed not to challenge the Town's action to retain their existing customer routes. Sanitation and Recycling Indust., 107 F.3d at 993 (impairment must be upon reasonable conditions); Tinnerello, 141 F.3d at 55 (finding bid process relevant to determine reasonableness of Town conduct); Unisys Corp. v. Dept. Of Labor, 220 Conn. 689, 600 A.2d 1019 (1991) (improper bid conditions that undermine the object and integrity of the competitive bid process are arbitrary and capricious); Spiniello Constr. Co. v. Town of Manchester, 189 Conn. 539, 544-545, 456 A.2d 1199 (1983) (granting bid pursuant to unpublished standard constitutes arbitrary and capricious action by government officials.). See also Section III (B), infra.

Summary judgment in defendants' favor on plaintiff's Contract Clause claim is inappropriate as defendants have substantially impaired plaintiff's contracts and they have acted unreasonably and improperly in doing so.

B. COUNT TWO (Substantive Due Process)

Neither the Second Circuit nor this Court addressed, much less "dispose[d] of" plaintiff's substantive due process claim. Contra Def. Br., p.7. Indeed, defendants themselves have utterly failed to address the substantive due process implications of the fact, which they cavalierly admit, that they refused to grant the government contract to any business that challenged the constitutionality of the Ordinance and regulations. Def. Br., pp.7-8.[8] It is "well-settled," that

8/ Defendants have failed to meet their burden on a motion for summary judgment by failing to address this issue in any manner in their brief. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986) (the moving party bears the initial burden of "informing the district court of the basis for its motion.") Further, there is no excuse for the defendants' failure as they recognized the conduct underlying this claim as a material fact in their Local Rule 9(c)(1) statement of facts, Defendants' Local Rule 9(c)(1) Statement of Facts, ¶ 71, citing, Tr. 83; the issue was raised during the hearing on plaintiff's application

"[t]he right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution," including the right of access to the courts. Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 594-597, 46 S.Ct. 605 (1926) (and cases cited therein).

The right to challenge government action in court is a fundamental constitutional right founded in the Due Process Clause. See, Wolf v. McDonnell, 418 U.S. 539, 579, 94 S.Ct. 2963 (1974); Terral v. Burke Constr. Co., 257 U.S. 529, 532-533, 42 S.Ct. 188 (1922).

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Id., at 593-594. See Def. Br., pp.7-8. The undisputed facts in this case establish that defendants conditioned the award of the government contract on the relinquishment of the constitutional right to bring action. See Tr. at pp.82:20-83:23, 125:8-15; Exhibit C hereto (Maranell Depo., p.84:4-25, p.86:18-21); Exhibit B hereto, ¶¶ 8-9, 20.

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for a preliminary injunction, Tr. at pp.82:20-83:23, 125:8-15; during the defendant's deposition, Maranell Depo., p.84, lines 4-25, p.86:18-21; in the appellate briefs, Plaintiff's Appellate Br., p.9; and at oral argument before the Second Circuit. Plaintiff's explication of the merits of its claim is thus not in recognition that defendants have successfully shifted the burden of proof, but is provided for the Court's benefit.

The Court has consistently held that any requirement that a business relinquish a constitutional right as a condition precedent to the privilege to do business, as the Town has admittedly done in this case, is unconstitutional. 44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484, 513, 116 S.Ct. 1495 (1996) (First Amendment), citing, Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694 (1972) (the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech."); Frost & Frost, 271 U.S. at 593-594 (liberty), citing, Southern Pacific Company v. Denton, 146 U.S. 202, 207, 13 S.Ct. 44 (1892) (right of removal to federal court) and Security Mutual Life Ins. Co. v. Prewitt, 202 U.S. 246, 267-269, 26 S.Ct. 619 (1906) ("a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts.") (dissenting opinion, expressly adopted by a unanimous Court in Terral, 257 U.S. at 532-533).[9]

9/ See also Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 238-239, 77 S.Ct. 752 (1957) (A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment); Power Manuf. Co. v. Saunders, 274 U.S. 490, 47 S.Ct. 678 (1927) (a corporation "**by seeking and obtaining permission to do business in a State" cannot "thereby become obligated to comply with or estopped from objecting to any provision in the state statutes which is in**

In Southern Pacific Company, supra,

> there was under consideration a Texas statute requiring a foreign corporation desiring to do business in the state, to agree that it would not remove any suit from a court of the state into the circuit court of the United States. This court held the statute invalid, saying: '**But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void**, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions.'

Frost, 271 U.S. at 594-595 (emphasis added), citing, Southern Pacific Company, 141 U.S. at 207; See also Terral (same). In Perry, supra, the Court addressed whether a state school could refuse to renew a teacher's contract on the basis that the teacher had spoken out against the school board. The Court held that:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his

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conflict with the Constitution of the United States.") (emphasis added), citing, W.W. Cargill Co. v. Minnesota, 180 U.S. 452, 468, 21 S.Ct. 423 (1901) ("the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute . . . that are repugnant to the Constitution of the United States."); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 507, 47 S.Ct. 179 (1926) ("the State may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed.")

> interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Perry, 408 U.S. at 597; See also, O'Hare Truck Service Inc. v. City of Northlake, 518 U.S. 712, 716-717, 116 S.Ct. 2353 (1996) (holding that Perry applies equally to independent contractors, and that the city's refusal to contract with tow truck company on the basis of its speech was unconstitutional). The fact that the teacher in Perry and the truck company in O'Hare had no right to a government contract was irrelevant. Perry, 408 U.S. at 597; O'Hare, 518 U.S. at 716-717, 725-726; See also Coogan v. Smyers, 134 F.3d 479, 484 (2d Cir. 1998).[10]

Thus, the Town's alleged right to regulate, or even to prohibit, garbage collection is not unlimited and provides no excuse. That right is "qualified by the superior right of all citizens to enjoy the protection of the Federal Constitution," Perry, 408 U.S. at 597; See also, Id., at 593-594. There can be no question that the defendants impermissibly placed plaintiff, and others, in a position where they had to elect between exercising its

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10/ See also 44 Liquor Mart, Inc., supra, 517 U.S. at 513 ("Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right."); U.S. Term Limits, Inc. v. Thornton, 514 U.S 779, 831, 844, 115 S.Ct. 1824 (1995).

constitutional right, or lose the opportunity to continue in business in the Town. See Exhibit B hereto, ¶¶ 8-9, 20; Exhibit C hereto (Maranell Depo., p.84:4-25, p.86:18-21). If this Court permits such government action to stand,

> constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject**. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool, -- an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.**

Frost, 271 U.S. at 593. As the facts reveal, the defendants rewarded USA Waste for choosing the "rock" and granted it an exclusive contract, while Plaintiff, choosing to stand on its constitutional rights, was left to the "whirlpool." Tr. at 83; Exhibit C hereto (Maranell Depo., pp.85:12-86:11). "The whole thing, however free from intentional disloyalty, is derogatory . . . and ought to meet the condemnation of the courts whenever brought within their proper cognizance." Frost, 271 U.S. at 596, citing, Doyle v. Continental Ins. Co., 94 U.S. 535, 533, 534, 1876 U.S. LEXIS 1903 (1876) (minority, adopted in Terral, supra).[11]

C. COUNT THREE (Taking)

1. Plaintiff Is Entitled To Compensation For The Town's Confiscation Of Its Possessory Rights.

11/ Far from recognizing the derogatory nature of their conduct, defendants persist in claiming that plaintiff's decision to forego the government contract was "ill-advised." Def. Br., p.19, See also, Def. Br., p.16 (claiming plaintiff's alleged injuries arise out of plaintiff's "choice" not to seek one of the contracts awarded by the Authority). Defendants make this claim notwithstanding their recognition that the only way plaintiff could have obtained a government contract was to relinquish its constitutional right to bring action. Defendants' Rule 9(c)(1) Statement, ¶ 71.

Plaintiff is entitled to compensation for defendants' physical appropriation of locations on which plaintiff stored its dumpsters so that they would be available for an identical use by its hauler, USA Waste.[12] Almota Farmers Elevator & Warehouse Co., supra, 409 U.S. 470; United States v. Certain Property, Borough of Manhattan, 388 F.2d 596, 601 (1967); See also e.g. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35, 102 S.Ct. 3164 (1982). The dumpsters were located on private property, and no owner or lessee of that property demanded that plaintiff remove them. Exhibit B hereto, ¶ 18.

12/ Because defendants' motion completely overlooks that, in addition to taking plaintiff's business, plaintiff has alleged that defendants physically invaded its property rights, defendants have utterly failed to meet their initial burden on these claims. See Third Amended Compl., ¶¶ 11, 16, 44, 45, 51; See Celotex Corp., 477 U.S. at 323; Sigmon v. Parker, Chapin, Flattau, 901 F.Supp. 667, 677, n.5 (S.D.N.Y. 1995) (arguments in support of a motion for summary judgment "may not be made for the first time in a reply brief."), citing, United States v. Gigante, 39 F.3d 42, 50 n.2 (2d Cir. 1994)

In Almota, supra, the plaintiff sought compensation for its interest in the continued use of, and permanent improvements it had made to, property which it did not own but which the government had condemned. The Court held that both the plaintiff's possessory interest and "[t]he improvements are assuredly 'private property' that the Government has 'taken' and for which it . . . must pay compensation." Id., 409 U.S. at 475 & n.2, citing, Mitchell v. United States, 267 U.S. 341, 344, 45 S.Ct. 293 (1925), wherein "the Government paid compensation [ ] for the land, including its 'adaptability for use in a particular business.'" In so holding, the Court implicitly affirmed the Second Circuit's *en banc* decision in Certain Property, supra. Almota, 409 U.S. at 473, citing, Certain Property. In that case as well, the Second Circuit held that the government was obligated to compensate a non-owner of property for the loss of its possessory interest and fixtures.[13]

13/ As in Almota and Certain Property, supra, applicable state law entitled plaintiff to compensation for the loss of both its possessory interest and the cost of removing the fixtures. See Toffolon v. Avon, 173 Conn. 525, 533-535; 378 A.2d 580 (1977), citing, C.G.S. § 8-125(f) ("real property for the purposes of taking is defined as 'land, subterranean or subsurface rights, structures . . . and every estate, right or interest therein.'") "The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term." Almota, 409 U.S. at 475, citing, Certain Property, 388 F.2d, at 601-602.

Further, where, as here, the government physically invades, or permanently appropriates, a plaintiff's assets, "cases uniformly have found a taking to the extent of the occupation, **without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."** Loretto, 458 U.S. at 434-35 (emphasis added). A physical appropriation of property is compensable "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S.Ct. 2886 (1992). For example, in Loretto, supra, the Court held that New York city effected a Taking when it granted one cable company an exclusive franchise to install cable on building rooftops for a one time fee of $1.00 to be paid to the building owners.[14] The Court noted that "a permanent physical occupation is a government action of such a unique character that it is a taking **without regard to other factors that a court might ordinarily examine.**" Id., 458 U.S. at 432 (emphasis added); See also Lucas, 505 U.S. at 1028 ("where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interest' involved.")[15]

14/ Thus, that a private company, USA Waste, rather than the Town is occupying plaintiff's property is irrelevant. A permanent occupation authorized by state law is a taking "without regard to whether the State, or instead a party authorized by the State, is the occupant." Loretto, at 432.

15/ Thus, Defendants' reliance upon Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646 reh'g den. 439 U.S. 833 (1978) is misplaced. That case involved a **regulation** of an owner's use of property, rather than a **physical occupation and appropriation** by the government such is at issue in this case and was discussed in Loretto and Lucas, supra. As the Court made clear after Penn Central, a government's physical appropriation of property, as opposed to mere regulation, warrants distinct standards and analysis under the Takings Clause. Loretto, supra; See also Lucas, 505 U.S. at 1028-1029, 1031 (a "State, by *ipse dixit*, may not transform private property into public property without compensation"); Producers Transportation Co. v. Railroad Commission, 251 U.S. 228, 230, 40 S.Ct. 131 (1920) ("it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility . . . for that would be taking

In this case, the Town has granted one hauler an exclusive franchise to install its dumpsters on property to which plaintiff maintained a valuable possessory right. Exhibit B, ¶¶ 13-19, Exhibits B(2)-(3), thereto. Similar to Loretto, supra, regardless of any alleged statutory power or governmental justification to undertake garbage collection, the Town may not appropriate plaintiff's storage rights in the absence of just compensation. Id.; Contra, Def. Br. at pp.9-11.

Finally, summary judgment would be inappropriate even assuming *arguendo* that the defendant's appropriation was subject to an analysis regarding "the extent to which the regulation has interfered with distinct investment-backed expectations" of the plaintiff, which it is not. See Def. Br., p.9; Footnote. 15, supra. No statute, including C.G.S. § 7-148(c)(4)(H) upon which defendant's rely, authorizes the defendants to eject plaintiff's dumpsters without just compensation. See C.G.S. § 7-148(c)(4)(H); Def. Br., p.11.

"The legislature has the power to prescribe the persons or corporations who may institute condemnation proceedings, and to prescribe the conditions and circumstances under which such proceedings may be instituted . . . All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain. The authority to condemn will be strictly construed in favor of the owner of property taken and against the condemnor and the authority must be strictly pursued." City of Middletown v. F.L. Caulkins Automobile Co., 19 Conn.Supp.

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private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment."); Chas. Wolff Packaging Co. v. Courts of Indus. Rels. of Kansas, 262 U.S. 522, 535, 43 S.Ct. 630 (1923) (same).

45, 47-48, 109 A.2d 888 (1954) (holding city had no power to take property for public parking where the General Assembly did not specifically grant such power), citing, State v. McCook, 109 Conn. 621, 630, 147 A. 126 (1929).

The General Assembly has not granted the Town power to condemn plaintiff's property for the purpose of garbage collection. Indeed, the legislature has specifically denied municipalities the power to condemn privately owned waste disposal facilities in the performance of its duties regarding solid waste disposal. C.G.S. § 7-273bb(a)(19). Moreover, where the General Assembly does grant condemnation power, it sets forth specific procedures, which the defendants did not follow. C.G.S. § 48-12 (procedures for condemnation). Thus, plaintiff cannot be deemed to have been on notice that the Town, in taking over garbage collection, would appropriate the property on which plaintiff's dumpsters were located rather than to place its containers at a different location from plaintiff's.

2. Plaintiff Is Entitled To Compensation For The Town's Confiscation Of Its "Roll Off" Contracts.

Plaintiff's contracts to collect and dispose of construction debris ("roll-off") are property within the meaning of the Fourteenth Amendment. See United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969) (discussing right of garbage hauler to operate and solicit customers and holding that protectable property rights are not limited to real property but encompass "any valuable right considered as a source element of wealth."). "The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments." Id., at 1075-1076. Plaintiff's "roll-off" contracts were not only a direct source

element of wealth to plaintiff but provided it with exposure and the potential to obtain future work.

Here, the Town has entirely appropriated plaintiff's roll-off contracts for its benefit and for the benefit of its hauler, and thus plaintiff is entitled to compensation regardless of either the public purpose implicated or the extent of the economic impact. Loretto, 458 U.S. at 434-435. The Town has basically handed these contracts, which are unrelated to the alleged purpose of the ordinance, to USA Waste. See Section III(A)(2), supra. Moreover, contrary to defendants' argument, plaintiff's roll-off contracts can not be deemed subject to any "express" authority of the municipality, as the legislature has specifically excluded "demolition debris" from the Town's authority. See Section III(A)(1), supra. Thus, plaintiff has a property right in its demolition debris contracts and business good-will, which the defendants appropriated for their benefit and for which it was entitled to compensation.

3. Neither California Reduction Company Nor Gardner Authorize Defendants' Conduct.

Defendants' reliance on California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 26 S.Ct. 100 (1905) and Gardner v. Michigan, 199 U.S. 325, 26 S.Ct. 106 (1905), is misplaced. In California Reduction Co., the issue was whether the plaintiffs' **garbage** was constitutionally protected property. While the Court rejected the plaintiff's claim because the garbage had become a nuisance, the property at issue in this case is plaintiff's business interests, storage rights, and "roll off" contracts which, far from being a nuisance, are currently being utilized by the Town and its hauler for their benefit. The Court in California Reduction Co. specifically distinguished these two situations: "The exercise of the police power by the

destruction of property which is itself a public nuisance . . . is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." Id., 199 U.S. at 324. Finally, Gardner did not even involve a Takings claim. Contrary to defendants' representation, that case involved only a Due Process challenge and thus the Court could not have "rejected a takings claim." Def. Br., p.9.

In sum, plaintiff in this case, no less than the plaintiff in Loretto, is entitled to just compensation for the Town's use and confiscation of its storage rights and "roll-off" work, a claim which neither California Reduction nor Gardner addressed, much less decided.

D. COUNT FOUR (Commerce Clause)

Defendants' contract with USA Waste indisputably discriminates against interstate commerce by directing all Town waste to a local incinerator. See C&A Carbone Inc. v. Town of Clarkstown, 511 U.S. 383, 114 S.Ct. 1677 (1993). Defendants' discriminatory conduct is not exempted by the market participant doctrine if, as they claim, they are acting in a "distinctive governmental capacity." West Lynn Creamery v. Healy, 512 U.S. 186, 114 S.Ct. 2205 (1994); See also Camps Newfound/Owatonna, Inc.v . Harrison, 520 U.S. 564, 117 S.Ct. 1590 (1997) (market participant exemption does not apply to actions taken by the State in its sovereign capacity); New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 276-277, 108 S.Ct. 1803 (1988) (same); Contra, Def. Br., p.11.

The Second Circuit has concluded that, in creating a municipal monopoly for garbage collection, a

> Town has **eliminated the market entirely**. **Not even the Town itself remains as a seller in the market.** Although the Town is now the lone provider of

> garbage collection services in the District, **it does so as a local government providing services** to those within its jurisdiction, **not as a business** selling to a captive consumer base.

Babylon, 66 F.3d at 1283 (emphasis added). This finding cannot be reconciled with the conclusion that the state is acting as a "market participant" buying and selling garbage collection services, after eliminating the "market entirely" for garbage collection, and transforming it into a 'government function'. Tinnerello, 161 F.3d at 55-56.

To avoid the Contract Clause, Substantive Due Process, and Takings Clause claims, defendants themselves argue that, in contracting to provide garbage collection, they are exercising their 'police power.'[16] Def. Br., pp.6-11. Defendants claim that plaintiff is not entitled to the constitutional protections afforded to almost every other industry because, unlike other businesses, garbage collection is a "core government function." Id. Under these circumstances, the market participant exception can have no bearing - there simply is no "market" in which the Town is a "participant" as it is acting in its sovereign capacity. See e.g. West Lynn Creamery, supra; Babylon, 66 F.3d at 1283.

The Supreme Court has made clear that the government may not avail itself of the "market participant" exemption where, as here, it is allegedly exercising a "core government function" as opposed to participating in a competitive market. Camps Newfound/Owatonna, Inc., supra. Defendants' contract with USA Waste is thus not subject to the market participant exemption.

16/ The Court has described the police power as "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people . . . " Spannaus, 438 U.S. at 241.

E. COUNT FIVE (Procedural Due Process)

Defendants acted in excess of their authority and pursuant to a delegation of authority that, as applied, is unconstitutionally vague. Contra Def. Br., p.12. First, as set forth in Section III(A)(1), supra, C.G.S. § 7-148(c)(4)(H) does not grant the defendant's the power to prohibit the private collection of waste, create a municipal monopoly or provide a special reward to the government contractor in the form of plaintiff's roll-off contracts. The Connecticut legislature has limited the municipality's authority to prohibit the conduct of a business to circumstances not present in this case. Id. Further the legislature has not authorized the Town to condemn plaintiff's property. See e.g., C.G.S. § 7-273bb(a)(19); Section III(C)(1), supra.

Second, to the extent the Court finds that C.G.S. § 7-148 authorized the creation of a municipal monopoly, the statute is unconstitutionally vague. A delegation of authority is void for vagueness where it "vests public officials with the discretion to grant, refuse or revoke a license to carry on an ordinarily lawful business, and does not set an express standard to guide and govern the exercise of this discretion." Town of New Milford v. SCA Services of Conn., Inc., 174 Conn. 146, 151, 384 A.2d 337 (1977), accord, Cox v. New Hampshire, 312 U.S. 569, 571, 61 S.Ct. 762 (1941); Hull v. Petrillo, 439 F.2d 1184, 1186 (2d Cir. 1971). General Statute § 7-148(c)(4)(H) does not provide any standards to guide the Town's exercise of its purported authority to prohibit all private garbage collection, nor does it provide any standards to guide the Town in exercising its authority to contract for garbage collection, and is thus unconstitutionally vague.

In SCA, supra, the Connecticut Supreme Court invalidated the previous version of C.G.S. § 22a-221a, which explicitly authorized municipalities to reject permit applications for private

disposal facilities because it authorized public officials revoke the right to carry on an otherwise lawful business with "a total absence of any standards which the local commission is to apply." SCA, 174 Conn. at 149-150. In this case, the legislature has not even explicitly authorized the Town to prohibit private garbage collection, much less provided statutory guidelines for the exercise such purported discretion. The legislature has also not provided any guidelines for the Town's exercise of its authority to create the government monopoly. Cf. Babylon, 66 F.3d at 1277 & n.3 (noting that the legislature set forth "a detailed bidding process for such contracts, indicating what information must be included in bid proposals, requiring notice and comment on the town's request for proposals, and establishing guidelines for evaluating submitted bids.")

The legislature's failure to provide any guidelines whatsoever has resulted in the precise type of injury which the "void for vagueness" doctrine is designed to prevent - abuse of discretion. Given the unbridled discretion to "contract" Maranell adopted an unpublished policy to condition the grant of the government monopoly on the waiver of a constitutional right. See Section III(B), supra. This policy, as well as its implementation, is an abuse of discretion. See Unisys Corp., supra, 220 Conn. 689 (improper bid conditions undermine the object and integrity of the competitive bid process are are arbitrary and capricious); Spiniello Constr. Co., supra, 189 Conn. at 544-545 (granting bid pursuant to unpublished standard constitutes arbitrary and capricious action by government officials.).

Further, the defendants improperly expanded their alleged authority to include taking plaintiff's property without just compensation and illegalizing the storage of plaintiff's dumpsters on private property pursuant to private agreement. See Section III(C), supra. This

conduct directly contravenes the specific procedures that the legislature requires a municipality to follow when it explicitly authorizes the municipality to condemn private property, which include negotiations with the owner as to the value of the property, an action to determine the value, and the posting of a bond. See C.G.S. §§ 48-6, 48-12, 8-128 et seq.; See also e.g. C.G.S. § 13b-43. In stark contrast, the defendants here simply ordered plaintiff to remove its containers and thereby make its property available for use by the Town. Exhibits B(2)-(3), thereto.

Finally, the defendants implemented their order by threatening to impose an illegal fine against plaintiff in a manner that violated the procedures mandated by the Connecticut General Assembly. The procedures set forth by the General Assembly, and violated by the Regulations, comport with the minimum requirements of Due Process. See e.g. Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975 (1990) (and citations therein).[17]

17/ The regulations, which prohibit private garbage collection, but make no mention of storage of containers on private property, provide for a fine of $5,000.00 per violation of the regulations. Def. Ex. 14, § 11.1(A); Exhibits B(2), (3), hereto. The statutes only authorized municipalities to impose fines of not more than $100.00, C.G.S. § 7-148(10)(A), or in certain circumstances not present here, $1,000. Moreover, the municipality may only impose the fine pursuant to ordinance, not regulation, as it threatened to do in this case. Id.; See also, C.G.S. § 7-148(5)(b) (Town may only exercise its penalty power by ordinance); Food, Beverage & Express Drivers Local Union No. 145 v. City of Shelton,

147 Conn. 401, 405, 161 A.2d 587 (1960) ("[T]he deliberative form of an ordinance, where it is required by law to accomplish a named act, . . . is the only manner or mode in which the act . . . can be accomplished."). Finally, the Town's procedures to impose the fine also directly contravene the statutory requirements. Comp. Def. Ex. 14, § 11.1(B) (purporting to permit "the Authority" to determine whether a violation has occurred, allowing only 10 days prior notice of a hearing, and failing to provide a right to appeal) and C.G.S. § 7-152c(b) (requiring appointment of independent hearing officer); C.G.S. § 7-152c(e) (requiring not less than 15 days advance notice of hearing); C.G.S. § 7-152c(g) (providing for judicial review of hearing decision by appeal to superior court).

Defendants are thus not entitled to summary judgment in their favor on plaintiff's procedural due process claim as they acted in excess of their authority and pursuant to an unconstitutionally vague delegation of power.

F. COUNT SIX (Anti-Trust)

Defendants bear the burden to establish their affirmative defense of immunity. Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920 (1980). To prevail, defendants must prove that they acted pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition in the garbage collection industry with "monopoly public service." Community Communications, Inc. v. City of Boulder, 455 U.S. 40, 51-52, 102 S.Ct. 835 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 414, 98 S.Ct. 1123 (1978); C.G.S. § 35-31(b). Defendants have utterly failed to do so. The general delegation of police power to all municipalities to collect garbage, upon which defendants rely, is not a "direct[] and unequivocal[]" State authorization to displace all private competition with municipal monopoly service. Def. Br., p.16; See, The Hertz Corp. v. City of New York, 1 F.3d 121, 128 (2d Cir. 1993) ("local government actions that are grounded in home-rule authority are not carried out pursuant to a clearly articulated state policy").

> When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State. Therefore, in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a

> particular city hardly can be found to be pursuant to "the state['s] command," or to be restraints that "the state . . . as sovereign" imposed.

City of Lafayette, 435 U.S. at 414.

The Supreme Court has consistently held that the general authority to "provide for" and "regulate" is not a specific state authorization to displace competition for purposes of anti-trust immunity. For example, in the seminal case of City of Lafayette, supra, the Court held that the city's power to own and operate electric utility systems did not constitute state authorization to engage in anti-competitive conduct against a competing privately owned utility company. Id., 435 U.S. at 391. In Community Communications, Inc., supra, the Court refused to find that the general power to regulate cable-television constituted a sufficiently clear state authorization to prohibit the expansion of a cable television company's business. The Court observed that:

> A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State . . . Thus in Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." **Acceptance of such a proposition -- that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive**

ordinances -- would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Id., 455 U.S. at 55-56.

Similarly, in this case, the delegation of power to "provide for or regulate" garbage collection is a position of mere neutrality which does not specifically contemplate an outright prohibition on all private garbage collection. The State has utterly failed to affirmatively address the creation of a municipal monopoly in this area. As in Community Communications, Inc., supra, the Town would be able to prescribe a monopoly service under this statute, while another could pursue regulation only, while still another could elect free-market competition, and all of these policies would be equally "contemplated." See e.g. Tr. at p.123:4-9 (describing garbage policies of other municipalities). Such a proposition cannot be accepted. Id.[18]

18/ See also e.g. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636, 112 S.Ct. 2169 (1992), citing, Cantor v. Detroit Edison Co., 428 U.S. 579, 596, 96 S.Ct. 3110 (1976) ("Michigan may regulate its public utilities without authorizing monopolization in the market for electric lightbulb.")

Further, rather than to support defendants' argument, both the State Wide Solid Waste Management Plan ("Plan") and Automated Salvage Transport, Inc. v. Wheelabrator Env. Sys., Inc., 155 F.3d 59 (2d Cir. 1998) only illustrate the deficiency in their position. See Def. Br., pp.15-16. As the Court in Automated Salvage Transport noted, the Plan implements an **express** state policy. Further, the policy is to displace waste **disposal facilities** competition, not waste collection competition: "CRRA's 'virtual monopoly' over waste disposal is the result of the Connecticut General Assembly's decision, discussed above, to phase out landfills in favor of more environmentally friendly waste-to-energy disposal. Connecticut's Solid Waste Management Plan, which promoted this monopoly, was promulgated not by CRRA, but by Connecticut's Department of Environmental Protection." Id., 155 F.3d at 67.[19] See also Babylon, 66 F.3d at 1278, n.5 (noting New York statute that explicitly authorized county to "displace competition with . . . monopoly" and "**exclusively** control all solid waste").

The general police power to "provide for or regulate" garbage collection found in C.G.S. § 7-148 is simply not comparable to the comprehensive and expressed state policy to take control of waste disposal sites based on environmental concerns. See Footnote 20, infra. "These statutes [C.G.S. § 22a-227 *et seq.*] evidence a legislative

19/ Automated Salvage Transport, specifically found that the legislators anticipated anti-competitive activities in the waste disposal industry: "Indeed, the bill creating CRRA was passed over objections that CRRA would simply condemn all of its private competitors. See id.; H. Rep. Tr. at 6686 (remarks of Rep. Camp); H. Rep. Tr. at 6698 (remarks of Rep. Varis); H. Rep. Tr. at 6699 (remarks of Rep. Pearson). The Connecticut General Assembly further protected CRRA's financial stability by restricting the development of new waste-to-energy plants that would compete with CRRA for the supply of waste. See Conn.Gen.Stat. §§ 22a-208d(a), 22a-208d(c)(1)(I) (forbidding construction or expansion of disposal facilities that would create an excess capacity for municipal solid waste)." Id., 155 F.3d at 63-64.

intent to commit the difficult regional problems of solid waste disposal to regional and statewide solution." Automated Salvage Transport, Inc., 155 F.3d at 70. "This is the antithesis of the scheme in City of Lafayette" as well as in C.G.S. § 7-148, "which leaves 'cities, each of the same status under state law, . . . equally free to approach a policy decision in their own way' without any indication that the anticompetitive restraints adopted as policy reflected the State's preferences rather than those of the municipalities." Id., citing, City of Lafayette, 435 U.S. at 414.[20]

Second, defendants' attempt to lump municipal "collection" with "disposal" under the aegis of the Plan is not supported by either the statutes or the Plan. See, Def. Br., p.15. As even defendants' selective review of the statutes reveals, the legislature addressed only the state's concerns with providing environmentally sound disposal in the state of Connecticut. Id.; Tr. at

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20/ See Automated Salvage Transport, 155 F.3d at 63-64, citing, C.G.S. §§ 22a-258 (Connecticut created the CRRA as a "necessary state structure, which can take initiative and appropriate action to provide the necessary systems, facilities, technology and services for solid waste management and resources recovery."); C.G.S. § 22a-259(3) (The Connecticut General Assembly rejected the landfill system so that "solid waste disposal services [could] be provided . . . by state systems and facilities . . . in accordance with the statewide solid waste management plan. C.G.S. § 22a-259(6)"); C.G.S.§ 22a-258 (finding that "coordinated large-scale processing of solid wastes may be necessary in order to achieve maximum environmental and economic benefits for the people of the state" and that "the development of systems and facilities and the use of the technology necessary to initiate large-scale processing of solid wastes have become logical and necessary functions to be assumed by state government").

pp.53:13-56:6; Defendants' Local Rule 9(c)(1) Statement, ¶¶ 2-3. The legislature did not express any concern with the status of garbage collection, and did not specifically contemplate a municipal take-over in this area. Id.; See also Def. Ex. 15 (The Plan); Automated Salvage Transport, Inc., 155 F.3d 59, 63-64 (2d Cir. 1998) (describing purpose and goal of Plan to provide facilities for waste disposal). The Court should thus reject the defendants' attempt to transform its general police power into a specific state authorization to create a municipal monopoly for garbage collection.

Finally, the implication of defendants' position militates against its adoption. Pursuant to the defendants' argument, the General Assembly has also expressed a state policy to allow municipal monopoly in the "construction of dwellings, apartments, boarding houses, hotels, commercial buildings, [and] youth camps," "auctions and garage and tag sales," and "amusement parks and amusement arcades," as well as on all entertainment, amusements, concerts, celebrations, cultural activities, employment of nurses, and low and moderate income housing, C.G.S. § 7-148(c)(7)(A)(viii), (H)(iii), (vi) (identifying services municipalities may regulate); C.G.S. § 7-148(c)(4)(C), (E), (H)(1) (identifying services municipalities may provide). This conclusion is not supported by any authority.

G. THE DEFENDANTS DO NOT ENJOY GOVERNMENTAL IMMUNITY FOR THEIR ANTI-TRUST ACTIVITY.

Defendants have also failed to meet their burden to establish governmental immunity. Where, as here, a municipality acts for the particular benefit of its inhabitants and their pecuniary benefit, it is not acting as an agent of the State, and is thus not accorded governmental immunity. See West Haven School Dist. v. Owens-Corning Fiberglass Corp., 721 F.Supp. 1547, 1550-1551 (D.Conn. 1988), citing, R.A. Civitello v. New Haven, 6 Conn. App. 212, 217-

18, 504 A.2d 542 (1986); See also, C.G.S. § 52-557n(a)(1)(B) (providing that political subdivisions shall be liable for "negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit."); Couture v. Board of Education, 6 Conn.App. 309, 312, 505 A.2d 432 (1986); Abott v. City of Bristol, 167 Conn. 143, 150, 355 A.2d 168 (1974).

> The distinction between governmental and nongovernmental functions was clearly stated in Winchester v. Cox, 129 Conn. 106, 109, 26 A.2d 92 (1942): 'The functions of a municipal corporation fall into two classes, those of a governmental nature, where it acts merely as the agent or representative of the state in carrying out its public purposes, and those of a proprietary nature, where it carries on activities for the particular benefit of its inhabitants.'

West Haven School Dist., 721 F.Supp. at 1550. "In making the final determination of whether the municipality is acting within a governmental capacity so as to allow it to invoke the doctrine of sovereign immunity '[t]he court must determine whether, in fact, the state is the real party in interest by examining 'the essential nature and effect of the proceeding' and whether a judgment would 'operate to control the activities of the state or subject it to liability." Id., 721 F.Supp. at 1551; See also R.A. Civitello, 6 Conn.App. at 220.

Here, the defendants have admitted that they created a municipal monopoly for the particular benefit of the Town citizens and to further their specific and unique pecuniary interests. See Defendants' Local Rule 9(c)(1) Statement, ¶¶ 32-34, 40-43, 52-59. The defendants were not acting as agents of the state but for the municipality's corporate benefit and the benefit of its inhabitants. Their acts did not have "statewide implications affecting all of the people of the state." West Haven School Dist., 721 F.Supp. at 1551. A judgment against defendants would not operate to control the activities of the state or subject it to liability. Id. Under these circumstances, neither defendants nor their actions are clothed with sovereign

immunity. See e.g. Id.; Mitchell v. City of Meriden, 3 Conn.Cir.Ct. 498, 500-501, 217 A.2d 487 (1965).

H. THE COMPLAINT IS SUFFICIENT AS TO MARANELL.

Defendants' attempt to obtain summary judgment because the complaint allegedly does not "explain[] Defendant Maranell's involvement in the alleged wrongdoing" must also fail. Def. Br., p.18. "By the plain terms of § 1983, two -- and only two -- allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." Gomez, 446 U.S. at 640. Thus, Gomez, supra, held that the plaintiff's summary allegation that "his discharge by respondent violated his right to procedural due process, and that respondent acted under color of Puerto Rican law" were sufficient to withstand a motion to dismiss. Id.

Moreover, "[t]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Leatherman v. Tarrant City, 507 U.S. 163, 168, 113 S.Ct. 1160 (1993) (holding Rule 8(a) applies to Section 1983 actions), and citing, Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 624 (9th Cir.1988) ("[A] claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or

practice"). Thus, in Leatherman, supra, the Court held that the plaintiff's were not required to explain the municipalities' involvement in the alleged wrongdoing to withstand a motion to dismiss.

Williams v. Smith, 781 F.2d 319 (2d Cir. 1986), upon which the defendants rely, only further supports plaintiff's position. Def. Br., p.18. First, while Williams held that the individual defendant must be "personally involved," the Court went on to explain that "[a] defendant may be personally involved in a constitutional deprivation within the meaning of 42 U.S.C. § 1983 in several ways." Id., at 323-324. The defendant need not directly participate in the violation, but will be liable if he is a supervisory official that learns of the violation and fails to remedy the wrong; creates a policy or custom under which the unconstitutional practices occur; allows such a policy to continue; or is grossly negligent in managing subordinates. Id. The Court thus refused to dismiss the plaintiff's complaint, notwithstanding that it did not contain specific allegations of "personal involvement," because it alleged that the defendant was a prison supervisor. Id. Plaintiff in this case, as well, has alleged that Maranell acted in a supervisory capacity. Third Amended Compl., ¶ 5.

Second, Williams required the defendant to set forth specific facts denying the claim, before it would shift the burden to the plaintiff. Id.,781 F.2d at 323, 324 ("Smith's broad allegation that he did not 'personally participate' in 'any of the events described in the Complaint is not a documented allegation of fact which Williams needs to rebut in order to survive a motion for summary judgment.") Defendant Maranell has not denied his involvement in the constitutional and statutory violations, and thus the defendants have provided not basis to shift the burden to plaintiff.

Nevertheless, plaintiff has alleged and presented evidence of Maranell's involvement in the constitutional violations sufficient to rebut any claim to the contrary by defendants. See Third Amended Compl., ¶¶ 5, Counts One through Five; Exhibit C hereto (Maranell Depo., p.84:4-25); Exhibit B, ¶¶ 8-9, 13-17, 19; Exhibits B(2), (3), thereto. As in Williams, supra, plaintiff is entitled to prove that Maranell, as the Town's First Selectman and Chairman of the Authority, was directly responsible for the constitutional violations alleged and/or accepted a custom or policy that allowed the constitutional violations to occur. Finally, the plaintiff has alleged that all defendants, which includes Maranell, engaged in anti-trust activities. Third Amended Complaint, Count Six, ¶ 76. These allegations are sufficient under the notice pleading standards of the federal courts. Leatherman, supra.[21]

I. MARANELL DOES NOT ENJOY ABSOLUTE IMMUNITY.

Defendant Maranell is not entitled to absolute immunity from plaintiff's constitutional claims because he has been sued in his official capacity. Third Amended Complaint, ¶ 5. The law is clear that absolute legislative immunity does not attach to an action against an individual in his official capacity. See Goldberg v. Town of Rocky Hill, 973 F.2d 70, 73 (2d Cir. 1992); New York State Nat'l Org. For Women v. Cuomo, 14 F.Supp.2d 424, 436-437 (S.D.N.Y. 1998); See also e.g. Leatherman, 507 U.S. at 166.[22]

21/ The allegations give defendant Maranell sufficient notice of his involvement in the alleged wrongs, not only as the primary orchestrator of the constitutional violations, but as a direct actor. For example, paragraphs 27, 32, 44 and 73 allege that the Authority ordered plaintiff to remove its containers and manifested an intent to appropriate plaintiff's possessory rights. As Mr. Maranell should be aware, he signed and sent the two letters that comprised this order and manifested this intent. See Exhibits B(2), (3) hereto.

22/ Even if plaintiff had sued Maranell in his individual capacity, legislative immunity would not apply

because Maranell's conduct included the execution and administration of the ordinance and regulations. See Third Amended Complaint, ¶¶ 27, 32, 33, 44, 45, 72-74; Maranell Depo., p.84, lines 4-25, p.86:18-21; Exhibits B, ¶¶ 13, 15-17, 19, Exhibits B(2), (3) hereto. A defendant involved in both legislative and administrative activities is not immune from suit as to his or her administrative actions. Jessen v. Town of Eastchester, 114 F.3d 7, 8 (2d Cir. 1997); New York State Nat'l Org. For Women, 14 F.Supp.2d at 436-437 (refusing to apply legislative immunity where evidence established defendant was involved not only in promulgating the challenged rules but in their administration). Defendants bear the burden to establish an immunity defense, Gomez, 446 U.S. at 640, and have utterly failed to prove that Maranell's conduct was limited to legislative activities.

J. MARANELL DOES NOT ENJOY QUALIFIED IMMUNITY.

Defendants have also failed to meet their burden to establish that Maranell is entitled to qualified immunity. Where the law is clearly established at the time of the official's actions, there is no basis to allow the qualified immunity defense. Crawford-El v. Britton, 523 U.S. 574, __, 118 S.Ct. 1584, 140 L.Ed.2d 759, 775 (1998). "The court's evaluation of whether relevant law is 'clearly established' is made on the basis of Supreme Court precedent and the law of this circuit." New York State Nat'l Org. For Women, 14 F.Supp.2d at 427, citing, Elder v. Holloway, 510 U.S. 510, 516, 114 S. Ct. 1019 (1994); Russell v. Scully, 15 F.3d 219, 223 (2d Cir. 1993).

The Courts had clearly established both the constitutional right to seek redress in court and the right to due process and compensation for takings by 1997. See, Crawford-El, 523 U.S. at __, 140 L.Ed.2d at 768, citing, Crawford-El v. Britton, 951 F.2d 1314, 1318 (D.C.Cir. 1991) (right of access to courts was a clear constitutional right by 1989); See also Id., 140 L.Ed. 2d at 776 (citing the First Amendment bar to retaliation for protected speech is an example of a law that "has long been clearly established"); Eastern Enterp. v. Apfel, 524 U.S. 498, 118 S.Ct. 2131 (1998) (characterizing the government's direct appropriation of private property for its own use as a "classic taking.") Further, "[f]or at least a quarter-century, this [Supreme] Court has made clear that [the government]. . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." Perry, 408 U.S. at 597.

Moreover, Maranell's violation of state rules or regulations support the rejection of his qualified immunity defense. See New York State Nat'l Org. For Women, 14 F.Supp.2d at 427, citing, Davis v. Scherer, 468 U.S. 183, 193-96 & n. 14, 104 S. Ct.

3012 (1984). As set forth in Sections III (A)-(E), supra, Maranell's conduct, which violated plaintiff's procedural due process rights and effected the taking of plaintiff's property, was in violation of the very Regulations he created. These Regulations, themselves, were in violation of Connecticut statutes governing municipalities. See Footnote 17, supra. These facts further support that, any claim that a reasonable person would have not have known that it was illegal to (1) condition a government contract on the relinquishment of a constitutional right, or (2) confiscate property for public use without procedural safeguards or just compensation, is nothing less than ludicrous.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that this Court deny defendants' Motion for Summary Judgment in its entirety.

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CERTIFICATION

This is to certify that a copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment has been sent to the following parties via first class overnite mail, postage prepaid, on this 29th day of March, 1999.

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