



## CITY MANAGER'S WEEKLY REPORT

July 15, 2016

Page 2

-  Vermont Superior Court Opinion and Order re: Illuzzi vs. City of Montpelier
-  Notice: Recreation Department "Front Counter" Moves to the Montpelier Senior Activity Center
-  Construction Notice: Spring Street Bridge Repair Project

### CITY MANAGER'S REPORT ...

#### **Recreation Department "Front Counter" Moves to the Montpelier Senior Activity Center**

Starting Monday, July 18<sup>th</sup>, the "front counter" of the Montpelier Recreation Department will be located at the Montpelier Senior Activity Center at 58 Barre Street. Residents of Montpelier and surrounding communities are invited to visit 58 Barre Street from 9:00 A.M. to 4:00 P.M., Monday through Friday, to buy pool passes, register for summer camps, and ask questions about or sign up for all other Recreation programming.

This change is implemented following the move of the Recreation Department to City management effective July 1<sup>st</sup>, the elimination of a part-time administrative assistant in the Recreation Department this year, to provide an accessible location to register for multi-age programs, and to better coordinate community services efforts. The Recreation and Montpelier Senior Activity Center teams are taking the opportunity to provide better services to residents by co-locating administrative support, cross-training staff, and ensuring that all are able to back each other up. No actual programming will be affected at the Recreation Department or the Montpelier Senior Activity Center.

Stop by 58 Barre Street to say hello to Norma Maurice, Lise Markus, Dan Groberg, or Janna Clar! All will be able to answer questions about Recreation and Senior programming.

#### **Community Services Process**

To provide feedback on the City's multi-generational community services conversation, please complete the on-line survey (<http://www.montpelier-vt.org/859/Community-Services-Department>) by Friday, June 22<sup>nd</sup>. The recommendations will be presented to the public on October 11<sup>th</sup> at 6:30 P.M. at the Senior Activity Center.

# CITY MANAGER'S WEEKLY REPORT

July 15, 2016

Page 3

## Legal

*Illuzzi vs City, et al:* On July 12<sup>th</sup>, the Vermont Superior Court of Washington County issued its “Opinion and Order on Defendants’ Motions for Summary Judgement and Mr. Illuzzi’s Motions to Compel, Enlarge, and Amend”. The City & its employee defendants were granted summary judgement except for the issue of causation. All of the motions filed by the Plaintiff were denied or dismissed. The attorney for the City will now consult with VLCT as to the next course of action.

*Police Investigation:* I will have an update after July 12.

*VCFA vs. City, Tax Appeal:* Notice was received that Vermont College of Fine Arts has appealed the recent judgment from Vermont Superior Court, Washington Unit, to the Vermont Supreme Court. The Superior Court judgment upheld the City’s determination that Schulmaier Hall is taxable due to its lease for “a general commercial purpose”.

Represented by Robert Fletcher.

## **WEEKLY UPDATES FROM DEPARTMENT HEADS ...**

### Senior Center

Due to staff summer vacations and kitchen deep cleaning, FEAST Together meals and van rides to MSAC are cancelled for Tuesday, July 19 and 26, and Friday, July 22. FEAST Together’s onsite meals at 58 Barre Street resume their normal Tuesday/Friday noon schedule on Friday, July 29, and weekly van rides resume on Tuesday, August 2. FEAST at Home delivered meals continue through the summer break. For reservations or more info about these services, call 262-6288.

## **TOPICS FOR UPCOMING COUNCIL MEETINGS ...**

July 27	Possible Consent Agenda only meeting
August 3	Eminent Domain Hearing – Overlake Park, LLC
August 10	Master Plan Outreach French Block Update and MOU Approval Personnel Plan Revisions Goal: Safe Community

# CITY MANAGER'S WEEKLY REPORT

July 15, 2016

Page 4

August 10 (cont'd.)	Street Closure Policy and Fees EDSP Implementation Plan Montpelier Transportation Advisory Committee Dog Ordinance - 2 <sup>nd</sup> Reading Junkyard Ordinance -1st Reading
September 14	Zoning Goal: Housing/Economic Development Bike Path Update Junkyard Ordinance – 2 <sup>nd</sup> Reading Montpelier Energy Advisory Committee Fund
September 28	Zoning Parts Goal: Clean Environment Storm Water Master Plan ? Water Source Protection Plan ?
October 12	Zoning Wrap Up Housing Strategies Plan ? Goal – Vibrant Downtown



William J. Fraser  
City Manager



## Notice: Herbicide Application in Montpelier Railroad Right-of-Way Scheduled Between July 20-22nd

*Contact:*

*Cary Giguere*

*Agrichemical Program Manager*

[Cary.Giguere@Vermont.gov](mailto:Cary.Giguere@Vermont.gov) (<mailto:Cary.Giguere@Vermont.gov>)

802-828-6531

The Washington County Railroad Right-of-Way (ROW) between Main Street and Granite Street is scheduled for herbicide treatment. The treatment will take place prior to 6 AM between July 20-22nd. The actual date will be determined by other rail traffic and weather conditions.

This planned treatment is a result of a multi-year effort between the state, the City of Montpelier, and the railroad owners. This section of rail was last chemically-treated in 2013; since then Secretary of Agriculture, Food & Markets, Chuck Ross, looked to the state's scientific advisory panel, Vermont Pesticide Advisory Council (VPAC), to review and identify if there were additional effective, sustainable, non-chemical, management options for this particular stretch of railroad.

Since 2015, multiple public meetings were held and, in May of 2016, the Vermont Pesticide Advisory Council unanimously recommended to the Secretary that this stretch be treated in 2016 as a result of increasing safety concerns, and the lack of a viable long-term alternative management option.

Because of its high pedestrian use, and limited rail traffic, this stretch of track has presented a unique opportunity for vegetation management strategies. Last year, the railroad, in conjunction with the City of Montpelier, was able to control vegetation by mechanical methods. However, mechanical removal does not address the persistent root structures below the ballast, which pose a serious safety risk by undermining the rails. According to the Agency of Transportation, these roots can lead to the deterioration of the rail infrastructure over time and present a significant threat to public safety. Therefore, additional weed removal methods are now required to ensure safe conditions. The city, the state, and the railroad operators look forward to continuing the dialogue, with the engaged community, and moving forward using all possible options.

Residents along the rail will receive notifications in the mail from the railroad. Others wishing to receive notifications of right-of-way treatments in their area, can sign up for VT-Alert, an electronic notification system, and also review documents related to this herbicide treatment at: [http://agriculture.vermont.gov/pesticide\\_regulation/vpac](http://agriculture.vermont.gov/pesticide_regulation/vpac) ([http://agriculture.vermont.gov/pesticide\\_regulation/vpac](http://agriculture.vermont.gov/pesticide_regulation/vpac))

VT SUPERIOR COURT  
VERMONT SUPERIOR COURT

SUPERIOR COURT  
Washington Unit

2016 JUL 12 P 2:03

CIVIL DIVISION  
Docket No. 142-3-15 Wncv

Vincent Illuzzi,  
Plaintiff,

v.

City of Montpelier, Todd Law,  
and Kurt Motyka,  
Defendants.

Opinion and Order on Defendants' Motions for Summary Judgment and  
Mr. Illuzzi's Motions to Compel, Enlarge, and Amend

Plaintiff Vincent Illuzzi owns a residential rental property in the City of Montpelier. He claims that a 2010 City project to replace a footbridge near his apartment building was designed in such a manner as to direct surface water towards his building, causing its foundation to cave in. He seeks compensation for that damage from the City itself; Mr. Todd Law, the City's Public Works Director in 2010; and Mr. Kurt Motyka, the City's Assistant Engineer and Project Engineer in 2010. He also claims that the City's conduct amounts to an unconstitutional taking. Messrs. Law and Motyka have jointly filed a summary judgment motion arguing that they are not proper defendants, pursuant to 24 V.S.A. § 901a, and are entitled to qualified immunity in any event. The City has filed a summary judgment motion disclaiming all liability. It argues that nothing it did caused any harm, the bridge project did not divert surface water toward the building, it is entitled to municipal sovereign immunity, and there was no taking. Mr. Illuzzi has filed a motion to

compel the production of certain documents requested from the City in discovery, two motions to enlarge the time to respond to Defendants' motions until he gets that discovery, and a motion to amend the complaint.<sup>1</sup>

1. *Facts*

Many (though, not all) of the material facts are undisputed. In 2009, the City was awarded a grant to replace a footbridge permitting pedestrians to cross from Vine Street, near Mr. Illuzzi's apartment building, over the North Branch of the Winooski River. Construction was to begin in June 2010. In January 2010, Mr. Motyka notified Mr. Illuzzi of the anticipated work. Mr. Illuzzi responded: "When Steve Gray was the public works director, I requested that the street [presumably Vine Street] be redesigned so that water doesn't flow onto my property. Any work on the street in the scope of the work?" Mr. Motyka responded,

Currently there is very little street work included with this project. The funding is strictly for bridge related work. I am not sure exactly where you are having water problems but the elevation of the bridge cannot be lowered due to the flood elevation. I would certainly be willing to look things over and if possible we can make some adjustments to minimize water flow onto your property, but we do not have money available for a total street reconstruction.

Mr. Illuzzi then wrote directly to Mr. Law:

I am in receipt of a March 11 letter from Assistant Engineer Kurt Motyka regarding the upcoming construction on the [Vine] Street Pedestrian Bridge . . . .

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<sup>1</sup> Initially, Mr. Illuzzi named Renaud Bros., Inc. (a third-party contractor that actually performed the bridge work) as a defendant. It filed a summary judgment motion, and Mr. Illuzzi filed a motion seeking an enlargement of time to respond. The parties later stipulated to the dismissal of any claims against Renaud Bros. Accordingly, those motions are moot.

In light of this I would like to bring to your attention that there have been water runoff issues from the street, and the line of separation between the street and property line has all but disappeared due to years of over paving. I request that the street/property line be reestablished and that water runoff issues be addressed.

On June 1, Mr. Motyka wrote Mr. Illuzzi to notify him that construction would begin on June 3. He included this: "If you would like to address the drainage problems you mentioned at your property, please contact me at your earlier convenience to schedule an on-site meeting. Alternatively, you could describe the issues in detail and we will do our best to make corrections during this project." Mr. Illuzzi did not schedule an on-site meeting. Instead, he responded:

Over the years, more and more blacktop has been added to the street, which has a crown in the middle.

As a result, water flows toward and sometimes into the basement.

If you can develop a way to block and divert the water that comes off the street, that would be very helpful, safer and avoid water damage claims down the road.

That's all I can offer at this time.

There is no evidence of further communications between Mr. Illuzzi or his agents and those of the City before the bridge project was completed.<sup>2</sup> According to the City, its agents reached out to Mr. Illuzzi but were unable to make contact. Mr. Illuzzi expresses doubt about this, claiming that he is easy to get in touch with and is always available. In any event, without better information about the asserted

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<sup>2</sup> There is evidence of communications about water issues between Mr. Illuzzi's agent and the third-party contractor that was hired to install the bridge, but there is no evidence that agents of the City were aware of that while the bridge was being constructed.

water issue, the City installed a swale in the course of the project with the evident purpose of diverting runoff away from Mr. Illuzzi's building.

After the project was completed, in August 2010 (during what the parties agree was a very wet summer), a significant rain event occurred. Surface water flooded into the basement and washed out part of the foundation of the building. Mr. Illuzzi complained to the City. The City met with Mr. Illuzzi at the site and did what Mr. Illuzzi characterizes as some minor, inexpensive work to ameliorate the water issue (precisely what is not detailed in the record). Evidently there has been no problem since.

Mr. Illuzzi believes (and the testimony of his expert tends to support) that the new bridge was installed at a higher elevation than the previous one; the entrance to it was widened; these alterations increased the volume and velocity of water running off towards the foundation, which presumably contributed to the damage to his building; and the new swale was insufficient to protect his property. In short, he contends that the project was designed such that increased runoff was directed onto his property. There is no dispute that both Mr. Law and Mr. Motyka had a hand in designing the bridge project. Defendants dispute, however, that the bridge project had any effect on the longstanding water issues on Mr. Illuzzi's property.

## 2. *The Motion to Compel and Motions to Enlarge*

After Defendants filed their summary judgment motions, Mr. Illuzzi filed a motion to compel the production of discovery from the City. He also filed motions to enlarge the time for responding to the summary judgment motions so that he would

be able to do so after receiving that discovery. The City responded that it already had turned over everything in its possession that was relevant to his requests and that Mr. Illuzzi was welcome to come to its offices and determine for himself whether he wanted anything else. Mr. Illuzzi subsequently filed his oppositions to the summary judgment motions and did not renew his motion to compel.

The Court does not perceive that any discovery dispute remains at this point and treats to the motion to compel and the motions to enlarge as moot.

### 3. *Summary Judgment Standard*

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial). The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts or affidavits to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991).

4. *Summary Judgment regarding Mr. Law and Mr. Motyka;  
Mr. Illuzzi's Motion to Amend*

Mr. Law and Mr. Motyka argue that Mr. Illuzzi improperly brought his claims against them individually as opposed to the City and that, in any event, they are entitled to qualified immunity. Mr. Illuzzi responded with, among other things, a motion to amend the complaint.

Subject to some limitations not relevant here, 24 V.S.A. § 901a bars direct actions against municipal employees for, among other things, damage to property. *Id.* § 901a(b). It requires that such claims be brought against the municipality, which may raise any defense that would have been available to the employee but which may not raise—with regard to those claims—any defense that would not have been available to the employee, including “municipal sovereign immunity.” *Id.* § 901a(c). In sum, negligence claims against City employees must be brought against the municipality, and the City may not assert sovereign immunity (but may assert individual immunities, such as qualified immunity). The law also provides, however, that: “This section shall not apply to an act or omission of a municipal employee that was willful, intentional, or outside the scope of the employee’s authority.” *Id.* § 901a(e).

After Defendants sought summary judgment on this basis, Mr. Illuzzi filed a motion to amend the complaint. The proposed amended complaint is not materially different in substance from the original (other than omitting the claim against Renaud Bros.) except that it proposes to re-characterize the claims against Mr. Law and Mr. Motyka as “wilfull negligence.” This presumably is some attempt at fitting

the claims against Defendants—who otherwise are clearly entitled to be dismissed from this case—under Section 901a(e) to avoid summary judgment.

It is highly questionable whether the term “willful” in this statutory context incorporates the concept of “willful negligence.” Historically, the expression “willful negligence” has had exceptionally little presence in the law of Vermont. In 1929, the Legislature adopted a statute providing as follows: “The owner or operator of a motor vehicle shall not be liable in damages for injuries received by any occupant of the same occasioned by reason of the operation of said vehicle unless such owner or operator has received or contracted to receive pay for the carriage of said occupant, or unless such injuries are caused by the gross or *wilful negligence* of the operator.” *Sorrell v. White*, 103 Vt. 277, 280 (1931) (emphasis). In *Sorrell*, a passenger had claimed gross or willful negligence against a driver and the issue of willful negligence alone was submitted to the jury and challenged on appeal.

The Court noted that the expression “has been hitherto completely unknown to us.” *Id.* at 281. The Legislature introduced the expression into Vermont law; it was not a fixture of the common law. The Court questioned its utility, noting that it is a “contradiction in terms” because “negligence arises from inattention, thoughtlessness or heedlessness, while wilfulness cannot exist without purpose and design.” *Id.* at 283 (comparing the expression to self-contradictory expressions such as “guilty innocence”). But, because the Legislature used it, the Court could not simply ignore the phrase.

The Court noted that the term must represent something more culpable than gross negligence. *Id.* at 282. To frame it, the Court assembled numerous, multi-faceted, out-of-state constructions of it:

To be wilfully negligent, one must be conscious of his conduct, and although having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. “An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person, or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness, such as charges the person whose duty it was to exercise care with the consequences of a wilful injury.” “When a person charged with an important duty voluntarily does or omits something in respect to such duty indicating a reckless or wanton disregard of consequences to the rights or personal safety of another, his conduct is characterized as ‘wilful negligence.’” It is not necessary that the existence of ill will should be shown. Although wilfulness imports intent, yet where the act is grossly reckless, there is a constructive intention as to the consequences, which, entering into the wilful, intentional act the law imputes to the offender, and thus what would otherwise be negligence merely becomes, by reason of a reckless disregard of the probable consequences of the act, a wilful wrong. There may be a wilful wrong without a direct design to do harm, and the term “wilful negligence” means a failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. . . . “The true conception of wilful negligence involves a deliberate purpose not to discharge some duty, necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed upon the person by operation of law.”

*Id.* at 284–85 (1931) (citations omitted). The Court then surmised that willful negligence “involves the element of conduct equivalent to a so-called constructive intent.” *Id.* at 285 (noting that the distinction between gross negligence and willful negligence is “shadowy” and “artificial,” and willful negligence remains a “contradiction”); see also Edwin H. Byrd, III, *Reflections on Willful, Wanton,*

*Reckless, and Gross Negligence*, 48 La. L. Rev. 1383, 1388 (1988) (noting that “possibly the most effective description of [the myriad ways of delineating levels of negligence] would be that ‘gross negligence’ is ‘gross,’ while ‘reckless’ is very gross, ‘wanton’ is very very gross, and ‘willful’ is even more gross, and so forth”).

Almost all references to “willful negligence” in Vermont case law arise out of that now long-repealed nonliability statute which, insofar as it attempted to employ various grades of negligence, was a failed experiment. *See Hardingham v. United Counseling Serv. of Bennington Cty., Inc.*, 164 Vt. 478, 487 (1995) (Dooley, J., dissenting) (“In the forty years the statute was in effect until repealed in 1969, it spawned a flood of appeals to this Court, and decision after decision attempted to find the line between gross [and willful] and ordinary negligence. In retrospect and in light of that experience, we found the terminology of the guest statute to be ‘ineffective as a definition of duty,’ and we characterized our experience . . . as ‘unsatisfactory.’” (citation omitted)). The few other references to willful negligence in Vermont cases are purely incidental. Currently, no Vermont statute uses the expression. In Vermont, willful negligence has largely been left to history.

In light of this, the Court does not believe that the Legislature intended to resurrect such a “shadowy” concept by importing it into 24 V.S.A. § 901a(e), and the Court will not draw that inference based on the use of the word “willful” alone. That conclusion is based on a number of considerations. First, the language of the statute itself suggests a level of conduct that surpasses negligence of whatever form. The statutory term, willful, is better interpreted as implying intentionality. In

typical usage, “willful” simply means “[v]oluntary and intentional, but not necessarily malicious.” Black’s Law Dictionary 1593 (7th ed. 1999). It does not ordinarily connote a mere lack of attention or neglect. That view is in accord with Vermont case law. *State v. Burlington Drug Co.*, 84 Vt. 243, 252 (1911) (“The word ‘wilful’ though given different definitions under different circumstances cannot well mean less than intentionally and by design.”); see *In re Chase*, 2009 VT 94, ¶ 26, 186 Vt. 355, 369 (collecting cases noting same).

Second, the Legislature has used the expression “willful negligence” in the past, and it could have used it here if that is the standard it intended. Third, as the Supreme Court has opined, willful negligence is an antiquated concept that is difficult to define. The Court sees little to be gained by its continued perpetuation, at least in the absence of clear legislative direction to the contrary.

Lastly, such an interpretation does not leave plaintiffs without a remedy for negligent conduct of municipal employees. The goal of the Legislature in crafting Section 901a was to insulate municipal employees from liability for non-intentional conduct and to place that liability on the municipality. It plainly did not intend to embroil the same employees (and plaintiffs) in unproductive litigation over the limits of an amorphous and contradictory legal expression. Mr. Illuzzi still may press a claim against the City for the same allegedly negligent conduct under the Court’s construction of Section 901a(e), and, in fact, may well have a more certain remedy against the municipal defendant.

Leave to amend is “freely given when justice so requires.” Vt. R. Civ. P. 15(a). Here, Mr. Illuzzi’s motion comes after the summary judgment motions were filed and briefed, and on a developed record. That record fails to admit of any reasonable inference of willful or intentional conduct on the parts of Mr. Law or Mr. Motyka. Nowhere has Mr. Illuzzi proffered evidence or allegations that could support willful or intentional conduct. The most the record can bear is that there were some aspects of the design of the new bridge, or paving in the vicinity, that increased the flow of surface water toward Mr. Illuzzi’s building and that, in turn, caused the harm to the foundation despite the new swale, and once that happened the City promptly took steps to correct it. At best, that is a negligence claim.<sup>3</sup> Even if “willful negligence” were the correct standard, and it means something less than but close to intentional, it does not appear in this case. The allegations and the summary judgment evidence simply do not fit within the language or the spirit of 24 V.S.A. § 901a(e).

In this instance, the proposed amendment is futile and would do little other than cause further delay in this action. 6 Charles Wright, Arthur Miller & Mary Kane, *Fed. Practice & Proc. Civ.* § 1487 (3d ed.) (“[S]everal courts have held that if a

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<sup>3</sup> On July 8, 2016, Mr. Illuzzi supplemented his opposition to summary judgment based on discovery he claims to have received in May 2016. He emphasizes that the new facts and allegations support his argument that Defendants were “willfully negligent.” The supplemental filing confirms that Defendants made a “change order” that was intended to ameliorate any water issues on Mr. Illuzzi’s property in the course of the bridge project by installing the swale and doing some regrading. Even if the Court considers the tardy filing, it does not alter the Court’s analysis; indeed, it lends support to it.

complaint as amended could not withstand a motion to dismiss or summary judgment, then the amendment should be denied as futile.”). The motion to amend is denied.

Mr. Law and Mr. Motyka’s summary judgment motion is granted. They are improper defendants in this case pursuant to 24 V.S.A. § 901a(b). Because they are entitled to be dismissed from this case on that basis, it is unnecessary to address their qualified immunity argument.

5. *The City’s Summary Judgment Motion*

a. *Direct Tort Claims against the City*

The City argues that it has municipal sovereign immunity as to any tort claims brought directly against it. The City’s argument is based on the governmental–proprietary dichotomy that, in Vermont, still is used to determine the breadth of a municipality’s sovereign immunity. *See Hillerby v. Town of Colchester*, 167 Vt. 270, 272 (1997) (“Traditionally, courts have held municipalities liable only where the negligent act arises out of a duty that is proprietary in nature as opposed to governmental.”). A town’s maintenance of its highways and associated drainage systems is a governmental function for which the town retains immunity. *Graham v. Town of Duxbury*, 173 Vt. 498, 499 (2001) (“Building and maintaining streets, and the accompanying drainage system, are generally government functions, and no liability for injuries suffered as a result of such activities may attach.”); *McMurphy v. State*, 171 Vt. 9, 14 n.2 (2000) (“This Court

has long held that the maintenance of highways is a governmental function.”). This line of authority appears to insulate the City from direct tort liability.

In opposition, Mr. Illuzzi asserts that, under Vermont law, he can bring an ordinary negligence claim against the City. As authority for that assertion, he cites a string of cases in which a municipality’s negligence over the maintenance or operation of its *sewer system* was at issue. There is no sewer system claim in this case, however.

The Vermont Supreme Court has carefully distinguished between a sewer system and a municipality’s highway infrastructure for purposes of the governmental–proprietary approach to municipal sovereign immunity. *Sanborn v. Vill. of Enosburg Falls*, 87 Vt. 479, 482 (1914) (“The construction and maintenance of sewers is not considered a governmental function but a power conferred upon a municipal corporation for its own benefit and that of its citizens, although its exercise may conduce to the general good. The sewers are the sewers of the corporation; but all highways are public highways, and their maintenance and protection are governmental functions.” (citation omitted)).

The Vermont Supreme Court has been critical of the governmental–proprietary dichotomy. *See, e.g., Hillerby*, 167 Vt. at 272–76; *Hudson v. Town of East Montpelier*, 161 Vt. 168, 177 n.3 (1993); *Vermont Gas Systems, Inc. v. City of Burlington*, 153 Vt. 210, 212–14 (1989). But, neither the Supreme Court nor the Legislature has modified this approach to sovereign immunity regarding direct

claims against a municipality. As a result, it remains the law of Vermont, and the City is entitled to summary judgment as to the direct tort claims against it.

b. *Derivative Claims Against City Based on the Negligent Conduct of Mr. Law and Mr. Motyka*

The City has not explicitly sought summary judgment on the claims or defenses that arise out of Mr. Law's or Mr. Motyka's conduct but are asserted against it pursuant to the derivative liability provision of 24 V.S.A. § 901a. It does, though, contend that summary judgment in this case is appropriate because Plaintiff cannot establish causation, which would apply with equal force to such claims. The Court concludes that Mr. Illuzzi has raised a triable issue regarding causation.

There is record testimony from Mr. Illuzzi and others, including his expert, that the reconstructed bridge visibly increased the volume and velocity of surface water draining onto Mr. Illuzzi's property and collecting at the site where the foundation collapsed. The fact that water collected in the same spot prior to the project for many years, and Mr. Illuzzi evidently had not taken any steps to solve the problem other than, at some point in the past, complaining to the City, may suggest that the bridge project was not the sole contributing cause of the damage. Nonetheless, though evidence of causation is somewhat vague, the Court concludes that Mr. Illuzzi has raised sufficient facts to demonstrate a material dispute for summary judgment purposes.

c. *Inverse Condemnation*

“The Fifth Amendment to the United States Constitution guarantees that ‘private property [shall not] be taken for public use, without just compensation.’” *Chioffi v. City of Winooski*, 165 Vt. 37, 39 (1996) (quoting U.S. Const. Amend. V). Similarly, the Constitution of the State of Vermont provides that “whenever any person’s property is taken for the use of the public, the owner ought to receive an equivalent in money.” Vt. Const. ch. I, art. 2. The essence of an inverse condemnation claim is that a taking occurred but the condemnor (here, the City), for whatever reason, did not follow the statutory or other formal process for exerting its eminent domain power and otherwise did not compensate the affected property owner. *Ondovchik Family Ltd. P’ship v. Agency of Transp.*, 2010 VT 35, ¶ 21, 187 Vt. 556, 568 (“Inverse condemnation claims are reserved for instances in which the state should have entered into eminent domain proceedings initially.”).<sup>4</sup>

Not every loss caused by the government is a taking—there is a critical distinction between a tort and a taking. “[A] property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the ‘direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.’” *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003), *quoted in Ondovchik*, 2010 VT 35, ¶ 16, 187 Vt. at 565–66. Additionally, “[e]ven where the

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<sup>4</sup> Sovereign immunity does not bar an inverse condemnation claim against the City. *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003); *Manning v. N.M. Energy, Minerals & Nat. Res. Dep’t*, 144 P.3d 87, 91 (N.M. 2006).

effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value." *Ridge Line*, 346 F.3d at 1356; see also *Matter of Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 799 F.2d 317, 326 (7th Cir. 1986) ("Accidental, unintended injuries inflicted by governmental actors are treated as torts, not takings."); *Henderson v. City of Columbus*, 827 N.W.2d 486, 494 (Neb. 2013) ("[A] threshold issue in an inverse condemnation case seeking compensation for damage to property is whether the actions that are alleged to have caused damage to property constitute an exercise of the governmental entity's right of eminent domain." (collecting cases)).

Assuming for purposes of this decision that the City's bridge project caused the harm alleged by Mr. Illuzzi, the summary judgment record is clear that, in doing so, the City neither explicitly nor implicitly exercised any eminent domain power. Prior to the project, Mr. Illuzzi notified the City of longstanding problems with water collecting near his foundation that he attributed to some aspect of Vine Street. The City made an effort at ameliorating that problem in the course of the project by, among other things, installing a swale. When the project was complete and a significant rain event occurred and the foundation collapsed, the City promptly returned to the site and did some more work, which solved the problem. At worst, there was a quickly remedied accident, oversight, or act of negligence in

the design of the bridge project that might or might not have a remedy in tort. But, on this record, there was no taking in the constitutional sense.

Order

For the foregoing reasons:

1. Mr. Illuzzi's motion to compel (MPR #5) is denied as moot;
2. All three motions to enlarge (MPR #s 6, 7, and 8) filed by Mr. Illuzzi are denied as moot;
3. Renaud Bros.' motion for summary judgment (MPR #3) is denied as moot;
4. Mr. Illuzzi's motion to amend (MPR #9) is denied;
5. Mr. Law and Mr. Motyka's motion for summary judgment (MPR #1) is granted; and
6. The City's motion for summary judgment (MPR #2) is denied on the issue of causation and granted on the issues of sovereign immunity and inverse condemnation.

As a result of the foregoing, the remaining causes of action in this case are derivative claims against the City based on the allegedly negligent conduct of Mr. Law and Mr. Motyka.

Dated this 12<sup>th</sup> day of July, 2016, at Montpelier, Vermont.

  
\_\_\_\_\_  
Timothy B. Tomasi,  
Superior Court Judge



## America's Small Town Capital

Mayor John Hollar

William Fraser  
City Manager

City Council Members:

Dona Bate  
Jessica Edgerly Walsh  
Tom Golonka  
Jean Olson  
Justin Turcotte  
Anne Watson

Jessie Baker  
Assistant City Manager

### **Recreation Department "Front Counter" Moves to the Montpelier Senior Activity Center July 15, 2016**

Starting Monday, July 18<sup>th</sup>, the "front counter" of the Montpelier Recreation Department will be located at the Montpelier Senior Activity Center at 58 Barre Street. Residents of Montpelier and surrounding communities are invited to visit 58 Barre Street from 9:00 am to 4:00 pm, Monday through Friday, to buy pool passes, register for summer camps, and ask questions about or sign up for all other Recreation programming.

This change is implemented following the move of the Recreation Department to City management effective July 1<sup>st</sup>, the elimination of a part time administrative assistant in the Recreation Department this year, to provide an accessible location to register for multi-age programs, and to better coordinate community services efforts. The Recreation and Montpelier Senior Activity Center teams are taking the opportunity to provide better services to residents by co-locating administrative support, cross-training staff, and ensuring that all are able to back each other up. No actual programming will be affected at the Recreation Department or the Montpelier Senior Activity Center.

This is an important step as the Montpelier community continues the conversation about multi-generational community services. If you'd like to provide input on the future of community services in Montpelier, please complete this survey (<http://bit.ly/mplrcommservices>) by July 22<sup>nd</sup>.

Stop by 58 Barre Street to say hello to Norma Maurice, Lise Markus, Dan Groberg, or Janna Clar! All will be able to answer questions about Recreation and Senior programming.



## *America's Small Town Capital*

DEPARTMENT OF PUBLIC WORKS, City Hall, 39 Main Street, Montpelier, VT 05602

July 15, 2016

### **CONSTRUCTION NOTICE**

#### **Spring Street Bridge Repair Project Vermont Route 12 (Bridge #B73)**

Our contractor, Blow & Cote, Inc., has given notice that they will begin the bridge repair project on **Wednesday, July 20, 2016**. The project involves the removal of the bituminous concrete deck surface, repairs as needed of the concrete bridge deck and approach slabs, replacement of the water-proof membrane, concrete sidewalk reconstruction, bituminous concrete paving, and other miscellaneous work.

The project will be completed in two phases to undertake the work along half the width of the bridge per phase to allow use of the other half of the bridge in alternating north/south directions. Each phase will require a detour because of the restrictive channelizing devices within the nearby Spring and Main Roundabout ("Keck Circle").

Phase 1 of the project will involve a **Route 12 north detour** which will begin at the Main Street (Route 12) and School Street intersection where northbound traffic will be directed to the Elm Street detour route. During this phase, repairs of the upstream half of the bridge will take place. Southbound or inbound traffic will be permitted to cross the bridge and proceed into town as normal. This work will take approximately three weeks to complete.

Phase 2 of the project will be the reverse of Phase 1, with work taking place on the downstream half of the bridge and inbound, **Route 12 south traffic detoured** to Elm Street and back to Main Street (Route 12) via School Street. Outbound Route 12 northbound traffic will be permitted to cross the bridge and proceed out of town to the "Meadow" neighborhood and points northerly as normal. This work will take approximately three weeks to complete.

Final paving of the bridge may require a one-day full closure of the bridge. An additional notice will be released at that time.

Notice is also given that public parking on the side of School Street between Main Street and Elm Street will be partially restricted to ensure adequate turning radius for tractor-trailer trucks following the Route 12 detour route. These parking restrictions will be in place for the duration of the project.

**The final completion date of the project is Friday, August 26<sup>th</sup>.**

This project is being funded by the City of Montpelier tax payers through the Capital Improvement Program with supplemental funding of about 66% from the Vermont Agency of Transportation's Town Highway Structures Grant program.