Vermont Superior Court
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Orleans Unit

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-00137

Andrew Cappello v. City of Newport et al

ENTRY REGARDING MOTION

Title: Defendants Motion to Dismiss (Motion 1)

Filer: Kevin Kite
Filed Date: March 13, 2023

The motion is GRANTED IN PART and DENIED IN PART.

Defendants, City of Newport, Travis Bingham, Thomas Bernier, and Paul Monette, move to dismiss Plaintiff Andrew Cappello's complaint for failure to state a claim upon which relief can be granted. The Court grants this motion in part and denies it in part as explained below.

I. Background

In a motion to dismiss, the Court is limited to the allegations and facts as established in Plaintiff's complaint, which the Court must assume are true and from which the Court must make all reasonable inferences. *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10.

In this case, Plaintiff's Complaint establishes the following. Plaintiff Andrew Cappello is a resident of East Charleston, Vermont who worked for the City of Newport, Vermont between 2009 and 2021 in its Parks and Recreation Departments. This employment was marked with personal and professional tension between himself and the then-City Manager, Laura Dolgin.[1] In June 2021, Plaintiff resigned his employment with the City. On August 5, 2021, Plaintiff was visiting friends at

[1] While Plaintiff mentions other city employees, the complaint primarily attributes these tensions during his employment to Ms. Dolgin, who is not a named defendant in the present litigation.

the Prouty Beach Campground. The Campground, which sits on the shores of Lake Memphremagog is owned and operated by the City of Newport.[2]

During Plaintiff's visit to Prouty Beach, he was approached by Defendant Thomas Bernier, the City of Newport's Director of Public Works who accused Plaintiff of harassing public works employees and demanded that Plaintiff leave Prouty Beach. Plaintiff did not leave. Soon thereafter, he was served with a notice against trespass under 13 V.S.A. § 3705(a)(1) that ordered him not to enter upon property that is lawfully possessed by the City of Newport. Specifically, the notice required Plaintiff not to enter Prouty Beach and Gardner Park, another city-owned park located approximately one mile from Prouty Beach. The Officer serving the notice on behalf of the City confirmed that the notice covered Prouty Beach and Gardner Park as well as all other property owned by the City of Newport.

The Notice, did not contain information as to why the City had issued it to Plaintiff, and it did not include any instructions or information on how to contest the notice. The Order was effective immediately, and Plaintiff left Prouty Beach soon thereafter. Plaintiff, after leaving Prouty Beach made a phone call to Defendant Travis Bingham, the City of Newport's Chief of Police. Chief Bingham told Plaintiff that Defendant Bernier had requested the notice, and Chief Bernier had complied with the request. At that time, Plaintiff did not contest the notice against trespass.

During the following spring of 2022, Plaintiff began volunteering for his children's T-ball team, but he could not continue because the team practiced at Gardner Park. At the same time, Plaintiff also started a position with the NorthWoods Stewardship Center, which required him to access Prouty Beach. In March of 2022, Plaintiff contacted the City Manager and Chief of Police asking for the Notice to be lifted. He did not receive a response from either, except for an email from the Chief clarifying that the notice against trespass was good for one year. Plaintiff next asked Defendant Paul Monette, then the Mayor of Newport, and the rest of the City Council to take up the notice and to petition requesting the notice to be lifted. Mayor Monette stated that he would not take up this issue at either the next City Council meeting or any meeting thereafter.

[2] There is no evidence in the record as to how the City came to own Prouty Beach, how the City operates the facility, and whether the Beach has functioned as a public park or as something closer to a private enterprise.

The City did not issue any further Notices, it never took legal action to enforce the notice or to arrest Plaintiff, and it is undisputed that the August 2021 notice expired the following year in August of 2022 and approximately six months before the present complaint was filed.

Plaintiff claims that during the 2021–22 period when the notice against trespass was in effect that he was unable to watch his children at Gardner Park and visit friends staying on Prouty Beach. Plaintiff continues to have fears when he visits parks in the City of Newport that if he is seen by either the Director of Public Works or the City Manager that he will be cited again. To date, Plaintiff has never been told the reason that he was issued a notice against trespass, and the Defendants have not provided any public statement or information to explain why the City issued this notice to Plaintiff or the process followed to issue this notice.

Based on these facts, Plaintiff has filed the present action containing six different counts against the City of Newport, Defendant Bernier, and Defendant Bingham. These claims include five counts under 42 U.S.C. § 1983 and the U.S. and Vermont Constitutions for violations of the following rights: (1) Freedom to Enter a Traditional Public Fora; (2) Freedom of Speech and Association; (3) Right to Due Process to Challenge the Trespass Notice; (4) Right to Access Public Parks and Areas; and (5) Right be Free from Discrimination. Plaintiff has also filed a sixth count under Article 7 of the Vermont Constitution for deprivation of common benefits. Plaintiff seeks a declaratory judgment from these claims stating that the City has violated his rights under the First and Fourteen Amendments of the U.S. Constitution and Article 4, 7, and 13 of the Vermont Constitution. He also seeks an injunction against future trespass orders without constitutional sufficient notice and opportunity to context. Finally, Plaintiff seeks an award of damages and attorney's fees.

II. Legal Analysis

A. Rule 12(b)(6) Standard

Defendants move to dismiss the present complaint on the basis that they claim Plaintiff has failed to state a claim upon which relief can be granted. V.R.C.P. 12(b)(6). To determine whether a complaint survives a motion to dismiss, the court assumes the factual allegations in the complaint are true. *Colby v. Umbrella Inc.*, 2008 VT 20, ¶ 5. The court will only grant the motion if there are no facts or circumstances that would grant plaintiff relief. Id. This is because the purpose of a motion

to dismiss for failure to state a claim is "to test the law of the claim, not the facts which support it." *Brigham v. State of Vermont*, 2005 VT 105, ¶ 11 (quoting *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002)). Courts rarely grant motions to dismiss for failure to state a claim. *Colby*, 2008 VT 20, at ¶ 5; see also *Kaplan v. Morgan Stanley & Co., Inc.*, 2009 VT 78, ¶ 7.

Courts generally disfavor these motions. *Bock v. Gold*, 2008 VT 81, ¶ 4 ("Motions to dismiss for failure to state a claim are disfavored and should be rarely granted."). For these reasons, a party seeking dismissal has a high burden to show that they are entitled to such an initial ruling. *Bock*, 2008 VT 81 at ¶ 4.

B. First Amendment of the U.S. Constitution and Article 13 of the Vermont Constitution

The First Amendment of the U.S. Constitution and Article 13 of the Vermont Constitution guarantee a person's rights to freedom of speech, among other rights. As a preliminary matter, the rights granted under Article 13 of the Vermont Constitution have long been held to be co-extensive with those rights under the First Amendment of the U.S. Constitution. *State v. Masic*, 2021 VT 56, ¶ 7 ("We have so far declined to extend greater free-speech protection under Article 13 than under the First Amendment and thus engage in a First Amendment analysis, construing Article 13 as coextensive with its federal analogue."); see also *State v. Read*, 165 Vt. 141, 153–54 (1996). The Court does not find any reason in the present facts or pleadings to alter this analysis. Therefore, for purposes of this decision, the Court will treat the federal and state rights under the First Amendment and Article 13 as co-extensive.

C. Speech and Expressive Conduct

Before the Court can fully examine the question of a public forum raised in Plaintiff's first count and challenged by the Defendants, there is a threshold question of whether this dispute involves protected speech or expressive conduct. *Virginia v. Black*, 538 U.S. 343, 358 (2003); *State v. Tracy*, 2015 VT 111, ¶ 15. The right to access a public forum is, first and foremost, grounded in First Amendment rights. If there is no protected First Amendment activity, then it does not matter whether the forum is a public, limited-public, or private forum. There is no activity to be protected. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) ("[W]e need go no further" if speech is not protected by the First Amendment).

On the other hand, if there is a protected speech or expressive conduct, then the determination of what type of forum is critical to determine what level of scrutiny the restriction on this speech or expressive conduct should receive. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983); *International Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–80 (1992).

In the present motion, Defendants challenge whether Plaintiff's actions were speech or expressive conduct. Defendants characterize the "speech" at issue here as leisure activities—hanging out with friends at Prouty Beach, watching a T-ball game—or commercial activities, such as performing tasks associated with his new job. To the extent that the notice against trespass was directed to Prouty Beach, there is legal support for the proposition that hanging out at a beach, talking with friends, or exploring a park is not, in and of itself, a protected speech or expressive conduct activity. See *Daly v. Harris*, 215 F.Supp.2d 1098, 1106–09 (D.Hawai'i 2002) (holding that using a public beach to talk with others and engage in other recreation activities did not implicated the First Amendment, regardless of its public forum status).

In response, Plaintiff argues that there are inherent First Amendment rights to access certain places or certain events. By way of example, he cites to authority that appears to stand for the proposition that a parent has an interest and right to attend a child's sporting event that is open to the general public. *Johnson v. Perry*, 859 F.3d 156, 172–73, 175–76 (2d Cir. 2017).

Looking closely at *Johnson* and the other cases cited by Plaintiff, however, there is an important thread running through them. Each involves either protected speech that the individual has previously made or intends to make and is subsequently prevented from doing, e.g., *Huminski v. Corsones*, 396 F.3d 53, 89 (2d Cir. 2005). In *Johnson*, the issue is not speech, but the right to peaceable assembly, which is "cognate to those of free speech and free press and is equally fundamental." *Johnson*, 859 F.3d at 171 (quoting *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937)). While the Second Circuit's substantive analysis of this right is focused, in part, on identifying the nature of the forum, it is not a forum analysis per se. Id. at 171–73. Instead, the Second Circuit's analysis is about events where the right to assemble is invoked. Thus, the right to enter a school is not unlimited or even particularly compelling despite its public status. The same could be true for entering City Hall on a night where no public meeting are scheduled. What matters in *Johnson* is that the ban implicates

public assemblies—meetings, sporting events, or other communal activities—where the general public is permitted or invited to attend. Id.

Defendants urge the Court to view *Johnson* on more limited terms as a retaliatory case where the father's speech led to an unconstitutional response. Id. at 161–64. While *Johnson* does have this component as part of its factual background, it is not limited to it. The Second Circuit's analysis on the First Amendment does not discuss whether father's statements were protected First Amendment Speech. Instead, the analysis is on the impact of the response, which prevents father from attending public sporting events that were important assemblies and part of the high school community.

Looking to this case, there is a question about the importance of the T-ball games that Plaintiff claims he was prevented from attending as a result of the City's notice against trespass. While these events were sporting events, it is not clear that they were the type of important community assemblies that might trigger the right to peaceably assemble that the high school games in *Johnson* were, but this analysis is ultimately a factual one, which makes it improper to decide at the level of a motion to dismiss. Plaintiff has alleged that they were important community events, and that is sufficient for the present motion.

Looking beyond the T-Ball games, there are substantial factual questions about the notice against trespass in this case. The Complaint in this matter contains sufficient allegation that if accepted would allow a jury to draw an inference that Plaintiff received the notice against trespass, at least in part, because of viewpoint differences between Plaintiff and City Officials. The Complaint also provides enough factual support for an inference that Defendant's actions were retaliatory given the proximate time and prior negative actions toward by Plaintiff leading up to the no trespass notice.

These factual inferences are in play because there is currently no explanation in the pleadings or the record as to why the city officials issued the notice against trespass. As discussed in the next sections, there is even a significant question whether the officers who issued the notice had the authority to do so. This notice against trespass does not appear to be the product of an ordinance, policy, or other process. Based on the Complaint, it was issued just after a difficult employment situation where Plaintiff and Defendants clashed, and there were no reported intervening events that might take this out of the realm of either speech or retaliatory implications.

In this respect, the facts of the present case are distinctly different than the issues in either *Daly* or *Hicks*, a case cited by and relied upon by the Defendants. In *Daly*, the plaintiff made a facial constitutional challenge to a regulation imposing a $3 admission for non-residents to a local park as a violation of free speech. 215 F.Supp.2d at 1102. In *Hicks*, an individual, who had been cited for multiple trespassing violations, sought to challenge the entire trespassing regulation as overbroad and violative of potential First Amendment rights, but admittedly not his own. *Virgina v. Hicks*, 539 U.S. 113, 118–19 (2003). The present case is neither one of overbreadth, nor a facial challenge to a city policy. Instead, this litigation arose from what, based on this limited record, appears to be a judgment call and a punitive measure undertaken by the City in response to some alleged behavior. It is unclear and disputed what this behavior was. Based on the pleadings, there is sufficient evidence, for the purpose of a motion to dismiss, that could allow a jury to conclude that the City's actions were an improper response to Plaintiff's statements and expressive conduct made prior to the issuance of the order. This is also enough to survive a motion to dismiss.

D. Public Forum Analysis

Defendants' next substantive argument for dismissal revolves around the meaning of a public forum. Defendants argue that neither Prouty Beach nor Gardner Park has been established as a traditional public forum, and they are not entitled to the type of first amendment protections that normally accompany such public fora or limited-public fora. See, e.g., *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 548 (2d Cir. 2002).

Setting aside the fact that the August 2021 notice against trespass incorporated broader language, which effectively banned Plaintiff from all City property, the law has long and broadly recognized public streets, sidewalks, and parks as public fora. *State v. McHugh*, 161 Vt. 574, 574–75 (1993) (citations omitted) ("Public streets and sidewalks are traditional public fora for purposes of free expression and do not lose that status in residential areas. . . . Speech in these areas may be regulated by a content-neutral regulation that is narrowly drawn to serve a significant government interest."); *Martin v. State, Agency of Transp. Dept. of Motor Vehicles*, 2003 VT 14, n. 4, 175 Vt. 80 ("Government regulation of speech in traditional public fora (property such as public streets and parks that has been devoted by long tradition to assembly and debate) and designated public fora (property in which the government has purposefully opened a nontraditional forum for public debate) is subject to strict scrutiny under the First Amendment."); *Perry Educ. Ass'n v. Perry Local*

Educators' Ass'n, 460 U.S. 37, 45 (1983) ("At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'") (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939)); see also *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Characteristics of Forum*, 70 A.L.R.6th 513, at §§ 8, 9 (2011) (collecting cases where restrictions on speech in a public park have been deemed to constitutional and unconstitutional)..[3]

Defendants argue that Prouty Beach and Gardner Park are different and should not be automatically classified as public fora. This may indeed bear out with additional facts and circumstances. Prouty Beach, for example, may be a commercial campsite with specific rules and regulations. Gardner Park may have similar restrictions. In this respect, there may be evidence that the City of Newport uses these resources differently than most public parks. Defendants may even demonstrate that these parks are limited public forums where admission is controlled, and the purpose of the area focused on commercial interests. See *D.A. Farber & J.E. Nowak*, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L.REV. 1219, 1220–23 (1984).

For the purpose of the present motion, however, there are insufficient facts to understand that these parks are something other than public forums. For the purposes of the present motion, Plaintiff has alleged that Prouty Beach and Gardner Park are public forums. Based on the extensive caselaw cited above, there is, at the very least, a precedential foundation to this proposition. It is reasonable to understand that the parks can be and normally are traditional public fora—in which case any action to bar speech or peaceable assembly through a notice against trespass would be subject the restriction to strict scrutiny analysis.

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[3] One of the most famous and earliest decisions involving free speech and public forums arose from Eugene V. Debbs delivering an anti-war speech in Nimisilla Park in Canton, Ohio. *D.R. Papke, Eugene Debbs as Legal Heretic: The Law-Related Conversion, Catechism and Evangelism of an American Socialist*, 63 U.CIN. L.REV. 339, 364–371 (1994), but it is not a stretch to suggest that this tradition harkens back much further to the Greek Agora and the Socratic tradition of engaging in dialogue in public space.

E. Overbroad Restrictions

The Defendants' second argument seeks to strike Plaintiff's second count, which involves Plaintiff's allegations that the notice against trespass was "overbroad and not narrowly tailored." Defendants' argument is that because Plaintiff was not engaged in "speech or conduct necessarily associated with speech (such as picketing or demonstrating)," there is no basis for an overbreadth challenge. *Virginia v. Hicks* , 539 U.S. 113, 124 (2003). While the Court has largely dealt with this issue above in Section II.C., Defendants' argument on this matter necessitates additional analysis. Defendants rely on both the facts and holding of *Hicks* for this argument. In *Hicks*, the Richmond Redevelopment and Housing Authority (RRHA), a public entity, owned and operates a low-income housing development. Id. at 115. The City of Richmond, in an effort to curb rampant crime and drug dealing, privatized the streets inside the development and deeded them to the RRHA. The RRHA then adopted trespassing regulations and policies. Id. at 116. The defendant, Kevin Hicks, violated these ordinances and was cited for trespassing. Id.

The lower courts in *Hicks* went back and forth on whether the streets in the development were or were not a public forum. Id. at 117–18. In his decision for a unanimous court, Justice Scalia notes that the key issue was not whether the streets were a public forum but whether the policy, which served a legitimate government function, was overbroad, such that the entire law should be struck. Id. at 119–21. Justice Scalia notes that the limited impact and powerful governmental interest did not justify an outright nullification of the regulations:

> As we noted in *Broadrick*, however, there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, ibid., before applying the "strong medicine" of overbreadth invalidation

Id. (internal citations omitted).

The problem with the Defendants' use of *Hicks* is that the present case does not involve a challenge to a broader policy. There is no allegation that Defendants adopted a regulatory scheme

that is overbroad, which is to say, adopted for a legitimate purpose, but which has such unconstitutional impacts that the entire law must be struck. Instead, Plaintiff's allegation is that penalty is overbroad and not narrowly tailored. In this respect, "overbroad" does not apply to the act of issuing a notice against trespass, but to the specific scope of the immediate notice, which broadly included all city property for one year. This type of overbroadness has nothing to do with the term overbroad as used in *Hicks*. It has more to do with the type of claim that the Second Circuit examined in *Huminski,* namely, whether the penalty was an overly broad restriction to his right of free expression. 396 F.3d at 92–93.

This confusion rests in the fact that Plaintiff has included two separate counts under the First Amendment based on the same factual scenario. Plaintiff's first count alleges a violation of his First Amendment right to enter traditional public fora. The second count alleges a violation of Plaintiff's Freedom of Speech and Association. These are effectively the same claims. As noted in Section II.C. above, the right to enter a public forum under the First Amendment is tied to the issue of speech and assembly. No one has an unrestricted right to enter a public forum. *Hotel Employees & Restaurant Employees Union, Local 100 v. City of N Y. Dep't of Parks & Rec.*, 311 F.3d 534, 544 (2d Cir. 2002). City Hall closes at the end of the day, and no one, apart from an industrious employee and maintenance staff, has access. This does not inherently invoke a First Amendment concern, but closing City Hall to block protestors or to prevent an individual from filing a petition protesting government action does.

Labelling spaces as public fora is not an enshrinement. It is a recognition that there are certain spaces so tied to free speech and association rights that the Court should review any restriction involving speech and access with strict scrutiny. *New York Magazine v. Metropolitan Tramp. Auth*, 136 F.3d 123, 128 (2d Cir. 1998)

For these reasons, the Court concludes that Plaintiff's first Count survives, but Count 2 is hereby struck as redundant. V.R.C.P. 12(f); see, e.g., *Ferring B.V. v. Fera Pharmaceuticals, LLC*, 2015WL4623507, at *13 (E.D.N.Y. 2015) (noting that a determination of whether a claim is redundant lies in the discretion of the court).

F. Due Process Clause of the Fourteenth Amendment and Article 4 of the Vermont Constitution

Plaintiff also alleges infringement of his due process rights as guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article 4 of the Vermont Constitution. Count 3 alleges that Defendants infringed upon Plaintiff's right to receive due process to challenge the trespass notice. Count 4 alleges that Defendants violated Plaintiff's fundamental right to access public parks and areas.

The Fourteenth Amendment to the U.S. Constitution protects persons against state deprivations of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The court looks at procedural due process by asking (1) whether there is a liberty interest the state has interfered with and (2) whether the procedures of that deprivation were constitutionally sufficient. *Wool v. Office of Professional Regulation*, 2020 VT 44, ¶ 20, 212 Vt. 305 (citing *Conway v. Gorczyk*, 171 Vt. 374, 376, 765 A.2d 463, 465 (2000)). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005) (citations omitted).

Art. 4 of the Vermont Constitution states,

> Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.

The Vermont Supreme Court considers Article 4 equivalent to the federal Due Process Clause. *Quesnel v. Town of Middlebury*, 167 Vt. 252, 258 (1997). As with the First Amendment and Article 13 analysis above, the Court will treat these two provisions as co-extensive.

For Count 3, Plaintiff alleges that he was unable to contest the trespass notice. Plaintiff alleges that this notice against trespass curtailed his freedom of speech and freedom of association guaranteed by the First Amendment. As noted above, this First Amendment Claim survives, and for this reason, this claim should also survive. See *LaFlamme v. Essex Junction School Dist.*, 170 Vt. 475, 482 (2000) (an infringement on First Amendment rights involves liberty).

This claim, however, touches upon another issue concerning the authority for an employee of the City to issue a notice against trespass. The concept of the notice against trespass comes from 13 V.S.A. § 3705(a)(1), which states that a criminal charge for trespassing occurs only if a person remains or returns to any land or place where they have received a notice against trespass. The notice constitutes the revocation of legal authority or consent from the "person in lawful possession" of the land or property.

This leads to the question of who in the City of Newport has lawful possession of the City's property. Looking at the City of Newport's Charter, the power appears to rest with the Mayor and City Council under their general authority. 24App. V.S.A. § 7-7 ("The administration of all fiscal, prudential, and municipal affairs of said City, and the government thereof, shall be vested in the Mayor and Board of Aldermen."). In this case, the allegation is that the Mayor and City Council did not order this notice against trespass. For the present purpose of the motion to dismiss, the only individuals named are the Public Works Director, Defendant Bernier, and the Chief of Police, Defendant Bingham. The record, for present purposes, indicates that Director Bernier ordered the notice be issued and sent, and Chief Bingham simply complied with the direction and issued the notice. Such an action raises a potential ultra vires issue, but more directly, it raises a due process issue. If, in fact, the City wishes to adopt a policy regarding the issuance of notices against trespass, then the Mayor and City Council would need to adopt such a regulation or policy. They could only do this through a public process where individuals would have the opportunity to provide public comment and where the City voters would ultimately have access to permissive referendum processes under 24 V.S.A. § 1971. If no such general policy or regulation was intended, then at the very least, the City Council and Mayor would have to make such determinations as the persons in lawful possession of the municipality's property. This did not occur. Collectively, these absences constitute an absence of process from which a jury could conclude that there had been a failure of procedural process in how this notice against trespass arose against Plaintiff.

For these reasons, Count 3 alleges facts sufficient to survive the present V.R.C.P. 12(b)(6) challenge.

G. Fundamental Right to Access Public Property

Plaintiff alleges in Count 4 that he "has a constitutionally protected liberty interest in travelling through and being present in public parks under the Fourteenth Amendment." Some

jurisdictions have recognized a liberty interest of intrastate travel. Gov. Discrim. § 11:2 (Dec. 2022 update). Vermont is not one of these states. Moreover, courts that have examined the issue of right of access to public property as a fundamental right have generally rejected this formulation. *Daly*, 215 F.Supp.2d at 1109–12. Therefore, Plaintiff cannot meet the first prong of the procedural due process analysis. The court **Dismisses** Count 4.

H. Equal Protection Clause of the Fourteenth Amendment

Plaintiff alleges in Count 5 that Defendants violated Plaintiff's right to be free from discrimination. This claim rests on 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment. To establish a 42 U.S.C. § 1983 claim, Plaintiff must establish "proof of a violation of the underlying constitutional rights asserted." *Mellin v. Flood Brook Union School Dist.*, 173 Vt. 202, 215 (2001) (citing *Daniles v. Williams*, 474 U.S. 327, 330 (1986)). Plaintiff must show that the challenged conduct constitutes "state action." *Colby*, 2008 VT 20 at ¶ 6. State action is shown by (1) the alleged constitutional deprivation is caused by the State and (2) the party who allegedly caused the constitutional deprivation is a state actor. Id. (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999)).

Plaintiff facially meets these first requirements by showing that the alleged constitutional deprivation was caused by the State. This is because municipal employees for the City of Newport, a municipal corporation created by the State of Vermont, originated and served the notice against trespass on Plaintiff. Plaintiff meets the second requirement because the parties responsible for this deprivation are state actors.

To establish an equal protection claim, a plaintiff must show "selective treatment . . . based on impermissible considerations such as race, religion, intent to inhibit the exercise of constitutional rights, or malicious intent to injure." *Parker v. Town of Milton*, 169 Vt. 74, 81 (1998); see also *Hoffer v. Ancel*, 2004 VT 38, ¶ 16, 176 Vt. 630. The Vermont Supreme Court has adopted a two-part test to determine whether there exists an equal protection claim: "(1) The person, compared with others similarly situated, was selectively treated; and (2) ... such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *In re Letorneau*, 168 Vt. 539, 549 (1998) (quoting *LaTrieste Restaurant & Cabaret Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir.1994)); see also *Hovey v. Vermont*, No. 5:16–CV–266, 2017 WL 2167123 (D. Vt. May 16, 2017).

Here, Plaintiff alleges that Defendants "singled [him] out for mistreatment due to City employees' personal dislike of [Plaintiff]." Complaint at ¶ 82. Plaintiff, however, has failed to show anyone else who was "similarly situated" and was not singled out. *In re Letorneau*, 168 Vt. at 549; see also *Neilson v. D 'Angelis*, 409 F.3d 100, 104 (2d. Cir. 2005) (stating that a class of one claimant "must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves."). Because Plaintiff has not pled any facts or provided such a similarly situated individual on which to base this claim and comparison, the Court must dismiss this claim under V.R.C.P. 12(b)(6). Therefore, Count 5 is **Dismissed**.

I. Article 7 of the Vermont Constitution

In Count 6, Plaintiff alleges that Defendant City of Newport violated his rights under Article 7 of the Vermont Constitution by depriving Plaintiff of a common benefit. "Though presented as a restriction of government and not a grant of privileges, Article 7 guarantees the right of the people to a government that does not favor any one person or family over another." *In re Town Highway No. 20*, 2012 VT 17, ¶ 32.

A claim under Article 7 of the Vermont Constitution is made up of three elements:.

> First, of course, a plaintiff must show the denial of a common benefit. In doing so, the plaintiff must show disparate and arbitrary treatment when compared to others similarly situated. Second, the plaintiff must show that the denial directly favors another particular individual or group. Finally, because we must defer to any "reasonable and just" basis supporting a discretionary judgment by a governmental decisionmaker, Baker, 170 Vt. at 214, 744 A.2d at 879, a plaintiff must demonstrate not only that that the decision was wholly irrational and arbitrary, but also that it was actuated by personal motives unrelated to the duties of the defendant's official position, such as ill will, vindictiveness, or financial gain.

Id. at ¶ 37; see also *Brown v. State*, 2018 VT 1, ¶ 17.

Plaintiff has alleged sufficient facts in his complaint to show that he was denied a common benefit—access to the public parks and all other property of the City of Newport. Plaintiff alleges that "[o]ther individuals who merely converse with City employees are not denied access to all City property." Complaint at ¶ 87. This allegation does not allege sufficient facts to show that the "denial directly favors another particular individual or group." *In re Town Highway*, 2012 VT 17 at ¶

37. Because Plaintiff has not shown sufficient facts to reach the requirements for a claim under Article 7 of the Vermont Constitution, the court **Dismisses** Count 6.[4]

J. Qualified Immunity Defenses

Finally, the individual Defendants allege they are protected from this lawsuit because of qualified immunity.

"Qualified immunity attaches to public officials who are (1) acting during the course of their employment and acting, or reasonably believing they are acting, within the scope of their authority; (2) acting in good faith; and (3) performing discretionary, as opposed to ministerial, acts." *Murray v. White*, 155 Vt. 621, 627 (1991); *Baptie v. Bruno*, 2013 VT 117, ¶ 11, 195 Vt. 308; *Amy's Enterprises v. Sorrell*, 174 Vt. 623, 624 (2002). "Good faith exists where an official's acts did not violate clearly established rights of which the official reasonably should have known." *Sabia v. Neville*, 165 Vt. 515, 521 (1996).

Plaintiff alleges sufficient facts to defeat a qualified immunity claim at this stage of litigation. First, Plaintiff has shown that the Defendants, who are public officials, may not have been acting within the scope of their employment by issuing an unauthorized notice of trespass. Second, whether the constitutional and statutory rights under the First Amendment and Due Proces Clause that Plaintiff claims Defendants violated by issuing a broad notice against trespass that effectively barred Plaintiff from public property were or were not clearly established rights has not been fully proven one way or the other. The Court is missing critical facts that would explain why and how the notice was issued. At this stage, there are allegations and some evidence to support an inference that this notice was issued based on either a viewpoint dispute or retaliatory behavior, either of which, if fully established, would be sufficient to defeat a claim of qualified immunity. It is also unclear if the T-Ball events were or were not community events of a sufficient scope as to implicate the right to peaceably assemble. Third, this action appears to have been done without due process

[4] Plaintiff effectively admits this lack of a comparative group but urges the Court to nevertheless allow the claim to continue because of the egregious nature of the violation. Def. Opposition at 30, n.8 (citing *Town Highway*, 2012 VT 17 at ¶34 (quoting *In re Property of One Church Street City of Burlington*, 152 Vt. 260, 263 (1989))). This argument is unavailing. Plaintiff has made out several claims in this matter concerning the behavior. The fact that such behavior may be reprehensible does not merit the suspension and re-interpretation of a separate constitutional provision that would effectively it enlarge it well-beyond the scope with which the courts have consistently applied it. *Town Highway*, 2012 VT 17, ¶57

or clear sources of authority under basic principles of municipal authority. Fourth, this action was also done in the wake of challenges raised against other municipalities—including the largest in Vermont—where the City of Burlington was the subject of a lawsuit and eventual settlement to resolve the broad use of notices against trespass to deal with difficult individuals. *Ploof v. City of Burlington*, Dckt. No. 537-7-18 CnCv. It is unclear whether the City of Newport's officials were aware of these events and considerations. Taken together, these factors make an application of qualified immunity at this stage and on the present record to be improper, and Defendants' motion to dismiss based on qualified immunity is **Denied.**

Notwithstanding this present rejection of qualified immunity, there is an issue of legislative immunity concerning Mayor Monette that has not been briefed by the parties. As the Court understands the facts, the sole allegation against Mayor Monette is that he refused to include the notice against trespass as an item of business for the city council or to include it as part of any city council agenda. The determination of a council agenda and conduct of a council meeting are fundamentally legislative functions, and the U.S. Supreme Court has ruled that local legislators are entitled to absolute legislative immunity for all actions taken "in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 52–54 (1998). Based on the holding of *Bogan*, the Court understands that Mayor Monette is likely entitled to immunity in this case, albeit legislative, instead of qualified. Given the lack of briefing on this issue, the Court will set a hearing for this narrow question and allow the parties to provide clarification on the application of legislative immunity to Mayor Monette, whether it removes him as a party, and what import *Bogan* has on this and any other claim against Mayor Monette.

III. Order

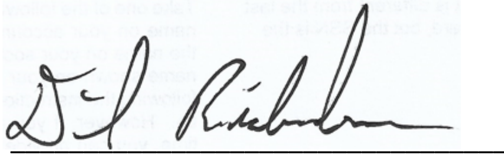
For a motion to dismiss under V.R.C.P. 12(b)(6), the court will only grant the motion if there are no facts or circumstances that would grant plaintiff relief. As explained above, Counts 1 and 3 surpass the minimum sufficiency requirements of V.R.C.P. 12(b)(6), and Defendants' Motion to Dismiss is **Denied as to these claims**. The Court finds Plaintiff's Count 2 to be redundant and duplicative of Count 1, and it is **Dismissed** in accord with V.R.C.P. 12(f). Counts 4, 5, and 6 are not established as a matter of law based on the present pleadings and case law. Defendants' Motion to Dismiss is **Granted as to these claims.** Finally, the Court does not find sufficient evidence to support an application of qualified immunity at this time, and the request to dismiss the individual

defendants is **Denied.** The issue of legislative immunity, however, appears to apply to Mayor Monette in light of the fact that his alleged liability arises from legislative actions he did or did not take as mayor presiding over city council. Since this issue was not briefed, the Court shall set this sole remaining issue for motion hearing, which shall also include a discovery conference. Notice of this hearing shall issue separately.

The motion is DENIED in part and GRANTED in part.

So Ordered.

Electronically signed on 9/8/2023 11:11 AM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge