

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Joseph McCoy

v.

Civil No. 1:20-cv-362-JL
Opinion No. 2021 DNH 158

Town of Pittsfield

MEMORANDUM ORDER

After the court's denial of Defendant Town of Pittsfield's motion for judgment on the pleadings regarding certain counts of this civil rights lawsuit involving a political message on a trailer in a residential yard, two of Plaintiff Joseph McCoy's claims remain: Count 1 for violation of his free speech rights, and Count 2 for violation of his equal protection rights.¹ The Town now moves for summary judgment on these claims, arguing that the undisputed factual record demonstrates that the Town did not apply its zoning ordinance against him in an unconstitutionally vague manner or in any other way that violated his First Amendment rights, and did not selectively enforce the ordinance against him in violation of his equal protection rights.² The Town also moves to strike a declaration and attachments to the declaration McCoy submitted as part of his objection to the summary judgment motion.³ This court has jurisdiction over McCoy's claims under [28 U.S.C. §§ 1331](#) and [1343](#) because the claims present federal questions and arise from federal civil rights statutes.

After consideration of the parties' submissions and hearing oral argument, the court grants the Town's motion for summary judgment and denies its motion to strike. As for the

¹ Doc. no. [13](#).

² See Motion for Summary Judgment (doc. no. [17](#)).

³ See Motion to Strike (doc. no. [23](#)).

content or viewpoint discrimination aspects of McCoy's First Amendment claim, summary judgment is appropriate because McCoy cannot "point to specific, competent evidence" that Town officials discriminated against him based on the expressive content on his trailer. [Sanchez-Rodriguez v. AT&T Mobility P.R., Inc.](#), 673 F.3d 1, 9 (1st Cir. 2012). McCoy's vagueness claim suffers the same fate because no reasonable fact finder could conclude that the Town's application of the storage container ordinance failed to provide a person of ordinary intelligence fair notice of what was prohibited, was so standardless that it authorized or encouraged seriously discriminatory enforcement, or even led to discriminatory enforcement in McCoy's case. Finally, the Town is entitled to summary judgment on McCoy's "class of one" equal protection claim because he has not met his burdens of production and persuasion to identify similarly situated landowners, demonstrated that the Town treated him differently than these alleged comparators, or proven that the Town did not have a rational basis for its enforcement of the ordinance against him.

I. Applicable legal standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(a\)](#). A dispute is "genuine" if it could reasonably be resolved in either party's favor at trial by a rational fact-finder, and "material" if it could sway the outcome under applicable law. [Estrada v. Rhode Island](#), 594 F.3d 56, 62 (1st Cir. 2010). In analyzing a summary judgment motion, the court "views all facts and draws all reasonable inferences in the light most favorable to the non-moving party." [Id.](#)

The Town also moves to strike the entire McCoy declaration and attachments thereto under [Fed. R. Civ. P. 37\(c\)\(1\)](#). "If a party fails to provide information or identify a witness as

required by [Rule 26\(a\)](#) . . . the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” [Fed. R. Civ. P. 37\(c\)](#). Thus, “the baseline rule is that the required sanction in the ordinary case is mandatory preclusion of late-disclosed information.” [Harriman v. Hancock County](#), 627 F.3d 22, 29 (1st Cir. 2010) (quotation marks and bracketing omitted). The court considers several factors in determining whether preclusion is appropriate, including “the sanctioned party’s justification for the late disclosure; the opponent-party’s ability to overcome its adverse effects (i.e., harmlessness); the history of the litigation; the late disclosure’s impact on the district court’s docket, and the sanctioned party’s need for the precluded evidence.” [Id.](#) at 30 (citing [Esposito v. Home Depot U.S.A., Inc.](#), 590 F.3d 72, 76 (1st Cir. 2009)).

Moreover, under [Rule 56](#), “[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” [Fed. R. Civ. P. 56\(c\)\(4\)](#). “[P]ersonal knowledge is the touchstone” of the admissibility analysis. [Perez v. Volvo Car Corp.](#), 247 F.3d 303, 315–16 (1st Cir. 2001). In addition, an affidavit’s statements “must concern facts as opposed to conclusions, assumptions, or surmise” to be admissible. [Id.](#) at 316. Finally, because [Rule 56](#) “requires a scalpel not a butcher knife,” a court must only strike the portions of an affidavit that are inadmissible, while crediting the remaining portions. [HMC Assets, LLC v. Conley](#), No. CV 14-10321-MBB, 2016 WL 4443152, at *2 (D. Mass. Aug. 22, 2016) (Bowler, M.J.) (quoting [Perez](#), 247 F.3d at 315).

II. Background

The following facts are undisputed, unless otherwise noted. See [L.R. 56.1\(b\)](#) (“All properly supported material facts set forth in the moving party’s factual statement may be deemed admitted unless properly opposed by the adverse party.”).

In early 2014, McCoy and his wife moved to Catamount Road in Pittsfield. Shortly after moving to Pittsfield, McCoy purchased a 52-foot trailer and had it delivered to his property. McCoy used the trailer to store items from his prior residence, as well as items from storage units he had purchased.⁴ He also kept tools and other items in the trailer so that he could perform maintenance or other renovation work on his property.⁵ In August 2015, the Town’s then building inspector, Jesse Pacheco, visited McCoy’s property to conduct an inspection relating to a building permit that McCoy had obtained for work on his home. During the inspection, Pacheco noticed the trailer and told McCoy that he needed to obtain a storage container permit⁶ from the Town to keep the trailer on his property.

⁴ McCoy Depo. (doc. no. [17-2](#)), at 25:1-13.

⁵ [Id.](#)

⁶ From 1997 to 2015, the Town’s Zoning Ordinance defined “storage container” as “any truck trailer, box trailer, school bus, mobile home or other similar facility used for storage or other purposes.” In 2016, the Town amended this definition in its ordinance to define a “storage container” as “a truck trailer, box trailer, school bus, MANUFACTURED HOUSING unit, or similar mobile container parked continuously for 31 days or more and used principally for storage and not used for any person’s residential occupancy or transient lodging.” Ordinance, Article 3.

McCoy then applied for and obtained a storage container permit from the Town for the trailer,⁷ effective September 1, 2015 (the “2015 Permit”).⁸ Article 14 of the Town’s Zoning Ordinance, applicable to storage containers, now provides (as it did when McCoy applied for his permit) that regulating and permitting conditions for storage containers are intended “to promote the general welfare by protecting the aesthetics of the town.” Under the ordinance, storage containers must be used only for storage, must meet certain setback requirements, and must not be kept on a lot for longer than 12-months during any 15-month period. Consistent with this section of the ordinance, the 2015 Permit stated that the trailer was permitted for storage purposes only for a period of one year, must be removed by September 1, 2016, and was not allowed to be kept permanently.

Later in 2015, McCoy rented another storage container to keep on his property, but did not obtain a storage container permit for the rental container. In January 2016, McCoy allowed his son to paint the side of his trailer with an image that reads “TRUMP! USA” with “2016” in smaller, red paint. As of January 29, 2016, the trailer appeared as follows in a social media posting:

⁷ The permit lists the serial number, make, and manufacturer of McCoy’s trailer and McCoy does not dispute that these numbers are associated with some other trailer or container.

⁸ See 2015 Permit, Exhibit 2 to Marston Affidavit (doc. no. [17-3](#)).



McCoy Depo., Ex. D (doc. no. [17-2](#)).

McCoy continued to use the trailer for storage but also used it to express his support for then-candidate Trump's bid to become President of the United States. In August 2016, the Concord Monitor published an article about the trailer and McCoy's support for candidate

Trump, which attracted more attention to the trailer and McCoy's property. A staff photographer from the Concord Monitor photographed the trailer as part of the article, as shown in the following image:



Ex. A to McCoy Depo. (doc. no. [17-2](#)), at 112. This photograph depicts the expressive content at issue in this lawsuit.

On September 1, 2016, McCoy's storage container permit for the trailer expired. Pacheco wrote to McCoy sometime in September or October 2016 and informed him that the 2015 Permit had expired and that the trailer needed to be removed pursuant to Article 14, Section 3 of the ordinance.⁹ The Town also notified McCoy that he needed to remove the unpermitted rental container, which did not feature any expressive content. By handwritten letter dated

⁹ 2016 Notice of Violation, Ex. 3 to Marston Affidavit (doc. no. [17-3](#)).

November 3, 2016, McCoy wrote to Pacheco and requested a six-month extension of the 2015 Permit.¹⁰ In his letter, McCoy wrote that he was seeking a six-month extension “to keep [his] tools and materials inside this trailer while [he] deal[t] with [an] emergency construction situation.” McCoy also cited the fact that he was handling the construction work himself and was “physically handicapped,” but would “complete this task [of removing the trailer in six months] in order to remain with good standards for this town and it’s [sic] rules as a Pittsfield home owner.”

On November 15, 2016, the Town’s select board met and considered McCoy’s request to keep his trailer for an additional six months. On a motion by Selectman Carl Anderson, which passed by unanimous vote, the board granted McCoy’s request. At this time, Anderson and other board members were well aware that McCoy was also using the trailer to express his support for President Trump. The board granted McCoy’s extension request despite having received at least one anonymous complaint¹¹ about the trailer and despite the fact that the applicable section of the ordinance prohibits storage containers from remaining on a lot for more than 12 months in any 15-month period.

McCoy continued to keep the trailer on his property into 2017 and in May 2017, Pacheco visited McCoy’s property. After this visit, McCoy requested a meeting with the select board. The board discussed McCoy’s trailer during its May 23, 2017 meeting, but tabled any decisions about the trailer until McCoy could appear before the board. In the board’s minutes from the

¹⁰ Nov. 2016 Letter, Ex. F to McCoy Depo. (doc. no. [17-2](#)), at 117.

¹¹ The Town has no record of who submitted the complaint or the basis for the complaint, and Town witnesses similarly have no recollection of the complainant’s identity or complaint’s basis.

May 23 meeting, there is no discussion of McCoy's trailer being used to express support for President Trump or any other expressive purposes.

The board met with McCoy during its June 13, 2017 meeting. McCoy explained that it was taking him longer than expected to finish the repairs on his home because he was handicapped and doing the work himself. He then requested another extension of the storage container permit for the trailer, this time for one year, and that he planned to "get rid" of the trailer after that. McCoy did not mention the trailer being used as a sign or indicate any interest in applying for a sign permit (a separate Town process) during this meeting. According to minutes from this meeting, the board agreed to "extend the permit for one year." On June 13, 2017, the board approved a new storage container permit for McCoy's trailer.¹²

By the end of July 2017, the side of the trailer that showed support for President Trump had been painted over with a scene of hot air balloons and a waving American flag. The following image from social media shows the side of the trailer at issue as of July 30, 2017:

¹² At oral argument, counsel for both parties suggested that the distinction between granting a permit extension or a new permit was one of terminology, not of substance. The court accepts this premise for purposes of this order.



Ex. H to McCoy Depo (doc. no. [17-2](#)), at 119.

For the remainder of 2017 and well into 2018, the trailer continued to display the balloon scene. On May 22, 2018, the select board wrote to McCoy to remind him that his storage container permit for the trailer was expiring in June 2018. The board also reminded McCoy that the trailer needed to be removed from his property for at least three months before he could

apply for another permit to “bring it back.”¹³ McCoy responded by letter dated May 29, 2018.

In his letter, McCoy referenced the fact that he had two trailers to unload and that he had emptied one, but because he was disabled, the task of emptying the other one was taking longer. McCoy then requested “another permit in order to accomplish this huge task.”¹⁴

The select board met on June 12, 2018 and considered McCoy’s request. After some deliberation, the board voted to deny the request. The following day, Town Administrator Cara Marston (then Cara Hayes) wrote McCoy to inform him of the board’s decision. In her letter, Marston noted that while the board understood the “personal circumstances that have caused delay, [it] ha[d] to balance the terms of the zoning ordinance with [his] request,” and voted to deny it.¹⁵ The board allowed McCoy an additional 30 days to remove the trailer from his property. Thereafter, McCoy sold the trailer to a local business and removed it from his property. The Town did not impose any penalties or take any other enforcement actions against McCoy relating to his trailer, other than to confirm that the trailer was removed following the board’s June 2018 decision.

McCoy and the Town had no further engagement regarding the trailer until almost two years later when McCoy sued, alleging that the Town’s actions regarding his trailer were discriminatory and motivated by political animus.¹⁶ After answering the complaint, the Town moved for judgment on the pleadings¹⁷ and the court granted the motion in part and denied it in

¹³ May 2018 Letter, Ex. 8 to Marston Affidavit (doc. no. [17-8](#)), at 32.

¹⁴ McCoy 2018 Letter, Ex. 9 to Marston Affidavit (doc. no. [17-8](#)), at 33.

¹⁵ Marston 2018 Letter, Ex. 12 to Marston Affidavit (doc. no. [17-8](#)), at 47.

¹⁶ See Doc. no. [1](#).

¹⁷ See Doc. no. [10](#).

part.¹⁸ The parties exchanged some written discovery, although it appears McCoy has not responded to the Town's interrogatories or requests for production of documents, and deposed some witnesses. The Town filed its motion for summary judgment on the agreed-upon deadline for such motions.

McCoy appears to argue that disputes of material fact preclude summary judgment for the Town. First, McCoy alleges that beginning in mid-2016, he did not use the trailer principally for storage; he instead used it principally to display his support for President Trump and secondarily for storage. McCoy contends that this fact is material because it shows that the Town should not have applied the storage container section of the ordinance against him at all, and that once it did apply that section, its application was unconstitutionally vague. McCoy next alleges that there are numerous other unpermitted storage containers in Pittsfield that the Town has not taken enforcement action against. As explained below, neither of these alleged factual disputes, if they can even be characterized as such, are sufficiently genuine or material to warrant denial of the Town's motion.

III. Analysis

Counts 1 and 2 of McCoy's complaint arise from [42 U.S.C. § 1983](#). To prevail on his [§ 1983](#) claims, McCoy establish two elements: "(i) that the conduct complained of has been committed under color of state law, and (ii) that this conduct worked a denial of rights secured by the Constitution or laws of the United States." [Rodríguez-Reyes v. Molina-Rodríguez](#), 711 F.3d 49, 55 (1st Cir. 2013). The Town argues that even viewing the undisputed factual record in

¹⁸ See Doc. no. [13](#).

McCoy's favor, McCoy cannot establish, as a matter of law, that the Town's conduct violated his constitutional rights. The court addresses each count in turn.

A. Count 1 - First Amendment

1. As-applied content or viewpoint discrimination

Because there was some confusion at oral argument about the nature of the claims McCoy is asserting in Count 1, the court summarizes the status of those claims here. In his complaint, McCoy consolidated three types of First Amendment claims into Count 1: content or viewpoint discrimination, overbreadth, and vagueness. After the court's order on the Town's motion for judgment on the pleadings, only the content or viewpoint discrimination and vagueness claims remained. Indeed, the court's order was clear that the content or viewpoint discrimination aspects of Count 1 survived the Town's motion for judgment on the pleadings.¹⁹ Notwithstanding this clarity, neither party separately briefed the content and viewpoint discrimination claim and counsel for the parties admitted at oral argument that they mistakenly believed that the court had dismissed this claim.²⁰

¹⁹ Doc. no. 13, at 8; 18 ("For the reasons set forth above, Pittsfield's motion for judgment on the pleadings is GRANTED as to Counts 3, 4, and the overbreadth portion of Count 1, and DENIED as to the remainder of Count 1 and all of Count 2. Counts 3 and 4 and the overbreadth portion of Count 1 are dismissed with prejudice.").

²⁰ McCoy's counsel initially conceded at oral argument that he was no longer pursuing the content or viewpoint discrimination claim and acknowledged that the direct evidence of discrimination, if any, was thin at best. He later argued that he misunderstood the court's judgment on the pleadings order and did not raise content or viewpoint discrimination in his summary judgment briefing because the Town's motion did not explicitly address this claim. This explanation is difficult for the court to accept. McCoy was on notice that the Town was seeking summary judgment on all remaining claims and the Town was clear that part of its argument was that there "is no evidence of discrimination." Doc. 17-1, at 2, 15. Since the beginning, this case has been about McCoy's allegation that the Town ordered him to remove his trailer because the trailer depicted the word "TRUMP" and that this decision was a "content-based and viewpoint-based restriction on speech." Complaint (doc. no. 20) at ¶¶ 20, 29. If, in the face of a summary judgment motion seeking complete dismissal of his lawsuit, McCoy had

The Town nevertheless argues that the undisputed facts show that it did not discriminate against McCoy based on the expressive content or political speech on his trailer. The court agrees.

“The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws ‘abridging the freedom of speech.’” [Reed v. Town of Gilbert](#), 135 S. Ct. 2218, 2226 (2015) (quoting [U.S. Const. amend. I](#)). “As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” [United States v. Stevens](#), 559 U.S. 460, 468 (2010) (citing [Ashcroft v. American Civil Liberties Union](#), 535 U.S. 564, 573 (2002)).

The government may restrict speech in nonpublic fora “as long as the restrictions are ‘reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view.’” [Cornelius v. NAACP Legal Defense and Education Fund, Inc.](#), 473 U.S. 788, 800 (1985) (quoting [Perry Educational Assn. v. Perry Local Educators’ Assn.](#), 460 U.S. 37, 46 (1983)). “The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination.” [Id.](#) at 811.

First Amendment jurisprudence recognizes varying levels of discrimination. Content discrimination occurs whenever a government regulates “particular speech because of the topic discussed or the idea or message expressed.” [Reed](#), 135 S.Ct. at 2226-27. Content-based restrictions “are subject to strict scrutiny, which requires the government to demonstrate that the restriction advances a ‘compelling interest’ and is ‘narrowly tailored to achieve that interest.’”

evidence to support this aspect of Count 1, he had ample opportunity to present it and failed to do so.

[Signs for Jesus v. Town of Pembroke, NH, 977 F.3d 93, 101 \(1st Cir. 2020\)](#) (quoting [Reed](#), 135 S.Ct. at 2218). Viewpoint discrimination is “an egregious form of content discrimination” in which “the government targets not subject matter, but particular views taken by speakers on a subject.” [Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 \(1995\)](#).

In cases like this one involving political speech, the “First Amendment’s guarantee of free speech applies with special vigor” and “affords the broadest protection to such political expression in order to ensure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” See [Nat’l Org. for Marriage v. McKee](#), 649 F.3d 34, 51 (1st Cir. 2011) (quotations omitted).

McCoy neither provides nor points to any evidence to support his claims that the Town enforced the ordinance against him in a discriminatory manner based on its content, or targeted McCoy because the trailer expressed a viewpoint supporting President Trump. In fact, the record evidence suggests the opposite. During the time that the trailer contained the expressive content at issue, the select board granted McCoy two extensions of storage container permit and allowed him to keep the trailer on his property far longer than the express terms of the ordinance contemplated. It was only in June 2018, well after the expressive content was removed from the trailer, that the Town ordered McCoy to remove it and refused to grant him any more permit extensions.²¹

²¹ McCoy’s counsel asserted at oral argument that the back side of the trailer continued to say “Trump,” even after the main section facing the road was painted over with the balloon scene, implying that this somehow showed the Town’s discriminatory animus. McCoy’s claims have never been about the alleged expressive content on the back side of the trailer. Instead, starting with the complaint, McCoy has focused on the larger, 52-foot length, part of the trailer that faced the road and caught the Town’s and public’s attention. See doc. no. 1, at ¶ 10 (“In July 2016, Mr. and Mrs. McCoy’s son, Brian Bales, painted the word ‘TRUMP’ on the trailer in large white letters (against a green background).”). McCoy has also presented no evidence that anyone from

There is no evidence in the record from which a reasonable jury could conclude that members of the select board or other Town officials at any time held discriminatory animus against McCoy resulting from his use of the trailer to express support for President Trump. Similarly, there is no evidence that Town officials held animus but did not act on it during the time the trailer expressed support for Trump, waited until the trailer no longer showed support for Trump, and *only then* decided to punish McCoy for his prior support for Trump by requiring him to remove the trailer. Nor is there evidence that Town officials harassed McCoy because of the expressive content on his trailer, as he alleged in his complaint.

When pressed about this at his deposition, McCoy answered that Town officials informed him that they had received complaints about his trailer and enforced the ordinance against him as a result of those complaints.²² Even if the court accepted as true McCoy's allegation that the select board ordered him to remove the trailer in response to anonymous, non-specific complaints, no rational factfinder could conclude that this demonstrates the Town's discriminatory animus. Nor does the Town's decision to enforce its own ordinance in 2018 (when he was plainly in violation of the ordinance) show that it discriminated against McCoy based on the content or viewpoint expressed on the trailer in 2016 and 2017. The Town is entitled to judgment as a matter of law on this aspect of McCoy's First Amendment claim.

the Town knew that the back side of the trailer allegedly continued to display his support for President Trump.

²² McCoy Depo. (doc. no. [17-2](#)), at 98:2-99:19-20, 100:20-101:5.

2. As-applied vagueness

McCoy also argues that the Town violated his free speech rights because the “Ordinance, as applied by the Town, is an unconstitutionally vague restriction on expressive activity.”²³ The vagueness doctrine implicates the Due Process Clause of the Fourteenth Amendment, not purely the First Amendment. See [United States v. Williams](#), 553 U.S. 285, 304 (2008); [Kolender v. Lawson](#), 461 U.S. 352, 353-54 (1983). A law is unconstitutionally vague when it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” [Id.](#) “The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment.” [Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.](#), 455 U.S. 489, 498 (1982). “Even when expressive rights are involved,” however, “perfect clarity and precise guidance have never been required.” [Butler v. O’Brien](#), 663 F.3d 514, 520 (1st Cir. 2011) (quoting [Williams](#), 553 U.S. at 304).

The Town contends that McCoy’s vagueness claim is factually unsupportable because he had ample notice of what was required under the ordinance and the Town adequately explained its decisions to him. McCoy responds by first arguing that the storage container section of the ordinance did not apply to his trailer at all, which shows that the Town’s use of that part of the ordinance was standardless to the point of authorizing or encouraging discriminatory enforcement. He next argues that even if the storage container section applied, the Town’s application was vague because the ordinance does not provide a process for seeking permit extensions or explain the grounds for granting an extension. Lastly, McCoy argues that the Town applied the ordinance so inconsistently that a person of ordinary intelligence would not

²³ Doc. no. 1, at ¶ 28.

have fair notice of what is prohibited. The court is not persuaded by any of McCoy's arguments and addresses each one in turn.

Even if the court accepted McCoy's argument that the storage container ordinance did not apply to his trailer (an assertion belied by McCoy's own behavior and other record evidence), it is unclear how that would affect McCoy's vagueness claim. For example, if, as McCoy says, his trailer was not a "storage container" as defined in the ordinance, the select board should have denied his initial application for a storage container permit. Had the board done that, McCoy would have no vagueness claim. McCoy's vagueness claim instead depends on the Town applying the storage container section of the ordinance to his trailer, so his puzzling argument that the "Ordinance should not be at issue in this case" (doc. no. [21](#), at 12) does not help his cause.

Next, the court rejects McCoy's conclusory argument that the ordinance's lack of language regarding permit extensions somehow proves that the Town applied it in a vague manner. This argument is neither legally nor factually supportable.²⁴ On the facts, the Town has not conceded, as alleged by McCoy, that it had no authority to grant a permit extension. And legally, the ordinance's silence on this issue does not equate to a prohibition. See [Ridley v. Mass. Bay Transp. Auth.](#), 390 F.3d 65, 93 (1st Cir.2004) ("The mere fact that a regulation requires interpretation does not make it vague."). Instead, the ordinance is clear that the select

²⁴ McCoy also raises this "exceeding authority" argument for the first time in his opposition to the Town's summary judgment motion. It was not plead in his complaint or raised during the parties' briefing of the Town's motion for judgment on the pleadings. In fact, McCoy relied on an entirely different theory to support his vagueness claim at the pleadings stage, and appears to have abandoned this theory now. See doc. no. [12](#), at 4 ("That application [of the ordinance] is also vague: the Town's action fails to make clear whether all political speech may be prohibited, or only some types of speech or expression. These allegations adequately assert a valid claim for relief.").

board “shall have charge of administering and enforcing the zoning ordinance.”²⁵ See also [N.H. RSA 41:8](#) (“The selectmen shall manage the prudential affairs of the town and perform duties by law prescribed.”); [Segre v. Ring](#), 103 N.H. 278, 280 (1961) (noting that “wide discretion should be given as to the methods” select boards employ to manage towns). The authority to administer and enforce the ordinance includes the authority and discretion to decide whether to grant storage container permits and extensions of existing permits. While the ordinance does not include specific provisions stating so, the select board’s general authority encompasses the power to grant or deny permit extensions. McCoy provides no authority stating otherwise.

Finally, while McCoy’s inconsistent application argument has some superficial appeal, it does not create a trial worthy issue over whether the application was unconstitutionally vague. It is true that the select board allowed McCoy to twice extend his permit, but denied him a third extension. McCoy is incorrect, however, that “[t]here is nothing different about [his] third extension request.”²⁶ At least two key factors differentiate McCoy’s third extension request from his prior requests. First, significant time had passed from when McCoy initially received his permit in 2015 to when he made the third extension request in 2018. That passage of time was undoubtedly a factor in the board’s decision not to grant McCoy another permit extension. Second, at the time the board denied McCoy a third extension, the expressive content on the trailer had been painted over. This change in circumstances is material because McCoy is alleging that the board’s decision was an “unconstitutionally vague restriction on expressive activity” and was so arbitrary or “standardless that it authorizes or encourages seriously

²⁵ Ordinance, Section 7, [available at](https://www.pittsfieldnh.gov/sites/g/files/vyhlf3681/f/pages/zoning_ordinance_2021_2.pdf) https://www.pittsfieldnh.gov/sites/g/files/vyhlf3681/f/pages/zoning_ordinance_2021_2.pdf.

²⁶ Doc. no. [21](#), at 14.

discriminatory enforcement.” Without expressive content on the trailer at the time of the board’s 2018 denial, the “vague restriction on expressive activity” and discriminatory enforcement aspects of McCoy’s vagueness claim are unsupportable, and McCoy has proffered no other evidence suggesting that the board’s 2018 decision restricted his expressive activity.²⁷

The ordinance clearly provides that storage containers must be kept on a lot for no more than 12 months during any 15-month period. McCoy’s initial storage container permit stated that it could not remain on his property permanently and had to be removed one year from the approved date. After McCoy’s initial permit expired after one year and the Town notified him that his trailer could not remain in his yard, McCoy wrote to the select board requesting a six-month extension of his permit. In his letter, McCoy told the board that he needed to keep the trailer longer to store items for emergency construction work that he (a disabled individual) was performing himself, but that he would “have it emptied and removed by the end of April 2017.” He also indicated that he wished “to remain with good standards for this town and it’s rules as a Pittsfield homeowner.” The board granted McCoy’s extension request.

In May 2017, McCoy again petitioned the board for a one-year extension of the permit due to unforeseen home repairs and the added time it would take for him to perform the repairs as a disabled person. McCoy also appeared before the board to state his case for an additional extension. At this meeting, when asked by a board member whether the trailer would be gone after another year, McCoy stated that he wanted to get rid of it, but just needed more time. The board granted McCoy’s second extension request, this time providing him another year to keep

²⁷ Indeed, in the main case that McCoy relies on in his summary judgment briefing to support his vagueness claim, [Buckle Up Festival, LLC v. City of Cincinnati](#), the city ordinance in question did not affect the plaintiff’s First Amendment rights in any way. See [Buckle Up Festival, LLC](#), 336 F. Supp. 3d 882, 886 (S.D. Ohio 2018).

the trailer on his property. A jury could infer from this evidence that McCoy understood his obligations under the ordinance and further understood or believed that the select board had the power to grant exceptions to the rules in the ordinance. It certainly does not suggest that McCoy “had no choice but to guess at [the ordinance’s] meaning and modes of application.” [United States v. Hussein](#), 351 F.3d 9, 14 (1st Cir. 2003).

After the Town notified McCoy in May 2018 that his permit was set to expire, he again requested more time to keep the storage container on his property. At that point, the trailer had been on McCoy’s property since 2014, and nearly three years had passed since the Town first issued a storage container permit for the trailer in September 2015. The select board considered McCoy’s request and denied it by unanimous vote. Following the vote, the board notified McCoy of its decision in writing and explained its reasoning, noting his “personal circumstances that have caused the delay,” but “balanc[ing] the terms of the zoning ordinance with [his] request.” Importantly, the decision letter stated that “as you have already been granted a year’s extension beyond the 12 months permitted, they voted not to grant this second extension.” McCoy does not dispute any of these facts. Under these circumstances, a person of ordinary intelligence would have understood how the storage container permitting and board deliberation process worked and, most importantly, would have had fair notice that he had run out of extensions. It is unreasonable for McCoy to expect the select board to grant him permit extensions in perpetuity, which, under his theory, would be the only application of the ordinance that was not vague.

On this record, no rational fact finder could conclude that the Town’s application of the ordinance was so inconsistent or “shifting” to the point that it was unconstitutionally vague. Instead, it was a proper exercise of the board’s authority and discretion after material changes in

circumstances. While the court does not suggest that, as a matter of law, laws applied in this manner can never be unconstitutionally vague, the Town's application of the ordinance under the facts and circumstances here does not constitute an unconstitutionally vague restriction on McCoy's expressive activity. The Town's motion for summary judgment is granted as to Count 1.

B. Count 2 - Equal Protection – Class of One Theory

In Count 2, McCoy asserts that the ordinance, as applied by Pittsfield, impermissibly creates two classes of residents – persons with unpermitted storage containers expressing political speech and persons with unpermitted storage containers not expressing political speech – and argues that the Town treats these classes differently in violation of the Constitution. To prove this “class of one” theory of equal protection liability, McCoy must establish that he has “been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” [Donovan v. City of Haverhill](#), 311 F.3d 74, 77 (1st Cir. 2002) (quoting [Village of Willowbrook v. Olech](#), 528 U.S. 562, 564 (2000) (per curiam)). The Town contends that McCoy cannot prove any of these elements, and the court agrees.

Similarly situated. “An individual is ‘similarly situated’ to others for equal protection purposes when ‘a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.’” [Davis v. Coakley](#), 802 F.3d 128, 133 (1st Cir. 2015) (quoting [Barrington Cove Ltd. P’ship v. Rhode Island Hous. & Mortgage Fin. Corp.](#), 246 F.3d 1, 8 (1st Cir. 2001)). At the summary judgment stage, McCoy has both the “burdens of production and persuasion” to identify – “backed by competent evidence” – “instances where persons similarly situated in all relevant respects were treated differently.” [Cordi-Allen v. Conlon](#), 494 F.3d 245, 250-51 (1st Cir. 2007) (quoting [Buchanan v. Maine](#), 469 F.3d 158, 178

(1st Cir. 2006)); see also [Gianfrancesco v. Town of Wrentham](#), 712 F.3d 634, 640 (1st Cir. 2013) (“[A] class-of-one plaintiff bears the burden of showing that his comparators are similarly situated in all respects relevant to the challenged government action.”).

These are “significant” burdens that are “enforced with particular rigor in the land-use context.” [Cordi-Allen](#), 494 F.3d at 251. Although “[e]xact correlation” with comparators is neither likely nor necessary, McCoy “must show an extremely high degree of similarity between [himself] and the persons to whom [he] compare[s]” himself. [Id.](#) (quoting [Clubside, Inc. v. Valentin](#), 468 F.3d 144, 159 (2d Cir. 2006)). Said differently, McCoy “must show that the parties with whom he seeks to be compared have engaged in the same activity vis-à-vis the government entity without such distinguishing or mitigating circumstances as would render the comparison” inapt. [Id.](#) (citing [Perkins v. Brigham & Women’s Hosp.](#), 78 F.3d 747, 751 (1st Cir. 1996)). Summary judgment is therefore appropriate on class of one claims “where it is clear that no reasonable jury could find the similarly situated” element met, even in cases where, as here, “the plaintiffs have presented copious evidence concerning a multiplicity of possible comparisons.” [Id.](#) at 252.

The parties disagree on the relevant comparison points. McCoy relies on the court’s order on the Town’s motion for judgment on the pleadings, where it stated that “the relevant comparison points are property owners in Pittsfield with unpermitted storage containers on their properties, including trailers, that do not express political speech.”²⁸ The Town argues that there are several additional comparison points that the court must consider and that McCoy cannot

²⁸ McCoy’s identification of comparators for his equal protection claim again demonstrates the illogicality of his argument that the storage container ordinance does not apply at all to his trailer. Because if the storage container ordinance does not apply, the relevant comparators change and McCoy’s declaration and the accompanying photographs of unpermitted trailers are irrelevant.

establish. Even assuming that McCoy's characterization of the relevant comparators is correct, he has not met his burden of providing competent evidence of such comparators or proving that they were similarly situated to him in all relevant respects.

As evidence of the alleged comparators, McCoy submitted a declaration with his objection to the Town's summary judgment motion that attached several exhibits containing photographs of alleged unpermitted storage containers. The Town moves to strike this evidence because McCoy did not disclose this information as part of his [Rule 26](#) initial disclosures or in response to repeated formal and informal requests made by Town counsel during discovery. To ensure the court is ruling on a complete summary judgment record, the court will consider McCoy's declaration and attachments as part of this motion. The Town's concerns about McCoy's belated disclosure of this information and continued, unexplained failure to respond to interrogatories and document requests are valid and well taken, however, and nothing in this ruling should be construed as endorsing this type of discovery conduct.²⁹

The Town argues that the relevant comparators are persons with permitted storage containers that expired, received extensions of the permit, and then were asked to remove the containers, similar to McCoy's experience with the Town. It also asserts that several other factors make up the relevant comparison points. McCoy rejoins that he has identified numerous other residents with unpermitted storage containers that have escaped enforcement action from

²⁹ At oral argument, McCoy's counsel tried to justify this discovery conduct by arguing that there was no real harm from his belated disclosures because the Town knew all along that these other unpermitted storage containers existed. Whether a litigant knew or should have known about a certain witness or item of evidence (absent timely, complete disclosures of the information during the litigation) does not excuse its opponent from meeting his fundamental discovery obligations under [Rule 26](#). And even if the court accepted McCoy's premise about lack of harm, McCoy has not shown that the prior information the Town allegedly had about unpermitted storage containers was the same information contained in his declaration and the attached photographs.

the Town and that is sufficient to meet his burden of showing similarly situated landowners. The court disagrees.

McCoy's evidentiary proffer is too conclusory or speculative to satisfy his burden of producing "competent evidence" of relevant comparators at the summary judgment stage. [See DePoutot v. Raffaelly](#), 424 F.3d 112, 117 (1st Cir. 2005) (the nonmoving party "must demonstrate, through submissions of evidentiary quality, that a trialworthy issue persists. Factual specificity is required; a conglomeration of conclusory allegations, improbable inferences, and unsupported speculation is insufficient to discharge the nonmovant's burden") (quotations omitted). In general, McCoy's declaration and photographs provide incomplete or inadequate information to show that these other trailers were similarly situated to McCoy. McCoy has provided photographs, addresses, and conclusory allegations that these property owners did not have permits³⁰ for the trailers and the Town did not require them to remove them. This "oversimplifies the analysis and fails to account for the fact that '[v]arious factual traits, circumstantial nuances, and peculiarities can set entities apart, rendering them, by virtue of their differences, amenable to disparate treatment.'" [Cordi-Allen](#), 494 F.3d at 252 (quoting [Racine Charter One, Inc. v. Racine Unified Sch. Dist.](#), 424 F.3d 677, 681 (7th Cir. 2005)). McCoy's evidence is also deficient in several specific, material respects.

First, the court cannot decipher from this evidence which of the alleged comparators may be "grandfathered" in; that is, they installed the storage containers before there was an ordinance requiring a storage container permit. In fact, the ordinance was not adopted until 1988, the storage container article was not added until 1997, and the storage container was amended in

³⁰ In some instances, the property owners did have permits and received those permits after the events at issue in this case, weakening their status as potential comparators.

2016. Without this information, a reasonable jury cannot determine whether the alleged comparators are similar in relevant respects. See Cordi-Allen, 494 F.3d at 253 (“In the land-use context, timing is critical and, thus, can supply an important basis for differential treatment. Since zoning bylaws, environmental standards, and licensing criteria may change over time, courts must be sensitive to the possibility that differential treatment — especially differential treatment following a time lag — may indicate a change in policy rather than an intent to discriminate”).

Second, McCoy’s declaration is missing other information about the trailers that would help a fact finder determine whether they are truly similarly situated. For example, McCoy does not explain: (1) whether the trailers have been parked in the same location continuously for more than 31 days (many have wheels or appear mobile); (2) whether the trailers were being used for residential occupancy or transient lodging (which would exclude them from the definition of “storage container” in the ordinance); (3) whether the storage containers were unpermitted during the same period that McCoy kept the trailer on his property; (4) whether any of these landowners received permit extensions from the select board; or (5) whether the Town took any enforcement action against these other landowners.³¹

McCoy must do “more than ‘point to nearby parcels in a vacuum and leav[e] it to the municipality to disprove conclusory allegations that the owners of those parcels are similarly situated,’” albeit by the slimmest of margins. Freeman v. Town of Hudson, 714 F.3d 29, 38 (1st

³¹ It is undisputed that the Town has taken similar enforcement action against other landowners with unpermitted storage containers on their property. That alone may be enough to defeat a “class of one” equal protection claim because, “[b]y definition, a class of one is not a class of many.” Cordi-Allen, 494 F.3d at 254; see also Campbell v. Rainbow City, Ala., 434 F.3d 1306, 1317 (11th Cir. 2006) (explaining that a class of one suit cannot be maintained when similar burdens have been imposed on other individuals).

Cir. 2013) (quoting [Cordi-Allen](#), 494 F.3d at 251). Simply put, he has failed to marshal evidence in support of his equal protection claim that is “sufficient to establish factual as well as regulatory similarity.” [Cordi-Allen](#), 494 F.3d at 251. For this reason alone, the Town is entitled to summary judgment on McCoy’s equal protection claim.

Discriminatory enforcement against McCoy. Even assuming for purposes of this order that McCoy has identified a group of similarly situated comparators, the summary judgment record is devoid of any evidence that the Town selectively enforced the ordinance against McCoy because of his trailer’s expressive content.

To maintain his equal protection claim, McCoy must also show that there is a trial worthy issue as to whether the Town intentionally treated him differently than other similarly situated landowners. See [Vill. of Willowbrook](#), 528 U.S. at 564 (“The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”) (emphasis added) (quoting [Sioux City Bridge Co. v. Dakota County](#), 260 U.S. 441, 445 (1923)); see also [Barrington Cove](#), 246 F.3d at 7 (“In order to establish its [equal protection] claim, however, Barrington needed to allege facts indicating that, ‘compared with others similarly situated, [it] was selectively treated . . . 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.’”) (quoting [Rubinovitz v. Rogato](#), 60 F.3d 906, 909-10 (1st Cir.1995)).

While McCoy is correct that direct evidence of discriminatory intent is rare, here, even the circumstantial evidence suggests that the Town acted with no discriminatory intent. For example, during the time period when McCoy used the trailer to express his support for President

Trump, the select board allowed him to keep the trailer on his property for far longer than what the ordinance allowed. In fact, the undisputed evidence shows that the board went out of its way to accommodate McCoy during this time. By the time the Town ordered McCoy to remove the trailer in June 2018, the expressive content at issue had been removed for almost a year. The Town also presented evidence with its summary judgment motion – which McCoy does not meaningfully contest – that it took similar enforcement action against other landowners with unpermitted storage containers. This further refutes the notion that McCoy was singled out for enforcement.

To show discriminatory enforcement, McCoy resorts back to his argument that the select board had no authority under the ordinance to grant extensions to storage container permits. Even if the court accepted McCoy’s argument that the board lacked authority or acted unlawfully in granting permit extensions, this does not change the result. “[T]he mere fact that [the Town] may have violated or abused federal or state regulatory regimes” in administering the ordinance “has no direct bearing on whether [the Town] violated [McCoy’s] equal protection rights.”

[Barrington Cove](#), 246 F.3d at 10-11.

Rational basis. Finally, McCoy offers no evidence to show that the Town did not have a rational basis for ordering him to remove the trailer in June 2018. By that time, the Town had allowed McCoy to keep the trailer on his property unpermitted from early 2014 to September 2015, afforded McCoy an extension of his original storage container permit, and granted him a new permit. The trailer remained on McCoy’s property for over four years when the ordinance only allowed storage containers for 12 months. McCoy had promised the select board multiple times that he was in the process of removing items from his trailer and would have the trailer removed from his property. Yet he continued to keep the trailer and store items inside the trailer

and continued to ask for extensions from the select board, all in recognition that he had no right to continue keeping the trailer on his property indefinitely. By June 2018, the select board had run out of patience with McCoy and declined to allow him to keep the trailer on his property. This was a wholly rational decision.

More importantly, McCoy has failed to adduce evidence of an arbitrary or irrational motive for Town's order to remove the trailer. And for good reason. By the time the Town ordered him to remove the trailer, it no longer contained expressive content and there is no evidence that Town officials held arbitrary or irrational motives prior to its June 2018 removal order, so no rational fact finder could infer that the Town's actions were motivated by political animus against McCoy. See [Wojcik v. Massachusetts State Lottery Com'n.](#), 300 F.3d 92, 104 (1st Cir. 2002) ("An equal protection claim will only succeed if the decision to treat an individual differently than those similarly situated is wholly 'arbitrary or irrational.'") (quoting [Me. Cent. R.R. Co. v. Bhd. of Maint. Way Employees](#), 813 F.2d 484, 492 (1st Cir. 1987)).


C. Ripeness or failure to exhaust administrative remedies

The Town also argues that it is entitled to summary judgment on McCoy's claims because he failed to exhaust his remedies at the Town level before filing suit. Specifically, the Town contends that McCoy should have sought a variance before the Town's Zoning Board of Adjustment or appealed the select board's 2018 decision ordering him to remove the trailer, and because he failed to do so, his claims in this case are not ripe. McCoy responds, in part, that the Town should be municipally estopped from arguing that McCoy failed to exhaust his administrative remedies because the Town's own conduct dissuaded him from doing so. The court need not reach these questions as a result of the above rulings in the Town's favor on the merits.

IV. Conclusion

For the reasons set forth above, the Town's motion for summary judgment³² is GRANTED and its motion to strike³³ is DENIED. The clerk shall enter judgment accordingly and close the case.

SO ORDERED.



Joseph N. Laplante
United States District Judge

Dated: October 6, 2021
cc: Robert M. Fojo, Esq.
Robert Joseph Dietel, Esq.

³² Doc. no. [17](#).

³³ Doc. no. [23](#).