STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(Filed: August 16, 2012)

JOSEPH S. DOLOCK, CAROLE B. DOLOCK, JOHN KAPTINSKI, ALICE KAPTINSKI, ALBERT G. HUETTEMAN, SUSAN B. HUETTEMAN, STEPHEN C. STOLLE, JOANN STOLLE, DANIEL B. MACLEOD, JUDITH MACLEOD, ROBERT YARNALL, DAVID A. HEILEMAN, JOANN HEILEMAN, JOAN JOHNSON, JOSEPH BEHL, SUSAN BEHL, MARY O'CONNOR, JOSEPH QUADRATO, MARY LOU QUADRATO, THOMAS GILLIGAN, LORETTA M. GILLIGAN, GREGORY POSSEMATTO, DIANE E. POSSEMATTO, MARTIN LADER, EILEEN S. LADER, NATALIE HILL, EDWARD NORTON, DONNA M. CHAMBERS, MICHAEL J. CHAMBERS, KRISTAN M. O'CONNOR, RONALD J. AREGLADO, MAUREEN AREGLADO and DONNA ZOSA,	:	
Plaintiffs	:	
	:	
v.	:	**C.A. No. WC-2010-0764**
	:	**(consolidated)**
GREGORY J. AVEDISIAN, CHARLENE Q. DUNN, MARJORIE F. FRANK, FORRESTER C. SAFFORD and RICHARD H. HOSP, in their Official Capacities as Town Council Members of the Town of Charlestown only and not as Individuals; and PATRICIA ANDERSON, in her capacity as Town Treasurer of the Town of Charlestown only and not as an Individual,	:	
Defendants	:	

JOSEPH S. DOLOCK, CAROLE B. DOLOCK, JOHN J. KAPTINSKI, ALICE G. KAPTINSKI, STEPHEN C. STOLLE, JOSEPHINE A. STOLLE, DANIEL B. MACLEOD, JUDITH MACLEOD, ROBERT YARNALL, DAVID A. HEILEMAN, JO ANN HEILEMAN, JOAN G. JOHNSON, MARY O'CONNOR, JOSEPH QUADRATO, MARY LOU QUADRATO, THOMAS J. GILLIGAN, LORETTA M. GILLIGAN, GREGORY J. POSSEMATTO, DIANE E. POSSEMATTO, MARTIN B. LADER, EILEEN S. LADER, DONNA M. CHAMBERS, MICHAEL J. CHAMBERS, KRISTAN M. O'CONNOR, RONALD J. AREGLADO, MAUREEN AREGLADO, ARLENE BIRNBAUM, WILLIAM C. BALZANO, WALTER A. SMITH, BARBARA SMITH, JOHN F. GRIBBIN, ROSEMARY B. GRIBBIN, PAUL F. RAICHE, BARBARA L. RAICHE, VIRGINIA HOVANESIAN, PETER HERSTEIN, BEVERLY A. HERSTEIN, KAREN DANN, SUSAN W. HUGHES, CONSTANTIN CARAMICUI, MARTHA RICE, GAETANO IPPOLITO, MARY IPPOLITO, RICHARD T. ABRAMSON, BARBARA J. ABRAMSON, TIMOTHY P. CALABRESE, ERIN P. CALABRESE, CHARLES J. BEZOUSEK and DONNA RUSSO,	:	
Appellants	:	
	:	
v.	:	**C.A. No. WC-2011-0052**
	:	**(consolidated)**
MICHAEL J. RZEWUSKI, RONALD CROSSON, WILLIAM F. MEYER, RICHARD H. FRANK and DAVID B. PROVANCHA, in their Official Capacities only as Members of the Zoning Board of Review of the Town of Charlestown; WHALEROCK RENEWABLE ENERGY, LLC; and LL PROPERTIES, LLC,	:	
Appellees	:	

TOWN OF CHARLESTOWN,	:	
Appellant	:	
v.	:	**C.A. No. WC-2011-0081**
	:	**(consolidated)**
TOWN OF CHARLESTOWN ZONING BOARD OF REVIEW; WHALEROCK RENEWABLE ENERGY, LLC; and LL PROPERTIES, LLC,	:	
Appellees	:	

DECISION

SAVAGE, J. Before the Court for decision are three consolidated cases: two zoning appeals and a declaratory judgment action. In Dolock et al. v. Town of Charlestown (C.A. No. WC-2010-0764), an action for declaratory judgment and injunctive relief, the Dolock Plaintiffs challenge the validity of former provisions of the Charlestown wind ordinance, in effect in 2010, that provided for review of applications to construct large wind energy systems by the Town Council rather than the Planning Commission and the Zoning Board when the applicants entered into partnership agreements with the Town. In Dolock et al. v. Town of Charlestown Zoning Board of Review et al. (C.A. No. WC-2011-0052), the Dolock Plaintiffs appeal a decision of the Zoning Board of Review of the Town of Charlestown, dated January 21, 2011, that found that Whalerock Renewable Energy, LLC had a vested right to proceed with its application to construct and operate a large wind energy system, notwithstanding a moratorium on such projects imposed by the Town Council. In Town of Charlestown v. Town of Charlestown Zoning Board of Review et al. (C.A. No. WC-2011-0081), the Town appeals the same decision of the Zoning Board, in response to which Whalerock purports to assert a cross-claim against the Charlestown Planning Commission to challenge the legality of its composition as an

elected body and whether it may exercise regulatory, as opposed to advisory, power. For the reasons set forth in this Decision, this Court: (1) remands the two zoning appeals, C.A. No. WC-2011-0052 and C.A. No. WC-2011-0081, to the Zoning Board to create a complete and certified record and to render a decision containing the requisite findings of fact and conclusions of law; (2) declines to address the cross-claim purportedly asserted by Whalerock in C.A. No. WC-2011-0081, as there is no evidence it has been filed or that it is procedurally proper and, alternatively, it is premature and non-justiciable; and (3) denies the Dolock Plaintiffs' requests for declaratory and injunctive relief in C.A. No. WC-2010-0764 on grounds of mootness.

I

Factual Background[1] and Procedural History

A

The Wind Ordinance

On January 11, 2010, the Town of Charlestown adopted an ordinance governing the construction of wind energy generator towers and systems and added it to the Zoning Ordinance contained in the Charlestown Code. See Charlestown Ordinance No. 317, attached as Ex. 1 to Town's Mem. in Supp. of its Reply to Zoning Ordinance Amendment Challenge and Composition of Planning Commission Membership. On August 10, 2010, the Town amended the wind ordinance simply to reformat it to conform numerically and

[1] The factual background is culled from a review of the parties' memoranda and attached exhibits, pertinent provisions of the Code of the Town of Charlestown, including the Zoning Code, state law and documents filed in this Court by the Town on February 15, 2011 in conjunction with the Dolock Plaintiffs' appeal of the Zoning Board's decision dated January 21, 2011. While this Court cites to the documents filed by the Town as the "Record," it notes that the Town has failed to certify the Zoning Board record on appeal, thereby denying this Court a true administrative record for review purposes. These documents thus are referenced for background purposes only.

alphabetically to other provisions of the zoning ordinance. See Ordinance No. 326, Amending Chapter 218 – Zoning: Reformatted Zoning Ordinance, August 10, 2010, Article VI § 218-37D(4) ("Wind Ordinance"), provided as an excerpt in Whalerock App. at 20-34.[2]

The Wind Ordinance provided two procedural mechanisms to obtain approval for a large wind energy system. Id. at art. VI § 218-37D(4). The first mechanism, which requires approvals from both the Planning Commission and the Zoning Board, provides, in pertinent part, as follows:

> The erection, construction and installation or modification of a large wind energy system, except as provided for in this section, requires site plan review with the Planning Commission and a Special Use Permit from the Zoning Board of Review. All wind energy systems, regardless of rated capacity or zoning district[,] are required to obtain a building permit from the Building Official. The issuance of a Special Use Permit shall adhere to § 218-23 . . . of the Charlestown Zoning Ordinance and any other standards set forth by this ordinance. The applicant shall apply for Site Plan Review with the Planning Commission as specified in this ordinance, retain a conditional approval from such Commission, and then apply for a Special Use Permit with the Zoning Board of Review. Upon the issuance of a Special Use Permit by the Zoning Board of Review[,] the applicant shall return to the Planning Commission to complete Site Plan Review. . . . Applicants are encouraged to meet with the Town Planner prior to application and to request a pre-application meeting with the Planning

[2] Aside from these stylistic changes, it does not appear that these amendments made any substantive changes to the zoning ordinance applicable to large wind energy systems at issue in this case. Although the parties refer almost exclusively to the earlier January 2010 version of the Wind Ordinance, this Court will cite to the ordinance, as amended on August 10, 2010, as that is the version of the ordinance in effect at the time of the events pertinent to this case. While the parties have failed to supply this Court with a copy of the amendment to the August 10, 2010 Wind Ordinance in its entirety, they do not challenge or supplement the portions of the August 10, 2010 Wind Ordinance included in the Whalerock Appendix at 20-34. Thus, this Court will presume that the August 10, 2010 ordinance provided is the operative Wind Ordinance, with all relevant portions included.

> Commission to discuss their project prior to submitting an application.

(Wind Ordinance at art. VI § 218-37D(4)(e).) It requires applicants first to apply for Site Plan Review with the Planning Commission and obtain conditional approval. See id. Site Plan Review, also called "development plan review," is defined in the zoning portion of the Charlestown Code as "[t]he process whereby the Town staff and/or the Planning Commission reviews the site plans, maps and other documentation of a development to determine the compliance with the stated purposes and standards of this Ordinance." See Code of the Town of Charlestown ("Code") § 218-5 (also noting that "development plan review" is defined by the Rhode Island Zoning Enabling Act). Pursuant to the Subdivision and Land Development regulations, which apply to "all cases of development plan review, as provided for in R.I.G.L. § 45-24-49 of the Zoning Enabling Act of 1991," a certificate of completeness is required regardless of whether the land development project is deemed to be "minor" or "major." Code § 188-4; see Code § 188-30A (requiring a determination of the certificate of completeness "within 25 days of receipt of a preliminary application for a minor subdivision"); Code § 188-33 (requiring the administrative officer to "issue or deny" such certificate within 90 days of the submission of a master plan, or within 60 days of the submission of a preliminary plan application). A "certificate of completeness" is defined in the Subdivision and Land Development regulations as "[a] notice issued by the Administrative Officer[, the Charlestown Town Planner,] informing an applicant that the application is complete and

meets the requirements of the checklist, and that the applicant may proceed with the approval process." Code § 188-9.[3]

If the Planning Commission grants an applicant conditional approval of its Site Plan, the applicant then is required to apply for a Special Use Permit from the Zoning Board. Under the Wind Ordinance, the application process to obtain Site Plan Review from the Planning Commission and a Special Use Permit from the Zoning Board is the same. (Wind Ordinance at art. VI § 218-37D(4)(e).) In this regard, the Wind Ordinance states that "[t]he required application materials shall be the same for Site Plan Review with the Planning Commission as they are for a Special Use Permit with the Zoning Board of Review." Id. at art. VI § 218D(4)(e)(i). These application materials include general contact and legal ownership information, impact statements regarding the "potential adverse impacts," sight lines, landscape plans, as well as operation and maintenance plans. Id. Generally, applications for Special Use Permits also must be "submitted in writing on a [supplied] form," Code § 218-22(K), which includes requests for information such as applicant name and address, owner name and address, location and dimensions of the premises, and other general use and application information regarding the premises, as well as a site plan and sketches or drawings. See, e.g., R. Item 11, Application for Special Use Permit, dated Nov. 12, 2010.

Under the Wind Ordinance, the Zoning Board cannot issue a Special Use Permit unless it finds that the applicant meets the following requirements of the Zoning Ordinance pertinent to all requests for special use permits:

> A. A special use permit may be approved by the Board

[3] This Court could locate no definition or description of the checklist in the Charlestown Code or the Subdivision and Land Development regulations.

> following a public hearing if, in the opinion of the Board, . . . evidence to the satisfaction of the following standards has been entered into the record of the proceedings:
>
> (1) The public convenience and welfare will be substantially served;
>
> (2) It will not result in adverse impacts or create conditions that will be inimical to the public health, safety, morals and general welfare of the community[;]
>
> (3) The requested special use permit will not alter the general character of the surrounding area or impair the intent or purpose of this Zoning Ordinance or the Comprehensive Plan upon which this Ordinance is based;
>
> (4) That the granting of a special use permit will not pose a threat to drinking water supplies;
>
> (5) That the use will not disrupt the neighborhood or the privacy of abutting landowners by excessive noise, light, glare, or air pollutants;
>
> (6) That the sewage and waste disposal into the ground and the surface water drainage from the proposed use will be adequately handled on site;
>
> (7) That the traffic generated by the proposed use will not cause undue congestion or introduce a traffic hazard to the circulation pattern of the area.

Code § 218-23. Moreover, the Zoning Board cannot grant a Special Use Permit for a large wind energy system under the Wind Ordinance unless it finds, "in writing," that:

> [1] There will not be any serious hazard to pedestrians or vehicles from the use;
> [2] No nuisance will be created by the use[;]
> [3] Adequate and appropriate facilities will be provided for the proper operation of the use; and
> [4] There will be no adverse environmental impacts.

(Wind Ordinance at art. VI § 218-37D(4)(f)(i).) Assuming the applicant receives a Special Use Permit from the Zoning Board, it then is required to return to the Planning Commission for final Site Plan Review.

The Wind Ordinance also provided a second procedural mechanism to obtain approval to construct a large wind energy system. Although the Town subsequently repealed the provisions of the Wind Ordinance that created this second procedural mechanism, it was in effect at the time of the parties' dealings in this case. It applied to applicants who entered into approved partnership agreements with the Town and allowed the Town Council to act as the permitting authority, as follows:

> Any proposed wind facility that has entered into an approved partnership agreement with the Town for the use of the facilities energy production, may be exempted, by Town Council approval, from the process requirements for Site Plan Review and Special Use Permit. The applicant must still comply with the sections of this ordinance but the review and approval of such project will be handled by the Town Council. The Town Council may request advisory opinions from the Zoning Board and the Planning Commission, but the Town Council will act as the permitting authority. The Town Council will be required to hold a minimum of one (1) public hearing on the application prior to issuing a decision and a notification to abutters within 200 feet of the proposed property, notifying of such public hearing is required.

(Wind Ordinance at art. VI § 218-37D(4)(f)(iii).) Pursuant to this provision, although the application requirements were identical to those contained in Article VI § 218-37D(4)(e), the Town Council, after ratifying an applicant's partnership agreement with the Town for the use of the proposed facility's energy production, could do the following: (1) exempt the applicant from both Site Plan Review before the Planning Commission and the Special Use Permit approval process before the Zoning Board; (2) require those

traditional steps for approval as authorized in Article VI § 218-37D(4)(e) of the Wind Ordinance; or (3) seek advisory opinions regarding the proposed project from the Planning Commission and Zoning Board. It then could grant or deny the application, subject to the requirements of a public hearing.

B

The Whalerock Application

On or about July 28, 2010, Whalerock Renewable Energy, LLC, and LL Properties, LLC entered into the "Charlestown Renewable Energy Partnership Agreement" with the Town. See R. Item 24. The Agreement contemplated the construction by Whalerock of two commercial-sized wind turbines, each with a height of 410 feet, on a private, undeveloped eighty-one acre parcel of land in Charlestown, Rhode Island, bounded by U.S. Route 1 to the southeast and Kings Factory Road to the north and owned by LL Properties, LLC. Id. The Agreement further contemplated the provision of green electricity produced by wind power from the wind turbines to the residents of the Town. Id. Under the terms of the Agreement, Whalerock agreed to pay Charlestown a royalty of 2% of the amounts that it expected to receive annually under a Power Purchase Agreement to be negotiated with National Grid (up to a maximum of $50,000 per year). Id. Lawrence LeBlanc signed the agreement on behalf of both Whalerock, as applicant and intended owner and operator of the wind energy system, and LL Properties, as owner of the land. Id. The President of the Town Council signed the Agreement on behalf of the Town, id., although the record does not indicate that she did so pursuant to a vote or authorization of the Town Council. See R. Items 1-28. There is

no evidence, therefore, that the Town approved the Agreement, as required by Article VI § 218-37(D)(4)(f)(iii).

Whalerock prepared a "Building Permit Application" entitled "Whalerock Renewable Energy Ninigret Hamlet Wind Project," dated September 10, 2010, and signed by Lawrence LeBlanc, on behalf of Whalerock and LL Properties, and Michael Carlino, Project Manager. See R. Item 24. It attached to the application a copy of the unratified Agreement. The application also contained other supporting materials, including: Project Description; Ownership Documentation (including the deed for the subject land); Siting and Design Plan; USGS Map and Locus Map; Impact Analysis with Noise Analysis, Shadow Flicker Study, and Visualizations; Landscape Plan; Feasibility Report; Operations and Maintenance; Electrical Interconnection; Site Control Plan; FAA Approval; Proof of Insurance; and Vestas V90 1.8 MW Turbine Specifications. Id.

In addition, Whalerock prepared an addendum to the application dated September 16, 2010. See R. Item 25. The addendum included a Statement of Clarification, prepared by Mr. Carlino, that stated that it was submitted to "address[] deficiencies identified by the Town Planner's initial review." Id., Annex A. It stated further that it included "the Wind Application Checklist and the Compliance Checklist provided with annotations by the Town Planner and addresse[d] each element individually." Id. The addendum also included: a Revised Site Plan to replace the original Site Plan it submitted (Annex B); a Technical Memo regarding potential adverse impacts to the community, neighborhood and the environment to replace the Impact Assessment in its original submission (Annex C); a Revised Landscape Plan to replace the Landscape Plan in its original submission

(Annex D); and an Archaeological Survey to address Indian artifact concerns and conservation issues (Annex E). See id., Annexes B-E.

On September 27, 2010, Ashley Hahn Morris, Planning Director (or Town Planner) for the Town of Charlestown, signed a "Certificate for Completion" relative to the application for the "Ninigret Hamlet Wind Project," in her capacity as "Administrative Officer," and sent it on that same date to Michael Carlino, Project Manager for Whalerock. See R. Item 6.[4] In the Certificate for Completion, she left blank the portions of the form where it asks for a description of the type of application or the stage of review. Id. She listed a "Submission Date" of September 16, 2010. Id. In describing the "Administrative Action" taken, she checked off the pre-printed language of the form that states: "Applicant *has submitted* sufficient checklist items and is certified as complete." Id. (emphasis in original). She did not check off the alternative provision of the form that stated "Applicant *has not* submitted sufficient checklist items and has deficiencies detailed on the back of this form. Application is incomplete." Id. (emphasis

[4] Before signing the Certificate for Completion, Ms. Morris, as Town Planning Director, submitted a letter to the Town Council about the receipt of Whalerock's application, but this letter is not contained in the documents filed by the Town on February 15, 2011 that purports to be the record on appeal. In her letter, she stated:

> I have begun a review of the application and will have to certify it complete or ask the applicant for additional information as may be required. I have forwarded a copy of the application to John Matuza (he is currently on vacation until September 23rd) for his review and certification for the Special Use Requirement as set forth in the ordinance. It is my understanding that the applicant has requested that if there is to be a review and advisory opinion by other boards and commissions that those be completed prior to the Town Council Public Hearing . . . .

(Dolock Mem., Ex. B, Letter from Ashley Hahn Morris to Town Council, dated Sept. 13, 2010.)

in original). She also placed an asterisk at the bottom of the form and wrote "Please see associated memo to TC dated 9/27/10 for additional information." Id. (emphasis added).[5]

[5] The memorandum, which is not part of the documents filed by the Town on February 15, 2011 that purports to be the record on appeal, outlined Ms. Morris's concerns about the Whalerock application and stated, in pertinent part, as follows:

> I am issuing the attached certificate of completeness for the application submitted by Whalerock Renewable Energy. I am able to verify that they have provided information in all of the necessary subject areas as required by the ordinance, although it is my opinion that in some of those areas the information that was provided is minimal and should be supplemented. The Planning Commission has requested that the applicant provide additional information on some subjects and the applicant has agreed to consider this request and provide some additional information at the public hearing. The additional information should be provided prior to the public hearing to allow for adequate time for review.
>
> I have included 2 sets of checklists with this memo. I created the checklist by going through the wind ordinance and making a list of all the items that were required. I created this list for my own review of the application. Checklist #1 is the checklist I used with the initial review of the application. After providing that checklist to the applicant additional information was submitted. Checklist #2 is a result of reviewing that additional information. The applicant has indicated that they would be willing to provide some of the additional information that is mentioned in checklist #2 but I [cannot] verify or review any of that because at the time of needing to issue the certificate no additional information has been provided for review. Please note that the checklist indicates that some form of a submission has been made for some of the items but that I have found the information to be vague or insufficient for a full analysis. Providing this information at the meeting allows no time for review and response. Also note that the items that are identified in blue on checklist #2 are the items that I have found with my second review of the application and second submission of materials to be vague or insufficient. I am issuing a certificate of completeness in spite of this because some

> level of information has been provided allowing me to check off the items as having a submission associated with it.

(Dolock Mem. Ex. D, Certificate for Completion and Memorandum from Ashley Hahn Morris to Town Council, dated Sept. 27, 2010.) Whalerock has submitted a copy of an unofficial transcript of the hearing on January 18, 2011, and the transcript implies that the "associated memo" was not submitted in full to the Zoning Board, notwithstanding the objection of the Dolock Plaintiffs, although the transcript cannot be considered part of the record on appeal because it was not certified as the official transcript and filed by the Town as part of the record on appeal. See Whalerock App. at 91. On the same day that Ms. Morris certified the application as complete, Building/Zoning Official John Matuza submitted a letter to the Town Council–also not part of the documents that purport to be the record on appeal–that advised of the status of the application, as follows:

> As there is a Municipal Partnership Agreement between the applicant and the Town of Charlestown, the Town Council will handle the review and possible approval. The applicant must still comply with the applicable sections of the zoning ordinance, Site Plan Review and Special Use Permit.
>
> When the Zoning Board reviews applications for Special Use Permits, the applicant presents evidence to the Board that they have satisfied the seven requirements of Article IV Section 218-23(A) of the Zoning Ordinance. I have attached that section of the Ordinance to assist in your review.
>
> The Board would also review that the requirements of Article VI Section 218-37 D (4) are met. The application addresses these requirements . . . .
>
> Please note that application states 'Building Permit Application' but the application is for approval to apply for a Building Permit. There is more information that is required for a Building Permit, which does not need to be addressed at this time. At the time of permitting my department will require additional construction documents.

(Dolock Mem. Ex C, Mem. from John Matuza to Town Council, dated Sep. 27, 2010.) Matuza thus implied that the process before the Town Council for permitting a wind energy system may differ from that of the Zoning Board.

It is unclear to this Court to whom Whalerock submitted its application and how it got before the Town Planner for review.

On October 14, 2010, the Town Council held a public hearing on the Whalerock application, but so many people attended that it continued the hearing until October 25, 2010. See R. Item 8. In the interim, the Dolock Plaintiffs, abutters to the Whalerock property, filed a Complaint for declaratory and injunctive relief in this Court against the members of the Charlestown Town Council and the Town Treasurer, accompanied by a Motion for a Temporary Restraining Order. See Dolock et al. v. Town of Charlestown, C.A. No. WC-2010-0764.[6] They sought to invalidate the Wind Ordinance and enjoin the permitting of any wind energy system involving a municipal partnership agreement, including the granting of the Whalerock application. See id. A hearing justice of this

[6] The Complaint in WC-2010-0764, filed by the Dolock Plaintiffs against the Charlestown Town Council Members and the Charlestown Town Treasurer, contains the following eight counts: Violation of the Rhode Island Land Development and Subdivision Act of 1992 – Rhode Island General Laws §§ 43-23-25 through 45-23-74 (Count I) (alleging Town Council members usurped decision-making authority granted to Town of Charlestown Planning Commission and challenging the validity of the Ordinance and the Public Hearing on October 25, 2010); Violation of the Rhode Island Zoning Enabling Act of 1991 – Rhode Island General Laws §§ 45-24-27 through 45-24-72 (Count II); Violation of the Rhode Island Constitution (Article XIII – Home Rule for Cities and Towns) (Count III); Violation of the Charter of the Town of Charlestown (Count IV) (alleging actions of Town Council members would violate Town Charter); Violation of the Comprehensive Plan of the Town of Charlestown (Count V) (alleging Wind Ordinance violates Comprehensive Plan); Conflict of Interest of Town Council Members (Count VI) ("because pursuant to the Ordinance . . . they purport to have the authority to enact ordinances, partner with private individuals and/or entities and then sit in a quasi-judicial role as self-appointed members of the Town of Charlestown Planning Commission and the Town of Charlestown Zoning Board of Review (to the exclusion of the lawfully appointed and/or elected members of those boards) and grant special use permits and conduct site plan reviews for their 'partners' in violation of law"); Declaratory Judgment (Count VII) (seeking declaration that Ordinance No. 317 is null and void and that the Public Hearing regarding the Whalerock Application is also null and void); and Injunctive Relief (Count VIII) (seeking to enjoin the Public Hearing regarding the Whalerock application and to order the Town to strike Ordinance No. 317 from the Code).

Court issued a temporary restraining order, allowing the public hearing of the Town Council to go forward as scheduled, but enjoining the Town Council from permitting Whalerock's proposed wind energy system pursuant to the Wind Ordinance, pending further hearing by the Court. See id., Temporary Restraining Order dated Oct. 22, 2010. Specifically, the Order stated:

> No building permit shall be issued by the Town of Charlestown for the Renewable Energy Ninigret Hamlet Wind Project. The Council Hearings may proceed and votes may be taken. The applicant is preserved its right to move to intervene, quash or other remedies. . . . This order is granted over the Town's objections, except that the Town agrees to the order remaining in effect until hearing.

Id. Before the Court could hear the matter further, the Town Council postponed the matter indefinitely at the public hearing held on October 25, 2010. See R. Item 8.

On November 2, 2010, the citizens of Charlestown elected three new Town Council members. See id. On November 3, 2010, Whalerock submitted a letter to the Town Clerk announcing its intent to seek review of the application by the Planning Commission and the Zoning Board under the other procedural mechanism for the approval of large wind energy systems in the Wind Ordinance, rather than by the Town Council. See R. (unnumbered), Letter from Nicholas Gorham to Town Clerk of Charlestown, dated Nov. 3, 2010. The letter, which the Town averred effectuated a withdrawal of Whalerock's original application, stated, in pertinent part:

> Under the ordinance, the applicant opted to pursue approval through the process delineated in paragraph 7C of the ordinance which provided that if the applicant entered into "an approved partnership agreement with the town" then review and approval of the project would be handled by the town council.

> The ordinance allows the applicant to opt for planning board and zoning board approval as an alternative.
>
> The town and the applicant executed a renewable energy partnership agreement in July. However, according to paragraph 6F of that agreement, it "is subject to ratification by the town council immediately following the public hearing set forth in section 7C of the ordinance[."]
>
> No such ratification took place, although the public hearing took place on October 14, 2010.
>
> As the agreement has not yet been ratified, the applicants hereby elect to have their application considered by the planning and zoning boards, instead of the Town Council and do hereby give notice that the partnership agreement, never having been ratified, is null and void. To the extent that it is necessary to terminate same, please accept this letter as notice thereof.

Id. The Town Council, through the Town Manager, responded on November 9, 2010, by letter to Whalerock's counsel, stating:

> This letter is to inform you that at a Town Council meeting held on November 9, 2010, the Charlestown Town Council voted to accept your client's withdrawal of their application for the establishment of a wind energy generation facility (the "Facility Application") and to also accept your client's repudiation of the Partnership Agreement between the Charlestown Town Council and Whalerock Renewable Energy LLC and LL Properties that was adopted by the Council on July 26, 2010. These actions terminate the Facility Application and dissolve[] any and all legal rights created under the Partnership Agreement, so-called.

(R. Item 9, Letter from William A. DiLibero to Nicholas Gorham, dated Nov. 9, 2010.) Counsel for Whalerock responded that "Whalerock did not withdraw its application." (R. Item 10, Letter from Nicholas Gorham to William DiLibero, dated Nov. 11, 2010) (emphasis in original).) He stated further that "the ordinance imposes only one set of application requirements for an application to either [the town council or the planning

and zoning boards]. The town planner issued a certificate of completeness of our application on September 27." Id.

On November 12, 2010, Whalerock filed with the Planning Commission and the Zoning Board exact copies of the application that it presumably had filed previously with some Town official or office and that the Town Planner had reviewed. See R. Item 12; Planning Commission Site Plan Review Application Form, received Nov. 2, 2010; R. No. 11, Special Use Permit Application received Nov. 12, 2010. A copy of Whalerock's Planning Commission Site Plan Review Application Form that it submitted to the Planning Commission stated that the application was certified complete as of September 27, 2010. See R. No. 12, Planning Commission Site Plan Review Application Form. On the application form for Site Plan Review, Whalerock stated that it "reserves the right to challenge the conformity of the planning commission as elected, with Title 45 chapter 22 of the General Laws, or the bias of any member thereof that would preclude fair and impartial consideration of this application." Id.

The cover sheet for Whalerock's application for a Special Use Permit before the Zoning Board stated that "[t]he applicant and landowner meet all of the criteria for the issuance of a special use permit as provided in the ordinance and as set forth in the materials submitted to the Town and certified as complete in September 2010 (copies attached) and as posted on Town's website." (R. No. 11, Special Use Permit application received Nov. 12, 2010.) The parties dispute whether Whalerock's submission of copies of its application reviewed previously by the Town Planner constituted submission of an entirely new application, as the Town contends, or submission of a duplicate for convenience, as Whalerock argues.

On November 15, 2010, following "unprecedented public outcry regarding applications" for wind energy systems, the Town Council adopted by resolution a moratorium on applications for and the permitting of any large wind energy systems. ("A Resolution Establishing a Temporary Moratorium on Applications and Permitting for Wind Energy Generators," attached to Town of Charlestown's Legal Mem. in Supp. of its Appeal from the ZBR Decision as Ex. 5 (the "Moratorium").) The Moratorium included a provision whereby "[a]ny application(s) for permitting of wind energy generators and systems presently filed with the Town shall not be affected by this [M]oratorium if such application(s) complies with the provisions of R.I. General Laws [§] 45-24-44, as amended, and Section 218-4 of the Charlestown Zoning Ordinance." Id. Section 45-24-44 of the Rhode Island General Laws states:

> (a) A zoning ordinance provides protection for the consideration of applications for development that are substantially complete and have been submitted for approval to the appropriate review agency in the city or town prior to enactment of the new zoning ordinance or amendment.
>
> (b) Zoning ordinances or other land development ordinances or regulations specify the minimum requirements for a development application to be substantially complete for the purposes of this section.
>
> (c) Any application considered by a city or town under the protection of this section shall be reviewed according to the regulations applicable in the zoning ordinance in force at the time the application was submitted.
>
> (d) If an application for development under the provisions of this section is approved, reasonable time limits shall be set within which development of the property must begin and within which development must be substantially completed.

Sec. 45-24-44. Section 218-4 of the Charlestown Code pertaining to zoning states:

> Vested rights shall relate to the review of an application should the zoning ordinance change before the review process has been completed. Applications for development that are submitted and have been deemed complete before enactment of this Ordinance shall have vested rights to proceed with the application process according to the regulations applicable of the Zoning Ordinance in force at the time the application was submitted and deemed complete. Projects for which a currently valid building permit is in effect shall have vested right to proceed and comply with the Zoning Ordinance in force under which the permit was issued.

Code § 218-4.

Subsequent to the institution of the Moratorium, Acting Town Planner Jane Weidman sent a letter to Lawrence LeBlanc, Whalerock's representative, by which she opined that the Whalerock application submitted on November 12, 2010 was not substantially complete and would be forwarded, along with her letter, to the Building Official to determine whether the project was vested. See R. Item 5, Letter from Jane Weidman to Lawrence LeBlanc, dated Nov. 30, 2010. On November 30, 2010, Building Official John Matuza determined that the Whalerock application could not be forwarded to the Zoning Board "because of the requirement for prior conditional approval and advisory recommendation by the Planning Commission (per RIGL 45-23-61 – Precedence of approvals)." (R. Item 3, Letter from John Matuza to Lawrence LeBlanc, dated Nov. 30, 2010.) Furthermore, Matuza determined that the "application [did] not qualify for vesting . . . , which requires a complete application in order to proceed with the application process." Id.

Whalerock filed a timely appeal of the decision of the Building Official to the Zoning Board to which it attached the Certificate for Completion and certain letters between the Town Clerk and counsel indicating the status of the application. Whalerock

stated that the "appeal seeks review of both the November 12, 2010 submission and the September 17, 2010 submission, certified as complete, which should have been forwarded to the Zoning Board and was never withdrawn." (R. Item 1, Whalerock Appeal to Zoning Board of Review, dated Dec. 9, 2010) (emphasis in original).

Whalerock's application dated November 2010 mirrored, in form and in substance, the application it submitted in September 2010. Whalerock characterized its later filed application not as a second application but as the same application that it submitted originally, arguing that the Certificate for Completion that it received from the Town Planner in September 2010 allowed it to proceed notwithstanding the Moratorium. It argued further that the Certificate for Completion bound the Town and could not be re-litigated because no party timely challenged its issuance at that time and the completeness determination is the same regardless of whether the applicant seeks approval from the Town Council or, alternatively, from the Planning Commission and the Zoning Board.

The Dolock Plaintiffs and the Town disagreed. They contended that Whalerock's later filed application was a second, new application because its first application did not go to the Town Planner for review for completeness before submission of the application to the Planning Commission for Site Plan Review and the Zoning Board for issuance of a Special Use Permit; instead, it went to the Town Council for review under the alternate procedural mechanism available then to obtain approval for a large wind energy system. They argued, therefore, that the Certificate for Completion issued by the Town Planner originally was irrelevant to Whalerock's second application and that the decision of the Acting Town Planner who reviewed its later filed application and deemed it incomplete

controlled. As such, they contended that the Moratorium barred Whalerock from proceeding with its pending application.

The Building Official appears to have adopted the position advanced by the Dolock Plaintiffs and the Town. He declared in his decision that the Whalerock application "does not qualify for vesting as stated in Section 218-4 of the Charlestown Zoning Ordinance (per RIGL 45-24-44), which requires a complete application in order to proceed with the application." (R. Item 3.) He referenced in this regard the decision of the Acting Town Planner regarding Whalerock's later filed application and appears to have accepted her findings as to lack of completeness. Id. In reaching this conclusion, however, it is unclear whether he considered Whalerock's original application or the Town Planner's Certificate for Completion issued with respect to that application. Id. It also is unclear whether the Dolock Plaintiffs appealed the first Town Planner's decision and the status of any such appeal.

In the Zoning Board proceeding, it appears that the parties disputed whether the Certificate for Completion issued by the Town Planner to Whalerock in September 2010 in connection with its application for a large wind energy system – attached at that time to its partnership agreement with the Town and submitted to the Town Council for review under Article VI § 218-37(D)(4)(f)(iii) – gave Whalerock the right to proceed with the large wind energy system application, identical in form and substance, that it later submitted in November 2010 under Article VI § 218-37(D)(4)(e) of the Wind Ordinance to obtain Site Plan Review by the Planning Commission and a Special Use Permit from the Zoning Board, notwithstanding the Moratorium on the construction of large wind energy systems enacted by the Town by resolution. Following a hearing on January 21,

2011, the Zoning Board overturned the decision of the Building Official, stating "Said decision implies that this application was certified complete and does have vested rights." (R. Item 27, Zoning Bd. of Rev. Decision, dated Jan. 21, 2011.)

The Dolock Plaintiffs filed an appeal of the Zoning Board's decision with the Superior Court on February 1, 2011. See C.A. No. WC-2011-0052. The Town filed a similar appeal of the Zoning Board's decision on February 10, 2011. Five days later, the Town filed documents with the Court, only in the Dolock Plaintiffs' zoning appeal in WC-2011-0052, that purport to be the Zoning Board record. It is not clear to this Court whether the Town filed its appeal on behalf of the municipality itself, the Town Council, the Planning Commission, or some other municipal body. It likewise is not clear who authorized the filing of the appeal. Absent proof of this authority, this Court is not even sure that the appeal is proper. This Court also is not clear how "the Town" has been aggrieved by any action of the Zoning Board.

Whalerock filed an answer and counterclaim with respect to the Town's zoning appeal in C.A. No. WC-2011-0081 on March 2, 2011. In its answer and counterclaim, Whalerock alleges that the Town is estopped from challenging the Zoning Board's decision because it previously defended Whalerock's application as complete. Whalerock also asserts a claim pursuant to the Equal Access to Justice Act, §§ 42-92-1 et seq., against the Town based on the fact that the Town took a prior position in prior related litigation. This counterclaim is not before this Court for decision.

On March 14, 2011, following the filing of the two zoning appeals, the Town Council allegedly amended the Wind Ordinance to eliminate the controversial provision that allowed an applicant seeking to construct a large wind energy system to enter into a

partnership agreement with the Town and pursue approval from the Town Council rather than the Planning Commission and the Zoning Board. See Charlestown Ordinance No. 338 (referenced in Town's Legal Mem. in Supp. of its Appeal from the ZBR Decision, at 1 n.1, and in Town's Legal Mem. in Supp. of its Reply to Zoning Ordinance Amendment Challenge and Composition of Planning Commission Membership at 2 n.2).[7] It further amended the Wind Ordinance, on September 12, 2011, to "prohibit the construction and operation of wind energy facilities." (Charlestown Ordinance No. 341.) On November, 2011, it amended the wind ordinance again to permit residential wind energy systems. See Code § 218-37 (amended by Ordinance No. 344 to allow for residential wind energy systems). As of today, therefore, the Wind Ordinance no longer allows for the construction and operation of commercial wind energy systems, but only permits the construction of residential systems. See id.

On May 9, 2011, following a hearing on April 18, 2011, a hearing justice of this Court consolidated the two zoning appeals with the Dolock Plaintiffs' Complaint for declaratory and injunctive relief. See C.A. No. WC-2011-0052, Order, dated May 9, 2011 (Lanphear, J.). After a scheduling conference on May 2, 2011, the Court also entered a Consent Order on May 6, 2011 to address the state of the pleadings and provide for the filing of legal memoranda. See C.A. No. WC-2011-0052, Consent Order, dated May 6, 2011 (Lanphear, J.). The Consent Order provides, in pertinent part, as follows:

[7] The Town did not provide this Court with a copy of Ordinance No. 338, as referenced in its memorandum. While the Charlestown Code makes reference to Ordinance No. 338 enacted on March 14, 2011 in its Disposition List, this Court has been unable, through its research, to locate the substance or official codification of any such Ordinance. See generally Charlestown Code; Official Website of the Town of Charlestown, Rhode Island, Charter and Ordinances, http://www.charlestownri.org/index.asp?Type=B_BASIC&SEC={CD02D962-319A-47E6-9D53-CB11FE7D8FCA} (last visited August 10, 2012).

> These consolidated matters came before the Court, Mr. Justice Lanphear presiding pursuant to a RCP 16 Pre-Trial Conference on May 2, 2011 for simplification of the issues, the necessity and desirability [of] amendments to the pleadings and to agree upon the facts and documents necessary to narrow the issues in the consolidated matters. The parties agree that the matter can be resolved without the necessity of trial and upon the record as it currently stands, as follows:
>
> 1. Whalerock shall be allowed to amend its answer and counterclaim to the Town of Charlestown's complaint (Town of Charlestown v. Charlestown Zoning Board of Review et[]al[.]C.A. No. 11-0081) to join the Charlestown Planning Commission as a party to this action and may assert a cross[-]claim against the Commission . . . .
> . . .
> 5. The parties agree that there is no need to supplement the record any further and that all claims described in this Order are ripe for decision by the Court without the necessity of any additional evidence.
> 6. The parties agree that expeditious resolution of all of the claims described in this Consent Order is in the best interests of all parties and that the matter is appropriate for priority assignment for decision as soon as memoranda and responses are filed with the Court. In consideration thereof[,] the parties agree that the application before the Planning Commission is stayed pending the Court's decision on the claims described herein.

Id.[8]

While the Consent Order allowed Whalerock to amend its answer and counterclaim in the Town zoning appeal in WC-2011-0081 to join the Charlestown Planning Commission as a party and assert a cross-claim against the Planning Commission, this Court has no evidence that Whalerock ever filed an amended answer,

[8] Although the Consent Order allowed Whalerock to amend its pleadings to assert a cross-claim to the pending zoning appeals, it does not sanction those amendments as procedurally proper nor require this Court to decide any claims on their merits. While the Consent Order also references the parties' agreement that there is no need to supplement the record, that provision of the Order does not require the Court to find that the record, as submitted, is adequate for decision.

an amended counterclaim, or any cross-claim against the Planning Commission. The only evidence of such a cross-claim is an unsigned pleading submitted by Whalerock in its Appendix. See Whalerock App. at 3-5. The unsigned pleading states two counts for declaratory relief against the Planning Commission. First, Whalerock seeks a declaratory judgment that the role of the Planning Commission regarding the Whalerock application for a Special Use Permit is advisory only and that, to the extent the Wind Ordinance purports to expand the Planning Commission's power to include regulatory rather than merely advisory power, the Wind Ordinance is null and void. Second, Whalerock seeks a declaratory judgment that the Charlestown Planning Commission is illegally constituted because its members are elected rather than appointed. See Whalerock App. at 3-4, Whalerock Cross-Claim.

In response to this purported cross-claim, the Town, on May 18, 2011, filed the Town's Reply to Crossclaims of Whalerock, which appears to answer the unsigned copy of the cross-claim in Whalerock's Appendix. See C.A. No. WC-2010-0764, Town's Reply to Crossclaims; App. at 3-5. It is unclear whether the Town, which signed its pleading as plaintiff and defendant-in-crossclaim, is the municipality itself, the Town Council, the Planning Commission, or some other municipal body.

At the request of the parties, this Court exercised its discretion and heard extensive oral argument pertaining to these consolidated cases on October 6, 2011. This Decision follows.

II

ANALYSIS

A

Appeal of Zoning Board's Decision

The zoning appeals in this case filed by the Dolock Plaintiffs and the Town of Charlestown question the propriety of the Zoning Board's decision of January 21, 2011 that overturned the Building Official's determination that the Whalerock application was not vested. In support of their appeal, the Dolock Plaintiffs argue that the decision is invalid because "no findings of fact were enunciated." See C.A. No. WC-2011-0052; Dolock Mem. at 14. The Dolock Plaintiffs assert that the decision warrants reversal under every ground in the Rhode Island statute governing zoning appeals. See § 45-24-69(d)(1)-(6).

In its appeal, the Town argues similarly that the Zoning Board's decision should be overturned because it contains no factual findings and is not supported by the substantial evidence of record. Additionally, the Town contends that the Zoning Board committed legal error in basing its decision as to vesting on Whalerock's first application because it never determined whether Whalerock withdrew the application from consideration or whether it simply could be transferred from the Town Council to the Planning Commission for review. The Town asserts that the process for evaluating each application (the first one submitted for Town Council review and the second one submitted for Planning Commission and Zoning Board review) differed such that each application should have been analyzed separately by the Zoning Board in its decision.

In response, the Zoning Board contends that the record on appeal from the Building Official's decision was complete and that the Town Planner who originally certified the application as complete was well-regarded and was a person upon whom the Zoning Board could rely. Moreover, the Certificate for Completion itself, the Zoning Board maintains, constitutes the substantial evidence necessary to uphold its decision of reversal. The Zoning Board argues, in the alternative, that the doctrine of equitable estoppel should protect Whalerock from being denied the right to proceed with Planning Commission and Zoning Board review because it made investments in reliance on the initial Certificate for Completion.

Whalerock similarly contends that the record before the Zoning Board was complete and included the Certificate for Completion as well as the "associated memo" explaining the certification. Notably, however, the documents filed by the Town with this Court, that purport to be the Zoning Board record, do not include that memorandum. See R. Items 1-28. Further, Whalerock argues that it filed one application, not two, and that the original Certificate for Completion controlled. Finally, Whalerock argues that this Court should not address the substantive issue of whether the Town Planner properly deemed the application complete, but instead whether the Zoning Board erred in overturning the Building Official's decision. In support of this argument, Whalerock asserts that both the Town and the Dolock Plaintiffs are time-barred from challenging the original Certificate for Completion, and thus they cannot now contest the Town Planner's determination that the application was complete at the time.

None of the parties have challenged the authority of the Town Planner or, subsequently, the Building Official to determine whether an application for a wind

energy system was complete or substantially complete under the version of the Wind Ordinance in effect at the time so as to survive the later Moratorium imposed on the construction and operation of such systems. Instead, the parties dispute the merits of the Zoning Board's decision.

1

Standard of Review

This Court's review of a Zoning Board decision is governed by R.I. Gen. Laws § 45-24-69, which states, in pertinent part:

> (c) . . . . The court shall consider the record of the hearing before the zoning board of review and, if it appears to the court that additional evidence is necessary for the proper disposition of the matter, it may allow any party to the appeal to present that evidence in open court, which evidence, along with the report, constitutes the record upon which the determination of the court is made.
>
> (d) The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
>
> > (1) In violation of constitutional, statutory, or ordinance provisions;
> >
> > (2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> >
> > (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

R.I. Gen. Laws § 45-24-69(c) and (d). Judicial review of these decisions is not de novo. Munroe v. Town of East Greenwich, 733 A.2d 703, 705 (R.I. 1999) (citing Kirby v. Planning Bd. of Rev. of Middletown, 634 A.2d 285, 290 (R.I. 1993)). Instead, this Court must give "deference to the findings of a local zoning board of review . . . . This is due, in part, to the principle that 'a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.'" Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (quoting Monforte v. Zoning Bd. of Rev. of East Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)). Thus, review of questions of fact "is confined to a search of the record to ascertain whether the board's decision rests upon 'competent evidence' or is affected by an error of law.'" Munroe, 733 A.2d at 705 (quoting Kirby, 634 A.2d at 290).

"This deferential standard of review, however, is contingent upon sufficient findings of fact by the zoning board." Kaveny v. Town of Cumberland Zoning Bd. of Rev., 875 A.2d 1, 8 (R.I. 2005). It likewise is dependent upon having a complete and certified record to review. See §§ 45-24-61(a), 45-24-69(a) and 45-24-69(c).

2

Compliance with the Zoning Act

The Rhode Island Zoning Enabling Act of 1991 provides, in pertinent part, as follows:

> (a) Following a public hearing, the zoning board of review shall render a decision within a reasonable period of time. The zoning board of review shall include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote. Decisions shall be recorded and filed

> in the office of the city or town clerk within thirty (30) working days from the date when the decision was rendered, and is a public record. The zoning board of review shall keep written minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating that fact, and shall keep records of its examinations, findings of fact, and other official actions, all of which shall be recorded and filed in the office of the zoning board of review in an expeditious manner upon completion of the proceeding. For any proceeding in which the right of appeal lies to the superior or supreme court, the zoning board of review shall have the minutes taken either by a competent stenographer or recorded by a sound-recording device.

Sec. 45-24-61(a) (emphasis added). The Act thus requires the Zoning Board to make a stenographic or audiotape recording of any zoning hearing (inclusive of its examinations, findings of fact and other official actions) in any proceedings to which attaches a right of appeal to the Superior Court or the Supreme Court.[9] Id.; see Zavota v. Zoning Bd. of Rev. for Town of Barrington, 2004 WL 1068023, *4 (R.I. Super. 2004) (Savage, J.) ("'[B]y its express terms, the Act requires a zoning board to make a stenographic or audiotape recording of any zoning board hearing . . .'") (quoting Ryden v. Barrington Zoning Bd. of Rev., 2002 WL 1804542 (R.I. Super. 2002) (Savage, J.)); Ryden, 2002 WL 1804542 at *8 (holding that the absence of a written stenographic record or audiotape recording of the zoning board hearing violates § 45-24-61(a)); Cormier v. Lincoln Zoning Bd., 1989 WL 1110263 (R.I. Super. 1989) (Bourcier, J.) (faulting Zoning Board for "fail[ing] to certify to this Court any meaningful transcript or transcription of the proceeding before the Board"). This requirement includes the duty to keep written

[9] "Prior to passage of the Zoning Enabling Act of 1991, verbatim transcripts of what occurred in the hearing before a zoning board were held to be preferable but the failure to furnish such a record was not necessarily fatal on appeal." Roland F. Chase, Rhode Island Zoning Handbook § 165 (1993).

minutes that indicate the vote, absence from voting, or abstention of each member of the zoning board as to each question before it, with the minutes to be taken by competent stenographic means or recorded by audiotape. § 45-24-61(a). In addition, the zoning board is required to produce a written or recorded decision that includes its findings of fact and shows the vote, abstention or absence from voting of each of its members. Id.

"The obvious intent of these provisions is to ensure that a reviewing court can review a zoning board's decision in light of the administrative hearing record underlying that decision." Ryden, 2002 WL 1804542 at *7. The reviewing court must be able to discern from the decision and record underlying it the findings of fact and conclusions of law made by the zoning board, the evidence that the zoning board relied upon to make its factual findings, the law that it applied to its findings of fact to reach its legal conclusions and whether the substantial evidence of record, inclusive of the testimony and documents admitted into evidence, supports its decision.

Once an aggrieved party files an appeal to this Court from a decision of the zoning board:

> The zoning board of review shall file the original documents acted upon by it and constituting the record of the case appealed from, or certified copies, together with other facts that may be pertinent, with the clerk of the court within thirty (30) days after being served with a copy of the complaint.

Sec. 45-24-69(a). The Act thus requires the zoning board to timely file with the reviewing court the original or a certified record of the entire proceeding under review. Id.; see Marsocci v. Pilozzi, 2006 WL 1530259 (R.I. Super. 2006) (Savage, J.) (criticizing zoning board for failure to file certified record). Section 45-24-69(a) parallels the provision of the Rhode Island Administrative Procedures Act that requires an agency

to "transmit to the reviewing court the original or a certified record of the entire record of the proceeding under review." Sec. 42-35-15(d); see also Frost v. R.I. Coastal Res. Mgmt. Council, 2011 WL 3153298 (Savage, J.) (addressing absence of timely filed certified record in connection with administrative appeal).

The certified record is absolutely necessary for judicial review of a zoning board's decision. See V.J. Berarducci & Sons, Inc. v. Zoning Bd. of Rev. of the Town of Johnston, 2002 WL 1803924, *2 (R.I. Super. 2002) (Sheehan, J.) ("The Court, when reviewing a decision of the zoning board of review, must examine the entire certified record . . . .") (citing Salve Regina College v. Zoning Bd. of Rev., 594 A.2d 878, 880 (R.I. 1991) (citing DeStefano v. Zoning Bd. of Rev. of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979))). Consistent with the statutory dictates of § 45-24-61(a) that define the required components of a zoning board record, that record must include: a properly transcribed or recorded transcript of the zoning board hearing; copies of all exhibits and memoranda submitted as part of that hearing; the entire record of proceedings before any other body that was the subject of review by the zoning board; final transcribed or recorded minutes of the zoning board proceedings, approved by the zoning board, reflecting the votes of all of its members; and the zoning board's written decision, inclusive of its findings of fact and conclusions of law, clearly stating the votes of its members either approving, disapproving, or abstaining from voting. See §§ 45-24-61(a) and 45-24-69(a). The zoning board, in submitting the record, must certify in writing to the Superior Court, at the time of its filing, that the record is complete. See § 45-24-69(a).

In the first instance, this requirement ensures that the reviewing court knows that it has before it, on appeal, all of the testimony, evidence and legal arguments that the zoning board considered in reaching its decision in the first instance as well as a complete record of its decision, including its findings of fact and conclusions of law and a recordation of the votes of its members. See id. If documents are filed with the court and not certified as "constituting the [complete] record of the case appealed from," the reviewing court has no way to determine if those documents were part of the record below or whether they comprise the complete record that is the subject of appeal. Id. The failure of the zoning board to file the certified record can warrant remand. See V.J. Berarducci & Sons, Inc., 2002 WL 1803924 (remanding case to zoning board based on its failure to file certified record on appeal); Lamborghini v. Koolian, 1991 WL 789807 (R.I. Super. 1991) (Bourcier, J.) (same).

The Act further requires a zoning board to "include in its decision all findings of fact." Sec. 45-24-61(a). The Town even incorporates this statutory standard into its own Code. See Code § 218-25.[10] "'[A] zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review.'" Bernuth v. Zoning Bd. of Rev. of Town of New Shoreham, 770 A.2d 396, 401 (R.I. 2001) (quoting Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996) (quoting Thorpe v. Zoning Bd. of Rev. of North Kingstown, 492 A.2d 1236, 1236-37 (R.I. 1985))) (other citations omitted). It "'must set forth in its decision findings of fact and reasons for the actions taken.'" Kaveny v. Town

[10] Section 218-25 of the Charlestown Code provides the manner by which the Zoning Board handles appeals. It explicitly states, in pertinent part, that "[a]ll decisions and records of the Board respecting appeals shall conform to the provision of R.I. Gen. Laws § 45-24-61." Code § 218-25(C).

of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005) (quoting Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (quoting Irish Partnership v. Rommel, 518 A.2d 356, 358 (R.I. 1986))). "Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany." Id. (quoting Bernuth, 770 A.2d at 401 (quoting Irish Partnership, 518 A.2d at 358-59)).

a

The Absence of a Proper Certified Record on Appeal

This Court is appalled at the state of the record in connection with these two consolidated zoning appeals. See Dolock et al. v. Town of Charlestown Zoning Board of Review et al., C.A. No. WC-2011-0052; Town of Charlestown v. Town of Charlestown Zoning Board of Review et al., C.A. No. WC-2011-0081. Its deficiency, coupled with the parties' voluminous filing of documents outside the record, has created a procedural morass that has unnecessarily consumed precious judicial resources.

The docket sheet in the court file with respect to the first of the two filed zoning appeals states that, on February 15, 2011, the Town filed "Zoning Board Records" with the Court, which are contained in an envelope entitled "Joseph Dolock v[.] Charlestown Zoning Board" listing the case number. See Dolock et al. v. Town of Charlestown Zoning Board of Review et al., C.A. No. WC-2011-0052. The Act, however, requires the "Zoning Board," and not the Town, to file its certified record—a particularly important distinction in this case where the Town and the Zoning Board are adverse parties in one of the appeals. See § 45-24-69(a). The documents filed are accompanied by an unsigned document entitled "Table of Contents" that bears only the case caption for that first filed

zoning appeal; neither the Town nor the Zoning Board filed any documents or certified record in connection with the later filed zoning appeal nor did the Town certify that the documents that it filed in the first filed appeal constituted the record for the later filed appeal. Compare Dolock et al. v. Town of Charlestown Zoning Board of Review et al., C.A. No. WC-2011-0052 with Town of Charlestown v. Town of Charlestown Zoning Board of Review et al., C.A. No. WC-2011-0081. The Table of Contents lists twenty-eight documents by "Item" number and contains a brief description of each document, although at least one Item number is repeated, and one document contained in the records is not listed. It is not even clear who prepared the Table of Contents or the documents referenced in it and who filed these documents with the Court.

As such, the Zoning Board never filed the certified record of its proceedings in each appeal with this Court, as required by § 45-25-69(a). This Court thus has no way to know if the documents filed by the Town in only one of the two zoning appeals comprise a full and accurate record of the Zoning Board proceeding below.

Making matters worse, this Court cannot tell from the records submitted whether the Zoning Board, in considering Whalerock's appeal from the November 30, 2010 decision of the Building Official, had before it the documents that comprised the record before the Acting Town Planner and then the Building Official (which presumably the Acting Town Planner would have been required to furnish to the Building Official and, in turn, the Building Official would have been required to provide the Zoning Board and would have been necessary for the Zoning Board to consider in determining the propriety of the Building Official's decision). Particularly relevant in this regard is whether the Acting Town Planner and then the Building Official considered, as part of the record

before them, the Certificate for Completion issued by the Town Planner on September 27, 2010 (either with or without the "associated memo" that she referenced in the certificate). While the Certificate for Completion is among the records submitted to the Court by the Town, there is no way to tell from those records whether that document comprised part of the record before the Town Planner and/or the Building Official. See R. Item 6, Certificate for Completion. In addition, the Certificate for Completion references an "associated memo" that is not included in the records filed by the Town with this Court. Id. This Court is unsure, therefore, whether that memorandum was attached to the original Certificate for Completion and whether it comprised part of the record before the Zoning Board.

Also unclear from the record is the status of any appeals of the two decisions of the Town Planner in September 2010 or the Acting Town Planner in November 2010 or the record connected to the Town Council's proceedings regarding Whalerock's application. Whalerock seems to suggest that the Town Planner's issuance of the Certificate for Completion on September 27, 2010 is a final adjudication of the issue of substantial completeness. Yet, there is a reference in the Draft Minutes to an appeal filed by Mr. Dolock from her issuance of that certificate and no evidence of that appeal or its outcome in the documents submitted to this Court. (R. Item 28, Draft Minutes). There also is no evidence of whether Whalerock filed an appeal from the decision of the Acting Town Planner on November 30, 2010. See R. Items 1-28. The documents submitted do not contain any record of the proceedings before the Town Council with respect to Whalerock's application which may have had a bearing on the Zoning Board's decision or the decisions of the Town Planner, Acting Town Planner and/or the Building Official

that preceded it. See id. This Court, for example, cannot discern, from the documents filed with it by the Town, to whom Whalerock submitted its application in September 2010, for what purpose, and in what capacity the Town Planner took action on the application. See id.

In addition, the minutes filed with this Court are in draft form. See R. Item 28, Draft Minutes. This label connotes minutes that may not have been written and transcribed in conformance with § 45-24-61(a) and may never have been approved by vote of the Zoning Board. This Court thus questions whether it is appropriate to consider them at all with respect to the pending zoning appeals.

Even more fundamentally, the Zoning Board has failed to provide this Court with an official transcript or any audio recording of the hearing before it on January 18, 2011. There is no way for this Court to determine, therefore, whether the draft minutes are accurate and reflect what happened at the hearing. The absence of an official transcript, final minutes approved by the Zoning Board, and a certified record of the hearing leave this Court without a record to review in connection with the pending appeals.

Whalerock and the Dolock Plaintiffs compounded this problem by submitting a large volume of documents to this Court that appear to be outside of the Zoning Board record. They provided many documents that are not among those documents filed by the Town and may well have not been before the Acting Town Planner or the Building Official in making their decisions or before the Zoning Board in overturning the Building Official's decision on appeal. Whalerock supplied the Court with an unofficial transcript of the Zoning Board hearing that may or may not be accurate. These materials cannot serve as the statutorily required certified record for the purpose of this Court's review of

the underlying Zoning Board decision, notwithstanding the agreement of the parties in their Consent Order dated May 6, 2011 that "there is no need to supplement the record any further and that all claims . . . are ripe for decision by the Court without the necessity of any additional evidence." See C.A. No. WC-2011-0052, Consent Order, dated May 6, 2011 (Lanphear, J.). In addition, these documents are not even relevant to the other claims and defenses asserted by Whalerock and the Dolock Plaintiffs, which raise purely legal issues. The submission of this volume of material served only to delay this Court's review process and obfuscate the issues pending before it in these consolidated cases.

This Court has no choice, therefore, but to remand these zoning appeals to the Zoning Board, pursuant to § 45-24-69(d). A remand is allowed when there is "a genuine defect in the proceedings in the first instance, which defect was not the fault of the parties seeking remand" or where "there is no record of the proceedings upon which a reviewing court may act." Roger Williams College v. Gallison, 572 A.2d 61, 63 (R.I. 1990) (per curiam). Here, this Court lacks a certified record, final minutes approved by the Zoning Board and an official transcript, thereby precluding judicial review of the two zoning appeals at issue in these consolidated actions and mandating a remand of those matters to the Zoning Board. See id.; V.J. Berarducci & Sons, Inc., 2002 WL 1803924; Lamborghini v. Koolian, 1991 WL 789807.

b

A Zoning Board Decision Devoid of the Requisite Findings of Fact and Conclusions of Law

While the absence of a proper certified record precludes meaningful review of the Zoning Board decision at issue here, this Court nonetheless will assume that the decision filed by the Town is, in fact, the decision that the Zoning Board rendered on January 21,

2011 and proceed to address the obvious deficiencies in that decision. In that way, this Court can attempt to avoid a further waste of judicial resources and allow the Zoning Board not only to address the state of the record on remand but also to address the deficiencies in its decision.

The Zoning Board's decision stated, in full, as follows:

> At a meeting of the Zoning Board of Review held Tuesday, January 18, 2011, your Zoning application appealing the decision of the Building Official dated November 30, 2010 under Article IV, Section 218-25 that the Whalerock application does not qualify for vesting as stated in Section 218-4 of the Charlestown Zoning Ordinance, per RIGL 45-24-44 in an R2A Zone was overturned as follows:
>
> | Board Members | Vote |
> |---|---|
> | Michael Rzewuski | Uphold |
> | Ronald Crosson | Overturn |
> | William Meyer | Overturn |
> | Richard Frank | Overturn |
> | David Provancha, Alt. #2 | Overturn |
>
> Said decision implies that this application was certified complete and does have vested rights.
>
> Be advised that a conditional approval from the Planning Commission must be retained prior to submitting an application to the Zoning Board of Review for a Special Use Permit.
>
> Premises located at King Factory Road, Charlestown and is further designated as Lot 186 on Assessor's Map 17.

(R. Item 27.) As is obvious from its brevity and dearth of substance, this decision is woefully deficient. It consists of less than a single page and contains no findings of fact or conclusions of law. The decision merely states that a meeting was held on January 18, 2011 and that the decision of the Building Official, dated November 30, 2010, was

overturned in a 4-1 vote of the board members. It lists the board members by name and vote and states cryptically that "[s]aid decision implies that this application was certified complete and does have vested rights." Further, the decision states the obvious under the Wind Ordinance: "that a conditional approval from the Planning Commission must be retained prior to submitting an application to the Zoning Board of Review for a Special Use Permit." See Wind Ordinance at art. VI § 218-37D(4)(e).

There is no indication of what the Zoning Board concluded, aside from overturning the Building Official's decision. There is not a single finding of fact. Moreover, the Zoning Board simply reversed the Building Official's decision without any explanation or analysis as to how it arrived at its conclusion that the Building Official was somehow in error. The decision includes the vote of its members, indicating that the vote was not unanimous, but fails to describe how or why the majority of its members decided in the way that they did and why the remaining member dissented.

Additionally, the strangely worded statement that "[s]aid decision implies that this application was certified complete and does have vested rights" does not clearly indicate who made the decision referenced nor does it reflect a definitive finding by the Zoning Board that the application was complete and had vested rights; it merely suggests that possibility by implication. (R. Item 27.) Regardless, the Zoning Board failed to make any findings of fact or articulate the legal precepts that it applied to the facts to reach its conclusion. Its decision, frankly, flagrantly disregards our Supreme Court's clear mandate that zoning boards must make factual as opposed to "conclusional" findings. Bernuth, 770 A.2d at 401 (quoting Irish Partnership, 518 A.2d at 358-59) (other citation omitted).

This void cannot be filled by the documents submitted to this Court by the Town, as the Zoning Board has failed to certify that those documents comprise the complete and accurate Zoning Board record. In addition, the minutes included among those documents are only in draft form, with no indication that the Zoning Board approved them, and the Zoning Board has not provided an official transcript of the hearing. Moreover, even if this Court could consider those documents, they would not cure the problems with the Zoning Board's decision. It is not for this Court, in reviewing that decision, to "search the record for supporting evidence or decide for itself what is proper in the circumstances." Id. (quoting Irish Partnership, 518 A.2d at 359).

It was the duty of the Zoning Board to rule on the legal and factual issues presented by the parties. Yet, its decision does not indicate what comprised the record of the proceeding before the Building Official that it reviewed. It does not indicate whether any party appealed from the decision of either the Town Planner or the Acting Town Planner and, if so, the status and record of any such appeal. In addition, it is unclear from the decision whether the Zoning Board considered any documents from or had any knowledge concerning consideration of Whalerock's application by the Town Council (including information as to how the application got before the Town Planner in September 2010). It simply does not reveal the content of the record before it and the testimony and evidence it relied on in reaching its decision.

Fundamentally, the Zoning Board's decision did not resolve, legally or factually, the central dispute between the parties – namely, whether the Certificate for Completion issued by the Town Planner to Whalerock in September 2010 gives Whalerock the right to proceed with the application it submitted in November 2010 to obtain Site Plan

Review from the Planning Commission and a Special Use Permit from the Zoning Board, notwithstanding the Moratorium on the construction of large wind energy systems. The starting point for this analysis is for the Zoning Board to determine under state law, and the Charlestown Code, what proof is required, legally, for Whalerock to demonstrate that it has vested rights to proceed with the application that it filed in November 2010. See R.I. Gen. Laws § 45-24-44(a); Code § 218-4. This inquiry requires a determination of the meaning of the terms "substantially complete" and "deemed complete," as used in those provisions of state and municipal law, and how those provisions of law are to be interpreted and applied with respect to the applications Whalerock filed under the Wind Ordinance.

The Zoning Board then must determine, under those legal precepts, whether the November 2010 Whalerock application was substantially complete prior to the Moratorium. This question is a mixed question of law and fact. See, e.g., Jalowiec Realty Associates, L.P. v. Planning and Zoning Comm'n of City of Asonia, 898 A.2d 157, 162 (Conn. 2006). To make these determinations, the Zoning Board may need to consider whether the application submitted by Whalerock in November 2010, even if identical in form and in substance to the application it submitted in September 2010, is one application for purposes of a review for substantial completeness. See § 45-24-58 ("The zoning ordinance establishes the various application procedures necessary for the filing of . . . special-use permits, development plan reviews, site plan reviews, and other applications that may be specified in the zoning ordinance, with the zoning board of review, consistent with the provisions of this chapter.") This inquiry could necessitate an examination of where Whalerock submitted the September 2010 application and for what

purpose, where it submitted the November 2010 application and for what purpose, and whether the application processes and procedures for review of substantial completion are the same for each application. If the applications are determined to be, in essence, a single application, then the Zoning Board might consider whether the Certificate for Completion issued in September 2010 controls the later filed application—a question that could require an examination of whether any party properly appealed the issuance of that certificate and the outcome of that appeal and an inquiry into whether the issuance of the Certificate for Completion is a final decision on the issue of substantial completeness that legally binds the Town.

If the Zoning Board were to determine that the November 2010 application is a second application not governed by the issuance of the Certificate for Completion, it then may have to determine whether the Acting Town Planner's decision of November 30, 2010, as accepted by the Building Official, was in error. See § 45-24-57(1)(i). The earlier issued Certificate for Completion still might be relevant in this analysis.

Ultimately, the Zoning Board must determine if Whalerock's application of November 2010 was substantially complete before passage of the Moratorium so as to be vested for purposes of proceeding with its application before the Planning Commission and Zoning Board. In making its determination, it is required to articulate its factual findings and legal analysis in detail to enable this Court to review it.

This Court thus remands this matter to the Board so that it can file a proper and complete certified record, including final approved minutes and an official transcript, and make the requisite findings of fact and conclusions of law to support its decision. See

§ 45-24-61(a) (requiring the zoning board to not only "include in its decision all findings of fact and conditions," but also to "keep written minutes of its proceedings" and "[f]or any proceeding in which the right of appeal lies to the superior or supreme court, the zoning board of review shall have the minutes taken either by a competent stenographer or recorded by a sound-recording device"); Bernuth, 770 A.2d at 401-02; Sciacca, 769 A.2d at 585. Such a remand is wholly proper, and indeed compelled, under Rhode Island law. See § 45-24-69; Bernuth, 770 A.2d at 401-02; Sciacca, 769 A.2d at 585.

B

Validity of the Wind Ordinance

In their Complaint for declaratory judgment and injunctive relief, the Dolock Plaintiffs assert that the Wind Ordinance, originally enacted in January 2010, violates the Rhode Island Zoning Enabling Act by making the Charlestown Town Council the permitting authority for wind energy projects in certain instances. See Compl., C.A. No. WC-2010-0764, Joseph F. Dolock, et als. v. Town of Charlestown Zoning Board of Review; Dolock Mem. at 10. Further, Plaintiffs argue that the "entire process [of enacting the Ordinance] was so tainted by the unlawful, irregular, and conflict-ridden actions of the Town Councilors then in office that the ordinance in its entirety should be stricken." Id. at 11.

The Town responds that the Dolock Plaintiffs' Complaint is an appeal of the enactment of an ordinance that is time-barred under § 45-24-71.[11] It also argues that the

[11] The Town additionally asserted at oral argument that the only other provision which affords a party grounds to challenge a zoning ordinance is R.I. Gen. Laws § 45-24-62. It argued that this provision only allows such a challenge "upon due proceedings in the name of the city or town, instituted by its city or town solicitor." Sec. 45-24-62. That

challenge by the Dolock Plaintiffs to provisions of the Wind Ordinance should be dismissed as moot because those provisions are no longer in effect.

The provision of the Zoning Enabling Act concerning appeals of zoning ordinances on which the Town relies provides, in pertinent part, as follows:

> (a) An appeal of an enactment of or an amendment to a zoning ordinance may be taken to the superior court for the county in which the municipality is situated by filing a complaint within thirty (30) days after the enactment or amendment has become effective. . . .

Sec. 45-24-71(a). This statute does not require a party to appeal the enactment of a zoning ordinance. It merely requires that, if such an appeal is taken, it be filed in accordance with the time strictures of the statute. Here, the Dolock Plaintiffs' challenge to the Wind Ordinance is not an appeal of an enactment of an ordinance. Instead, the action is one that seeks a declaration that the challenged provisions of the Wind Ordinance are invalid on their face and thus clearly falls within this Court's jurisdiction under the Uniform Declaratory Judgments Act, §§ 9-30-1 et seq. Accordingly, the Town's argument that the Dolock Plaintiffs' declaratory judgment action is barred by § 45-24-71 must be rejected.

The next question, therefore, is whether the Dolock Plaintiffs' requests for declaratory and injunctive relief are moot. Our Supreme Court "'has consistently held that a case is moot if the original complaint raised a justiciable controversy, but events occurring after the filing have deprived the litigant of a continuing stake in the controversy.'" State v. Med. Malpractice Joint Underwriting Ass'n, 941 A.2d 219, 220 (R.I. 2008) (quoting Cicilline v. Almond, 809 A.2d 1101, 1105 (R.I. 2002) (quoting

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statute, however, sets forth the manner in which the Town may seek to enforce its zoning ordinances, not challenge them. See id.

Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence, 754 A.2d 89, 90 (R.I. 2000))). "An appeal is moot when 'a decision by this court on the merits [would] not have a practical effect on the underlying controversy.'" Campbell v. Tiverton Zoning Bd., 15 A.3d 1015, 1021 (R.I. 2011) (quoting In re Westerly Hospital, 963 A.2d 636, 639 (R.I. 2009) (mem.) (citing City of Cranston v. Rhode Island Laborers' Dist. Council, Local 1033, 960 A.2d 529, 533 (R.I. 2008))).

Here, the Dolock Plaintiffs challenge art. VI § 218-37D(4)(f)(iii) of the Wind Ordinance on the grounds that it constitutes a usurpation by the Town Council of the powers of the Planning Commission and the Zoning Board. Yet, the Town Council apparently has repealed that provision of the Ordinance. See Charlestown Ordinance No. 338, supra 23 n.9; Charlestown Ordinance No. 341. In addition, Whalerock has terminated its partnership agreement with the Town, elected not to have its application considered by the Town Council under Article VI § 218-37D(4)(f)(iii), and decided instead to pursue approval of its application under Article VI § 218-37(D)(4)(e) before the Planning Commission and the Zoning Board. As such, the Dolock Plaintiffs' Complaint is clearly moot. See id.

C

Role and Composition of the Charlestown Planning Commission

In its cross-claim that Whalerock claims it properly filed, it seeks declaratory relief challenging the legality of the composition of the Charlestown Planning Commission. It asks this Court to declare that the Planning Commission is not validly constituted because its members are elected, not appointed, in violation of the Land Use Planning Enabling Act and the Development Review Act. See R.I. Gen. Laws §§ 45-22-

1, et seq., and 45-23-25, et seq. The Town counters that the General Assembly ratified the Charlestown Town Charter, which included a provision for the election of Planning Commission members, such that the election of its members is not in violation of municipal or state law. See Charlestown Charter § C-172, enacted by P.L. 191 ch. 15, §§ 1, 2.

Whalerock's purported cross-claim for declaratory relief also asks this Court to declare that the role of the Planning Commission in the Site Plan Review of wind energy systems is advisory only. The Town responds that, pursuant to the Wind Ordinance, the Planning Commission's review is both regulatory and advisory. The Town also argues that Whalerock lacks standing to assert either of its claims because it has not been aggrieved by any decision of the Planning Commission. Finally, the Town asserts that Whalerock has failed to exhaust its administrative remedies with regard to the Planning Commission because it has not been able to appeal any decision or action of the Planning Commission, such that the Court cannot reach Whalerock's cross-claim regarding the Planning Commission's role.

Before this Court can consider the merits of Whalerock's cross-claim, it must address its procedural infirmities. First, there is no evidence that Whalerock ever filed its cross-claim. It also is not clear, as the Consent Order dictated, that the cross-claim it purported to file named the Planning Commission as a party to this action. In addition, this Court is hard-pressed to understand how a counterclaim can be amended by a defendant to assert a cross-claim against an unnamed party-defendant. More importantly, this Court is of the view, notwithstanding the language of the Consent Order, that it is procedurally improper to bring claims for declaratory relief in a pending zoning appeal,

particularly where the party against whom declaratory relief is sought is not a party to that appeal. For all of these reasons, this Court declines to address the purported cross-claim.

Alternatively, if Whalerock could surmount these fundamental defects in its cross-claim, this Court still would decline to address it. As the record stands before this Court, the application proceedings before the Planning Commission are stayed pursuant to the Consent Order. If it is determined, after final adjudication of the zoning appeals before this Court, or otherwise, that the Whalerock application is barred by the Moratorium, then the Planning Commission would not engage in Site Plan Review of that application and Whalerock could never be aggrieved by any action of the Planning Commission. Until final resolution of the zoning appeals, therefore, Whalerock's requests for declaratory relief are premature.

Moreover, the declaratory judgment statute "is not intended to serve as a forum for the determination of abstract questions or the rendering of advisory opinions." Lamb v. Perry, 101 R.I. 538, 542, 225 A.2d 521, 523 (1967) (citation omitted). The Act "requires that there be a justiciable controversy [among the parties] and does not authorize [this] Court to give an advisory opinion upon hypothetical facts which are not in existence or may never come into being." Berberian v. Travisono, 114 R.I. 269, 274, 332 A.2d 121, 124 (1975). Although the parties agreed that the "expeditious resolution of all of the claims [including Whalerock's cross-claims] is in the best interests of all parties" and that these claims are "ripe for decision," this Court would be acting at the height of speculation if it were to assume that any decision of the Planning Commission would somehow affect Whalerock. See WC-2011-0052, Consent Order, dated May 6,

2011 (Lanphear, J.) As Whalerock has not been aggrieved by any action of the Planning Commission to date, and it is unclear whether it ever will be, this Court is of the view that its requests for declaratory judgment as to whether the composition of the Planning Commission is legal and whether its role is advisory or regulatory present non-justiciable abstract questions on hypothetical facts. See Berberian, 114 R.I. at 274, 332 A.2d at 124. Its declaratory judgment action, therefore, is not only premature but also tantamount to a request for two advisory opinions. See id. This Court declines to render such opinions and exercises its discretion under the Act to deny Whalerock's requests for declaratory relief in its purported cross-claim, even assuming that cross-claim has been filed and is procedurally proper. See id.

III

Conclusion

For all of these reasons, this Court remands the two appeals from the January 21, 2011 decision of Charlestown Zoning Board in Dolock et al. v. Town of Charlestown Zoning Board of Review et al. (C.A. No. WC-2011-0052) and in Town of Charlestown v. Town of Charlestown Zoning Board of Review et al. (C.A. No. WC-2011-0081) to the Zoning Board for further proceedings in order to file with this Court: (1) a complete and certified record of its proceedings; and (2) a decision containing the requisite findings of fact and conclusions of law. Additionally, this Court denies as moot the Dolock Plaintiffs' requests for declaratory and injunctive relief in Dolock et al. v. Town of Charlestown (C.A. No. WC-2010-0764). Finally, this Court declines to address Whalerock's purported cross-claim for declaratory relief in Town of Charlestown v. Town of Charlestown Zoning Board of Review et al. (C.A. No. WC-2011-0081), as there

is no evidence it has been filed or that it is procedurally proper and, alternatively, it is premature and non-justiciable. Counsel shall confer and submit an Order for entry consistent with this Decision.