STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(Filed: April 10, 2013)

WHALEROCK RENEWABLE ENERGY, LLC and LL PROPERTIES, LLC,	:	
Plaintiffs	:	
v.	:	
	:	**C.A. No. WC-2012-0709**
TOWN OF CHARLESTOWN and CHARLESTOWN PLANNING COMMISSION,	:	
Defendants	:	
TOWN OF CHARLESTOWN, by and through its Town Solicitor,	:	
Appellant	:	
v.	:	
	:	**C.A. No. WC-2012-0713**
TOWN OF CHARLESTOWN ZONING BOARD OF REVIEW, WHALEROCK RENEWABLE ENERGY, LLC and LL PROPERTIES, LLC,	:	
Appellees	:	
RONALD J. AREGLADO, MAUREEN AREGLADO, ROBERT BALZANO, BRENDA BALZANO, DONNA M. CHAMBERS, MICHAEL J. CHAMBERS, KAREN DANN, THOMAS J. GILLIGAN, LORETTA M. GILLIGAN, DAVID A. HEILEMAN, JO ANN HEILEMAN, PETER HERSTEIN, BEVERLY A. HERSTEIN, VIRGINIA HOVANESIAN, SUSAN W. HUGHES, JOAN G. JOHNSON, ARNOLD JOHNSON, MARTIN B. LADER, EILEEN S. LADER, DANIEL B. MACLEOD, JUDITH MACLEOD, KRISTAN M. O'CONNOR, MARK F. O'CONNOR, MARY C. O'CONNOR, JOSEPH QUADRATO, MARY LOU QUADRATO, PAUL F. RAICHE,	:	**C.A. No. WC-2012-0760**

BARBARA L. RAICHE, and	**:**
WALTER A. SMITH,	**:**
Appellants	**:**
v.	**:**
	:
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	**:**

DECISION

K. RODGERS, J. These three separate cases concern the application of Whalerock Renewable Energy, LLC (Whalerock) and LL Properties, LLC (LL Properties) to construct a large wind energy system on an undeveloped parcel located in the Town of Charlestown (Town). In Whalerock Renewable Energy, LLC, et al. v. Town of Charlestown, et al. (C.A. No. WC-2012-0709), an action for declaratory judgment, Whalerock and LL Properties seek a declaration from this Court with respect to the scope of the Town's Planning Commission's role in reviewing the application and the legality of the Planning Commission's composition. In Town of Charlestown v. Town of Charlestown Zoning Board of Review, et al. (C.A. No. WC-2012-0713), the Town appeals from a decision by the Town's Zoning Board of Review (Zoning Board) following remand from an August 2012 decision issued by another justice of this Court.[1]

[1]See generally Dolock, et al. v. Avedisian, et al., C.A. Nos. WC-2010-0764, WC-2011-0052, WC-2011-0081, 2012 WL 3612317 (Super. Ct. Aug. 16, 2012) (Savage, J.). That decision will be referenced throughout the instant Decision and will be referred and cited to herein simply as the "Remand Decision." Furthermore, as the Westlaw version of the Remand Decision is without any form of pagination, all citations to the Remand Decision

Finally, in Ronald J. Areglado, et al. v. Michael J. Rzewuski, et al. (C.A. No. WC-2012-0760), the Areglado Plaintiffs (abutters) appeal the same Zoning Board decision following the Remand Decision of August 2012.

This Court is currently faced with a number of motions in the above-captioned matters: Whalerock's Motion to Dismiss the Areglado Plaintiffs' appeal in C.A. No. WC-2012-0760 as having been untimely filed; Whalerock's Motion to Dismiss the Town's appeal in C.A. No. WC-2012-0713 for lack of standing; in C.A. No. WC-2012-0709, the Areglado Plaintiffs' Motion to Intervene, Whalerock's Motion for Partial Summary Judgment on Count I, and the Town's Cross-Motion for Summary Judgment; and Whalerock's Motion to Remand for a Hearing on the Merits, which purports to be filed in all three of these cases. The Court entertained arguments on these motions on March 11, 2013. Based upon the arguments presented, along with a thorough review of the documents filed with the Court in each of these cases, this Court issues the following Decision.

I

Facts and Travel[2]

A

Underlying Factual Background

On January 11, 2010, the Town amended its Zoning Ordinance to include an ordinance governing the construction of both small and large wind energy systems. See Charlestown Ordinance No. 317, Amending Chapter 218 Zoning – Wind Energy

found herein will contain pinpoint citations based on the pagination of that decision as originally filed by the Court.

[2] A more detailed review of the history and travel of Whalerock's application may be found in the Remand Decision. See Remand Decision, at 3-26.

Generators, Jan. 11, 2010, Article XV § 218-105D (a copy of which is attached as Exhibit 1 to the Town's "Joint Exhibit Package" filed in C.A. No. WC-2012-0709 and C.A. No. WC-2012-0713, at Ex. 1 (hereinafter, "Town's App.")). The January 11, 2010 ordinance appeared within the Zoning Ordinance, Article XV, Section 105; Article XV of the Zoning Ordinance is entitled "Capital Facilities Impact Fees." On August 10, 2010, the Town amended its Zoning Ordinance by reformatting the January 11, 2010 ordinance governing wind energy systems and placing it within Article VI of the Zoning Ordinance entitled "Land Use Regulations," and more specifically, within Section 37 entitled "Specific Land Use Standards and Conditions." See Charlestown Ordinance No. 326, Amending Chapter 218 – Zoning: Reformatted Zoning Ordinance, Aug. 10, 2010, Article VI § 218-37D(4) (hereinafter, "Wind Ordinance") (a copy of which is attached to Whalerock's Appendix in Support of Motion for Remand filed in C.A. No. WC-2012-0709, C.A. No. WC-2012-0713, and C.A. No. WC-2012-0760, at pp. 39-53 (hereinafter, "Whalerock's App.")).

As of August 10, 2010, the Wind Ordinance provided two procedural mechanisms for obtaining approval for large wind energy systems. Id. §§ 218-37D(4)(e), 218-37D(4)(f)(iii). The first mechanism provides as follows:

> (e) Application Procedures for a Large Wind Energy System (LWES)
>
> 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 Special use permits 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.
>
> Site Plan Review is required for all large wind energy systems and any small wind energy system that is located in a commercially or industrially zoned property, or is to be utilized by a commercial or industrial operation, regardless of its zoning district. Applicants are encouraged to meet with the Town Planner prior to application and to request a pre-application meeting with the Planning Commission to discuss their project prior to submitting an application.

Id. § 218-37D(4). The Wind Ordinance then identifies the required application materials, which are the same for site plan review before the Planning Commission and special use permit before the Zoning Board. See id. § 218-37D(4)(e)(i)(1)—(7).

By contrast, the second mechanism under the Wind Ordinance applied to applicants who have entered into approved partnership agreements with the Town, in which case the applicant could request that the Town Council act as the permitting authority. Id. § 218-37D(4)(f)(iii). That section of the Wind Ordinance provides in pertinent part:

> (iii) Municipal Partnership Agreements
>
> Any proposed wind facility that 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. . . .

Id.

On July 28, 2010, Whalerock and LL Properties entered into the "Charlestown Renewable Energy Partnership Agreement" with the Town, which contemplated constructing wind turbines on an undeveloped parcel in the Town and providing the electricity from the turbines to Town residents. On September 10, 2010, Whalerock and LL Properties prepared and submitted a "Building Permit Application" entitled "Whalerock Renewable Energy Ninigret Hamlet Wind Project," along with a number of supporting documents, presumably invoking the process specified in Article VI § 218-37D(4)(f)(iii) of the Wind Ordinance for the Town Council to serve as the permitting authority. Several days later, on or about September 16, 2010, Whalerock prepared an addendum to the application to address deficiencies in the original application.

On September 22, 2010, at a regularly-scheduled open meeting, the Planning Commission considered Whalerock's application at the Town Council's request for an advisory opinion. The draft minutes of that meeting reflect that the Planning Commission considered Whalerock's application for approximately three hours for the purpose of this advisory opinion to the Town Council. See generally Whalerock App. at pp. 5-12.

On September 27, 2010, Ashley Hahn Morris, the then-Town Planner, signed a "Certificate for Completion" regarding Whalerock's application in her capacity as the Town's Administrative Officer. On this certificate, Ms. Morris indicated that the application was complete insofar as the applicant had submitted sufficient documentation.

By memorandum dated October 8, 2010, entitled "Planning Commission Advisory Opinion on Whalerock Renewable Application," Ms. Morris provided the Town Council with the requested advisory opinion which included therein the "Planning Commission Recommendations for Conditions of Approval." Whalerock App. at pp. 1, 3.

A public hearing on Whalerock's application was next scheduled before the Town Council on October 14, 2010; however, due to the large number of people in attendance, the hearing was continued to October 25, 2010.[3] At the October 25, 2010 hearing, the Town Council postponed the matter indefinitely.

On November 2, 2010, three new Town Council members were elected. The following day, Whalerock submitted a letter to the Town Clerk in which it indicated its intent to seek review by the Planning Commission and the Zoning Board pursuant to the first procedural mechanism contained in the Wind Ordinance. Thereafter, on November 12, 2010, Whalerock filed with the Planning Commission and the Zoning Board copies of the application which had presumably been filed with the Town under the second procedural mechanism back in September 2010.

On November 12, 2010, the newly-appointed Town Planner, Jane Weidman, determined that Whalerock's application was not substantially complete. Three days later, on November 15, 2010, the Town Council adopted a moratorium on large wind energy systems. That moratorium, however, did not affect any existing application which

[3] In the interim, certain abutters filed a complaint with this Court seeking to invalidate the Wind Ordinance and to enjoin all wind energy systems involving municipal partnership agreements under the second procedural mechanism. See Dolock, et al. v. Avedisian, et al., C.A. No. WC 2010-0764. This was one of the three cases consolidated and decided in the Remand Decision.

complied with the vesting provisions included in the Rhode Island Zoning Enabling Act of 1991, codified at G.L. 1956 § 45-24-27 et seq. (the "Zoning Enabling Act") and in the Town's Zoning Ordinance. Both § 45-24-44 and § 218-4 of the Charlestown Zoning Ordinance provide for vested rights for applications that have been submitted and deemed substantially complete, thereby allowing such applications to be reviewed in accordance with the state of the law at the time the application was submitted.

On November 30, 2010, the Town's Building Official determined that Whalerock's application did not qualify for vesting because it was not a complete application. Whalerock timely appealed the Building Official's decision to the Zoning Board of Review. A hearing thereon was conducted before the Zoning Board on January 18, 2011, at the conclusion of which the Zoning Board voted four-to-one to overturn the Building Official's decision. By decision dated and recorded with the Town on January 21, 2011, the Zoning Board memorialized the four-to-one vote to overturn the Building Official's decision. That January 21, 2011 decision did little more than list the five Zoning Board members who voted and his corresponding vote to "uphold" or "overturn" the Building Official's decision.[4]

[4] The January 21, 2011 decision also recited: "Said decision implies that this application was certified complete and does have vested rights." While not germane to the issues now before this Court, the scant decision and this "strangely worded statement" were addressed in the Remand Decision. See Remand Decision, at 41.

B

The Remand Decision

Both the abutters and the Town timely appealed the Zoning Board's January 21, 2011 decision to this Court. On May 9, 2011, these two appeals were consolidated with the abutters' previous complaint for declaratory and injunctive relief relating to the Wind Ordinance. See supra, note 3. The Court heard extensive oral argument pertaining to these consolidated cases on October 6, 2011. Justice Savage subsequently issued a fifty-one page decision on August 16, 2012. The Remand Decision found that the record on appeal to this Court failed to include a certified record from the Zoning Board, final minutes approved by the Zoning Board, or an official transcript of the hearing before the Zoning Board. See Remand Decision, at 35-39. As part of its direction on remand in connection with the abutters' and the Town's appeals, the Remand Decision required that the Zoning Board file with this Court "a complete and certified record of its proceedings." Id. at 50.

Further, the Remand Decision addressed the "woefully deficient" manner in which the Zoning Board failed to include a single finding of fact or conclusion of law in its single-page decision overturning the Building Official's decision. Id. at 40. Specifically, the Court remanded the abutters' and the Town's appeals to the Zoning Board in order that it may file "a decision containing the requisite findings of fact and conclusions of law." Id. at 50. The Court set forth a number of considerations the Zoning Board may address on remand to satisfy "our Supreme Court's mandate that zoning boards must make factual as opposed to 'conclusional' findings." Id. at 41 (citing

Bernuth v. New Shoreham Zoning Bd. of Review, 770 A.2d 396, 401 (R.I. 2001); Irish Partnership v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986)); see also id. at 43-45.

Importantly, in the lengthy discussion concerning the complete absence of required findings of fact and conclusions of law in the Zoning Board's decision, the Court noted that "[t]he 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." Id. at 41. The matter was not remanded for the purpose of identifying which member voted in favor of overturning the Building Official's decision or against overturning that decision, but rather to determine why they voted the way they did. Id. at 41, 50.

The Remand Decision also questioned whether the Town filed the appeal on behalf of the municipality itself, the Town Council, the Planning Commission, or some other municipal body; whether the appeal was authorized; whether the Town's appeal to this Court was proper; and how the Town—whatever entity that entails—was aggrieved by any action of its Zoning Board. See id. at 23. However, as the standing of the Town was not raised by any of the parties, the Court did not render a decision thereon but certainly did express concern over the propriety of the Town's appeal.

Additionally, the Court in its Remand Decision declined to address a purported cross-claim for declaratory relief filed by Whalerock in the Town's appeal from the Zoning Board's January 21, 2011 decision. That purported cross-claim by Whalerock sought a declaration that the role of the Planning Commission under the Wind Ordinance is merely advisory. As grounds for declining to address this cross-claim, the Court noted

that it was procedurally improper, was premature, and presented a non-justiciable, abstract question that was tantamount to requesting an advisory opinion. Id. at 48-50.

Finally, with respect to the abutters' request for declaratory relief, the Court determined that the abutters' request was moot based on revisions to the Wind Ordinance that had occurred during the pendency of the case, which revisions are not pertinent to the instant Decision. Id. at 47, 50.

The Court remanded the Town's and the abutters' appeals from the January 21, 2011 decision back to the Zoning Board to address two specific matters: (1) to file with the Court a complete and certified record of the Zoning Board's proceedings, and (2) to file with the Court a decision containing the requisite findings of fact and conclusions of law. Id. at 50. The Superior Court did not retain jurisdiction over the matter after it was remanded to the Zoning Board.

C

The Zoning Board's Decision Upon Remand

On remand from this Court, the Zoning Board scheduled this matter for its October 16, 2012 meeting. In advance of that scheduled date, legal counsel for the Zoning Board had prepared and circulated a draft of proposed findings of fact and conclusions of law aimed to satisfy the Court's order on remand. Ultimately, the matter was not considered and no public comment was elicited or allowed on October 16, 2012, and the matter was continued to November 13, 2012.[5]

[5]At this Court's request following oral argument, both the October 16, 2012 and November 13, 2012 hearing transcripts before the Zoning Board were submitted to the Court by way of a document captioned "Consent Order Regarding Addition to Record on Appeal" and filed in C.A. No. WC-2012-0713 and C.A. No. WC-2012-0760.

On November 13, 2012, the proposed findings of fact and conclusions of law prepared by counsel were adopted in their entirety by the same five individuals who are delineated in the January 21, 2011 decision issued and recorded by the Zoning Board by which, on a four-to-one vote, the Zoning Board overturned the Building Official's determination that Whalerock's application was not vested. The one member of the Zoning Board who voted to uphold the Building Official's decision specifically agreed that the reasons set forth in the three-page document prepared by counsel would serve as the reason for the four-to-one vote to overturn the Building Official's decision, but that he continued to disagree with the motion to overturn the Building Official's decision. Hence, all five Zoning Board members who had participated in the January 2011 proceeding and vote similarly participated in and agreed upon the language which would serve as the Zoning Board's findings of facts and conclusions of law that were ordered to be completed on remand; and these five members reaffirmed their original vote of four-to-one in favor of overturning the Building Official's decision. Tr. at 8-9 Nov. 13, 2012.

A copy of the three-page decision containing the findings of fact and conclusions of law was filed with and recorded by the Town Clerk on November 14, 2012. The November 14, 2012 decision did not identify the members in attendance or how those members voted, but such information was previously set forth in the Zoning Board's original decision dated January 21, 2011. Additionally, the same information concerning the manner in which each of the five participating Zoning Board members voted was provided in a subsequent letter to Whalerock's counsel, which letter was inexplicably filed with and recorded by the Town Clerk on November 26, 2012.

D

Pending Cases and Status of Subject Property

On November 26, 2012, Whalerock filed an action for declaratory judgment that seeks, *inter alia*, to have this Court declare the powers of the Town's Planning Commission as they relate to Whalerock's application for a large energy wind system. See generally Count I (C.A. No. WC-2012-0709). On November 29, 2012, the Town filed a timely appeal to this Court of the Zoning Board's decision that was recorded on November 26, 2012. Compl. ¶ 7 (C.A. No. WC-2012-0713). The abutters later filed a similar appeal on December 13, 2012. Compl. ¶ 34 (C.A. No. WC-2012-0760).

Subsequent to the filing of these three cases, LL Properties entered into an agreement with a third party, N.I.N., LLC (NIN), to sell the parcel upon which Whalerock intended to construct the wind energy system. This agreement, entitled "Contract of Sale of Unimproved Property – Time Payments," was executed and recorded with the Town Clerk on December 31, 2012. See Town's App. at Ex. 11. The title to the property has not been transferred, as the agreement provides that such transfer is contingent upon payment in full by NIN by or before December 31, 2013. Id. at Ex. 11, ¶ 2(C). For the time being, according to the agreement, an executed Warranty Deed has been placed in escrow with South County Real Estate Title Insurance Company.[6] Id. at Ex. 11, ¶¶ 3-4.

[6]Based upon the December 31, 2012 agreement to sell the subject property, the Town filed a Cross-Motion for Summary Judgment in C.A. No. WC-2012-0709 and C.A. No. WC-2012-0713, arguing that Whalerock no longer has a property interest sufficient to give it standing to continue pursuing its application. Whalerock and LL Properties thereafter moved to substitute and/or join NIN as a party in those two actions. At the oral argument on March 11, 2013, this Court granted the motion to join NIN in those two

II

Standard of Review

A

Motion to Dismiss

"[T]he sole function of a motion to dismiss is to test the sufficiency of the complaint." Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (quoting R.I. Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). In deciding a motion pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure, a court "assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs." Giuliano v. Pastina, 793 A.2d 1035, 1036-37 (R.I. 2002) (quoting Martin v. Howard, 784 A.2d 291, 297-98 (R.I. 2001)). A court may then grant a motion to dismiss pursuant to Rule 12(b)(6) only "when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim." Palazzo, 944 A.2d at 149-50 (quoting Ellis v. R.I. Public Transit Auth., 586 A.2d 1055, 1057 (R.I. 1991)).

B

Conversion from Motion to Dismiss to Summary Judgment

Should this Court look outside the pleadings when considering a motion to dismiss, it must automatically convert the motion into a motion for summary judgment pursuant to Super. R. Civ. P. Rule 56. See St. James Condo. Ass'n v. Lokey, 676 A.2d 1343, 1345 (R.I. 1996) (citing Tangleridge Development Corp. v. Joslin, 570 A.2d 1109,

---

cases and denied the Town's Cross-Motion for Summary Judgment to the extent such Cross-Motions were premised on Whalerock's and/or LL Properties' lack of standing.

1111 (R.I. 1990)). Some examples of matters outside the pleadings that would require this conversion "include oral testimony, exhibits, documents, and records from prior proceedings, stipulations or agreed statements of fact . . . ." 73 Am. Jur. 2d Summary Judgment § 19 (2001). In ruling on a motion to dismiss, a court is not required to consider such extraneous materials filed by the parties; however, when a motion to dismiss is transformed to one for summary judgment, "the clear mandate of Rule 12(b)(6) requires that . . . all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." St. James Condo. Ass'n, 676 A.2d at 1345. If a court decides to rule on the motion under Rule 12(b)(6) rather than convert the motion to one for summary judgment under Rule 56, it should "state expressly in its decision on the motion whether it has excluded any extraneous matters from its consideration." Id. at 1346.

C

Summary Judgment

If a motion to dismiss is converted into a motion for summary judgment, the proceeding is then subject to the particular standard of review governing motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Super. R. Civ. P. 56(c). Thus, a court must first "determine whether there is a genuine issue concerning any material fact." Industrial Nat'l Bank v. Peloso, 121 R.I. 305, 307, 397 A.2d 1312, 1313 (1979) (citing R.I. Hosp. Trust Nat'l Bank v. Boiteau, 119 R.I. 64, 376 A.2d 323 (1977)). Only when an

examination of the materials before the court, viewed in the light most favorable to the opposing party, reveals no such issue is a suit ripe for summary judgment. R.I. Hosp. Trust Nat'l Bank, 119 R.I. at 66, 376 A.2d at 324.

A party opposing summary judgment "carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996). However, "[t]he purpose of the summary judgment procedure is issue finding, not issue determination." Industrial Nat'l Bank, 121 R.I. at 307, 397 A.2d at 1313 (citing O'Connor v. McKanna, 116 R.I. 617, 359 A.2d 350 (1976)). Accordingly, the trial justice "may not pass on the weight or credibility of evidence." Id. at 308, 397 A.2d at 1313 (citing Palazzo v. Big G Supermarkets, Inc., 110 R.I. 242, 292 A.2d 235 (1972)).

III

Analysis

A

The Abutters' Appeal – WC-2012-0760

Whalerock challenges the abutters' appeal as being untimely for having been filed more than twenty days after the Zoning Board's decision was filed and recorded with the Town Clerk on November 14, 2012. The abutters contend that it is the November 26, 2012 filing and recording of the letter to Whalerock's attorney—which indicated the number and identity of the members in attendance, and how those members voted—that triggered the twenty-day appeal period to this Court. For the reasons set forth herein, the

Court disagrees with the abutters' contention and grants Whalerock's motion to dismiss the abutters' appeal for having been filed out of time.

The Zoning Enabling Act provides that an aggrieved party may appeal a zoning board decision to the Superior Court within twenty days from the date that the decision "has been recorded and posted in the office of the city or town clerk." § 45-24-69. This twenty-day period to appeal to the Superior Court has been strictly interpreted by the Rhode Island Supreme Court. In Mauricio v. Pawtucket Zoning Bd. of Review, our Supreme Court found that the language of a substantially similar provision (in effect before the 1991 enactment of the Zoning Enabling Act) was unambiguous and, therefore, "must be applied literally by giving the words their plain and ordinary meaning." 590 A.2d 879, 880 (R.I. 1991) (citations omitted). In considering the plain language of the-then effective statutory provision, § 45-24-20,[7] the Court held:

> In the case at bar the statute requires that the persons who seek review of a decision of a zoning board must file a complaint in the Superior Court for the county in which the municipality is situated within twenty days after the decision of the zoning board has been filed. This statute is plain and unambiguous. It does not give any room for interpretation. It must be complied with in accordance with its terms.

Id. at 880 (emphasis in original).

The Zoning Enabling Act provides for appeals to the Superior Court in a substantially similar fashion as in the now-repealed § 45-24-20:

> An aggrieved party may appeal a decision of the zoning board of review to the superior court for the county in which the city or town is situated by filing a complaint stating the reasons of appeal within twenty (20) days after

[7] In enacting the Zoning Enabling Act in 1991, the General Assembly repealed former §§ 45-24-1—26 by P.L. 1991 ch. 307, § 1, as amended by P.L. 1993 ch. 36, § 2, P.L. 1993 ch. 144, § 2, and P.L. 1994 ch. 92, § 3, effective December 31, 1994.

> the decision has been recorded and posted in the office of the city or town clerk.

§ 45-24-69(a).

As with the old version of the statute discussed in Mauricio, the language of § 45-24-69 is unambiguous. As a result, this Court is bound to give the words of that statute their plain and ordinary meaning. See Chambers v. Ormiston, 935 A.2d 956, 960 (R.I. 2007) (noting that if a statute is unambiguous "we simply apply that plain meaning to the case at hand"). Thus, the twenty-day appeal period commences when the "decision has been recorded and posted" in the Town Clerk's office. § 45-24-69(a).

Here, a three-page decision of the Zoning Board was filed with the Town Clerk on November 14, 2012. The decision contained a brief travel of the case as well as seven findings of fact and six conclusions of law, the latter two elements having been specifically ordered in the Remand Decision to be included in the decision. The decision did not contain the votes of each participating member and the names of those members present for the vote, all of which information was included in the Zoning Board's original decision filed and recorded on January 21, 2011.

The abutters contend that the twenty-day appeal period did not begin until the November 26, 2012 letter to Whalerock's attorney was filed with and recorded by the Town Clerk. Moreover, the abutters assert that the November 14, 2012 decision was defective insofar as it failed to list the names and votes of the members present at the Zoning Board's meeting. The abutters would have this Court conclude, then, that the operative date for appeals under § 45-24-69 is the date upon which a decision is filed which fully complies with the statutory requirements of § 45-24-61.

This Court is not persuaded that the plain and ordinary language of § 45-24-69 referencing a "decision" would include a subsequent, unnecessary letter to counsel restating the names of the members voting for and against the action taken. The decision filed and recorded on November 14, 2012, set forth findings of fact and conclusions of law as required by § 45-24-61. It is this November 14, 2012 decision which this Court would be asked to review on appeal, and not the subsequent document re-stating what the votes were. Accordingly, the twenty-day appeal period was triggered by the filing and recording on November 14, 2012, and not by the filing and recording of the subsequent letter to counsel on November 26, 2012.

Furthermore, this Court finds that the November 14, 2012 decision was not defective by failing to include the list of Zoning Board members who voted and how. The Zoning Board's original decision dated and recorded on January 21, 2011, did contain the requisite information regarding the number and identity of the members in attendance and how those members voted. There is no indication in the Remand Decision of this Court that the Zoning Board's January 21, 2011 decision was insufficient in regards to these details about the vote. See Remand Decision, at 41, 50. Rather, the Court remanded the January 21, 2011 decision back to the Zoning Board for two specific purposes: filing both a certified record of the Zoning Board proceedings and a decision containing the requisite findings of fact and conclusions of law. Id. at 50. On remand to the Zoning Board, there was no reason to re-state the identities and votes of the individual members of the Zoning Board. Therefore, the Zoning Board's decision filed and recorded on November 14, 2012 was not deficient.

Even if this Court had found deficiencies in the November 14, 2012 decision filed and recorded by the Zoning Board, any such defect would not alter the start date of the twenty-day appeal period. To rule as abutters suggest would effectively read additional requirements into the statute by providing that the time period for appeals is twenty days from the date of a complete, non-defective decision. Taken to its logical end, in some instances, then, a defective decision may never be ripe for appeal if an alleged defect is not rectified by the zoning board. This is an absurd result. See Berman v. Sitrin, 991 A.2d 1038, 1043 (R.I. 2010) (stating that "under no circumstances will this Court construe a statute to reach an absurd result") (quotation omitted). Rather than allowing an additional, unspecified time period to appeal an allegedly defective decision of a zoning board, the proper mechanism for challenging such a decision is to appeal to this Court within the time period prescribed by § 45-24-69(a), asserting such defect as the basis for appeal.

The November 14, 2012 decision is the operative decision of the Zoning Board which began the twenty-day appeal period. The abutters filed their appeal twenty-nine days after the Zoning Board's decision was recorded with the Town Clerk and, therefore, their appeal was untimely.[8] It is clear beyond a reasonable doubt that the abutters filed their appeal beyond the twenty-day appeal period and, therefore, would not be entitled to

[8] That the Town also appealed from the Zoning Board's November 26, 2012 decision, see Compl. ¶ 7 (C.A. No. WC-2012-0713), as the abutters did is not dispositive of the Town's appeal as the Town's appeal was filed within twenty days of the filing and recording of the operative decision of November 14, 2012.

relief under any set of facts. Accordingly, this Court grants Whalerock's Motion to Dismiss[9] the abutters' appeal in C.A. No. WC-2012-0760 as having been untimely filed.

B

The Town's Appeal – WC-2012-0713

Whalerock has moved to dismiss the Town's appeal for lack of standing. Specifically, Whalerock contends that the Town is not an "aggrieved party" as defined by § 45-24-69(a) of the Zoning Enabling Act. The Town maintains that it has standing because it is acting in furtherance of the public interest insofar as failure to allow a challenge by the local legislative branch of government would be "abhorrent to the fundamental concepts of orderly government, due process and equal protection standards." Town's Obj. to Mot. 12(b)(6) or Summ. J. and to Mot. to Remand (C.A. No. WC-2012-0173) at 9. Additionally, the Town argued before the Court that the manner in which the Zoning Board failed to publicly deliberate the findings of fact prepared by its counsel runs counter to the importance of the public process and the legitimacy of the decision rendered. For the reasons set forth herein, this Court disagrees that the Town's purported interest in this matter gives the Town standing and grants Whalerock's motion to dismiss the Town's appeal.

Typically, "[t]he requisite standing to prosecute a claim for relief exists when the plaintiff has alleged that 'the challenged action has caused him injury in fact, economic or otherwise[.]'" Bowen v. Mollis, 945 A.2d 314, 317 (R.I. 2008) (citing R.I.

[9] Whalerock filed the instant motion as Motion to Dismiss and/or For Summary Judgment. This Court's analysis did not require the Court to look outside the pleadings in reaching its conclusion. For this reason, the Court uses the standard applicable to motions to dismiss under Rule 12(b)(6). See St. James Condo. Ass'n., 676 A.2d at 1345 (noting that if a court looks outside the pleadings when considering a motion to dismiss, it must automatically convert the motion into a motion for summary judgment).

Ophthalmological Soc'y v. Cannon, 113 R.I. 16, 22, 317 A.2d 124, 128 (1974) (quoting Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 152, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970))). "This legally cognizable and protectable interest must be 'concrete and particularized * * * and * * * actual or imminent, not 'conjectural' or 'hypothetical.'" Id. (citing Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))).

In cases arising under the Zoning Enabling Act, Rhode Island law specifies who is an "aggrieved party" in order to establish standing to appeal a zoning board decision. The Zoning Enabling Act defines an "aggrieved party" as follows:

> An aggrieved party, for purposes of this chapter, shall be:
>
> (i) Any person or persons or entity or entities who can demonstrate that their property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town; or
>
> (ii) Anyone requiring notice pursuant to this chapter.

§ 44-24-27(4).

No statutory definition of "aggrieved party" existed prior to the 1991 enactment of the Zoning Enabling Act. Indeed, prior to 1991, our Supreme Court had relied upon two earlier Rhode Island Supreme Court cases in adopting an expanded interpretation of "aggrievement" for purposes of determining a municipal solicitor's standing to challenge a zoning board's action. City of E. Providence v. Shell Oil Co., 110 R.I. 138, 142, 290 A.2d 915, 918 (1972) (citing Hassell v. Zoning Bd. of Review of E. Providence, 108 R.I. 349, 275 A.2d 646 (1971); Buffi v. Ferri, 106 R.I. 349, 351, 259 A.2d 847, 849 (1969)). The Shell Oil Co. court concluded:

> The Legislature in § 45-24-6 and § 45-24-7[10] assigned responsibility for the protection of that public interest to the local government, and that government, although generally not "aggrieved" in the conventional or personal sense, becomes "aggrieved" in the broader or public sense whenever the public interest is affected by a zoning board's action. We hold, therefore, that in the circumstances of this case the city solicitor of East Providence was an "aggrieved" person within § 45-24-20, as amended, and therefore had standing to appeal the zoning board's decision in this case to the Superior Court.

110 R.I. at 143, 290 A.2d at 918.

The Town continues to rely upon Shell Oil Co. as well as an unreported Superior Court decision, City of Pawtucket v. Pawtucket Zoning Bd. of Review, (C.A. No. PC-2010-0879), 2010 WL 1751809 (Super. Ct. Apr. 28, 2010) (Rubine, J.), for the proposition that a municipality may be aggrieved by a local zoning decision. However, by enacting the Zoning Enabling Act in 1991 and its specific definition of "aggrieved party," the General Assembly is presumed to have been aware of the Shell Oil Co. holding. P.J.C. Realty, Inc. v. Barry, 811 A.2d 1202, 1206 (R.I. 2002) (citing Smith v. Ret. Bd. of Employees' Ret. Sys. of R.I., 656 A.2d 186, 189-90 (R.I. 1995)) ("The Legislature is presumed to be aware of the state of existing relevant law when it enacts or amends a statute."). If the General Assembly had intended to extend "aggrievement" to allow appeals by municipalities as the Shell Oil Co. court held, then the General Assembly was required to include language to that effect in § 44-24-27(4), or elsewhere in the Zoning Enabling Act. In the absence of such statutory language, this Court must assume that the intent of the General Assembly was to limit the definition of "aggrieved party" to the unambiguous language of the statute, and to include only parties whose

[10] These two provisions have since been repealed upon the enactment of the Zoning Enabling Act. See supra, note 7.

property may be adversely affected by a zoning board's decision and parties who must receive notice under the statute. See § 45-24-27(4).

It is undisputed that the Town does not own property abutting—or even in the nearby vicinity of—the parcel that is the subject of Whalerock's application. Likewise, it is undisputed that the Town is not a party to whom notice must be given under the provisions of the Zoning Enabling Act. Thus, the Town is not an aggrieved party under the unambiguous language of § 45-24-27(4), and is without standing under the Zoning Enabling Act to appeal the Zoning Board's November 14, 2012 decision.[11] It is clear beyond a reasonable doubt that the Town lacks standing to appeal the Zoning Board's decision and, therefore, would not be entitled to relief under any set of facts. Accordingly, this Court grants Whalerock's Motion to Dismiss[12] the Town's appeal in C.A. No. WC-2012-0713.

C

The Zoning Board's Decision

This Court finds it important to note that as a result of this Court's rulings on each of the zoning appeals before this Court—that the abutters' appeal was untimely filed and that the Town does not have standing to appeal—the Zoning Board's decision overturning the Building Officer's decision stands.[13] In the Remand Decision, the

[11] The same holds true with regard to the November 26, 2012 from which the Town appealed. See Compl. ¶ 7 (C.A. No. WC-2012-0713); see also supra, note 8.

[12] Whalerock also filed the instant motion as Motion to Dismiss and/or For Summary Judgment. As with the abutters' appeal, this Court's analysis did not require the Court to look outside the pleadings in reaching its conclusion. For this reason, the Court uses the standard applicable to motions to dismiss under Rule 12(b)(6). See St. James Condo. Ass'n, 676 A.2d at 1345.

[13] It likewise becomes unnecessary to consider whether the Zoning Board properly and thoroughly addressed all the outstanding considerations raised in the Remand Decision,

Superior Court did not retain jurisdiction of the cases and, therefore, any further appeal from the Zoning Board's decision following remand would require a properly filed appeal with this Court. No such appeal was timely filed by an aggrieved party.

Accordingly, for the remainder of the instant Decision, this Court relies on the Zoning Board's decision insofar as it has now been conclusively established, by virtue of the unchallenged Zoning Board decision of November 14, 2012, that Whalerock's application was, and remains vested, under the Wind Ordinance.

D

Whalerock's Declaratory Judgment Action – WC-2012-0709

Whalerock has filed a Motion for Partial Summary Judgment as to Count I of its declaratory judgment action, seeking a declaration that the Planning Commission's role is merely advisory in nature.[14] The Town has objected to Whalerock's Motion for Partial Summary Judgment and filed a Cross-Motion for Summary Judgment, arguing that Whalerock's declaratory judgment action is barred by *res judicata* and/or the law of the case doctrine. The abutters have also filed a Motion to Intervene in this declaratory judgment action. For the reasons set forth herein, the Court denies both the Town's Cross-Motion for Summary Judgment and the abutters' Motion to Intervene, and grants Whalerock's Motion for Partial Summary Judgment.

---

what records the Zoning Board was relying upon in reaching its decision, and whether its decision should be affirmed, reversed or modified by this Court in accordance with § 45-24-69(d).

[14] Whalerock's Motion for Partial Summary Judgment before the Court addresses Count I only, and does not require an analysis of Count II of its Complaint seeking a declaration that the Planning Commission is not properly constituted insofar as its members are elected officials.

1

The Town's Cross-Motion for Summary Judgment

The Town's Cross-Motion for Summary Judgment is based entirely on the Remand Decision's determination that an earlier cross-claim purportedly filed by Whalerock against the Charlestown Planning Commission was procedurally improper, premature, and tantamount to a request for an advisory opinion. See Town's Mem. in Supp. of Obj. to Whalerock's Mot. Partial Summ. J. and Cross-Mot. Summ. J. (C.A. No. WC-2012-0709) at 2-3. The Town asserts that *res judicata* bars Whalerock's declaratory judgment action in its entirety, and that the law of the case doctrine also requires this Court to dismiss this count as being premature.

Before analyzing the application of the doctrines of *res judicata* and law of the case, it is necessary to first address the manner in which Whalerock's purported cross-claim was presented to the Court earlier and addressed in the Remand Decision. By way of a Consent Order entered consolidating the three actions that were addressed in the Remand Decision, the parties had agreed that Whalerock would be allowed to amend its answer and counterclaim in the Town's appeal from the Zoning Board's January 21, 2011 decision (C.A. No. WC-2011-0081), to join the Charlestown Planning Commission as a party to that action, and to assert a cross-claim against the Planning Commission. Thus, Whalerock "purport[ed] to assert a cross-claim against the Charlestown Planning Commission to challenge . . . whether it may exercise regulatory, as opposed to advisory, power." Remand Decision, at 3-4. The Court discussed this purported cross-claim against a non-party as follows:

> 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 is also 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 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 would still 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." . . . 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 the 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. . . . As Whalerock has not been aggrieved by any action of the Planning Commission to date, and it is unclear if 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. . . . Its declaratory judgment action, therefore, is not only

> premature but also tantamount to a request for two advisory opinions. . . . This Court declines to render such opinions and exercises its discretion under the Act to deny Whalerock's request for declaratory relief in its purported cross-claim, even assuming that the cross-claim had been filed and is procedurally proper. . . .

Id. at 48-50 (emphasis added) (citations omitted).

a

Res Judicata

In order for *res judicata* to apply to bar a cause of action, there must be (1) identity of parties, (2) identity of issues, and (3) finality of judgment. DiSaia v. Capital Indus., Inc., 113 R.I. 292, 298, 320 A.2d 604, 607 (1974). The doctrine's purpose is to bar relitigation of all issues that were tried or might have been tried in the original suit by any court of competent jurisdiction. Providence Teachers Union, Local 958 v. McGovern, 113 R.I. 169, 172, 319 A.2d 358, 361 (1974).

In the instant case, no party before this Court disputes that the parties and issues are not the same ones raised in Whalerock's purported cross-claim.[15] Thus, the only factor to consider in the instant case is whether the Remand Decision as it relates to Whalerock's request for declaratory judgment concerning the Planning Commission's role as advisory or regulatory constitutes a "final judgment" that would bar relitigating the issue of the Planning Commission's authority. See DiSaia, 113 R.I. at 298, 320 A.2d at 607.

[15]While it appears that the Planning Commission may not have been made a party to the Town's earlier appeal decided in the Remand Decision, the Planning Commission was duly made a defendant in Whalerock's instant declaratory judgment action. In any event, no one has argued here that this case lacks the "identity of parties" required to determine if the present action is barred by *res judicata*.

A judgment on the merits precluding the relitigation of the same cause of action is one based on the legal rights and liabilities of the parties. Am. Jur. 2d. Judgments § 541 (2006). However, for *res judicata* to bar litigation of an issue, it must be clear that the court intended that the previous disposition was to be without a right to further proceedings. Id. § 546. Generally, "the party asserting res judicata . . . must plead and prove that the prior judgment on which it is relying was final. Failure to prove a final judgment generally will defeat a plea of res judicata or collateral estoppel." Id. § 648.

The Remand Decision expressly declined to address the issue of the Planning Commission's role or authority and, therefore, cannot amount to a disposition of the issue. See Remand Decision, at 49. While that Decision did indicate that the declaratory judgment action "is not only premature but also tantamount to a request for two advisory opinions," this cannot in any way be interpreted to be a final judgment or without a right to further proceedings. Id. at 50. Accordingly, Whalerock's declaratory judgment action is not barred by *res judicata*.

b

Law of the Case

The law of the case doctrine is well-established in this jurisdiction. Salvadore v. Major Electric & Supply, Inc., 469 A.2d 353 (R.I.1983); R.I. Hosp. Trust Nat'l Bank v. Nat'l Health Found., 119 R.I. 823, 384 A.2d 301 (1978). Unlike the finality of decision provided by the doctrine of *res judicata*, the law of the case doctrine is a rule of policy and convenience that possesses flexibility. R.I. Hosp. Trust Nat'l Bank, 119 R.I. at 829, 384 A.2d at 305. The cases discussing this doctrine make clear that "after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later

stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling." State v. Infantolino, 116 R.I. 303, 310, 355 A.2d 722, 726 (1976); R.I. Ophthalmological Soc'y, 113 R.I. at 20, 317 A.2d at 126-27. However, the doctrine does not apply when the second motion is based on an expanded record. R.I. Hosp. Trust Nat'l Bank, 119 R.I. at 829, 384 A.2d at 305. When presented with an expanded record, it is within the trial justice's sound discretion whether to consider the issue. Id. (citing Kirby v. P.R. Mallory & Co., 489 F.2d 904, 913 (7th Cir. 1973); 6 Moore, Federal Practice ¶ 56.14(2) at 363-66 (2d ed. 1976); 1 Kent, R.I. Civ. Prac. § 56.11 at 424 (1969)).

Here, the law of the case doctrine does not bar this Court from ruling on the issue of the Planning Commission's authority. The Remand Decision expressly declined to rule on the request for declaratory judgment as being procedurally infirm, premature, and seeking an advisory opinion. Significant changes to the state of the record have taken place since the Remand Decision. First, the certified record from the Zoning Board and a decision containing findings of fact and conclusions of law have been presented, as ordered in the Remand Decision. Second, as a result of the untimely appeal filed by the abutters and the lack of standing on behalf of the Town, the decision of the Zoning Board finding that Whalerock's application is vested stands and, therefore, the moratorium on commercial wind energy systems imposed by the Town is inapplicable to Whalerock. Finally, the instant declaratory judgment action was filed separate and apart from any pending zoning appeals, and thus does not suffer from the same procedural infirmities with which Whalerock's purported cross-claim was plagued.

Because *res judicata* does not bar this Court's consideration of Count I of Whalerock's declaratory judgment action and based upon this significantly different procedural context, this Court will exercise its discretion and will consider Whalerock's Motion for Partial Summary Judgment seeking a declaration that the role of the Planning Commission is advisory under the Wind Ordinance. R.I. Hosp. Trust Nat'l Bank, 119 R.I. at 829, 384 A.2d at 305. The Town's Cross-Motion for Summary Judgment, then, is denied.

2

The Abutters' Motion to Intervene

Before turning to Whalerock's Motion for Partial Summary Judgment, the Court addresses next the abutters' Motion to Intervene filed in this declaratory judgment action. In support of this motion, the abutters state that because the "basic issue" in the three above-captioned matters is which Zoning Ordinance should be applied to Whalerock's application, then "[i]n the interest of judicial efficiency, it would be most practical to allow the [motion] to participate in this case for the sake of achieving consistency of the issues litigated and the decisions ultimately to be made on those issues." Mot. to Intervene ¶¶ 2, 5 (C.A. No. WC-2012-0709). This Court rejects this notion.

First and foremost, the issues in Whalerock's declaratory judgment action are not the same as those presented in the untimely appeal filed by the abutters and the appeal taken by the Town without having standing to do so. Certainly, the Court's consideration of Whalerock's declaratory judgment action is dependent on whether its rights were vested or not, but the issues in the declaratory judgment action differ significantly from the appeals taken by the abutters and the Town from the Zoning

Board's November 14, 2012 decision. For instance, had the appeal from the Zoning Board's November 14, 2012 decision been properly appealed to this Court, then this Court would review the decision in accordance with § 45-24-69; if the Court found that the Zoning Board improperly concluded that the application was vested, then the application would be subject to the later-enacted moratorium and the declaratory judgment action would become moot. On the other hand, if the Court affirmed the Zoning Board's decision on appeal, then the Court would proceed to consider the issues raised in the declaratory judgment action. In any event, the consideration of the appeals from the Zoning Board's decision does not dictate how this Court will rule upon the merits of Whalerock's request for declaratory judgment.

At this juncture, however, the Zoning Board's decision was not properly appealed, see supra, Secs. III.A, III.B, and the decision that Whalerock's application was vested stands. Therefore, this Court proceeds to consider the Planning Commission's role under the Wind Ordinance without consideration of the issues raised on appeal by the abutters who seek to intervene in this case. The Court is hard-pressed to understand how judicial economy would be best served by granting the abutters' Motion to Intervene.

Additionally, the abutters have not properly asserted their interest in intervening in accordance with Rule 24 of the Rhode Island Superior Court Rules of Civil Procedure. The Motion to Intervene does not state whether the abutters are seeking intervention as of right or permissive intervention. Super. R. Civ. P. 24(a), (b). The abutters also fail to include with their Motion an accompanying pleading setting forth their claim or defense

for which intervention is sought. Super. R. Civ. P. 24(c). Accordingly, the abutters' Motion is denied.

3

The Planning Commission's Role and Authority

Whalerock's Motion for Partial Summary Judgment seeks to have this Court issue a declaration that the role of the Planning Commission is merely advisory to the Zoning Board. The Uniform Declaratory Judgments Act, codified at G.L. 1956 § 9-30-1 et seq., allows the Superior Court to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." § 9-30-1. However, "[t]he decision to grant or to deny declaratory relief under the Uniform Declaratory Judgments Act is purely discretionary." Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997) (citing Woonsocket Teachers' Guild Local Union 951, AFT v. Woonsocket Sch. Comm., 694 A.2d 727, 729 (R.I. 1997); Lombardi v. Goodyear Loan Co., 549 A.2d 1025, 1027 (R.I. 1988)).

The instant claim for declaratory relief requires the Court to consider the interplay between the Rhode Island Land Development and Subdivision Review Enabling Act of 1991 (the "Land Development Act"), codified at G.L. 1956 § 45-23-25 et seq., and the Zoning Enabling Act—both of which all municipalities are required to follow—as well as the now-repealed Wind Ordinance that was in effect at the time of Whalerock's September 2010 application, and which is applicable to this vested application. It also calls for this Court to engage in statutory construction to ascertain the role of the Planning Commission as provided in the Wind Ordinance.

It is well-established that the interpretation of a statute is a question of law. See Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 711 (R.I. 2000). "In matters of statutory

interpretation our ultimate goal is to give effect to the purpose of the act as intended by the Legislature." Webster v. Perrotta, 774 A.2d 68, 75 (R.I. 2001) (citation omitted). In attempting to accomplish this goal, it is the "plain statutory language [that] is the best indicator of legislative intent." State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005). Indeed, "[i]t is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Ryan v. City of Providence, 11 A.3d 68, 70-71 (R.I. 2011) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996) (internal quotations omitted)). Only if the language of a statute is found to be ambiguous does the Court "engage in a more elaborate statutory construction process" guided by the canons of statutory interpretation. Chambers v. Ormiston, 935 A.2d 956, 960 (R.I. 2007) (citation omitted). A statute is ambiguous "when the language of [the] statute is not susceptible to literal interpretation." New England Dev., LLC v. Berg, 913 A.2d 363, 369 (R.I. 2007) (citing Ret. Bd. of Employees' Ret. Sys. of R.I. v. DiPrete, 845 A.2d 270, 279 (R.I. 2006)); see also LaPlante v. Honda N. Am., Inc., 697 A.2d 625, 628 (R.I. 1997) (finding a statute ambiguous where "it is subject to two completely different, although initially plausible interpretations") (quotation omitted). The "ultimate interpretation of an ambiguous statute . . . is grounded in policy considerations and [this Court] will not apply a statute in a manner that will defeat its underlying purpose." Arnold v. R.I. Dept. of Labor and Training Bd. of Review, 822 A.2d 164, 169 (R.I. 2003) (citing Pier House Inn, Inc. v. 421 Corp., 812 A.2d 799, 804 (R.I. 2002)).

Generally, a municipal planning board or commission's role is governed by the Land Development Act. Local planning board or commission approval is necessary for a

variety of land development projects, and the scope of the project will dictate the submission requirements and stages of review for such projects. See, e.g., § 45-23-36 (general provisions identifying types of applications); §§ 45-23-39—40 (major land developments and subdivisions stages and review); § 45-23-38 (minor land developments and subdivisions stages and review); § 45-23-37 (administrative subdivisions review). Additionally, in instances where land development projects require certain approvals by both the local planning board and any other local permitting authority, § 45-23-61 of the Land Development Act sets forth the procedure for and the precedence for multiple approvals. Section 45-23-61 provides, in part:

> Where an applicant requires both a special-use permit under the local zoning ordinance and planning board approval, the applicant shall first obtain an advisory recommendation from the planning board, as well as conditional planning board approval for the first approval stage for the proposed project, which may be simultaneous, then obtain a conditional special-use permit from the zoning board, and then return to the planning board for subsequent required approval(s).

§ 45-23-61(a)(2) (emphasis added).

Notwithstanding the established "precedence of approvals between planning board and other local permitting authority" in § 45-23-61(a)(2), the General Assembly also provides for limited review by local planning boards or commissions if provided for in a local zoning ordinance. Specifically, within the Zoning Enabling Act (as amended in 2009), the law reads as follows:

> A zoning ordinance may permit development plan review of applications for uses requiring a special-use permit, a variance, a zoning ordinance amendment, and/or a zoning map change. The review shall be conducted by the planning board or commission and shall be advisory to the permitting authority.

§ 45-24-49(a) (amended by P.L. 2009, ch. 310, § 55) (emphasis added).

At the time the General Assembly amended § 45-24-49 in 2009, the Legislature was presumed to be aware of the state of the law, including the full scheme of review and approval by a local planning board or commission as set forth in the Land Development Act. See P.J.C. Realty, Inc. v. Barry, 811 A.2d 1202, 1206 (R.I. 2002) (citing Smith v. Ret. Bd. of Employees' Ret. Sys. of R.I., 656 A.2d 186, 189-90 (R.I. 1995)) ("The Legislature is presumed to be aware of the state of existing relevant law when it enacts or amends a statute."). Thus, the General Assembly was aware of the order in which an applicant would seek and obtain approvals from both a local planning board and a local zoning board pursuant to § 45-23-61(a)(2), yet, in amending § 45-24-49, opted to provide a means by which a local ordinance could allow for planning board review that would be merely advisory to the zoning board. Similarly, at the time the Town Council enacted and amended the Wind Ordinance in 2010, the Town Council was presumed to know the state of its existing ordinances and the state statutory scheme to which it must adhere, including the Zoning Enabling Act and the Land Development Act, generally, and § 45-24-49, as amended. See Pawtucket CVS, Inc. v. Gannon, C.A. No. PC-2005-0965, 2006 WL 998242, at *7 (Super. Ct. Apr. 14, 2006) (Gibney, J.).

The Town argues that the Planning Commission's authority is advisory to the Zoning Board as to the proposed use of the property, but is regulatory as to the site improvements associated with that use, and that such a dual role is not contrary to or in violation of the terms of § 45-23-49(a). For the reasons that follow, this Court disagrees.

The language of the applicable Wind Ordinance found within the Town's Zoning Ordinance requires site plan review, as permitted in § 45-24-49(a), but does not require Planning Commission approval in the manner generally provided for in the Land

Development Act. See Wind Ordinance, § 218-37D(4)(e). The Wind Ordinance states, in pertinent part:

> 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 Special use permits 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.
>
> Site Plan Review is required for all large wind energy systems and any small wind energy system that is located in a commercially or industrially zoned property, or is to be utilized by a commercial or industrial operation, regardless of its zoning district. Applicants are encouraged to meet with the Town Planner prior to application and to request a pre-application meeting with the Planning Commission to discuss their project prior to submitting an application.

Id. § 218-37D(4)(e) (emphasis added).

Furthermore, the Wind Ordinance contains standards for Planning Commission review and for Zoning Board approval and issuance of a special use permit. The Wind Ordinance clearly and unambiguously states that an "applicant shall apply for Site Plan Review with the Planning Commission as specified in this ordinance." Id. (emphasis added). The Wind Ordinance thereafter, in three distinct subsections, identifies the standards by which the Planning Commission must review an application regarding siting, design and aesthetics, and safety and the environment. See id. §§ 218-

37D(4)(g)—(i).[16] By comparison, the Wind Ordinance sets standards for the Zoning Board to approve and issue a special use permit by which it is required to "adhere to § 218-23 Special use permits of the Charlestown Zoning Ordinance and any other standards set forth by this ordinance." Id. § 218-37D(4)(e) (emphasis added); see also § 218-37D(4)(f)(i). Section 218-23 of the Zoning Ordinance generally governs special use permits before the Zoning Board, including the time frames for notice and public hearings and the findings that the Zoning Board must make following such public hearing for a special use permit to be granted. Section 218-23 identifies the specific findings that must be made:

> (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 excess noise, light, glare, or air pollutants;

[16] Within the "Design and Aesthetic Standards," the Wind Ordinance requires that signs must comply with Article XI of the Charlestown Zoning Ordinance. See Wind Ordinance, § 218-37D(4)(h)(iii)[3]. Within the "Safety and Environmental Standards," construction site runoff control and storm water management must comply with "sections 12.5 Drainage Structures and Facilities. [sic] of the Town of Charlestown Land Development and Subdivision Regulations [sic]." Id. § 218-37D(4)(i)(v). Neither of these standards, however, elevates the Planning Commission's role from mere review to regulatory authority.

> (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.

Unlike the specific reference to § 218-23 of the Zoning Ordinance contained within the Wind Ordinance, the Planning Commission is not directed to adhere to any procedures or remit any specific findings outside of the Wind Ordinance. For instance, the Planning Commission is not required to review Whalerock's application in accordance with the Subdivision and Land Development Regulations that are found in Chapter 188 of the Town's Code of Ordinances and which are wholly separate from the Zoning Regulations in Chapter 218. Unlike the Zoning Board's directive to also comply with § 218-23, the Planning Commission is not required to base its review on the general findings that are set forth in § 188-11; nor is it required to order compliance with the lengthy, tiered procedures for Major Subdivision/Land Development review and approvals set forth in § 188-33. Instead, the Town Council enacted and amended the Wind Ordinance and limited the Planning Commission to site plan review of Whalerock's application "as specified in [the Wind Ordinance]." See Wind Ordinance, § 218-37D(4)(e). Importantly, had the Town Council wished to invoke the more stringent provisions of the Subdivision and Land Development Regulations, including § 188-11 and/or § 188-33, then reference thereto would have been included in § 218-37D(4)(e) in the same manner that reference was actually made in both § 218-37D(4)(e)

and § 218-37D(4)(f) to the Zoning Board standards for special use permit contained in § 218-23 of the Town's Ordinance. The Town Council did not do so.

Moreover, the reference in the Wind Ordinance to a "conditional approval" from the Planning Commission and/or to two additional standards applicable to signage and construction site runoff, see supra, note 16, does not elevate the Planning Commission's role from advisory to regulatory. The Planning Commission's role under the Wind Ordinance is defined therein, and does not include the typical staged review and approval process governed by the Land Development Act or Chapter 188 of the Town's Ordinance. Indeed, even if the Zoning Board were to issue a special use permit, the applicant is directed to return to the Planning Commission to complete site plan review, see § 218-34D(4)(e), and not for "subsequent required approval(s)." Cf. § 45-23-61(a)(2). Thus, the Planning Commission's role under the Wind Ordinance, at all times, is to review the wind energy systems project, and the "conditional approval" provides the Planning Commission with the opportunity to suggest conditions which it collectively deems appropriate to submit to the Zoning Board in its consideration of a special use permit. The additional standards regarding signage and runoff merely require the Planning Commission to consult two other standards in the Town's Code of Ordinance, but do not create a regulatory scheme.

This Court concludes from the unambiguous language in the Wind Ordinance that the Planning Commission's review under the Wind Ordinance is simply one example by which "a zoning ordinance may permit development plan review of applications for use requiring a special-use permit." § 45-24-49(a) (emphasis added). Having permitted development plan review under the Wind Ordinance, as the Zoning Ordinance is

permitted to do pursuant to § 45-24-49(a) and of which the Town Council was presumed to be aware when it enacted and amended the Wind Ordinance, see Pawtucket CVS, Inc., 2006 WL 998242, at *7, such review by the Planning Commission "shall be advisory" to the Zoning Board, rather than regulatory. § 45-24-49(a). There being no other procedures to which the Planning Commission must adhere or findings for the Planning Commission to remit as identified in the Wind Ordinance, there is no "regulatory authority" reserved for the Planning Commission as the Town argues, and interpreting such authority to be regulatory would violate the Zoning Enabling Act, specifically § 45-24-49(a). Thus, review by the Charlestown Planning Commission is limited to the criteria specified in the Wind Ordinance, see § 218-34D(4)(g)—(i), and such review is merely advisory to the Zoning Board. § 45-24-49(a).[17]

There being no genuine issues of material fact presented as to Count I of Whalerock's declaratory judgment action, Whalerock's Motion for Partial Summary Judgment as to Count I of its Complaint is granted, and this Court declares that the role of the Planning Commission under the Wind Ordinance is advisory only.

[17] In further support of this conclusion, this Court notes that counsel for the Planning Commission conceded at oral argument before this Court on March 11, 2013, that the role of the Planning Commission in this matter was merely advisory. As such, counsel further conceded that, even if the Planning Commission did not render its "conditional approval" under the Wind Ordinance, the Zoning Board could still take up Whalerock's application for a special use permit.

E

Motion to Remand to the Zoning Board for Hearing on the Merits

Finally, Whalerock has filed a Motion to Remand its application to the Zoning Board for a hearing on the merits.[18] Because the Town has maintained that it has regulatory authority over the site conditions of the project, the Town maintains that Whalerock must first apply to the Planning Commission for "conditional approval." As discussed in the previous section of this Decision, this Court disagrees. Additionally, the Planning Commission has already provided an advisory opinion and set forth conditions therein, thus satisfying the Planning Commission's advisory obligations under the Wind Ordinance prior to the Zoning Board's consideration of Whalerock's application for a special use permit.

To date, a three-hour hearing before the Planning Commission took place on September 22, 2010, at the Town Council's request for an advisory opinion. That advisory opinion was initially requested by the Town Council pursuant to the then-existing mechanism for approval of an application under the Wind Ordinance, with the Town Council acting as the permitting authority to review and approve the project. See Wind Ordinance, § 218-37D(4)(f)(iii).[19] Although it was the Town Council that would have reviewed and approved Whalerock's application, the Town Council could—and did—seek an advisory opinion from the Planning Commission. The Planning

[18] Whalerock filed its Motion to Remand for a Hearing on the Merits as to each of the three cases presently before this Court. However, having dismissed the abutters' and the Town's appeals in the preceding sections of this Decision, the Court will only consider the Motion to Remand in the context of the declaratory judgment action in C.A. No. WC-2012-0709.

[19] It is undisputed that the applicant opted out of review under that procedural mechanism in November 2010, thus paving the way for review under § 218-37D(4)(e).

Commission's role at that juncture was the same as it remains today: to review the submitted materials in accordance with the standards specified in subsections (g), (h) and (i) of § 218-37D(4) of the Wind Ordinance and to advise accordingly. As of the September 22, 2010 public hearing, the Planning Commission was responding to the Town Council's request for an advisory opinion in accordance with § 218-37D(4)(f)(iii), and at this time, the Planning Commission's role is advisory to the Zoning Board pursuant to § 45-24-49(a).

The three-hour public hearing was memorialized in draft minutes presented to this Court. See Whalerock App. at pp. 5-12.[20] Consistent with the review standards imposed by § 218-37D(4)(g)—(i) of the Wind Ordinance, the public hearing before the Planning Commission included, *inter alia*, discussion of shadow flicker, see Wind Ordinance, §§ 218-37D(4)(i)(iii), 218-37D(4)(i)(vii); Whalerock App. at pp. 6, 12-13; wildlife and natural resource impacts, see Wind Ordinance, §§ 218-37D(4)(i)(v), 218-37D(4)(i)(vi); Whalerock App. at p. 8; erosion and sediment control, see Wind Ordinance, § 218-37D(4)(i)(v); Whalerock App. at pp. 10-11; lights, see Wind Ordinance, § 218-37D(4)(h)(ii); Whalerock App. at pp. 11-12; color and finish, see Wind Ordinance, § 218-37D(4)(h)(i); Whalerock App. at p. 12; additional structures, see Wind Ordinance, § 218-37D(4)(h)(vi)—(viii); Whalerock App. at p. 12; signage, see Wind Ordinance, § 218-37D(4)(h)(iii); Whalerock App. at p. 12; and noise, see Wind Ordinance, § 218-37D(4)(i)(iv); Whalerock App. at p. 13. These draft minutes also reflect the then-Town

[20]Because consideration of this declaratory judgment action is not limited to the record below as it would be on a zoning appeal, the "draft" nature of these minutes does not prohibit this Court from relying on this document as evidence that a substantial hearing and lengthy consideration of the issues have taken place before the Planning Commission in September 2010.

Planner's position, consistent with this Court's analysis, see supra, Sec. III.D(3), that "the Planning Commission can make [its] concerns and what would be conditions of approval and recommendations part of your advisory" to the Town Council. Whalerock App. at p. 9.

As a result of the hearing before the Planning Commission, a memorandum was prepared and dated October 8, 2010, and directed from the then-Town Planner to the Town Council with the subject line reading "Planning Commission Advisory Opinion on Whalerock Renewable Application." Whalerock App. at p. 1. This October 8, 2010 memorandum reflecting the Planning Commission's advisory opinion specifically includes the "Planning Commission's Recommendations for Conditions of Approval." Whalerock App. at pp. 4-5.

This Court is satisfied that the Planning Commission did in fact engage in site plan review during its September 22, 2010 hearing, albeit at the request of the Town Council for an advisory opinion, and that such site plan review did adhere to the review standards set forth in § 218-37D(4)(g)—(i). Further, this Court finds that an advisory opinion was issued by the Planning Commission by way of memorandum dated October 8, 2010, which includes the "conditional approval" required by § 218-37D(4)(e). Therefore, the Planning Commission has satisfied all of its obligations under the Wind Ordinance before Whalerock's special use permit application may be considered by the Zoning Board. To allow the Planning Commission another bite at the apple to further review Whalerock's application at this juncture would impermissibly add another procedural step that is simply not required under the Wind Ordinance.

The next step in Whalerock's application under the Wind Ordinance is for the application for a special use permit to be considered by the Zoning Board. Accordingly, this Court hereby remands this case directly to the Zoning Board for all further action relative to Whalerock's application for a special use permit; no further review or action of the Planning Commission is necessary before the Zoning Board considers and acts upon Whalerock's request for a special use permit. If a special use permit is granted by the Zoning Board, the application shall thereafter return to the Planning Commission to complete site plan review, which is, once again, merely advisory. See Wind Ordinance, § 218-37D(4)(e); see also § 45-24-49(a).

For these reasons, Whalerock's Motion to Remand for a Hearing on the Merits is granted, and this Court orders that hearing before the Zoning Board on Whalerock's application for a special use permit is to be conducted expeditiously and in no event later than June 14, 2013.

IV

Conclusion

For the reasons set forth in the various sections of this Decision, this Court takes the following actions:

Whalerock's Motion to Dismiss is granted as to the abutters' appeal in C.A. No. WC-2012-0760.

Whalerock's Motion to Dismiss is granted as to the Town's appeal in C.A. No. WC-2012-0713.

Whalerock's Motion for Partial Summary Judgment is granted as to Count I of its Complaint for declaratory relief in C.A. No. WC-2012-0709, and the role of the Planning

Commission under the Wind Ordinance is hereby declared to be advisory only to the Zoning Board.

The Town's Cross-Motion for Summary Judgment is denied in C.A. No. WC-2012-0709.

The Motion to Intervene in C.A. No. WC-2012-0709 is denied.

Whalerock's Motion to Remand for a Hearing on the Merits before the Zoning Board is granted in C.A. No. WC-2012-0709, which hearing shall be conducted no later than June 14, 2013; no further review or action of the Planning Commission is necessary prior to review of Whalerock's application for a special use permit by the Zoning Board.

Counsel for Whalerock shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	Whalerock Renewable Energy, LLC, et al. v. Town of Charlestown, et al.
CASE NO:	C.A. No. WC-2012-0709
COURT:	Washington County Superior Court
DATE DECISION FILED:	April 10, 2013
JUSTICE/MAGISTRATE:	Kristin E. Rodgers
ATTORNEYS:	
For Plaintiff:	Nicholas Gorham
For Defendant:	Peter D. Ruggiero James A. Donnelly