STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(Filed: August 22, 2013)

TOWN OF CHARLESTOWN, by and through its Town Solicitor, Plaintiff/Appellant	:	
v.	:	**C.A. No. WC-2012-0713**
TOWN OF CHARLESTOWN ZONING BOARD OF REVIEW, WHALEROCK RENEWABLE ENERGY, LLC and LL PROPERTIES, LLC, Defendants/Appellees	:	

DECISION

K. RODGERS, J. This case is one of three related cases previously before this Court concerning the application of Whalerock Renewable Energy, LLC and LL Properties, LLC (collectively, Whalerock) to construct a large wind energy system on an undeveloped parcel located in the Town of Charlestown (the Town). In this particular case, the Town appealed from a decision by the Town's Zoning Board of Review (the Zoning Board) following remand from an August 2012 decision issued by another Justice of this Court.[1]

This Court issued a lengthy Decision, on April 10, 2013, regarding a number of dispositive motions filed in each of the three related cases. That Decision, among other

[1] See generally Dolock v. Avedisian, 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 found herein will contain pinpoint citations based on the pagination of that decision as originally filed by the Court.

things, dismissed the Town's appeal in the above-captioned case for lack of standing. The Town's standing in this case is again at issue here, following the Town's Motion to Reconsider filed with this Court on May 22, 2013. The Court entertained arguments on this motion on June 7, 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]

Whalerock filed an application to construct a large wind energy system in the Town, pursuant to a zoning ordinance in effect at the time of their application. See Charlestown Ordinance No. 326, Amending Chapter 218 – Zoning: Reformatted Zoning Ordinance, Aug. 10, 2010, Article VI § 218-37D(4) (hereinafter, Wind Ordinance). Although the Town Council later placed a moratorium on the construction of large wind energy systems, the Zoning Board determined, on January 18, 2011, that Whalerock's application was vested under both G.L. 1956 § 45-24-44 and § 218-4 of the Charlestown Zoning Ordinance. The Zoning Board's four-to-one vote was memorialized by a decision dated and recorded with the Town on January 21, 2011. Both the abutters and the Town timely appealed the Zoning Board's decision to this Court.

On appeal, another Justice of this Court issued the Remand Decision, finding that the record on appeal to this Court failed to include a certified record from the Zoning

[2] A more detailed review of the history and travel of Whalerock's application may be found in both the Remand Decision and the April 10, 2013 Decision of this Court. See Remand Decision, at 3-26; Whalerock Renewable Energy, LLC v. Town of Charlestown, C.A. Nos. WC-2012-0709, WC-2012-0713, WC-2012-0760, 2013 WL 1562604 (Super. Ct. Apr. 10, 2013).

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. Thus, the Remand Decision directed that the Zoning Board file with this Court "a complete and certified record of its proceedings." Id. at 50. Additionally, 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.

On remand from this Court, the Zoning Board adopted a draft of proposed findings of fact and conclusions of law which had been prepared by counsel. At the time, 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.

That same day, Whalerock filed an action for declaratory judgment that sought, inter alia, to have this Court declare the powers of the Town's Planning Commission as they relate to Whalerock's application. 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 had been 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).

This Court was then faced with a number of dispositive motions regarding these three related—but not consolidated—cases. The Court entertained arguments on these motions on March 11, 2013 and subsequently issued a lengthy written Decision on April 10, 2013. See Whalerock Renewable Energy, LLC v. Town of Charlestown, C.A. Nos. WC-2012-0709, WC-2012-0713, WC-2012-0760, 2013 WL 1562604 (Super. Ct. Apr. 10, 2013). In that Decision, this Court dismissed the abutters' appeal, finding that the appeal was untimely filed. This Court also denied both the abutters' motion to intervene and the Town's cross-motion for summary judgment in C.A. No. WC-2012-0709, while granting both the declaratory relief requested in Count I of Whalerock's Complaint and granting Whalerock's Motion to Remand for a Hearing on the Merits. Finally, and most significant to the pending Motion, this Court dismissed the Town's appeal for lack of standing. However, on May 22, 2013—over one month after the issuance of this Court's April 10, 2013 Decision—the Town filed the instant Motion to Reconsider, to which

Whalerock objected. This Court entertained oral arguments in this matter on June 7, 2013.

II

Standard of Review

Motions to reconsider are treated as motions to vacate pursuant to Rule 60(b) of the Rhode Island Superior Court Rules of Civil Procedure. See Turacova v. DeThomas, 45 A.3d 509, 514-15 (R.I. 2012); see also Keystone Elevator Co., Inc. v. Johnson & Wales Univ., 850 A.2d 912, 916 (R.I. 2004) (treating a motion to reconsider as a Rule 60(b) motion because "the Rhode Island Rules of Civil Procedure—like the Federal Rules of Civil Procedure—do not provide for a motion to reconsider"). This approach is appropriate because the Court must "appl[y] a liberal interpretation of the rules to 'look to substance, not labels.'" Keystone Elevator Co., Inc., 850 A.2d at 916 (quoting Sarni v. Meloccaro, 113 R.I. 630, 636, 324 A.2d 648, 651–52 (1974)).

The determination of whether to grant or deny relief on a motion to vacate a judgment or order "rests in the sound discretion of the trial court, and the exercise of that discretion frequently necessitates resolving a conflict between the interests of doing justice and the interests of finality." 1 Robert B. Kent et al., Rules of Civil Procedure with Commentaries, § 60:1 (West 2006). This Court may grant such relief for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under applicable law;
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;

> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> (6) any other reason justifying relief from the operation of the judgment.

Super. Ct. R. Civ. P. 60(b); § 9-21-2. Additionally, this Court "should [lean] toward granting rather than denying relief, particularly if there has been no intervening reliance on the judgment." 1 Robert B. Kent et al., Rules of Civil Procedure with Commentaries, § 60:1 (West 2006).

III

Analysis

The Town now seeks to show this Court, via the introduction of "new" evidence, that it is, in fact, an aggrieved party as defined in the Rhode Island Zoning Enabling Act of 1991 (the Act), codified at G.L. 1956 §§ 45-24-27 et seq. The Act defines "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).

Using this definition, this Court previously found—based on the evidence presented by both parties on Whalerock's motion to dismiss—that the Town was not an aggrieved party. Specifically, this Court stated in its April 10, 2013 Decision:

> 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. 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 the Town's appeal in C.A. No. WC-2012-0713.

Whalerock Renewable Energy, LLC v. Town of Charlestown, C.A. Nos. WC-2012-0709, WC-2012-0713, WC-2012-0760, 2013 WL 1562604 (Super. Ct. Apr. 10, 2013) (footnotes omitted) (emphasis added).

At no time during the pendency of Whalerock's motion to dismiss did the Town assert either that it owned property near Whalerock's parcel that would be adversely affected by a decision of the Zoning Board regarding Whalerock's application, or that it was entitled to receive notice regarding that application under the terms of the Act. In fact, counsel for the Town represented to this Court at oral argument on the instant Motion that he had simply relied on opposing counsel's assertions that the Town neither owned property near the subject parcel nor was entitled to receive notice under the terms of the Act.

Despite the previous representations of both parties, the Town now asserts that "the Town is an aggrieved party because it holds (and has held since 1999) tax title to property within the two hundred foot radius of" Whalerock's parcel. Town's Mem. at 1 (emphasis added). Specifically, the Town states that it has tax title to Tax Assessor's Plat 19 Lot 63-1. Id. Furthermore, the Town argues not only that it owns property that may

be adversely affected by a decision on Whalerock's application with the Zoning Board, but also that it did, in fact, receive "notices of all relevant hearings before the [] Zoning Board." Id. at 2. This evidence cannot be considered as "newly discovered evidence" under Rule 60(b)(2) given that the Town's interest in the property dated back to 1999 and was readily discoverable by the Town prior to this Court's dismissal of its appeal.[3] Thus, in considering the instant Motion, this Court is left to determine whether "any other reason justifying relief from the operation of the judgment" exists. Super. Ct. R. Civ. P. 60(b)(6).

The Town has submitted three affidavits along with supporting documentation in support of the instant Motion. First, the affidavit of the Town's Tax Assessor, Kenneth Swain, states that the Town acquired the property located at Plat 19 Lot 63-1 at tax sale, with a deed having been recorded on September 19, 1999. See Swain Aff. ¶¶ 2-3, Ex. 1. Additionally, printouts from the Tax Assessor's database list both the Town and Gordon and Virginia Johnson under the heading "Record of Ownership"; however, the sole party listed under the heading "Current Owner" is the Town. Id. at Ex. 2. Next, the affidavit of the Town's Building Official, Joseph Warner, states that the Town was sent notice of all relevant meetings before the Zoning Board and that Lot 63-1 is within 200 feet of the Whalerock property. See Warner Aff. ¶¶ 3-4, 6, Exs. 3-4. The exhibits provided in

[3] This Court would be remiss if it did not address the significant judicial resources that have been expended adjudicating Whalerock's motion to dismiss the Town's appeal in the absence of these readily discoverable facts. The Town's counsel not only failed to exercise reasonable diligence in ascertaining this readily discoverable information from his own client, but inexplicably and wrongfully relied upon opposing counsel's version of the facts rather than independently verifying such facts in preparation of the Town's objection to a dispositive motion. It is a disservice to the prompt and efficient administration of justice to allow counsel to litigate in this manner, which unduly—and repeatedly—taxes the services of this Court.

support of this affidavit do reveal that the Town was given notice of meetings on January 11, 2011, November 13, 2012, and May 21, 2013 and that such notice was provided "to all those property owners within 200 feet of the property in question." See id. Exs. 1-5. Additionally, an affidavit of the Administrative Assistant to the Town Administrator, Michele Blair Voislow, indicates that mail regarding both the November 13, 2012 and May 21, 2013 meetings was received by the Town.[4] See Voislow Aff. ¶¶ 2, 6. This Court is satisfied by the evidence now presented that such notice was received because Plat 19 Lot 63-1 is, in fact, within 200 feet of Whalerock's parcel.

Whalerock argues, however, that the location of that parcel is not, in and of itself, determinative of whether the Town was required to be given notice under the Act. Whalerock contends that, while "owners" of property within 200 feet of the Whalerock

[4] With regard to the facts set forth in Voislow's affidavit, the Court notes that receipt of notice is not the same as being a party "requiring notice pursuant to" the Act, as is required by the statutory definition of an aggrieved party. § 44-24-27(4). The notice requirements of the Act are found in § 45-24-53, which provides:

> Written notice of the date, time, and place of the public hearing and the nature and purpose of the hearing shall be sent to all owners of real property whose property is located in or within not less than two hundred feet (200') of the perimeter of the area proposed for change, whether within the city or town or within an adjacent city or town. Notice shall also be sent to any individual or entity holding a recorded conservation or preservation restriction on the property that is the subject of the amendment. The notice shall be sent by registered or certified mail to the last known address of the owners, as shown on the current real estate tax assessment records of the city or town in which the property is located.

§ 45-24-53(c) (emphasis added). The fact that Whalerock prepared its notice list for the January 18, 2011 meeting before the Zoning Board and intentionally included all property owners within five hundred feet of the subject parcel out of an abundance of caution, as acknowledged by Whalerock's counsel at oral argument on June 7, 2013, does not render the property owners between 201 feet and 500 feet from the subject property as "requiring notice" under the Act, nor does it render such property owners "aggrieved parties" under § 45-24-27(4).

parcel are entitled to notice, "[t]he town does not 'own' the property. Rather, the [T]own holds a statutory interest in the property which it acquired from the fee simple absolute owners in 1999." Whalerock's Mem. at 1.

Sec. 44-9-14 provides the authority for the Town's Tax Collector to take a property at a tax sale. That statute states, in pertinent part:

> If at the time and place of sale no person bids an amount equal to the tax and charges for the land offered for sale, the collector shall then and there make public declaration of the fact; and, if no bid equal to the tax and charges is then made, the collector shall give public notice that the collector purchases for the city or town by which the tax is assessed the land as offered for sale at the amount of the tax and the charges and expenses of the levy and sale.

§ 44-9-14. However, even if the Town takes the property in this way, the property's record owner may still exercise his or her statutory right of redemption.[5] See § 44-9-19. Whalerock argues that this fact differentiates § 44-9-14 from § 44-9-8.1, which permits the Town to take land for which taxes are not paid within fourteen days from the date of such a demand for payment but only "upon a determination that the property is necessary

[5] The right of redemption held by any record owner of property sold at a tax sale is described in § 44-9-19(a) as follows:

> Any person having an interest in land sold for nonpayment of taxes, or his or her heirs or assigns, at any time prior to the filing of a petition for foreclosure under § 44-9-25, if the land has been purchased by the city or town and has not been assigned, may redeem the land by paying or tendering to the treasurer the sum for which the real estate was purchased, plus a penalty which shall be ten percent (10%) of the purchase price if redeemed within six (6) months after the date of the collector's sale, and an additional one percent (1%) of the purchase price for each succeeding month, together with all charges lawfully added for intervening taxes, which have been paid to the municipality, plus interest thereon at a rate of one percent (1%) per month, and expenses assessed subsequently to the collector's sale.

for redevelopment, revitalization, or municipal purposes by the redevelopment agency of a municipality." § 44-9-8.1. In support of this argument, Whalerock notes that "[t]he title conveyed by a tax collector's deed shall be absolute after foreclosure of the right of redemption by decree of the superior court." § 44-9-24. It is undisputed that no such foreclosure of the right of redemption has taken place in this matter.

Based on these statutory provisions, Whalerock contends that the Town's ownership is not absolute because it has never foreclosed the record owners' right of redemption. See id. Thus, according to Whalerock, it is the record owners and not the Town who were required to receive notice under § 45-24-53. As noted, the Tax Assessor's database lists the "Record of Ownership" of Plat 19 Lot 63-1 as not only the Town but also Gordon and Virginia Johnson. See Swain Aff. Ex. 2. Thus, under Whalerock's argument, notice must have been sent to Gordon and Virginia Johnson. It is undisputed that the exact whereabouts of the Johnsons is unknown and that notice was not provided to the Johnsons.

This Court disagrees with Whalerock's characterization of the statutory requirements. Sec. 45-24-53 simply requires notice to "be sent to all owners of real property." Noticeably absent from this requirement is any distinction between various levels of ownership, as Whalerock suggests is appropriate. The Town is undisputedly listed in the Tax Assessor's database as the "Current Owner" of Plat 19 Lot 63-1. See Swain Aff. Ex. 2. As such, this Court believes that it was the Town—and not the Johnsons—who were required, pursuant to § 45-24-53, to receive notice of all Zoning Board matters regarding Whalerock's application. To rule otherwise would subject parties preparing notices under this statute—not only in the Town but in municipalities

throughout the State—to the extraordinarily burdensome task of either investigating the record ownership of each parcel entitled to notice under the Act or risking the issuance of defective notices. Moreover, even if this Court had determined that the record owners of this parcel must have been given notice under § 45-24-53, it is undisputed that both the Town and the Johnsons are listed as record owners under the heading "Record of Ownership" in the Tax Assessor's database. See id. As such, regardless of whether the Johnsons would have also been entitled to notice under § 45-24-53, the Town certainly was entitled to such notice, either as one of the record owners or as the sole "Current Owner" of the property. See id.

For this reason, this Court finds that the Town was, in fact, a party "requiring notice pursuant to" the Act as the owner of real property within a 200 foot radius. § 44-24-27(4); § 45-24-53(c). As such, based on the additional evidence presented to the Court on the instant Motion, this Court finds that that the Town is an "aggrieved party" with standing to appeal the Zoning Board's decision following remand. This Court grants the Town's Motion pursuant to Rule 60(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure because the fact that the Town is an aggrieved party is a significant "reason justifying relief from the operation of the judgment." However, this Court notes—based on the representations of counsel in this matter—that notwithstanding this Decision, the matter will proceed to the Zoning Board for a decision on the merits of Whalerock's application as previously ordered by this Court's April 10, 2013 Decision.

IV

Conclusion

For the reasons set forth herein, and based on the additional evidence presented to this Court in support of the instant Motion, this Court finds that the Town is an aggrieved party as defined by § 44-24-27(4) of the Act. As such, this Court grants the Town's Motion and vacates its prior judgment pursuant to Rule 60(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. The prior judgment is vacated only inasmuch as the Court's April 10, 2013 Decision found that the Town was not an aggrieved party. In order to allow this matter to proceed to the Zoning Board on the merits, and based on the Town's representations that it does not seek to reopen its appeal in this matter, this Court's April 10, 2013 Decision remains in effect in all other respects.

Counsel for the Town shall submit an appropriate order for entry consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Town of Charlestown, By and Through Its Town Solicitor v. Town of Charlestown Zoning Board of Review, et al.
CASE NO:	WC-2012-0713
COURT:	Washington County Superior Court
DATE DECISION FILED:	August 22, 2013
JUSTICE/MAGISTRATE:	Kristin E. Rodgers
ATTORNEYS:	
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