

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: January 15, 2015)

REDWOOD REALTY II, LLC and :
NORTH AMERICAN PROCESSING, :
LLC, F/K/A NEW ENGLAND DISPOSE, :
LLC :

V. :

C.A. No. PC 06-5810

STEVE WOERNER, in his capacity as :
Finance Director for the Town of :
Cumberland, Rhode Island; :

KELLEY NICKSON-MORRIS, in her :
capacity as a former member of the :
Zoning Board of Review for the Town of :
Cumberland, in her capacity as a former :
Town Councilor of the Town Council for :
the Town of Cumberland; :

CARL ZOUBRA, in his capacity as a :
member of the Zoning Board of Review for :
the Town of Cumberland; :

TARA CAPUANO, in her capacity as a :
member of the Zoning Board for the Town :
of Cumberland; :

ROBERT CHAPUT, in his capacity as a :
member of the Zoning Board of Review :
for the Town of Cumberland; :

JOHN McCOY, in his capacity as the :
Chairman of the Zoning Board of Review :
for the Town of Cumberland; :

EDMOND M. McGRATH, in his capacity :
as a member of the Zoning Board of Review :
for the Town of Cumberland; :

DANIEL McKEE, in his capacity as :
Mayor for the Town of Cumberland; :

RAYMOND MADDEN, *individually, and* :
in his capacity as the former Building :
and Zoning Official for the Town of :
Cumberland; :

NEIL J. HALL, *in his capacity as the* :
Building and Zoning Official for the Town :
of Cumberland; :

KEVIN F. CRAWLEY, *in his capacity as* :
a member of the Planning Board for :
the Town of Cumberland; :

KENNETH BUSH, *in his capacity as a* :
member of the Planning Board for :
the Town of Cumberland; :

ROY COSTA, JR., *in his capacity as a* :
member of the Planning Board for :
the Town of Cumberland; :

HARRY MacDONALD, *in his capacity as* :
a member of the Planning Board for :
the Town of Cumberland; :

ISABEL SILVESTRE REIS, *in her* :
capacity as a member of the Planning :
Board for the Town of Cumberland; :

MARIA VRACIC, *in her capacity as* :
a member of the Planning Board for :
the Town of Cumberland; :

DAVID COUTU, *in his capacity as a* :
member of the Planning Board for :
the Town of Cumberland; :

ANTHONY PANDOZZI, *in his capacity* :
as a member of the Planning Board for :
the Town of Cumberland; :

CHRISTOPHER A. BUTLER, *in his* :
capacity as a member of the Planning :
Board for the Town of Cumberland :

DECISION

MCGUIRL, J. Before the Court in this action for Declaratory Judgment, Plaintiffs Redwood Realty II, LLC (Redwood) and North American Processing, LLC, F/K/A New England Dispose, LLC (collectively, Plaintiffs), have filed a Motion for Leave to File a Second Amended Complaint. In response, the Defendants object and have filed a Motion for Summary Judgment. Jurisdiction is pursuant to Super. R. Civ. P. 56 and 15, and the Uniform Declaratory Judgments Acts (UDJA), G.L. 1956 § 9-30.

I

Facts and Travel

Redwood is the owner of real property located at 32 Martin Street in Cumberland, Rhode Island, and otherwise known as Lot 236 of Assessor's Plat 34 (Property). The Property consists of approximately fourteen acres of land and is located within a light industrial (I-1) zoning district. In January 2006, Redwood entered into a partnership with New England Dispose, LLC (Dispose) (later known as North American Processing, LLC) for the development of a construction and demolition processing facility (C & D Facility) on the Property.

On March 13, 2006, counsel for the Plaintiffs submitted a request to the Town of Cumberland Building Official,¹ Mark Favreau, for a Zoning Certificate for the proposed C & D Facility. Through this Zoning Certificate, Dispose sought a determination that the proposed C & D Facility constituted wholesale trade within an enclosed structure for purposes of the Cumberland Zoning Ordinance (Ordinance) and, thus, constituted a permitted use for an I-1 zoning district.

¹ In Cumberland, the Building Official also serves as the Zoning Enforcement Officer. See Cumberland Zoning Ordinance, Art. 2, § 1 (defining "Building official" as "[t]he building official of the Town of Cumberland who is also the zoning enforcement officer").

On March 20, 2006, after reviewing the preliminary plans and consulting with the Town Planner, Mr. Favreau concluded that the proposed C & D Facility was allowed on the Property by right and issued a Zoning Certificate. The Plaintiffs then submitted a Preliminary Design Plan Review Application for the C & D Facility to the Town of Cumberland Planning Board (Planning Board). On May 2, 2006, the application was certified as complete. On July 28, 2006, two Cumberland residents appealed the issuance of the Zoning Certificate with the Zoning Board of Review, sitting as the Board of Appeals (Zoning Board).

Meanwhile, because the Planning Board failed to act upon the Preliminary Design Plan Review Application within sixty-five days as required by Section 5(F) of the Cumberland Land Development and Subdivision Regulations, the plan was deemed complete on August 7, 2006. The Plaintiffs informed the Planning Board that they intended to seek a Final Plan review. On September 15, 2006, a second appeal of the Zoning Certificate was filed with the Zoning Board by two other Cumberland residents.

On November 8, 2006, Plaintiffs filed the instant declaratory and injunctive relief action. Specifically, they were seeking this Court to (1) enjoin the Zoning Board from conducting a hearing that same day; (2) declare that Defendants were estopped from revoking the Zoning Certificate; and (3) enjoin Defendant Kelley Nickson-Morris (Ms. Nickson-Morris), in her capacity as a Zoning Board member and Councilwoman-elect, from interfering with any pending or new applications for a Zoning Certificate and from participating in the pending appeals, as well as enjoin Defendant Daniel McKee, in his capacity as Mayor-elect (Mayor McKee), from interfering with or revoking the existing Zoning Certificate. The Court granted Plaintiffs' request to enjoin the Zoning Board from conducting the November 8, 2006 Zoning Board hearing.

Meanwhile, Mayor McKee hired Raymond Madden as the new Building Official and tasked him with reviewing and evaluating Plaintiffs' original Zoning Certificate application in light of the

applicable Zoning Code provisions. Mr. Madden commenced his employment with the Town of Cumberland on January 8, 2007. On January 10, 2007, he informed Mayor McKee that he believed that the Zoning Certificate had been issued erroneously and that he would await further instruction and direction from Mayor McKee regarding how to proceed.

Mayor McKee sought confirmation of Mr. Madden's conclusion from Attorney Michael Horan. Attorney Horan concurred that the issuance of the Zoning Certificate was in excess of Mr. Favreau's lawful authority, and consequently, was an ultra vires act. He then concluded that the Town of Cumberland legally could revoke and nullify the Zoning Certificate.

On January 19, 2007, Mr. Madden notified Plaintiffs that he was revoking the Zoning Certificate because the Zoning Code did not permit a C & D Facility within an I-1 zoning district. As a result of this revocation, the pending zoning appeals filed by Plaintiffs' neighbors were terminated by agreement of the parties. The Plaintiffs then filed their own appeal to the Zoning Board. In it, they challenged the legality and propriety of Mr. Madden's revocation of the Zoning Certificate.

While that appeal was pending, on February 28, 2007, Plaintiffs submitted two new Zoning Certificate requests to Mr. Madden with respect to the Property. The first request sought an opinion as to whether a C & D Facility was a permitted use in an I-1 zoning district. The second request sought a determination as to whether a wood and wood product processing and manufacturing facility (Wood Processing Facility) was a permitted use in the same zoning district. On March 19, 2007, Mr. Madden denied both requests, finding that neither use was permitted under the Zoning Code in an I-1 zoning district. The Plaintiffs appealed this ruling to the Zoning Board in a second zoning appeal.

On April 23, 2007, the parties agreed to stay the aforementioned zoning appeals to allow Plaintiffs to submit an application to the Planning Board for a Development Plan Review of the

proposed C & D Facility. The parties further agreed that should the Planning Board deny the application, Plaintiffs would recommence their appeals before the Zoning Board. The Plaintiffs then submitted their Development Plan Review application for the C & D Facility to the Planning Board.

The Planning Board scheduled a hearing on the matter for May 30, 2007. At that hearing, the Planning Board voted to deny the application without hearing any evidence or considering the merits of the application. Instead, the Planning Board reasoned that it had no jurisdiction over the matter because Mr. Madden previously had revoked the Zoning Certificate after determining that a C & D facility was not a permissible use in an I-1 zoning district. The Planning Board left open the possibility of revisiting the matter in the event that the proposed use was determined to be permissible or that the revocation was set aside. The Plaintiffs appealed this decision to the Zoning Board.

At that point, Plaintiffs had various appeals pending before the Zoning Board; namely, (a) Mr. Madden's revocation of the Zoning Certificate; (b) his denial of a Zoning Certificate for a C & D Facility; (3) his denial of a Zoning Certificate for a Wood Processing Facility; and (4) the Planning Board's denial of the Development Plan Review application. The Zoning Board consolidated all of these appeals for review and, between April 23, 2007 and December 17, 2007, it conducted seven hearings at which numerous witnesses testified and documentary evidence was submitted.

While these appellate hearings were being conducted, Plaintiffs turned their attention back to the instant declaratory action. Accordingly, on July 19, 2007, Plaintiffs filed a Motion for Leave to File an Amended Complaint, which Motion was granted by Rule of Court. In their First Amended Complaint, Plaintiffs made various allegations of substantive and procedural due process violations of their rights. They sought the Court to declare: (1) that they had been deprived of their right to a fair and impartial hearing; (2) that under the doctrines of vested rights, laches, and equitable estoppel, Defendants were estopped from revoking the Zoning Certificate; and (3) that Mayor McKee and Mr. Madden's action amounted to intentional interference with expected business opportunity. The

Plaintiffs additionally sought damages and an injunction ordering Defendants to refrain from interfering with any pending or new applications.

Meanwhile, after the conclusion of the hearings in the four consolidated appeals before the Zoning Board, the Zoning Board found that the Zoning Code did not permit the operation of either a C & D Facility or a Wood Processing Facility within an I-1 zoning district; consequently, it denied all four appeals. Accordingly, the Zoning Board concluded that Mr. Madden acted properly when he revoked Plaintiffs' Zoning Certificate and later rejected their subsequent Zoning Certificate requests. The Zoning Board further concluded that the Planning Board properly denied Plaintiffs' Development Plan Review application. On February 11, 2008, the Zoning Board issued three written decisions summarizing its findings and conclusions with respect to Plaintiffs' four appeals. The Plaintiffs appealed those decisions to this Court.

On March 16, 2011, this Court issued a written Decision in which the Court remanded the consolidated matters to the Planning Board for consideration of Plaintiffs' Development Plan Review application. A subsequent Motion to Reconsider was granted in part and denied in part on September 6, 2011. In that Decision, the Court mandated that the Planning Board consider the application pursuant to the Ordinance in effect prior to October 7, 2007, and it permitted the Planning Board to receive and consider evidence at the hearing on remand.

Meanwhile, on September 30, 2011, Plaintiffs filed a Motion for Leave to File a Second Amended Complaint. In Plaintiffs' proposed four-Count Second Amended Complaint, they allege that their Substantive and Procedural Due Process Rights were violated, and they seek the Court to declare Defendants' intentional interference "amount[s] to harassment, intimidation and an unnecessary hindrance of the Plaintiffs' business, business expectation/advantage/opportunity and rights as afforded by the Rhode Island Constitution and Rhode Island General Laws."

(Second Am. Compl. at 26, 31, 34, and 36).² As a result of these alleged violations, Plaintiffs seek damages, attorneys' fees, costs and other further relief that the Court may deem fair, just and equitable. The Defendants object to Plaintiffs' Motion for Leave to File a Second Amended Complaint, and additionally have filed a Motion for Summary Judgment.

Mindful of the possible applicability of the Doctrine of Administrative Finality to this case, the Court inquired about the status of the consolidated cases on remand to the Planning Board after the instant Motions were filed. Counsel for the Plaintiffs informed the Court that:

“Unfortunately, for several reasons, my client does not want to pursue this project before the Planning Board. Importantly, those reasons include:

“1. The current economic climate, which has changed dramatically since 2006;

“2. The fact that other competitors have moved in and are currently operating similar operations that would drastically impact my client's market share with respect to the facility he had proposed; and

“3. The same Administration is in place in the Town, and one of the named Defendants, who was diametrically opposed to the proposal, is currently the Director of Planning for the Town.

“Accordingly, based on the foregoing, my client simply wants this case to move along with respect to the damages he has been seeking for the violation of his constitutional rights, particularly, his right to a fair hearing and/or those associated with the unfair/categorical denial of his final plan application despite a preliminary plan approval.” Letter from Attorney Michael A. Kelly, dated Jan. 22, 2013.

With this information and clarification before it, the Court now will consider the present Motions. Additional facts will be supplied as needed.

² Although the Complaint contains four Counts, the fourth Count is misdesignated as “Count VI.”

II

Standard of Review

Under Rule 15(a) of the Superior Court Rules of Civil Procedure, “after a responsive pleading is served, a party may amend a ‘pleading only by leave of court or by written consent of the adverse party.’” Lomastro v. Iacovelli, 56 A.3d 92, 94 (R.I. 2012) (quoting Super. R. Civ. P. 15(a)). Rule 15 further mandates that leave to amend “shall be freely given when justice so requires.” Super. R. Civ. P. 15(a). Thus, although “the decision to grant or to deny a motion to amend a complaint is confided to the sound discretion of the [trial] justice[,]” it is well settled “that trial justices should liberally allow amendments to the pleadings.” Lomastro, 56 A.3d at 94-95.

Summary judgment is proper when, after reviewing the admissible evidence in the light most favorable to the non-moving party, “no genuine issue of material fact is evident from ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ and the motion justice finds that the moving party is entitled to prevail as a matter of law.” Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Super. R. Civ. P. 56(c)). When considering a motion for summary judgment, “the court may not pass on the weight or credibility of evidence, but must consider affidavits and pleadings in the light most favorable to the party opposing the motion.” Westinghouse Broad. Co. v. Dial Media, Inc., 122 R.I. 571, 579, 410 A.2d 986, 990 (1980) (internal citations omitted).

During a summary judgment proceeding, “the justice’s only function is to determine whether there are any issues involving material facts.” Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981). Moreover, if no genuine issue of material fact exists, the trial justice may determine “whether the moving party is entitled to judgment under the applicable law.” Ludwig v. Kowal,

419 A.2d 297, 301 (R.I. 1980) (quoting Belanger v. Silva, 114 R.I. 266, 267, 331 A.2d 403, 404 (1975)). “When there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is properly entered.” Tangleridge Dev. Corp. v. Joslin, 570 A.2d 1109, 1111 (R.I. 1990); Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating that “summary judgment is proper when there is no ambiguity as a matter of law”).

III

Analysis

A

Plaintiffs’ Motion for Leave to File a Second Amended Complaint

In their initial three-Count Complaint, Plaintiffs petitioned the Court for declaratory and injunctive relief. The initial Complaint was filed on November 8, 2006. On that same day, the Court issued a temporary restraining order on the prayer for injunctive relief, thereby preventing the Zoning Board from conducting a meeting that evening. On August 8, 2007, the Court granted Plaintiffs’ Motion for Leave to File an Amended Complaint. The Plaintiffs now seek to amend the Complaint for a second time, allegedly to conform the Complaint to the Court’s Decision in the related consolidated matters.

As previously stated, an amendment under Super. R. Civ. P. 15 is “allowed with liberality.” Manocchia v. Narragansett Capital Partners Television Invs., 658 A.2d 907, 909 (R.I. 1995). Nevertheless, “the final decision whether to allow the amendment rests within the discretion of the trial justice and will not be disturbed unless it constitutes an abuse of discretion.” Id.

Rule 15(a) of the Superior Court Rules of Civil Procedure provides in pertinent part:

“A party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”

In construing the federal counterpart to our Super. R. Civ. P. 15, the United States Supreme Court has declared:

“If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave should, as the rules require, be ‘freely given.’” Foman v. Davis, 371 U.S. 178, 182 (1962) (emphasis added).

Accordingly, in Rhode Island, “‘amendments to pleadings are to be allowed with great liberality absent a showing of extreme prejudice’ and the burden of demonstrating such prejudice lies on the party opposing the motion to amend.” Lomastro, 56 A.3d at 95 (quoting Kuczer v. City of Woonsocket, 472 A.2d 300, 301 (R.I. 1984)). As this case involves a request for declaratory relief, the Court first will consider the applicability of the UDJA to the proposed Second Amended Complaint.

1

The Uniform Declaratory Judgments Act

The UDJA “gives the Superior Court broad discretion to ‘declare rights, status, and other legal relations whether or not further relief is or could be claimed.’” Arnold v. Lebel, 941 A.2d 813, 817 (R.I. 2007) (quoting § 9-30-1). Declarations issued by the Court “may be either

affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.” Sec. 9-30-1. In addition,

“Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper . . . If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.” Sec. 9-30-8.

In the section entitled “Construction,” the General Assembly declared the UDJA

“to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered. The remedy provided by this chapter shall be cumulative and shall not exclude or prevent the exercise of any other right, remedy, or process heretofore allowed by law or by previous enactment of the legislature.” Sec. 9-30-12.

The threshold determination with respect to a UDJA petition is whether the claimant has presented the court with “an actual case or controversy.” N & M Props., LLC, v. Town of W. Warwick, 964 A.2d 1141, 1144 (R.I. 2009). The Court must “mak[e] this initial determination[;] [otherwise, it] does not have jurisdiction to entertain the claim.” Id. at 1144-45. Justiciable claims require the presence of two elements: “(1) a plaintiff with the requisite standing and (2) some legal hypothesis which will entitle the plaintiff to real and articulable relief.” Id. at 1145 (internal quotations omitted). “The question of standing . . . concerns, apart from the ‘case’ or ‘controversy’ test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” Ass’n of Data Processing Serv. Orgs., Inc., v. Camp, 397 U.S. 150, 153 (1970).

Thus, with respect to the standing requirement for justiciability, the issue concerns “whether the person whose standing is challenged has alleged an injury in fact resulting from

the challenged statute. If he [or she] has, he [or she] satisfies the requirement of standing.” N & M Props., 964 A.2d at 1145 (quoting R.I. Ophthalmological Soc’y v. Cannon, 113 R.I. 16, 26, 317 A.2d 124, 129 (1974)). By “focus[ing] on the party who is advancing the claim rather than on the issue the party seeks to have adjudicated[,] [t]he standing inquiry is satisfied when a plaintiff has suffered some injury in fact, economic or otherwise.” N & M Props., 964 A.2d at 1145 (internal citation and quotations omitted). An injury in fact is defined “as ‘an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Id. (quoting Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997)). Furthermore, it is important that the injury be of a personal nature; thus, a claimant is required to “‘demonstrate a personalized injury distinct from that of the community as a whole.’” N & M Props., 964 A.2d at 1145 (quoting Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004)).

The second justiciability requirement necessitates that “‘the facts postulated yield to some conceivable legal hypothesis which will entitle the plaintiff to some relief against the defendant.’” N & M Props., 964 A.2d at 1145 (quoting Goodyear Loan Co. v. Little, 107 R.I. 629, 631, 269 A.2d 542, 543 (1970)). Thus,

“[w]here a concrete issue is present and there is a definite assertion of legal rights coupled with a claim of a positive legal duty with respect thereto which shall be denied by adverse party, then there is a justiciable controversy calling for the invocation of the declaratory judgment action. If the court determines that there is no justiciable controversy, the court can go no further, and its immediate duty is to dismiss the action * * *.” N & M Props., 964 A.2d at 1145 (internal citations and quotations omitted)..

With these directives at hand, the Court will consider the instant Motions. Before doing so, however, the Court first will address the applicability of the Doctrine of Administrative Finality.

In Rhode Island, “[i]t is well settled that a plaintiff aggrieved by a state agency’s action first must exhaust administrative remedies before bringing a claim in court.” Arnold, 941 A.2d at 818 (quoting R.I. Emp’t Sec. Alliance, Local 401, S.E.I.U. v. State Dep’t of Emp’t and Training, 788 A.2d 465, 467 (R.I. 2002)). Nevertheless, “[t]his Court has made exceptions when the exhaustion of administrative remedies would be futile.” Id. The futility exception “is especially true when a party ‘seeks a declaration that the challenged ordinance or rule is facially unconstitutional or in excess of statutory powers.’” Id. (quoting Kingsley v. Miller, 120 R.I. 372, 374, 388 A. 2d 357, 359 (1978)).

The underlying dispute in this declaratory action first arose in the context of a Zoning Certificate application. As outlined in the factual section of this Decision, when this action was filed, the Zoning Certificate application process already was in motion. However, this Court remanded the related consolidated appeals to the Planning Board for consideration of Plaintiffs’ Development Plan Review application.

Subsequent to the Court’s remand, counsel for the Plaintiffs assured the Court that Plaintiffs are no longer pursuing that avenue of relief. Based upon said representation, the Court finds that Plaintiffs are waiving their right to a hearing on remand. See Haydon v. Stamas, 900 A.2d 1104, 1112-13 (R.I. 2006) (“Waiver that results from a party’s actions may be expressed in the actions themselves or implied from them, and ‘may arise where a person against whom the waiver is asserted has pursued such a course of conduct as to sufficiently evidence an intention to waive a right or where his [or her] conduct is inconsistent with any other intention than to waive it.’”) (quoting Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 65 (R.I. 2005)).

Based upon counsel’s representation that his client no longer intended to pursue the matter, the Court further concludes that Plaintiffs are estopped from attempting to revive any of their claims before the Planning Board or Zoning Board, and that the February 11, 2008 Zoning Board decisions

now constitute final judgments.³ See State v. Lead Indus. Ass’n., 69 A.3d 1304, 1310 (R.I. 2013) (“One of the primary factors courts typically look to in determining whether to invoke the doctrine [of judicial estoppel] in a particular case is whether the ‘party seeking to assert an inconsistent position would derive an unfair advantage * * * if not estopped.’”)⁴ As a result, the Court is satisfied that the Doctrine of Administrative Finality does not preclude the Court from addressing the motions presently before it.

2

Statutory Interpretation

Recently, our Supreme Court succinctly summarized the Court’s function when interpreting a statute. See Peloquin v. Haven Health Ctr. of Greenville, LLC, 61 A.3d 419, 425 (R.I. 2013). Accordingly, “[w]hen the language of the statute is clear and unambiguous, it is our

³ Those judgments consist of (a) Mr. Madden’s revocation of the Zoning Certificate; (b) Mr. Madden’s denial of a Zoning Certificate for the construction of a C & D facility; (c) Mr. Madden’s denial of a Zoning Certificate for a Wood Processing Facility; and (d) the Planning Board’s denial of the proffered Development Plan Review application.

⁴ In Lead Indus. Ass’n., our Supreme Court succinctly set forth the principles underlying the doctrine of judicial estoppel:

“The invocation of judicial estoppel is driven by the important motive of promoting truthfulness and fair dealing in court proceedings. Unlike equitable estoppel, which focuses on the relationship between the parties, judicial estoppel focuses on the relationship between the litigant and the judicial system as a whole. The United States Supreme Court has noted that [b]ecause the rule is intended to prevent improper use of judicial machinery, * * * judicial estoppel is an equitable doctrine invoked by a court at its discretion. One of the primary factors courts typically look to in determining whether to invoke the doctrine in a particular case is whether the party seeking to assert an inconsistent position would derive an unfair advantage * * * if not estopped. Courts often inquire whether the party who has taken an inconsistent position had succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.” Lead Indus Ass’n., 69 A.3d at 1310 (internal citations and quotations omitted).

responsibility to give the words of the enactment their plain and ordinary meaning. Moreover, when we examine an unambiguous statute, there is no room for statutory construction and we must apply the statute as written.” Id. (internal citations and quotations omitted).

Addressing the plain approach, the Court stressed that it

“is not the equivalent of myopic literalism, and it is entirely proper for us to look to the sense and meaning fairly deducible from the context. Therefore we must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections. It is generally presumed that the General Assembly intended every word of a statute to have a useful purpose and to have some force and effect, and this Court’s ultimate goal is to give effect to the purpose of the act as intended by the Legislature. Finally, under no circumstances will this Court construe a statute to reach an absurd result.” Id. (internal citations and quotations omitted).

Furthermore, “when interpreting statutes, a court should construe ‘each part or section * * * in connection with every other part or section to produce a harmonious whole.’” Zambarano v. Ret. Bd. of Emps.’ Ret. Sys. of State, 61 A.3d 432, 436 (R.I. 2013) (quoting 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 46:5 at 189–90 (7th ed. 2007)).

This case began on November 8, 2006 with a three-Count Complaint in which Plaintiffs petitioned the Court for declaratory and injunctive relief. In Count I of the Complaint, Plaintiffs sought the Court to declare that various Defendants’ actions violated their substantive and procedural due process rights to a fair and impartial hearing. In Count II, Plaintiffs sought the Court to declare that Defendants were equitably estopped from revoking the Zoning Certificate and from interfering with Plaintiffs’ development plan review. The Plaintiffs also sought, and were granted, an injunction in Count III to prevent the Zoning Board from conducting a meeting that very same date.

The Plaintiffs later amended their Complaint. In addition to seeking a declaration that they had been deprived of their substantive and due process right to a fair and impartial hearing, Plaintiffs sought the Court to declare that, under the doctrines of vested rights, laches, and equitable estoppel, Defendants were estopped from revoking the Zoning Certificate, and that Mayor McKee and Mr. Madden's action amounted to intentional interference with expected business opportunity. The Plaintiffs sought damages for the alleged intentional interference with expected business opportunity and also requested the Court to issue an injunction against Defendants from interfering with any pending or new applications. The Plaintiffs now seek the Court for leave to file a second amended Complaint.

In Count I of the Second Amended Complaint, Plaintiffs seek the Court to declare that Defendants' actions violated their substantive and procedural due process rights such that there was an "intentional interference by the Defendants amount[ing] to harassment, intimidation and an unnecessary hindrance of the Plaintiffs' business, business expectation/advantage/opportunity and rights as afforded by the Rhode Island Constitution and Rhode Island General Laws." In Count II, Plaintiffs seek the Court to declare "that the Zoning Board's impartiality was influenced and tainted by the actions of Defendants Morris, Madden and McKee, thereby violating Plaintiffs' Substantive and Procedural Due Process Rights[.]" and that there was an unnecessary hindrance of Plaintiffs' business opportunity/expectations. Count III seeks a declaration that the Planning Board's actions amounted to a violation of Plaintiffs' substantive and procedural due process rights amounting "to an unnecessary hindrance of the Plaintiffs' business, business expectation/advantage/opportunity and rights as afforded by the Rhode Island Constitution and Rhode Island General Laws[.]" Finally, Count IV seeks a declaration "that the actions of the Defendants amount to harassment, intimidation and an unnecessary hindrance of the Plaintiffs' business, business expectation/advantage/opportunity and rights as afforded by the

Rhode Island Constitution and Rhode Island General Laws[.]” The Plaintiffs seek damages on all four Counts.

As stated, the UDJA grants this Court the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Sec 9-30-1. It is clear from this language that before the Court may entertain a claim for “further relief,” there first must exist a request for a declaration of “rights, status and other legal relations.” This conclusion is supported by the clear language contained in § 9-30-8, which provides in pertinent part:

“Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper . . . If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.” Sec. 9-30-8 (emphasis added).

Thus, there exists “an implied recognition that declaratory judgment actions are a special breed of lawsuit, intended to fill a gap in the remedies otherwise available but not to be substituted for the ‘real’ thing when a coercive suit can be brought.” Travelers Indem. Co. v. Boles, 503 F. Supp. 179, 181 (N.D. Cal. 1980). However,

“[i]t is not the role of declaratory judgment to take the place of an action for damages[;] [rather] . . . in a proper case for declaratory relief, where the court has entered a decree adjudicating the rights of parties and where the granting of relief in the form of damages may be predicated on that determination of rights, the court making the determination should also make that award of damages.” F. Rosenberg Elevator Co. v. Goll, 118 N.W.2d 858, 862 (Wis. 1963).

Nevertheless, ““a cause of action for declaratory relief may properly embrace in a single cause of action claims for further consequential relief which might otherwise be regarded as separate causes of action, including equitable relief and damages.”” Westport Ins. Corp. v. Appleton Papers Inc., 787 N.W.2d 894, 920 (Wis. App. 2010) (quoting City of Milwaukee v.

Firemen's Relief Ass'n of the City of Milwaukee, 149 N.W.2d 589 (Wis. 1967)). Accordingly, “the granting of relief in the form of damages may be predicated on that determination of rights[.]” Westport Ins. Corp., 787 N.W.2d at 920.

The proposed Second Amended Complaint in the instant matter reveals that Plaintiffs do not seek a declaration of rights under any specified contract, statute, regulation, or ordinance provision. Rather, it appears that Plaintiffs simply are alleging tortious interference with a business expectancy, and are seeking damages as a result of that alleged interference.⁵ As stated above, “[i]t is not the role of declaratory judgment to take the place of an action for damages” F. Rosenberg Elevator Co., 118 N.W.2d at 862.

Considering that Plaintiffs’ proposed Second Amended Complaint does not seek a declaration of rights under any specified contract, statute, regulation, or ordinance provision, the Court concludes that Plaintiffs have not presented the Court with “an actual case or controversy” for purposes of the UDJA. As the Court “does not have jurisdiction to entertain the claim[.]” N & M Props., 964 A.2d at 1144-45, the Court further concludes that the underlying facts or circumstances relied upon by a plaintiff are not the proper subject of relief under Super. R. Civ. P. 15. Consequently, the Plaintiffs’ Motion for Leave to File a Second Amended Complaint is denied. The Court’s analysis of the Motion does not end at this point, however. In the unlikely event that the Second Amended Complaint could be construed as requesting a declaration of

⁵ Assuming that it is appropriate to use the UDJA as a vehicle to seek damages for tortious interference with a business expectancy, in Rhode Island, “[t]o prevail on a claim of tortious interference with contractual relations, a plaintiff must establish ‘(1) the existence of a contract; (2) the alleged wrongdoer’s knowledge of the contract; (3) his [or her] intentional interference; and (4) damages resulting therefrom.’” Bossian v. Anderson, 69 A.3d 869, 877 (R.I. 2013) (quoting Ims v. Town of Portsmouth, 32 A.3d 914, 925–26 (R.I. 2011)). In this case, Plaintiffs have not alleged the existence of a contract that could be the subject of such a claim; thus, dismissal of these allegations would have been ripe under a summary judgment standard.

rights under 42 U.S.C. § 1983, a very broad assumption considering that the statute is not cited, then the Court also would deny the Motion for Leave to File a Second Amended Complaint.

With respect to 42 U.S.C. § 1983 actions,

“while a plaintiff who has been constitutionally injured can bring a § 1983 action to recover damages, that same plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future. Thus, ‘[s]tanding to obtain injunctive and declaratory relief must be analyzed separately from standing to obtain retrospective relief.’” Facio v. Jones, 929 F.2d 541, 544 (C.A. 10th Cir. 1991) (quoting M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees § 2.5, at 29 (1986)).

In Facio, although the defendant “had allegedly suffered actual harm—and could presumably recover damages under § 1983—he could not demonstrate a case or controversy with the City that would justify the equitable relief sought because standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers.” Id. (internal quotations omitted). Accordingly, the Court dismissed the action because the lower court had “no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.” Id. at 545 (quoting Liverpool, New York & Philadelphia S.S. Co. v. Comm’rs of Emigration, 113 U.S. 33, 39 (1885)).

In the present case, even assuming that Plaintiffs might be seeking relief under 42 U.S.C. § 1983, they have not alleged that there is “a good chance of likewise being injured in the future” such that declaratory or injunctive relief would be appropriate. Facio, 929 F.2d at 544. As such, the Court concludes that the proposed Second Amended Complaint does not properly invoke the requirements for seeking declaratory relief under 42 U.S.C. § 1983. Consequently, the Court

would deny Plaintiffs' Motion for Leave to File a Second Amended Complaint on this ground as well.

The Court, having denied Plaintiffs' Motion for Leave to File a Second Amended Complaint, now will address Defendants' Motion for Summary Judgment with respect to the applicable Amended Complaint.

B

Defendants' Motion for Summary Judgment

The Defendants assert that before Plaintiffs can prove a violation of their substantive and procedural due process rights, they first must establish the existence of a protectable property interest. The Defendants then maintain that because the Zoning Certificate at issue in this case did not impart any binding and enforceable rights upon Plaintiffs, they cannot establish this threshold element of their claim.⁶

In response, Plaintiffs maintain that the Planning Board's deemed approval of their Preliminary Design Plan Review Application created a property interest sufficient to maintain their substantive and procedural due process claims and, thus, defeat Defendants' Motion for Summary Judgment. The Defendants counter that, like the Zoning Certificate, the Preliminary Plan Approval cannot constitute a property interest as a matter of law because it does not amount to a legitimate claim of entitlement to Final Plan approval.

In their six-Count First Amended Complaint, Plaintiffs seek the Court to declare that (a) "Defendants Morris, Madden and McKee's actions have violated the Plaintiffs' right to an impartial hearing and right to a meaningful opportunity to be heard" (Count I); (b) "the actions of

⁶ To the extent that the Second Amended Complaint could be construed as an action for damages or a 42 U.S.C. § 1983 action, the reasoning set forth in this Decision above would require the granting of summary judgment on the same grounds.

Defendants Morris, Madden and McKee have violated Plaintiffs' rights as afforded by Article I Section 2 of the Rhode Island Constitution [by violating] . . . Plaintiffs' right to an impartial hearing and right to a meaningful opportunity to be heard" (Count II); (c) "the action of the Defendant, Madden in issuing the Revocation is ultra vires . . . the Revocation is illegal, null and void[,] and . . . the Zoning Certificate as issued by Favreau was validly issued and is fully reinstated" (Count III); (d) "by virtue of the Doctrines Vested Rights, Laches and Equitable Estoppel, the Defendants are estopped from revoking the Zoning Certificate as issued by the former Building Official, Favreau, and interfering with the Plaintiffs' Development Plan Review application and review" (Count IV); and (e) "the Revocation as ordered to be issued by McKee is an action taken by a municipal governmental entity acting outside of its scope of authority and acting . . . to interfere with a private business" (Count V). In addition to seeking the requested declarations, Plaintiffs seek an award of damages in Counts II-V.

In Count VI, Plaintiffs seek the Court to impose an injunction that (a) orders Defendants to refrain from interfering with any pending or new applications for Plaintiffs' Zoning Certificate; (b) orders Defendants Morris and McKee to refrain from partaking in any of Plaintiffs' appeals before the Zoning Board of Appeals; and (c) orders Defendants Morris, McKee and Madden to refrain from harassing, intimidating, and influencing the Zoning Board members, to refrain from interfering with Plaintiffs' business and/or business advantage/expectation/opportunity, and to refrain from intimidating, harassing, targeting and/or improperly scrutinizing Plaintiffs, Plaintiffs' Facility, Plaintiffs' Property, and/or Plaintiffs' business(es). Before addressing the summary judgment motion presently before the Court, it first must determine whether the case has been rendered moot by Plaintiffs' waiver of their right to a hearing before the Planning Board after this Court's remand in the consolidated appeals.

As “a threshold issue of justiciability[.]” this Court should determine whether the case is moot in the first instance. Boyer v. Bedrosian, 57 A.3d 259, 271 (R.I. 2012) (quoting City of Cranston v. R.I. Laborers’ Dist. Council Local 1033, 960 A.2d 529, 533 (R.I. 2008)) (“Although neither party directly has raised the issue, this Court first must address the threshold issue of justiciability before [it] may entertain the merits of the parties’ substantive arguments.”). This applies to all actions, even those for declaratory and injunctive relief. See Boyer, 57 A.3d at 272 (declaring that “the principle of mootness applies in actions for equitable relief, and that declaratory judgment will not be rendered on moot questions”).

It is axiomatic that “[a] case is moot if there is no continuing stake in the controversy, or if the court’s judgment would fail to have any practical effect on the controversy.” Id. (citing Lynch v. R.I. Dep’t of Env’tl. Mgmt., 994 A.2d 64, 71 (R.I. 2010); H.V. Collins Co. v. Williams, 990 A.2d 845, 848 (R.I. 2010)); see also United Serv. and Allied Workers of R.I. v. R.I. State Labor Relations Bd. 969 A.2d 42, 44 (R.I. 2009) (“A once fully justiciable case may become moot when events occurring after the filing have deprived the litigant of an ongoing stake in the controversy.”) (internal quotations omitted). Furthermore, “if this Court’s judgment would fail to have a practical effect on the existing controversy, the question has become moot.” United Serv. and Allied Workers of R.I., 969 A.2d at 44 (internal quotations omitted). Our Supreme Court has declared that:

“Only when this Court determines that an otherwise moot controversy is of extreme public importance, which [is] capable of repetition but which [evades] review, shall we address the merits of such a case. Cases of extreme public importance are those involving issues of great significance such as important constitutional rights, matters concerning a person’s livelihood, or matters concerning citizen voting rights.” Id. at 45 (internal citations and quotations omitted).

The current dispute involves the development of the Property as a C & D Facility. Arguably, this concerns a matter of extreme public importance because it involves a person's livelihood, as well as a property interest. However, because Plaintiffs have decided to waive their right to a hearing on remand to the Planning Board, the decisions of the Zoning Board have become final judgments and Plaintiffs voluntarily have given up their stake in the controversy. Haydon, 900 A.2d at 1112 (reiterating that “[w]aiver is the voluntary intentional relinquishment of a known right. It results from action or nonaction * * * ”). Consequently, the Court would conclude that the instant action has been rendered moot by Plaintiffs’ failure to pursue their administrative remedies before the Planning Board and that the Motion for Summary Judgment should be granted.

However, even considering an argument that Plaintiffs’ actions did not render the matter moot, this Court nevertheless would grant Defendants’ Motion for Summary Judgment on alternative grounds.

Pursuant to the Constitution of Rhode Island,

“procedural due-process protections are grounded in article 1, section 2, which states that [n]o person shall be deprived of life, liberty, or property without due process of law * * *. Procedural due process ensures that notice and an opportunity to be heard precede any deprivation of a person’s life, liberty, or property. Though a state may choose to create stronger constitutional protections than those afforded by the federal constitution, [t]he applicability of the constitutional guarantee of procedural due process depends in the first instance on the presence of a legitimate property or liberty interest within the meaning of the [federal constitution]. Only when a legitimate property or liberty interest exists does a court determine what process is due.” Moreau v. Flanders, 15 A.3d 565, 587-88 (R.I. 2011) (internal citations and quotations omitted).

From the foregoing, the question arises as to what property or liberty interest is at issue in this case. As this Court observed in its Decision on the consolidated appeals, “a zoning

certificate is not legally binding.” Redwood Realty II, LLC v. Bruce, Nos. PC 08-1185, PC 08-1186, PC 08-1187, 2011 WL 997146, at *18 (R.I. Super. 2011) (quoting Parker v. Byrne, 996 A.2d 627, 633 (R.I. 2010). Rather, it “is merely an advisory determination, designed to provide only informational assistance to the requesting party.” Redwood Realty II, LLC, Nos. PC 08-1185, PC 08-1186, PC 08-1187, 2011 WL 997146, at *18 (citing G.L. 1956 § 45-24-54).

Accordingly,

“[A]lthough a zoning certificate may well serve as an indication about how the zoning official views the use, structure, building or lot insofar as it complies with the Ordinance—information that no doubt would be useful to property owners and others—it does not operate to create any enforceable rights or to divest existing rights.” Id.

With respect to allegations of substantive due process violations, it is well settled that “[s]ubstantive due process, as opposed to procedural due process, addresses the essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government’s conduct, regardless of procedural swaddling, was in itself impermissible.” L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 211 (R.I. 1997) (internal quotations omitted). Thus, “substantive due process prevents the use of governmental power for purposes of oppression, or abuse of governmental power that is shocking to the conscience, or legally irrational action that is not keyed to a legitimate state interest. . . . [and] protects individuals against state actions that are egregiously unacceptable, outrageous, or conscience-shocking.” Id. (internal citations and quotations omitted).

The Plaintiffs seek the Court to declare that their procedural due process rights were violated because they were denied their right to an impartial hearing and a meaningful opportunity to be heard. However, from the foregoing, the Court concludes that Plaintiffs do not have a legitimate property interest in the Zoning Certificate sufficient to pursue a claim of a

violation of their due process rights. Likewise, the Court further concludes that Plaintiffs did not acquire a vested property interest in Preliminary Plan Approval.

In its remand of the Preliminary Plan Application to the Planning Board, this Court charged the Planning Board with the responsibility to ensure that it made findings in accordance with the following requirements:

- “(1) The granting of approval will not result in conditions inimical to the public health, safety and welfare;
- “(2) The requested action will not alter or impair the intent or purpose of [the zoning] ordinance or the comprehensive plan upon which this section is based;
- “(3) The plans for such projects comply with all the requirements of [the zoning] ordinance and the [land development and subdivision] regulations;
- “(4) Any conditions or restrictions that are necessary to ensure that these findings have been met [and] have been incorporated into the vote of approval.” Redwood Realty II, LLC, Nos. PC 08-1185, PC 08-1186, PC 08-1187, 2011 WL 997146, at *30-31 (quoting Cumberland Zoning Ordinance, Art. 5, § 5-17(e)).

The Court further ordered that “[t]he Planning Board may not grant development plan approval unless and until these required findings are made.” Id. at *31.

It is conceivable that had Plaintiffs not waived their right to a hearing on remand before the Planning Board and that the hearing actually had been conducted, the application could have been denied based upon “a myriad of unforeseeable reasons.” See L.A. Ray Realty, 698 A.2d at 210. As such, the Court cannot conclude that Plaintiffs have a property interest in the Preliminary Plan Application sufficient to invoke the substantive due process clause of the Rhode Island Constitution. Furthermore, given the fact that this Court’s remand in the consolidated appeals provided Plaintiffs with a meaningful opportunity to be heard—an opportunity that they voluntarily have waived by opting not to pursue their right to a hearing on

remand before the Planning Board—the Court concludes that Plaintiffs’ procedural due process claims would fail.

With respect to Counts III, IV, and V, Plaintiffs seek the Court to declare that revocation of the Zoning Certificate was ultra vires (Count III), that Defendants are estopped from revoking the Certificate (Count IV), and that the revocation constituted a governmental action that was outside the scope of its authority (Count V). Considering that Plaintiffs did not acquire a vested property interest in the Zoning Certificate or in the Preliminary Plan Application in the first instance, coupled with the fact that the Zoning Board’s decisions with respect to the Zoning Certificate now constitute final judgments, these Counts would not survive a Motion for Summary Judgment. Similarly, Plaintiffs’ claim for injunctive relief likewise would be dismissed. Consequently, the Court concludes that there exist no genuine issues of material fact that would preclude the Court from granting Defendants’ Motion for Summary Judgment.

IV

Conclusion

For the foregoing reasons, the Court denies Plaintiffs’ Request for Leave to File a Second Amended Complaint. Furthermore, the Court grants Defendants’ Motion for Summary Judgment.

Counsel for the prevailing parties shall submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Redwood Realty II, LLC v. Woerner, et al.

CASE NO: PC 06-5810

COURT: Providence County Superior Court

DATE DECISION FILED: January 15, 2015

JUSTICE/MAGISTRATE: McGuirl, J.

ATTORNEYS:

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