



B, and, under the Lease as it existed prior to the property becoming a condominium, Seaport had use of one parking space, which it rented on an annual basis. Id.

Seaport originally claimed that Waldo and Hennessey had failed to furnish Seaport with a condominium unit deed following lawful demand after the property was converted into condominiums, in violation of the Lease. (Compl. ¶ 17.) However, Waldo and Hennessey conveyed the deed to Seaport on July 18, 2013, rendering this count moot. See Seaport Studios, Inc. v. Waldo, et al., No. WC-09-0871, 2014 WL 2457775, at \*1 (R.I. Super. May 28, 2014) (Trial Order).

In 2005, Waldo and Hennessey submitted a parking plan (2005 Plan) to the Town of Westerly (Town), in accordance with Westerly Town Ordinance 260-77<sup>1</sup> (Ordinance 260-77). This plan included a parking calculation which appears to include Seaport’s unit, along with

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<sup>1</sup>The Ordinance states that:

“A. Parking required. Any structure or use, erected or developed after the date of passage of this chapter, must provide off-street parking facilities including garage in accordance with the following regulations:

[Amended 5-15-2000 by Ch. No. 1300]

“(1) Residential dwelling: two car spaces for each dwelling unit.

.....

“(5) Office use: one car space for every 250 square feet of gross floor space.

“(6) Retail and service business: 6.5 parking spaces for every 1,000 square feet of gross floor area up to 10,000 square feet; 4.75 parking spaces for every 1,000 square feet of gross floor area greater than 10,000 square feet.

.....

“(9) All other nonresidential uses: One car space for every 300 square feet of gross floor area.

“B. Plans and specifications for parking facilities. Plans and specifications for the required parking facility and its access drives shall be submitted at the time of application for a permit for the main use. In allocating area for off-street parking facilities, each parking space shall have a minimum width of nine feet, a minimum length of 18 feet and shall be served by suitable aisles to permit access into all parking spaces. In no case shall the gross area per parking space be less than 270 square feet. Such plans and specifications shall include planted islands and buffers as well as a lighting plan. . . .”

Given the language of Ordinance 260-77, it is unclear whether it requires the preexisting building of Seaport to be provided with specific parking spaces.

other properties. The 2005 Plan was accepted by the Town. Compl. ¶¶ 56, 57. In 2009, Seaport brought this action against Napatree Point A Master Condominium alleging various claims. In 2012, Waldo and Hennessey submitted a new parking plan (2012 Plan), which Seaport claims does not comply with Ordinance 260-77. Id. at ¶¶ 58-59. The Westerly Town Planner approved the 2012 Plan in a preliminary form without an official zoning review, which Seaport claims to be in violation of Ordinance 260-77. Id. at ¶ 60. Seaport alleges that the 2012 Plan failed to show which residences and commercial units are served by the parking lot; how the number of spaces per unit is calculated; and how the spaces relate to the number of residences and the square footage of commercial units. Id. at ¶ 59. Seaport asserts that Ordinance 260-77 requires it to have nine parking spaces and that the 2012 plan does not provide it with those required spaces, thus rendering its property non-conforming as per the Town of Westerly Zoning Regulations. Id. at ¶¶ 56, 59.

In 2014, Seaport filed an Amended and Supplemental Complaint, including Count III, which added the Town as a Defendant and which is at issue in these Motions to Dismiss. Count III relates to these nine commercial parking spaces to which Seaport claims it is entitled. Id. at ¶¶ 22-23. In Count III, Seaport seeks declaratory judgment against the Town enforcing its rights under Ordinance 260-77 and asking the Court to strike down the 2012 Plan.

## II

### Parties' Arguments

Waldo, Hennessey, JHRW, and 118 Bay Street Corporation (collectively NPC) and the Town move to dismiss Count III based on Seaport's lack of standing to seek enforcement of Ordinance 260-77. The parties maintain that there is no actual case or controversy between the Town and Seaport, rendering declaratory judgment inappropriate in the instant matter. NPC and

the Town further argue that Seaport failed to exhaust its administrative remedies by not appealing the Town Planner’s decision to the Westerly Zoning Board. Seaport contends that the Town is a necessary and material party to the action and that declaratory judgment is an appropriate form of relief because without it Seaport would be left without an adequate remedy.

### III

#### Standard of Review

A Super. R. Civ. P. 12(b)(1) motion for lack of subject matter jurisdiction “questions the very power of the court to hear the case.” Rogers v. Rogers, 18 A.3d 491, 493 (R.I. 2011). “[I]n ruling on a Rule 12(b)(1) motion, a court is not limited to the face of the pleadings. A court may consider any evidence it deems necessary to settle the jurisdictional question.” Boyer v. Bedrosian, 57 A.3d 259, 270 (R.I. 2012).

Under Super. R. Civ. P. 12(b)(6), a motion to dismiss should be granted only “when it is clear beyond a reasonable doubt that [Seaport] 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 v. Alves, 944 A.2d 144, 149-50 (R.I. 2008). The court’s review is limited to the “four corners of the complaint and must assume all allegations are true, resolving any doubts in [Seaport’s] favor.” Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 278 (R.I. 2011). “The standard for granting a motion to dismiss is a difficult one for the movant to meet.” Pellegrino v. R.I. Ethics Commission, 788 A.2d 1119, 1123 (R.I. 2000). “This analysis requires a resolution of the overarching issue of justiciability: the court must have subject-matter jurisdiction over the issues raised in the complaint, [Seaport] must have standing, and the issues must not be moot.” Boyer, 57 A.3d at 270.

A Super. R. Civ. P. 12(c) motion is a motion for judgment on the pleadings. It is “tantamount to a Rule 12(b)(6) motion, and the same test is applicable to both, that is, is it clearly apparent that [Seaport] can prove no set of facts to support the complaint.” Collins v. Fairways Condominiums Ass’n, 592 A.2d 147, 148 (R.I. 1991); Chariho Regional Sch. District v. Gist, 91 A.3d 783, 787 (R.I. 2014). With a Super. R. Civ. P. 12(c) motion, the trial court may dispose of a case when material facts are not in dispute and only questions of law remain. Chariho Regional Sch. District, 91 A.3d at 787.

## IV

### Analysis

#### Declaratory Judgment

In the instant case, Seaport seeks a declaratory judgment requiring the Town to enforce its own zoning ordinances by striking down the 2012 Plan and, thus, securing Seaport’s rights in the nine parking spaces so that NPC cannot sell or transfer any interest in the spaces. Seaport also claims that the relief it seeks involves a determination of the “validity” of Ordinance 260-77. Before proceeding, the Court must address the threshold issues of whether Seaport has standing and whether there is an actual justiciable controversy.

The Uniform Declaratory Judgments Act (UDJA) “grants broad jurisdiction to the Superior Court to ‘declare rights, status, and other legal relations whether or not further relief is or could be claimed.’” Tucker Estates Charlestown, LLC v. Town of Charlestown, 964 A.2d 1138, 1140 (R.I. 2009) (citing G.L. 1956 § 9-30-1). Even where there are other avenues of relief, our Supreme Court has recognized that a plaintiff may proceed under the UDJA, in particular where “the complaint seeks a declaration that the challenged ordinance or rule is facially unconstitutional or in excess of statutory powers, or that the agency or board had no

jurisdiction.” Kingsley v. Miller, 120 R.I. 372, 374, 388 A.2d 357, 359 (1978). While the Superior Court has broad discretion in granting relief under the UDJA, “[i]ts discretion concerning whether to entertain the action itself . . . is more limited.” Tucker Estates Charlestown, LLC, 964 A.2d at 1140. To dismiss a declaratory judgment action under Super. R. Civ. P. 12(b)(6) “is proper only when the pleadings demonstrate that, beyond a reasonable doubt, the declaration prayed for is an impossibility.” Id.

In addressing the question of standing in a situation where a plaintiff challenges a statute, our Supreme Court has held that the “question is whether the person whose standing is challenged has alleged an injury in fact resulting from the challenged statute.” N&M Properties, LLC v. Town of West Warwick ex rel. Moore, 964 A.2d 1141, 1145 (R.I. 2009) (citing R.I. Ophthalmological Society v. Cannon, 113 R.I. 16, 26, 317 A.2d 124, 129 (1974)). Zoning ordinances are part of a class of laws which have the primary objective of protecting “public health, safety, morals, and welfare.” Robinson v. Town Council of Narragansett, 60 R.I. 422, 199 A. 308, 313 (1938). It is well established that “only the municipality, through its town solicitor, may initiate proceedings to enforce local zoning ordinances.” Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303, 309 (R.I. 1980); see also G.L. 1956 §§ 45-24-60(b),<sup>2</sup> 45-24-62;<sup>3</sup> Duffy v. Milder, 896 A.2d 27, 35 (R.I. 2006) (finding that “only a town may initiate a suit to enjoin violations of local zoning ordinances” unless the town solicitor fails to adequately represent interests of abutting land owners, which triggers an exception and allows abutting land

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<sup>2</sup> “The city or town may also cause suit to be brought in the supreme or superior court, or any municipal court . . . in the name of the city or town, to restrain the violation of, or to compel compliance with, the provisions of its zoning ordinance.” Sec. 45-24-60(b).

<sup>3</sup> “The supreme court and the superior court, within their respective jurisdictions . . . shall, upon due proceedings in the name of the city or town, instituted by its city or town solicitor, have power to issue any extraordinary writ or to proceed according to the course of law or equity or both.” Sec. 45-24-62.

owners to sue). In creating this rule, “the legislature intended to limit the exercise of jurisdiction by the courts in the enforcement of zoning ordinances to such proceedings only as were brought in the name of the municipality. . . .” Town of Lincoln v. Cournoyer, 95 R.I. 280, 286, 186 A.2d 728, 731 (1962). The purpose of this rule is to exclude individuals from instituting “unnecessary and unwarranted litigation that could serve only to unduly burden the courts and to distress and harass the affected landowners.” Id.

In N&M Properties, our Supreme Court was faced with a plaintiff seeking relief under the UDJA. 964 A.2d 1141. Specifically, Seaport alleged that a decrease in municipal parking led to a decrease in the value of his property, and that the Town’s decision to sell the parking areas was inconsistent with the comprehensive community plan. In its opinion, the Court determined that the plaintiff had no standing because he “did not enjoy any special ownership rights or privileges with respect to the municipal parking lots.” N&M Properties, LLC, 964 A.2d at 1145.

While Seaport, in the instant matter, could be said to have privileges with respect to the nine parking spaces based on its agreements with NPC, those privileges exist only as between Seaport and NPC, not between Seaport and the Town. Therefore, unlike the situation in N&M Properties, no actual controversy exists between the Town and Seaport with regard to ownership rights or privileges. Thus, Seaport, as an individual, does not have standing to force the Town to enforce Ordinance 260-77 through the guise of a declaratory judgment action.

Even if Seaport had standing, a “necessary predicate to a court’s exercise of its jurisdiction under the [UDJA] is an actual justiciable controversy.” Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004) (internal citations omitted). Injury in fact is generally considered “an invasion of a legally protected interest which is (a) concrete and particularized \* \* \* and (b)

actual or imminent, not conjectural or hypothetical.” Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Further, there can be no justiciability if the facts of the case do not “yield some legal hypothesis which will entitle plaintiff to real and articulable relief.” Meyer, 844 A.2d at 151.

Seaport maintains that the 2012 Plan violates Ordinance 260-77, that the Westerly Town Planner approved the plan in error, and that the Town has failed to comply with its zoning ordinances by approving the plan. The harm Seaport asserts is that the 2012 Plan effectively has placed Seaport’s property in violation of Ordinance 260-77 because it now lacks the necessary number of parking spaces as required by the Ordinance and that, as such, this is allegedly a deprivation of a legally protected interest. See N&M Properties, LLC, 964 A.2d at 1144 (holding that plaintiff must have suffered some injury in fact that is of a personal nature). However, in its Amended and Supplemental Complaint, Seaport does not assert that it has lost the use of the nine parking spaces allocated to it under the 2005 Plan. Nor does the Amended and Supplemental Complaint suggest that the Town has sought to enforce Ordinance 260-77 against Seaport. Consequently, Seaport has not alleged an injury that could be considered “concrete and particularized” or “actual or imminent.” Lujan, 504 U.S. at 560.

Rather, the injury, if any, seems to be hypothetical; namely, that there is a possibility that Seaport could be denied the use of the parking spaces or that the Town might bring an action against Seaport for a violation of Ordinance 260-77. See N&M Properties, LLC, 964 A.2d at 1145 (finding that “the facts postulated [must] yield to some conceivable legal hypothesis which will entitle the plaintiff to some relief against the defendant”). Without an actual controversy, Seaport is requesting this Court to issue what is, in effect, an advisory opinion.

It is well established that courts will not “issue advisory opinions or rule on abstract questions.” State v. Beechum, 933 A.2d 687, 689 (R.I. 2007); see also Watson v. Fox, 44 A.3d 130, 138 (R.I. 2012) (holding that where “plaintiff essentially is seeking an advisory opinion disguised as a request for a declaratory judgment,” and plaintiff lacks standing, a motion to dismiss is appropriate). Furthermore, a “declaratory-judgment action may not be used ‘for the determination of abstract questions or the rendering of advisory opinions.’” Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997) (citing Lamb v. Perry, 101 R.I. 538, 542, 225 A.2d 521, 523 (1967)). A declaratory judgment action does not “license litigants to fish in judicial ponds for legal advice.” Goodyear Loan Co. v. Little, 107 R.I. 629, 630, 269 A.2d 542, 543 (1970). Thus, this Court declines Seaport’s request to issue an advisory opinion based on the hypothetical nature of its arguments.

The Court concludes that Count III of Seaport’s Amended and Supplemental Complaint fails due to both a lack of standing and a justiciable controversy. Furthermore, this Court may not issue an advisory opinion. It is not clear that Seaport has suffered any harm, the Town has taken no action against Seaport to create a controversy, and an individual landowner does have standing to bring a suit seeking the enforcement of zoning ordinances.

## V

### **Conclusion**

The Motion of Defendants Waldo, Hennessey, JHRW and 118 Bay Street Corporation to dismiss Count III of the Amended and Supplemental Complaint is granted. The Motion of the Town to dismiss Count III of the Amended and Supplemental Complaint is granted.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Seaport Studios, Inc. v. Waldo, et al.

**CASE NO:** WC-2009-0871

**COURT:** Washington County Superior Court

**DATE DECISION FILED:** January 13, 2015

**JUSTICE/MAGISTRATE:** Lanphear, J.

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