STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

[FILED: AUGUST 27, 2018]

JAMES A. MASCOLA, IN HIS CAPACITY AS TRUSTEE OF THE JAMES A. MASCOLO REVOCABLE TRUST	:	
VS.	:	**C.A. NO. WC-2018-0097**
TOWN OF WESTERLY	:	

DECISION

TAFT-CARTER, J. Before this Court is Defendant Town of Westerly's (the Town) Motion to Dismiss Plaintiff James A. Mascolo, in his capacity as Trustee of the James A. Mascolo Revocable Trust's (Plaintiff) Complaint, appealing the enactment of a Zoning Ordinance (the Ordinance) pursuant to Super. R. Civ. P. 12(b)(1) and 12(b)(6). The Town argues that the Court does not have subject matter jurisdiction over the instant matter because the Plaintiff failed to file his appeal in accordance with G.L. 1956 § 45-24-71(a); the Complaint failed to allege with specificity the way in which the Ordinance conflicts with the Town's Comprehensive Plan in accordance with § 45-24-71(b); that the Plaintiff lacked standing to allege the procedural due process claim because he waived the claim for defective notice of the public hearing and because he did not suffer an injury; that the Plaintiff's claim for substantive due process violation fails; and that the officials or employees of the Town are entitled to legislative immunity from claims arising under § 1983. Jurisdiction is pursuant to Super. R. Civ. P. 12.

I

Facts and Travel

This action arises out of the passage of a Zoning Ordinance by the Westerly Town Council on January 22, 2018. The Plaintiff appeals Chapter 1910 of the Town of Westerly Code of Ordinances entitled "An Ordinance in Amendment of Chapter 1439 of the General Ordinances of the Town of Westerly entitled 'Re-Enact and Re-Adopt Chapter 1242 entitled 'The Westerly, Rhode Island, Zoning Ordinance of 1998, as Amended.'"" The Ordinance created an overlay district regulating airport hazards related to the Westerly State Airport and established the location and boundaries of the Airport Area Overlay District to provide a clear area, free of above-ground obstructions and any structures in the zone closest to each runway end at the Westerly Airport in order to enhance the protection of people and property on the ground. The Ordinance set forth "Confliction Areas," which are defined as "[t]hose areas identified within the Airport Area Overlay District where ground elevation plus the maximum height restriction under current zoning . . . is within the FAR Part 77 approach surface and conflicts with the regulated imaginary surfaces." (Westerly Zoning Ordinance § 260-51(D).) The Ordinance stated that "[t]he confliction area maps . . . are based on FAR Part 77 Surfaces designated on the Airport Layout Plan for the Westerly State Airport of July 2009 and the results of FAR Part 77 35' Height Analysis conducted by Stantec, engineering consultant for RIAC, for the Westerly Airport in July 2016." (Westerly Zoning Ordinance § 260-51(E)(2).)

The Plaintiff is the owner of property located at 4 Eagle Court in the Town (the Property). The Property is in close proximity to the Westerly State Airport. The Ordinance

designated the Plaintiff's property as being located in a Confliction Area near Runway 32 of the Airport and included the Property in the Overlay District.

On September 29, 2017, the Westerly Planning Board issued a unanimous Advisory Opinion in favor of the Ordinance. (Advisory Op., Sept. 29, 2017.) In the Advisory Opinion, the Planning Board explained that it reviewed a version of the Ordinance on August 9, 2016, which was "revised based on research and efforts made by the Planning & Zoning Solicitor." *Id.* The Planning Board noted that the difference between the initial Ordinance and the revised ordinance was the removal of Zones B and C from the Zoning District. *Id.* The Advisory Opinion stated that the revised Ordinance "is consistent with the Comprehensive Plan, specifically Action Item 3.6, and that the proposed ordinance advances the purposes of zoning as defined in § 260-5 General Purposes of the Zoning Ordinance . . . ." *Id.*

On November 21, 2017, Alan R. Andrade, Senior Vice President of Operations and Maintenance at the Rhode Island Airport Corporation (RIAC), issued a letter to the Town's Manager regarding the clearing of airspace obstructions surrounding the Airport. (RIAC letter, Nov. 21, 2017.) The letter addressed issues relating to an obstruction removal project by RIAC in order to meet the Federal Aviation Administration (FAA) requirements for safe approach surfaces at the Westerly State Airport. *Id.* The letter advised that "RIAC attempted to purchase avigation easements from the neighbors whose properties were identified to have obstructions in approach surface, but not all neighbors were willing to grant the easement." (RIAC letter at 2.) RIAC then requested the Rhode Island Department of Transportation (RIDOT) acquire these easements by eminent domain; however, a lawsuit was filed in the Rhode Island Superior Court challenging the State's authority to acquire avigation easements. *Id.* A preliminary injunction

was temporarily granted restraining RIDOT from using its eminent domain authority to remove the obstructions until a full trial on the matter occurs. *Id.*

The RIAC letter advised that rather than litigating with the Town neighbors, RIAC sought guidance from the elected officials as to "what utility the Town wants from the Airport." *Id.* The letter advised that RIAC was committed to working closely with the Town and that if the Town was able to come to an agreement with the neighbors for the clearing of obstructions, RIAC would work to secure funding from the FAA for the purchase of avigation easements. *Id.* at 3.

On or about November 27, 2017, the Town sent a letter to individuals who own property in close proximity to the Airport notifying them of the December 18, 2017 meeting. The letter stated:

> "Public Hearing will be held in the Council Chambers, Town Hall, Westerly, Rhode Island, on Monday, December 18, 2017 at 6:00 o'clock pm. . . . to consider the proposed ordinance, to amend the Zoning Ordinance and Zoning Map as summarized below:
>
> "AN ORDINANCE IN AMENDMENT OF CHAPTER 1439 OF THE GENERAL ORDINANCES OF THE TOWN OF WESTERLY ENTITLED 'RE-ENACT AND RE-ADOPT CHAPTER 1242 ENTITLED 'THE WESTERLY, RHODE ISLAND, ZONING ORDINANCE OF 1988, AS AMENDED.'"" (Compl. ¶ 9.)

The Plaintiff alleges that he was neither sent notice of the hearing by certified mail nor did he receive a "map in the Notice showing the existing and proposed boundaries, zoning district boundaries, existing streets and roads and their names, and city and town boundaries…." (Compl. ¶¶ 17-18.)

The Town Council held two public hearings on December 18, 2017 and January 22, 2018, both of which were attended by counsel for the Plaintiff, Gregory Massad (Attorney

Massad). (Meeting Minutes, Dec. 18, 2017.) According to the December 18, 2017 meeting minutes, several citizens provided testimony and written letters in favor of and in opposition to the Ordinance at this hearing. *Id.* Attorney Massad spoke in opposition to the passage of the Ordinance on behalf of the Plaintiff at both hearings stating that the Ordinance was ill-advised and premature. *Id.* He argued that the inclusion of properties in the runway protection zone that are not presently affected was "reckless." *Id.* Additionally, Attorney Massad stated that the issue with the Ordinance not only involved the cutting of property owner's trees, but also constitutional protection of clients' properties. *Id.* Various citizens opposing the enactment of the Ordinance disapproved of the trimming of trees on their property. *Id.* The opponents were concerned that the effect of the Ordinance would result in the devaluing of their properties. *Id.* Alternatively, citizens in favor of the Ordinance testified that the airport brings in business to the surrounding area and that it is an asset to the community. *Id.*

After the public forum, Town Councilors addressed Citizens' comments "relating to the airport, its economic impact, the fact that people bought homes within the vicinity of the airport, the displacement of thresholds, and the removal or cutting of trees." *Id.* Town Council Vice President Celico inquired whether the Town leadership is willing to reach an agreement with the neighbors for clearing of obstructions. *Id.* Vice President Celico noted that RIAC intended to work on securing grant funding from the FAA for the purchase of avigation easements at that time if an agreement were reached. *Id.* The Town Council unanimously voted to continue the hearing to January 22, 2018. *Id.* At the January 22, 2018 hearing, the Town Council voted to pass the proposed Ordinance by a vote of 6 to 1. (Meeting Minutes, Jan. 22, 2018.)

The Plaintiff filed the instant action on February 22, 2018. The Plaintiff requested the Court to declare the Ordinance invalid for failure to comply with the notice requirements set out

in § 45-24-71(a) and Chapter § 260-28D(2) of the Westerly Code, and for failure to bring the Ordinance into compliance with the Comprehensive Plan in accordance with § 45-24-71(b). Furthermore, the Plaintiff seeks a declaration that the Ordinance is unconstitutional as a deprivation of his procedural and substantive due process rights under § 1983. The Plaintiff also seeks a permanent injunction enjoining the Town from enforcing the Ordinance. Additionally, the Plaintiff seeks damages, reasonable attorney's fees, costs and other equitable relief that this Courts finds proper and just.

The Court heard oral arguments on June 18, 2018 and now issues its Decision.

II

Standard of Review

It is well-settled in Rhode Island that the "sole function of a motion to dismiss is to test the sufficiency of the complaint." *Multi-State Restoration, Inc. v. DWS Properties, LLC*, 61 A.3d 414, 416 (R.I. 2013) (*quoting Laurence v. Sollitto*, 788 A.2d 455, 456 (R.I. 2002) (further quotation omitted)). "'When ruling on a Rule 12(b)(6) motion, the trial justice must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor.'" *Estate of Sherman v. Almeida*, 747 A.2d 470, 473 (R.I. 2000) (quoting *R.I. Affiliate, Am. Civil Liberties Union, Inc. v. Bernasconi*, 557 A.2d 1232, 1232 (R.I. 1989)).

The Rhode Island Supreme Court held in *Leone v. Mortg. Elec. Registration Sys.*, 101 A.3d 869 (R.I. 2014), "[w]hen ruling on a motion to dismiss, Rule 12(b) states if 'matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56' . . . when the [hearing] justice receives evidentiary matters outside the complaint and does not expressly exclude them in

passing on the motion, then Rule 12(b)(6) specifically requires the motion to be considered as one for summary judgment." *Multi-State Restoration*, 61 A.3d at 417 (*quoting Martin v. Howard*, 784 A.2d 291, 298 (R.I. 2001)).

III

Analysis

A

Appeal of Zoning Enactment

The Westerly Home Rule Charter empowers the Westerly Town Council to "enact, repeal, and amend zoning ordinances" so long as the ordinance is not inconsistent with state law. Home Rule Charter § 2-1-9(c). Here, the Town Council utilized this power to enact a new zoning ordinance to create an overlay district regulating airport hazards related to the Westerly State Airport and to establish the location and boundaries of the Airport Area Overlay District.

The Town argues that the Court lacks subject matter jurisdiction over the instant appeal because the Plaintiff's Complaint failed to comply with § 45-24-71(a), requiring an appeal of an enactment or an amendment to a zoning ordinance to the Superior Court to be made within thirty (30) days after the enactment or amendment became effective. The Town also argues that the Complaint fails to comply with § 45-24-71(b) requiring the allegations pertaining to an appeal of an ordinance to be pled with specificity. The Town concludes that because all four (4) counts of the Plaintiff's Complaint rely on and incorporate therein Plaintiff's appeal of the Zoning Ordinance pursuant to § 45-24-71(a), the Town seeks dismissal of the Plaintiff's Complaint in its entirety. Conversely, the Plaintiff argues however, that the thirty day appeal period did not begin to run until the day after the Ordinance was passed at the January 22, 2018 public hearing pursuant to Chapter § 260-3 of the Westerly Code. The Plaintiff avers that his Complaint

complied with § 45-24-71(b) because it specifically referenced the challenges of potential expansion of the airport due to the proximity to residential areas and argues that the Ordinance effectively rezones his property to a zone not articulated in or contemplated by the Comprehensive Plan.

The Superior Court possesses exclusive original jurisdiction over actions at law in which the amount in controversy is at least $10,000. *See* G.L. 1956 § 8-2-14. "Clearly, 'subject-matter jurisdiction is an indispensable requisite in any judicial proceeding.'" *Gallop v. Adult Corr. Institutions*, 182 A.3d 1137 (R.I. 2018) (*quoting Long v. Dell, Inc*., 984 A.2d 1074, 1079 (R.I. 2009)). "Subject-matter jurisdiction is the very essence of the court's power to hear and decide a case"; it has been defined as "jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." *Id*. (*quoting* Black's Law Dictionary 931 (9th ed. 2009)). While the Superior Court possesses exclusive original subject-matter jurisdiction to hear the case at bar, whether the Court should exercise that jurisdiction is the crux of the issue. This Court has drawn a distinction between subject-matter jurisdiction and the authority of the court to proceed. *See Chase v. Bouchard*, 671 A.2d 794, 795-96 (R.I. 1996); *Hartt v. Hartt*, 121 R.I. 220, 226, 397 A.2d 518, 521 (1979).

Section 45-24-71(a) governing the appeals of an enactment or amendment to a zoning ordinance provides:

> "An appeal of an enactment of or an amendment to a zoning ordinance may be taken to the superior court for the county in which the municipality is situated by filing a complaint within thirty (30) days after the enactment or amendment has become effective. The appeal may be taken by an aggrieved party or by any legal resident or landowner of the municipality or by any group of residents or landowners whether or not incorporated, of the municipality. The appeal shall not stay the enforcement of the zoning ordinance, as enacted or amended, but the court may, in its discretion, grant a stay on appropriate terms, which may include

> the filing of a bond, and make other orders that it deems necessary for an equitable disposition of the appeal." *Id.* (*emphasis added*).

Moreover, § 45-24-71(b) requires the complaint to "state with specificity the area or areas in which the enactment or amendment does not conform with the comprehensive plan and/or the manner in which it constitutes a taking of private property without just compensation." *Id.*

Section 5 of Chapter § 260-51 of Westerly's "Airport Area Overlay District" Ordinance, states:

> "This Ordinance shall take effect upon passage."
> "A true copy of an Ordinance passed January 22, 2018." *Id.*

The Plaintiff argues that Chapter § 260-3 of the Westerly Code entitled "Westerly Rhode Island Zoning Ordinance of 1998," delayed the effective date of the appeal period to the following day. Chapter § 260-3 provides that "[t]his chapter shall take effect on October 16, 1998, any subsequent amendment to this chapter shall take effect upon the day following its passage by the Town Council." *Id.* However, in accordance with § 1-3-3 of the Westerly Home Rule Charter, the date of passage of an Ordinance is controlled by the language in the superseding Ordinance. Section 1-3-3 provides that "[e]xcept insofar as they are inconsistent with this Charter, all the ordinances, rules, regulations, and resolutions heretofore enacted by the Council and any board or commission shall continue in effect until superseded by action of the Council." *Id.* There is no conflict between the effective date provided in the new Ordinance and Chapter § 260-3 because § 260-51 superseded § 260-3. Thus, the language contained in § 260-51, enacted by the Town Council on January 22, 2018, controlled the date the Ordinance was passed and became effective. Sec. 1-3-3.

Clearly,

> "The power to enact laws includes the power to fix a future effective date. A statute with a definite effective date commences

> operation from that time. The rule applies only where a contrary intent is not manifest in the act itself. Where a contrary intent is expressly stated a statute should take effect in accordance with the purpose and intent of the body which enacts it." 2 *Sutherland Statutory Construction* § 33:7 (7th ed.); *see also Dallman v. Isaacs*, 911 A.2d 700, 705 (R.I. 2006) (noting "the well-settled principle that, absent express statutory language designating otherwise, an ordinance amendment becomes effective on the date of its passage[]").

Consistent with § 45-24-71(a) and in accordance with the language of the Ordinance, Chapter § 260-51, the Ordinance took effect on January 22, 2018, the day the Ordinance was passed by the Town Council. The time for filing an appeal of this Ordinance began on January 22, 2018, running until February 21, 2018, thirty days after the Ordinance took effect. Thus, the Plaintiff's appeal of the zoning ordinance on February 22, 2018 was untimely. As such, the Town's Motion to Dismiss the Plaintiff's appeal of the enacted statute pursuant to § 45-24-71 is granted as to Count II.

B

Standing

1

Notice Requirements

The Town argues that Plaintiff lacks standing to assert his procedural due process claims because any alleged notice deficiencies were waived upon Plaintiff's counsel's attendance and participation at the public hearings and because Plaintiff did not allege an injury sufficient to create a justiciable controversy.[1] Alternatively, Plaintiff argues that his counsel was

[1] The Court may review and consider any evidence outside the four corners of the complaint in adjudicating Rule 12(b)(1) motions to determine if Plaintiff has standing to bring the instant action. *Boyer v. Bedrosian*, 57 A.3d 259, 270 (R.I. 2012). Therefore, the Court may consider the Meeting Minutes and other evidence in determining whether the Plaintiff has standing.

disadvantaged or aggrieved by such defective notice, thereby preserving his claim for defective notice. The Plaintiff also asserts that he suffered an economic injury to his property due to its re-classification in a "Confliction Area" as a result of the Ordinance.

Pursuant to § 45-24-53(c), "[w]here a proposed amendment to an existing ordinance includes a specific change in a zoning district map, but does not affect districts generally, public notice shall be given as required by subsection (a) of this section, with the additional requirements that:

> "(1) Notice shall include a map showing the existing and proposed boundaries, zoning district boundaries, existing streets and roads and their names, and city and town boundaries where appropriate; and
> "(2) 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." *Id.*

Likewise, Westerly Code 260-28D(2) requires public notice to be given "[w]here a proposed amendment to this chapter includes a specific change in the Zoning Map" as follows:

> "(a) Notice shall include a map showing the existing and proposed zoning district boundary lines, existing streets and roads and their names, and Town boundary lines within the zoning district as existing and as proposed; and
> "(b) Written notice of the date, time and place of the public hearing and the nature and purpose thereof shall be sent by the applicant to all owners of real property whose property is located in or within 200 feet of the perimeter of the area proposed for change, whether within the Town or within an adjacent Town. Such notice shall be sent by both first-class mail, postage prepaid and by certified mail

> return receipt requested at least 21 days prior to the date of hearing. Notice shall be sent to the last known address of such owners as shown on the Town's current real estate tax assessment records and if such address is different from the property address also to said property address by first-class mail, postage prepaid. Prior to the hearing the applicant or its legal representative shall file with the Town Clerk a notarized affidavit that the notice provisions have been satisfied." *Id*. (*emphasis added*).

In the present case, two public hearings took place on December 18, 2017 and January 22, 2018 regarding the Ordinance. The Town sent a letter to individuals who owned property in close proximity to the Airport, notifying them of the December 18, 2017 meeting. The letter was not sent by certified mail, nor did it include a map showing the existing and proposed boundaries, zoning district boundaries, existing streets and roads and their names, and city and town boundaries where appropriate. No additional notice was sent to the Plaintiff. Therefore, notice of the public hearing did not comply with § 45-24-53(c)(1) and Westerly Code 260-28D(2), requiring a map "showing the existing and proposed boundaries, zoning district boundaries, existing streets and roads and their names, and city and town boundaries where appropriate" to be sent with written notice "of the date, time, and place of the public hearing and the nature and purpose of the hearing." Section 45-24-53(c)(1)-(2).

However, "[p]ersonal attendance at a meeting of a government body constitutes a waiver of the right to object to any defect concerning the notice of any proceedings that occur at that meeting, unless 'the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect.'" *Gardner v. Cumberland Town Council*, 826 A.2d 972, 980-81 (R.I. 2003) (*quoting Graziano v. R.I. State Lottery Comm'n*, 810 A.2d 215, 222 (R.I. 2002)). The Rhode Island Supreme Court concluded that "[g]iven these circumstances, the [plaintiffs] waived their right to object to the alleged lack of personal service on them . . . because they and their attorney attended the December 1998 meeting at which the council voted

to abandon the street." *Id*. at 981. In *Estate of Konigunda v. Town of Coventry*, 605 A.2d 834, 835 (R.I. 1992), the Court found that "[a]lthough it is undisputed that the council failed to comply with § 24-2-2, it is our view that petitioner waived its right to object to the lack of notice by appearing and opposing the declaration on the merits at the November 13, 1989 hearing. Thus actual notice of the hearing was established." This Court noted that "[i]t is significant that petitioner's attorney also made substantive factual and legal arguments against the declaration." *Id*. at 835.

While Attorney Massad appeared at both public hearings and objected to the passage of the Ordinance on behalf of Plaintiff, Plaintiff preserved his defective notice claim because he alleged that he and his attorney were disadvantaged or aggrieved by the defective notice's failure to include a map depicting the existing and proposed zoning district boundary lines. Attorney Massad argued that this defect negatively impacted his ability to prepare and effectively advocate on Plaintiff's behalf because he was required to rely on outdated and incomplete data when preparing to defend Plaintiff's interests at the public hearings. *Gardner*, 826 A.2d at 980-81 (noting that a claimant waives his right to object to any defective notice unless "the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect"); *Graziano*, 810 A.2d at 222 (explaining that lack of preparation or ability to respond to the issue due to defective notice constitutes a disadvantage or grievance).

In considering the Town's Rule 12(b)(6) Motion to Dismiss, the Court must "'assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor.'" *Estate of Sherman*, 747 A.2d at 473 (*quoting Bernasconi*, 557 A.2d at 1232). Thus, for the purposes of this motion only, the Court finds that Plaintiff and his Counsel were disadvantaged or aggrieved by the Town's defective notice, thereby preserving Plaintiff's defective notice

claim. *Gardner*, 826 A.2d at 980-81; *Graziano*, 810 A.2d at 222. Therefore, the Town's Motion to Dismiss is denied as to this count.

2

Injury-In-Fact

The test for standing is whether the person whose standing is challenged has alleged an injury in fact, economic or otherwise, resulting from the challenged statute. *R.I. Ophthalmological Soc'y v. Cannon*, 113 R.I. 16, 317 A.2d 124 (1974). If he or she has alleged such an injury, he or she satisfies the requirement of standing. *Id.* In addition, this Court "defined injury in fact as 'an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.'" *Key v. Brown Univ.*, 163 A.3d 1162 (R.I. 2017) (*quoting N & M Properties, LLC v. Town of West Warwick ex rel. Moore*, 964 A.2d 1141, 1145 (R.I. 2009)). "It is also recognized that the personal nature of a plaintiff's injury must 'demonstrate a personalized injury distinct from that of the community as a whole.'" *Key*, 163 A.3d at 1169 (*quoting Meyer v. City of Newport*, 844 A.2d 148, 151 (R.I. 2004)).

In order to have standing to bring an action under the Uniform Declaratory Judgments Act, a plaintiff must have an actual justiciable controversy. *Sullivan v. Chafee*, 703 A.2d 748 (R.I. 1997) ("A declaratory-judgment action may not be used 'for the determination of abstract questions or the rendering of advisory opinions[]'"). "[W]hen standing is at issue, the focal point shifts to the claimant, not the claim, and a court must determine if the plaintiff 'whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable' or, indeed, whether or not it should be litigated." *McKenna v. Williams*, 874 A.2d 217, 226 (R.I. 2005) (*quoting Flast v.Cohen*, 392 U.S. 83, 99-100 (1968)). In addition,

although § 45-24-50(a) provides that a municipality has the authority to amend its zoning ordinances through action by its town council, § 45-24-50(b) requires that any such amendments be consistent with the town's comprehensive plan. Accordingly, § 45-24-71 provides for a cause of action against the town council for an amendment of the town's zoning ordinance which is not in conformance with the Comprehensive Plan, and it entitles this Court to invalidate a zoning amendment which does not so conform.

Here, Plaintiff alleged that the Ordinance injured his Property by placing restrictions on the height of a structure constructed on the Property and requiring property owners to submit an application for development plan review to the Town's planning board prior to constructing any structure, development or subdivision, other than a single family residence. The Ordinance also requires property owners to receive the approval and recommendation of the FAA and RIAC. Thus, Plaintiff has alleged an economic injury to his land caused by the enactment of the Ordinance, specifically pointing to the restrictions placed on his property and other properties located within the Confliction Area. *Key*, 163 A.3d at 1170 (noting that the plaintiffs have standing to bring suit because "they have suffered particularized injury as a result of the field's construction and subsequent use—including physical damage to their home, a decrease in their home's value, and a diminished use and enjoyment of their property[]").

Therefore, Plaintiff has the requisite standing to bring his claim pursuant to § 45-24-71 and is a proper party to bring the instant action because he suffered an injury to his Property caused by the Ordinance. *R.I. Ophthalmological Soc'y*, 113 R.I. at 16, 317 A.2d at 124; *Key*, 163 A.3d at 1170; *Town of Coventry v. Hickory Ridge Campground, Inc.*, 111 R.I. 716, 723, 306 A.2d 824, 828 (1973). Thus, the Town's Motion to Dismiss is denied as to this count.

C

Arbitrary and Capricious Conduct

The Town argues that the rezoning of Plaintiff's property constituted a legitimate state purpose and that the means chosen to accomplish that purpose were rational. The Plaintiff counters that the Ordinance's designation of his Property in a Confliction Area is arbitrary, unreasonable and not rationally related to a legitimate government interest. The Plaintiff asserts that the Town's actions deprived him of his constitutionally protected substantive due process rights by depriving him of his interests in and right to develop his Property. Specifically, Plaintiff's Complaint alleges that the enactment of the Ordinance constitutes an unjust taking without compensation and a deprivation of Plaintiff's constitutional right to his property.

"The guarantee of procedural due process assures that there will be fair and adequate legal proceedings, while substantive due process acts as a bar against 'certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *State v. Germane*, 971 A.2d 555, 574 (R.I. 2009) (*quoting L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202, 210 (R.I. 1997)). "The substantive component of due process 'guards against arbitrary and capricious government action.'" *East Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Town of Barrington*, 901 A.2d 1136 (R.I. 2006) (*quoting Brunelle v. Town of S. Kingstown*, 700 A.2d 1075, 1084 (R.I. 1997)). "To prevail on such a claim, a successful litigant must show that the statute in question violates a constitutionally protected liberty or property interest or that the General Assembly's implementation of the statute was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" *Id. at 1150* (*quoting Cherenzia v. Lynch*, 847 A.2d 818, 826 (R.I. 2004)). In analyzing substantive due process claims,

> "The threshold question that must be addressed before [the Court] can determine the constitutionality of the statute is whether a fundamental right is in play. If so, in that case the statute will be subject to strict scrutiny; however, where neither a suspect class nor a fundamental right is implicated, then the legislation properly is analyzed under a minimal-scrutiny test. Under those circumstances, this Court will review the statute to insure that a rational relationship exists between the provisions of [the statute] and a legitimate state interest. Under this analysis, if [the Court] can conceive of any reasonable basis to justify the classification, [it] will uphold the statute as constitutional." *Germane*, 971 A.2d at 582 (*quoting Riley v. R.I. Dep't of Envtl. Mgmt*., 941 A.2d 198, 205-06 (R.I. 2008)).

Here, Plaintiff seeks a declaration that the Town Council acted arbitrarily or capriciously when it passed the Ordinance rezoning Plaintiff's property to a new zoning designation. Such a declaration in the context of a Rule 12(b)(6) Motion to Dismiss would require the Court to look beyond the four corners of the Complaint to analyze the intent of the Town Council in determining which properties were to be included in the Confliction Area. *Consolidated Realty Corp. v. Town Council of Town of N. Providence*, 513 A.2d 1, 5 (R.I. 1986) (in order to determine if findings are arbitrary or capricious, the Court "must scrutinize the whole record to determine whether legally competent evidence exists to support the findings of the court below[]"). Where the Court is precluded from considering any evidence outside the scope of Plaintiff's Complaint upon a motion pursuant to Rule 12(b)(6), the Town's Motion to Dismiss must be denied as to this count. *Estate of Sherman*, 747 A.2d at 473 (*quoting Bernasconi*, 557 A.2d at 1232); *Leone*, 101 A.3d at 873 (if the trial justice considers matters outside the pleading and does not expressly exclude them in passing on the motion, then Rule 12(b)(6) specifically requires the motion to be considered as one for summary judgment).

D

Legislative Immunity

The Town argues that the Westerly Town Council legislators are entitled to legislative immunity from suit under § 1983. The Town asserts that absolute immunity attaches to all actions of local officials taken in the sphere of legitimate legislative activity which is applicable to the instant suit. However, Plaintiff argues that the Town may not shield itself behind the doctrine of legislative immunity because this doctrine only applies to claims brought against legislators and officials, and not against municipalities as a whole.

The United States Supreme Court held in *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) "that state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities." The Court noted that the purpose of legislative immunity is to ensure that "the exercise of legislative discretion [would] not be inhibited by judicial interference or distorted by the fear of personal liability." *Id*. at 44. The Court went on to afford local legislators similar legislative immunity to § 1983 suits noting that "legislators were entitled to absolute immunity from suit at common law and that Congress did not intend the general language of § 1983 to 'impinge on a tradition so well grounded in history and reason.'" *Id.* at 49 (*quoting Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

However, it is well-settled in Rhode Island that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *L.A. Ray Realty*, 698 A.2d at 209-10 (*quoting Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 659 (1978)). This Court noted that "the court is interposed between the state and the people in order

to protect the people from unconstitutional actions under color of state law by the Executive, the Legislature, or the Judiciary." *Id*. at 209.

Here, Plaintiff names only the Town as a Defendant to this lawsuit. It does not name any officials or employees of the Town in either their official or individual capacities as Defendants which render legislative immunity as a shield to Plaintiff's claims. Thus, the Town's Motion to Dismiss is denied as to this count because legislative immunity is not afforded to the municipality to shield it from a § 1983 claim. *Bogan*, 523 U.S. at 44; *L.A. Ray Realty*, 698 A.2d at 209.

E

Attorney's Fees

The Town requests reasonable attorney's fees to compensate it for defending the instant action. The Plaintiff argues that the Town is not entitled to attorney's fees because it cannot show that Plaintiff's actions "were frivolous, unreasonable, or without foundation" and brought in bad faith. *DiRaimo v. City of Providence*, 714 A.2d 554, 557-58 (R.I. 1998); *see also Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1192 (1st Cir. 1996). Section 45-24-71(f) of the Zoning Enabling Act specifically provides for attorney's fees only in cases involving the appeal of the enactment or amendment of a zoning ordinance. This section provides that "[t]he court may, in its discretion, upon the motion of the parties or on its own motion, award reasonable attorney's fees to any party to an appeal, including a municipality." *Id.* The Court declines to award attorney's fees to the Town because it has not found Plaintiff's actions to be "frivolous, unreasonable, or without foundation" or brought in bad faith. *DiRaimo*, 714 A.2d at 557-58; *Andrade*, 82 F.3d at 1192.

IV

Conclusion

Based upon the above reasons, the Town's Motion to Dismiss the Plaintiff's Complaint is granted with respect to Count II and denied with respect to all remaining Counts. The Town's request for attorney's fees is denied. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	James A. Mascola, in his capacity as Trustee of the James A. Mascola Revocable Trust v. Town of Westerly
CASE NO:	WC-2018-0097
COURT:	Washington County Superior Court
DATE DECISION FILED:	August 27, 2018
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
For Plaintiff:	Gregory Massad, Esq.
For Defendant:	William J. Conley Jr., Esq.