STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: August 11, 2022)

RHODE ISLAND GROWS, LLC; RICHARD J. SCHARTNER; and NORMAN SCHARTNER,	:	
Appellants,	:	
	:	
v.	:	**C.A. No. WC-2022-0057**
	:	
RICHARD BOOTH, in his capacity as a member of the Exeter Zoning Board of Appeals; THOMAS MCMILLIAN, in his capacity as a member of the Exeter Zoning Board of Appeals; RICHARD QUATTROMANI, in his capacity as a member of the Exeter Zoning Board of Appeals; DR. SUSAN LITTLEFIELD, in her capacity as an alternate member of the Exeter Zoning Board of Appeals; LOREN ANDREWS, in his capacity as a member of the Exeter Zoning Board of Appeals; TIMOTHY ROBERTSON, in his capacity as a member of the Exeter Zoning Board of Appeals; and SUSAN FRANCO-TOWELL, in her capacity as an alternate member of the Exeter Zoning Board of Appeals,	:	
Appellees.	:	

DECISION

TAFT-CARTER, J. Before the Court for decision is a zoning appeal brought by Rhode Island Grows, LLC, Richard J. Schartner, and Norman Schartner (collectively, R.I. Grows) from the February 7, 2022 Decision (the Decision) of the Town of Exeter's (the Town) Zoning Board of Review (the Zoning Board). Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

In the Decision, the Zoning Board upheld the Town Zoning Inspector's (the Zoning Inspector) October 6, 2021 Notice of Violation and Order to Cease and Desist (the Order) enjoining R.I. Grows from any further construction on Town Lots 52-1-4, 52-1-5, and 52-1-6 (the Property) due to multiple violations of the Town Zoning Code (the Zoning Code). Compl. ¶ 38; *see id.* Ex. I (Decision) and Ex. F (Order). R.I. Grows seeks to build an agricultural greenhouse facility (the Greenhouse) that will allow it to engage in Controlled Environmental Agriculture (CEA) on the Property. (Compl. ¶ 16.) The parties' dispute centers around whether construction of the Greenhouse must comply with the procedural and substantive requirements of the Zoning Code. *See* Appellants' Mem. Law Supp. Appeal Compl. (Appellants' Mem.) 2-3; Defs./Appellees' Mem. Law Opp'n Appeal Compl. (Defs.' Mem.) 2-3.

On August 20, 2021, the Zoning Inspector sent a letter to R.I. Grows through its principals, Richard and Norman Schartner (the Schartners) (R. at 48). After stating that two years had passed since counsel for R.I. Grows had first discussed the Greenhouse with the Zoning Inspector, the Zoning Inspector noted that construction on the Greenhouse had begun and asked why R.I. Grows believed that its "CEA" project (the Project) could proceed without first obtaining zoning approval from the Town. *Id.* The Zoning Inspector stated that R.I. Grows had sought Town approval for the solar accessory elements of the Greenhouse, which the Zoning Inspector interpreted as an acknowledgment of the Town's regulatory authority. *Id.* The Zoning Inspector asked for a timely response and noted that failure to respond with an adequate justification could result in an order to cease and desist. *Id.*

On August 31, 2021, R.I. Grows responded to the Zoning Inspector by requesting an opportunity to further discuss the Project. (R. at 50.) While recognizing the Town's regulatory authority over the construction of ground based solar arrays, R.I. Grows disputed the assertion that its current activities on the Property—which it described as "agricultural activities[,] primarily the construction of a greenhouse for the purpose of plant agriculture"—constituted a "CEA Project." *Id.* R.I. Grows also asserted that agricultural activities were permitted on the Property under § 45-24-37(g) and noted that the Property already contained "numerous greenhouses[,] . . . many of which [had] been in place for decades." *Id.*

On September 8, 2021, representatives from R.I. Grows met with the Zoning Inspector to discuss the Greenhouse. (Order 2.) According to the Order, R.I. Grows' position at that meeting was that the entire Greenhouse, "less the solar field, was exempt from Town oversight, whether it be Zoning, Planning, or Building[.]" *Id.* R.I. Grows indicated that it based this position on information it had received from "Mr. Ken Ayers of RI DEM Agriculture, the RI Farm Bureau, and other 'State' sources." *Id.* In response, the Zoning Inspector asked that R.I. Grows provide documentation to support its views. *Id.* Acknowledging R.I. Grows' statement at the meeting that § 45-24-37(g) describes agriculture as a permitted use, the Zoning Inspector responded in the Order by noting the distinction under state zoning law between a use and a structure. *Id.* at 1-2; *see* § 45-24-31(63) ("Structure. A combination of materials to form a construction for use, occupancy, or ornamentation, whether installed on, above, or below the surface of land or water."); § 45-24-31(65) ("Use. The purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained."). The Zoning Inspector also "made [his] position clear that a greenhouse constructed with a steel frame and rigid glass panels was indeed a structure." (Order 1.)

After the agreed-upon deadline of September 30, 2021 passed without R.I. Grows producing the requested documentation, the Zoning Inspector issued the Order to Cease and Desist on October 6, 2021. *Id.* at 2. In the Order, the Zoning Inspector found R.I. Grows in violation of § 1.6.A.8 of Appendix A of the Zoning Code, which states that "[n]o building or structure shall hereafter be erected, enlarged or relocated, and no nonstructural use shall be initiated until a zoning certificate has been issued by the zoning inspector indicating that the proposed use and structure conforms to the provisions of this ordinance." *Id.* (quoting Zoning Code, Appendix A, § 1.6.A.8). The Zoning Inspector also found R.I. Grows in violation of § 2.5.1.A of Appendix A of the Zoning Code, which states that "[d]evelopment plan review is required for all permitted uses other than one or two-family dwellings or accessory buildings." *Id.* (quoting Zoning Code, Appendix A, § 2.5.1.A). The Order also states that the Greenhouse's accessory "'Solar energy facilities' may require a zoning certificate," but because "no presentation has been made to the Zoning Inspector, this [was] yet to be determined." *Id.* Similarly, the Order states that R.I. Grows "may" be in violation of the Zoning Code's dimensional regulations, including "Maximum Lot Coverage" and required setbacks, but that the Greenhouse's compliance with the dimensional regulations could not be evaluated without the site plans—which had not been submitted to the Zoning Inspector. *Id.* R.I. Grows appealed the Order to the Zoning Board. (Compl. Ex. G (Zoning Appeal).)

On January 13, 2022, R.I. Grows appeared before the State Building Code Standards Committee (SBCSC) to appeal a separate stop-work order issued by the Town's Building Official against the Greenhouse for the lack of a building permit. *See* Appellants' Mem. Ex. E (SBCSC Decision); Compl. Ex. H (Hr'g Tr.) 5:22-6:8. In the SBCSC Decision, the SBCSC accepted R.I. Grows' argument that while § 3112 of the State Building Code would normally require a permit for the erection of a "fabric structure," exceptions are made under § 3112 for agricultural and

horticultural greenhouses that are used primarily for growing. SBCSC Decision 2; *cf.* Appellants' Mem. Ex. F at 2 (State Building Code § 3112) (defining fabric structures as "structures utilizing wood, metal or plastic frames and covered with cloth, canvas, glass or plastic material, excluding tents, and furnishings such as umbrellas, awnings and canopies or portable shade canopies"). The SBCSC also heard the uncontradicted testimony of "Jason Pannone, project manager of Bentley Builders[,]" that "they had not commenced with any work that would require the issuance of a plumbing, mechanical, or electrical permit at the time of the stop work order." (SBCSC Decision 2.) Accordingly, the SBCSC vacated the stop-work order after finding that:

> "1. the structure that is the subject of the stop work order is in fact a horticultural and/or agricultural greenhouse and does meet the definition of a fabric structure as defined by SBC-1 § 3112.1;
> "2. that said structure falls within exception # 1 of § 3112.2 for agricultural and horticultural greenhouse[s] used primarily for growing wherein a building permit is not required;
> "3. that exception # 1 is predicated on the structure being used primarily for growing, not exclusively; and,
> "4. that none of the mechanical, plumbing, or electrical components of the project have begun and that the Applicant has acknowledged that the appropriate permit(s) will be obtained at that juncture." *Id.* at 2-3.

January 13, 2022 was also the date on which the Zoning Board held a public hearing (the Hearing) on R.I. Grows' appeal of the Order. *See* Hr'g Tr. 6:1-6. At the Hearing, counsel for R.I. Grows referenced the SBCSC's decision and called Fred Laist (Laist), Chief Financial Officer of R.I. Grows, to testify that the "primary purpose and reason" for the construction of the Greenhouse "is agricultural, horticultural, and farming purposes." *Id.* at 14:18-15:10. The Zoning Inspector, when called as a witness by the Zoning Board, testified to his belief that R.I. Grows could not construct the Greenhouse without first obtaining a zoning certificate because the Greenhouse is a "structure" as defined by state law. *Id.* at 45:2-22.

On cross-examination by counsel for R.I. Grows, the Zoning Inspector stated that he had only issued a zoning certificate for one other greenhouse during his seventeen-year tenure because he did not issue zoning certificates for "temporary" structures, but only for "permanent" structures. *Id.* at 60:15-22, 62:9-14. When pressed on the "distinction between temporary and permanent as it relates to a greenhouse structure[,]" the Zoning Inspector stated that the "primary thing is foundation" and that "a structure built on a foundation that's buried in the ground" is a permanent structure but that "one that's just iron pipes driven in the ground and they bolt another iron pipe to it or plastic hoops, that's not a permanent structure." *Id.* at 61:22-62:8. The Zoning Inspector also stated that the size of the Greenhouse did not factor into his determination that the Greenhouse is a structure to which the Zoning Code applies. *Id.* at 67:4-7.

The Zoning Inspector then testified that he believes that the Greenhouse has a foundation because he personally witnessed a concrete foundation for the Greenhouse being poured on the Property. *Id.* at 67:19-68:8. The Zoning Inspector acknowledged the distinction between "footings" for "posts" and a foundation, which he defined as "a continuous piece of concrete that runs around the periphery of the building[,]" but stated that the Greenhouse has both. *Id.* at 68:6-69:1. Counsel for R.I. Grows then reexamined Laist, who stated that a "foundation is not part of the plan for the greenhouse." *Id.* at 70:23-24. Laist stated that there "are footings, and there is a retraining [*sic*] parameter [*sic*] wall[,]" but no foundations proper. *Id.* at 70:24-71:1.

On February 7, 2022, the Zoning Board issued its written Decision to uphold the Order. (Decision 1.) In the Decision, after recapitulating the history of the Order and the subsequent appeal, the Zoning Board made the following determinations:

> "a. the Zoning Board has no authority or jurisdiction over whether the Project required a local building permit or is exempted by state law and would not consider that issue;

> "b. the Project greenhouse constituted a permanent structure as it included fixed concrete pier foundation supports for the greenhouse structure and perimeter retaining walls;
> "c. no authority was presented by the Appellant to show[ ] that even as a permitted use under the General Laws the Project was preempted by state law or otherwise exempt from compliance with other regulatory provisions of the Exeter Zoning [Code], such as the issuance of a zoning certificate or development plan review;
> "d. no evidence or authority was provided by the appellant to show that the Right to Farm act, so-called, precludes or preempts the Project from compliance with the sections of the Exeter Zoning [Code] cited by the Zoning Inspector in his [Order];
> "e. that whether the Project and use is exempt from local regulation by state law is a question of law for the courts to decide; and,
> "f. in consideration of the foregoing, the Zoning Inspector did not commit error in his determination that the Project was subject to compliance with Sections 1.6.A.8. and 2.5.1.A. of the Exeter Zoning [Code]." *Id.* at 3-4.

Accordingly, the Zoning Board voted unanimously to uphold the Order. *Id.* at 4. This timely appeal followed. *See* Compl.

After the parties exchanged briefs, R.I. Grows filed a Motion for Oral Argument on June 1, 2022. (Appellants' Mot. Oral Argument 2.) On June 9, 2022, the Zoning Board filed a Motion to File a Supplemental Memorandum, which it contended was necessary to share certain information that only came to light when the Town finally obtained a set of full-size site plans for the Greenhouse through the Rhode Island Department of Environmental Management (RIDEM). *See* Appellees' Mot. Leave to File Suppl. Mem. 1; *id.* Ex. AA (Suppl. Mem.). The Zoning Board noted that the certified record on appeal includes a set of site plans from R.I. Grows entitled "RIDEM Submission"; however, the Zoning Board also asserted that these copies were too small to be legible and were not provided to the Zoning Inspector prior to the Hearing. (Suppl. Mem. 2.) On June 22, 2022, this Court granted R.I. Grows' Motion for Oral Argument and the Zoning Board's Motion to File a Supplemental Memorandum.

On June 28, 2022, R.I. Grows filed a Motion to Supplement the Record with affidavits from Jason Pannone and Benjamin Hyman, two contractors with personal knowledge of the construction of R.I. Grows' Greenhouse, to the effect that the Greenhouse lacks a permanent foundation. Appellants' Mot. Suppl. Record 1-2; *see* Appellants' Suppl. Mot. Suppl. Record. On July 7, 2022, this Court heard and denied R.I. Grows' Motion to Supplement the Record because it was unable to conclude that the proffered affidavits were "necessary for the proper disposition" of this appeal.[1] Section 45-24-69(c). The Court heard oral argument on R.I. Grows' appeal of the Zoning Board's Decision on July 21, 2022.

II

Standard of Review

Judicial review of a zoning board of review's decision is governed by § 45-24-69. Pursuant to § 45–24–69(d),

> "[t]he court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
> "(1) In violation of constitutional, statutory, or ordinance provisions;
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 45-24-69(d).

[1] Several of the Zoning Board's filings also incorporate or reference materials from outside the record. *See* Defs.' Mem. 2 n.2, 3. With the exception of the site plans filed as an exhibit to the Zoning Board's Supplemental Memorandum, which are substantively identical to the site plans in the record, the Court finds that these extraneous materials are not necessary to the proper disposition of this appeal and has not relied upon them. *See* Suppl. Mem. 2.

"'[A] zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review.'" *Von Bernuth v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396, 401 (R.I. 2001) (quoting *Cranston Print Works Co. v. City of Cranston*, 684 A.2d 689, 691 (R.I. 1996)). In reviewing a zoning board's decision, "[i]t is the function of the Superior Court to 'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). "Substantial evidence is defined as 'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.'" *New Castle Realty Co. v. Dreczko*, 248 A.3d 638, 643 (R.I. 2021) (quoting *Iadevaia v. Town of Scituate Zoning Board of Review*, 80 A.3d 864, 870 (R.I. 2013)). Questions of law are reviewed *de novo*, as "a zoning board's determinations of law, like those of an administrative agency, 'are not binding on the reviewing court'" and "'may be reviewed to determine what the law is and its applicability to the facts.'" *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (quoting *Gott v. Norberg*, 417 A.2d 1352, 1361 (R.I. 1980)).

III

Analysis

A

Agricultural Uses and the Right to Farm Act

R.I. Grows' primary argument is that the Zoning Board erred by failing to acknowledge the Greenhouse as an "agricultural use" that is protected by state law, including § 45-24-37(g), which defines "'plant agriculture'" as a "'permitted use within all zoning districts of a

municipality, including all industrial and commercial zoning districts, except where prohibited for public health or safety reasons or the protection of wildlife habitat.'" (Appellants' Mem. 6-7) (quoting § 45-24-37(g).) R.I. Grows also argues that the Rhode Island Right to Farm Act, G.L. 1956 chapter 23 of title 2, preempts any application of the Zoning Code to the Greenhouse. *Id.* at 7-9.

The Zoning Board argues that the Right to Farm Act speaks only to the protection of agricultural operations against nuisance actions and does not preempt local zoning authority over the erection of structures like the Greenhouse. (Defs.' Mem. 20-24.) Noting that the only local ordinances that the Right to Farm Act explicitly preempts are those that "'regulate and control the construction, location, and maintenance of all places for keeping animals[,]'" the Zoning Board contends that R.I. Grows' overly broad interpretation of the Right to Farm Act is absurd and contradicted by the plain language of the statute. *Id.* at 21-22 (quoting G.L. 1956 § 23-19.2-1). At oral argument before this Court, the Zoning Board conceded that agriculture is a permitted use but maintained that this fact is immaterial to the Zoning Board's authority over the construction of the Greenhouse as a structure.

A local ordinance is preempted and "invalid when it is 'in direct and material conflict with a state law.'" *State ex rel. City of Providence v. Auger*, 44 A.3d 1218, 1229 (R.I. 2012) (quoting *Town of Glocester v. R.I. Solid Waste Management Corp.*, 120 R.I. 606, 607, 390 A.2d 348, 349 (1978)). "The presence or absence of such a conflict 'depends on what the Legislature intended when it enacted the statute.'" *Id.* (quoting *Town of Glocester*, 120 R.I. at 607, 390 A.2d at 349). "[C]onflict preemption may exist when it is 'impossible for a . . . party to comply with both [sets of] requirements' or when a 'law stands as an obstacle to the accomplishment and execution of the

full purposes and objectives of [the Legislature.]'" *Id.* (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

Additionally, "state laws of statewide application pre-empt municipal ordinances on the same subject if the Legislature intended that they thoroughly occupy the field." *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 109 (R.I. 1992) (citing *Easton's Point Associates, Inc. v. Coastal Resources Management Council*, 559 A.2d 633, 636 (R.I. 1989)). The Rhode Island Supreme Court has "long recognized the doctrine of implied pre-emption and do[es] not require a clear statement by the Legislature of its intention to pre-empt local legislation" if that intention is nevertheless apparent from the "state's overall scheme of regulation[.]" *Id.* (citing *Rhode Island Cogeneration Associates v. City of East Providence*, 728 F. Supp. 828, 834 n.12 (D.R.I. 1990)).

Under § 45-24-37(g), and "[n]otwithstanding any other provisions of [the Zoning Enabling Act], plant agriculture is a permitted use within all zoning districts of a municipality, including all industrial and commercial zoning districts, except where prohibited for public health or safety reasons or the protection of wildlife habitat." Section 45-24-37(g). However, under Rhode Island zoning law, permitted uses are still subject to the dimensional requirements of local ordinances. *See, e.g.*, *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 693 (R.I. 2003) ("[A] mini self-storage facility is a permissible use; thus, the [variance] inquiry is confined to the extent and nature of the dimensional relief requested[.]"). A use is defined as the "purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." Section 45-24-31(65). Conversely, "dimensional restrictions . . . govern a permitted use of a lot of land" and include "area, height, or setback restrictions." *Sciacca v. Caruso*, 769 A.2d 578, 582 n.5 (R.I. 2001) (citations omitted). The Order does not rest on a finding that plant agriculture is not a permitted use on the Property; instead, the

Order enjoined construction of the Greenhouse for noncompliance with provisions of the Zoning Code governing the erection of structures, a valid distinction under state law. *See* Order 1-2.

Turning to the Right to Farm Act, that statute sets out the following legislative findings:

> "(1) That agricultural operations are valuable to the state's economy and the general welfare of the state's people;
> "(2) That agricultural operations are adversely affected by the random encroachment of urban land uses throughout rural areas of the state;
> "(3) That, as one result of this random encroachment, conflicts have arisen between traditional agricultural land uses and urban land uses; and
> "(4) That conflicts between agricultural and urban land uses threaten to force the abandonment of agricultural operations and the conversion of agricultural resources to non-agricultural land uses, whereby these resources are permanently lost to the economy and the human and physical environments of the state." Section 2-23-2.

Accordingly, "[t]he general assembly declare[d] that it is the policy of the state to promote an environment in which agricultural operations are safeguarded against nuisance actions arising out of conflicts between agricultural operations and urban land uses." Section 2-23-3. Agricultural operations are broadly defined as:

> "any commercial enterprise that has as its primary purpose horticulture, viticulture, viniculture, floriculture, forestry, stabling of horses, dairy farming, or aquaculture, or the raising of livestock, including for the production of fiber, furbearing animals, poultry, or bees, and all such other operations, uses, and activities as the director, in consultation with the chief of division of agriculture, may determine to be agriculture, or an agricultural activity, use or operation." Section 2-23-4(a).

Under § 2-23-5(a),

> "No agricultural operation, as defined in this chapter is found to be a public or private nuisance, due to alleged objectionable:
> "(1) Odor from livestock, manure, fertilizer, or feed, occasioned by generally accepted farming procedures;
> "(2) Noise from livestock or farm equipment used in normal, generally accepted farming procedures;
> "(3) Dust created during plowing or cultivation operations;

> "(4) Use of pesticides, rodenticides, insecticides, herbicides, or fungicides." Section 2-23-5(a).

Besides this protection from nuisance actions and the provision that "no rule or regulation of the department of transportation shall be enforced against any agricultural operation to prevent it from placing a seasonal directional sign or display on the state's right-of-way," the only other legal regime from which agricultural operations are explicitly exempted are "city or town ordinance[s] adopted under § 23-19.2-1[,]" which would otherwise allow "cities and towns [to] make any rules and regulations that they shall deem necessary to regulate and control the construction, location, and maintenance of all places for keeping animals," for the "summary removal or reconstruction of these places that shall be deemed by them detrimental to the public convenience and welfare," and for "the time and manner of removing manure from them, and for the driving of animals through the highways[.]" Sections 2-23-5(b); 23-19.2-1. "The provisions of [the Right to Farm Act] do not apply to agricultural operations conducted in a malicious or negligent manner, or to agricultural operations conducted in violation of federal or state law controlling the use of pesticides, rodenticides, insecticides, herbicides, or fungicides." Section 2-23-6.

Thus, the Right to Farm Act—which makes no mention of zoning or local zoning ordinances—is primarily addressed toward protecting agricultural operations from nuisance actions arising from conflicts between farmers and their neighbors and only explicitly supersedes certain limited provisions of state and local law. "In addition, nowhere in the [Right to Farm Act] did the General Assembly vest '*exclusive* power and authority' in one body or set forth a comprehensive approach to regulation and enforcement through a statutory scheme." *Auger*, 44 A.3d at 1231 (footnote omitted) (quoting *O'Neil*, 617 A.2d at 110). Accordingly, there is no

indication that the General Assembly intended to place agricultural operations entirely beyond the legitimate reach of local zoning ordinances.

A comparison of Rhode Island's Right to Farm Act with New Jersey's Right to Farm Act (the New Jersey Act) is instructive. In *Villari v. Zoning Board of Adjustment of Deptford*, 649 A.2d 98 (N.J. Super. Ct. App. Div. 1994), the New Jersey Superior Court held that an earlier version of the New Jersey Act, which did "not even refer to the Municipal Land Use Law (MLUL) . . . [that] confers comprehensive zoning power upon a municipality's governing body," also did not "contain such 'clear and compelling evidence' of a legislative intent to displace municipal power over zoning insofar as it applies to commercial agricultural uses" so as to justify a finding of implied preemption. *Villari*, 649 A.2d at 102. Subsequently, the New Jersey Legislature amended the New Jersey Act to "explicitly preempt[ ] municipal regulation of various commercial agricultural activities which meet certain eligibility criteria." *Township of Franklin v. Hollander (Hollander I)*, 769 A.2d 427, 437 (N.J. Super. Ct. App. Div. 2001). The *Hollander I* court also held that, although "primary jurisdiction to regulate agricultural management practices" under the amended New Jersey Act "rests with the County Agricultural Board (CAB) or the State Agricultural Development Committee (SADC)" rather than zoning boards or other forms of municipal government, "the legislative imperative requiring attention to public health and safety also imposes a limitation on such jurisdiction and requires the respective boards to consider the impact of municipal land use ordinances." *Id.* at 428-29, 439; *see id.* at 440 ("In sum, in exercising its authority under the Act, the CAB or SADC must afford a local agency comity in recognition that the municipality interests must be appropriately acknowledged and considered.").

On appeal, the Supreme Court of New Jersey affirmed *Hollander I*. *Township of Franklin v. Hollander (Hollander II)*, 796 A.2d 874, 876 (N.J. 2002). While acknowledging the protection

afforded to "farming interests" by the New Jersey Act, the *Hollander II* court confirmed that the "agricultural boards" tasked with enforcing the New Jersey Act must give "appropriate consideration not only to the agricultural practice at issue, but also to local ordinances and regulations, including land use regulations, that may affect the agricultural practice." *Id.* at 877-78. The *Hollander II* court also noted that this responsibility would likely give rise to "cases where the local zoning ordinance simply does not affect farming" or "where, although the ordinance has a peripheral effect on farming, it implicates a policy that does not directly conflict with farming practices[,]" in which "cases greater deference should be afforded to local zoning regulations and ordinances." *Id.* at 877. Seeking to "invest those abstract principles with meaning[,]" the *Hollander II* court offered the following hypotheticals:

> "A farmer may seek to erect a 150-foot silo in a municipality where there is a 50-foot height limitation, or he may wish to construct a barn with a 50-foot sideyard, but the local ordinance requires 100 feet. On the face of it, such ordinances do not interfere with farming and, therefore, the zoning ordinance limitations ordinarily should be respected. However, some cases may present closer questions. Assume a farmer intends to erect a barn that is 60 feet tall, but the local ordinance prohibits structures exceeding 50 feet. The town may contend that 50 feet is more than sufficient for the barn's height, but the farmer may be able to demonstrate a legitimate, agriculturally-based reason for needing the extra space. The point of those examples is that a fact-sensitive inquiry will be essential in virtually every case." *Id.* at 878.

Significantly, the Supreme Court of New Jersey contemplated that their hypothetical farmers would pursue their cases through procedures set forth under the New Jersey Act; in Rhode Island, enforcement of zoning requirements are vested in "the local official or agency" designated by the pertinent zoning ordinance. Section 45-24-54. Despite the protection afforded to farming by the Right to Farm Act and § 45-24-37(g), the Court has no reason to believe that the General Assembly intended to completely displace local authority to enforce zoning ordinances whenever

agricultural uses are implicated. *See Lischio*, 818 A.2d at 693 (discussing zoning boards' authority in a scenario where "a request for a height variance for a permitted use would result in a structure so massive or out of place as to alter the general character of the surrounding area").

Although the General Assembly did not thoroughly occupy the field of agricultural regulation through the Right to Farm Act, "conflict preemption may exist when it is 'impossible for a . . . party to comply with both [sets of] requirements' or when a 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [the Legislature.]'" *Auger*, 44 A.3d at 1229 (quoting *Myrick*, 514 U.S. at 287). *Town of North Kingstown v. Albert*, 767 A.2d 659 (R.I. 2001), on which R.I. Grows relies extensively, represents such an instance. In *Albert*, our Supreme Court upheld the denial of the Town of North Kingstown's "request to permanently enjoin [the] defendants from completing excavation on their property to create an irrigation pond designed to provide an adequate water supply to their seventy-acre turf farm." *Albert*, 767 A.2d at 660. The Town of North Kingstown sought to enforce the portion of its zoning ordinance listing "Earth Removal" as a prohibited use. *Id.*

However, the trial justice found that the irrigation pond was developed to service defendants' turf farm and was the "only viable alternative" for defendants to obtain sufficient water for that farm; as such, the earth removal resulting from the excavation of the pond was "merely incidental to the farming operation" and did not constitute a "use" within the sense of that word's statutory definition as "'[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained.'" *Id.* at 661-62, 664 (quoting § 45-24-31(60)). The trial justice also cited to the Right to Farm Act and noted that the Town of North Kingstown's attempt to prohibit the pond "would have an adverse [e]ffect on

defendant's farming operation and would be adverse to the policy of the Legislature to encourage farming operations." *Id.* at 661.

The Supreme Court upheld these findings and noted that the "town acknowledged during oral argument" that the defendants could not have obtained a license to excavate the irrigation pond under the earth removal ordinance "because a license is not available for an expressly prohibited zoning use." *Id.* at 663. In discussing the applicability of the Right to Farm Act to the defendants' predicament, the Supreme Court stated:

> "Although we agree with the town that the Farm Act is applicable to nuisance actions, we are cognizant that the statute is a statement of policy by the Legislature that farming activities and activities incidental to the right to farm ought not to be arbitrarily prohibited on the ground that the activity is objectionable on the ground of nuisance to either surrounding landowners or the municipality where the farm is located. Certainly, the town's interpretation of the removal and zoning ordinance is in direct conflict with the [defendants]' right to continue to farm this parcel. . . . According to the town's interpretation of its zoning ordinance, the [defendants] were completely precluded from creating an irrigation pond on their farm at any time. . . . We deem this to be potentially fatal to [the defendants'] long-standing agricultural operation at this location and in conflict with the policy of this state to encourage the continued viability of the state's remaining farming operations. Therefore, we are of the opinion that this legislative scheme, designed to prevent the creation of nuisances, must be interpreted so as to not seriously infringe on ordinary farming operations within the town." *Id.* at 665.

Thus, while *Albert* indicates that the Right to Farm Act is relevant to the application of municipal zoning ordinances to agricultural operations, the Supreme Court did not categorically forbid such applications. Procedurally, Rhode Island's Right to Farm Act could be viewed as the inverse of the New Jersey Act: in Rhode Island, it is zoning boards who are vested with jurisdiction over the application of zoning regulations to agricultural operations, but who must take the legitimate interests of farmers into account. *Cf. Hollander II*, 796 A.2d at 877-78.

Here, and in contrast to *Albert*, there is nothing in the record that indicates that it would be impossible for R.I. Grows and the Schartners to maintain or expand their farming operations while still complying with the Zoning Code, or that requiring R.I. Grows to undergo the normal procedures for obtaining the Town's zoning approval for the construction of the Greenhouse would "merely amount to an exercise in futility." *Albert*, 767 A.2d at 663. The Order acknowledges the distinction between uses and structures and rests on R.I. Grows' noncompliance with the procedural requirements of the Zoning Code; as the Order also indicates, the primary reason for R.I. Grows' refusal to undergo these procedures is its "position that the entire [Greenhouse] project, less the solar field, [i]s exempt from Town oversight[.]"[2] Order 2; *cf. Albert*, 767 A.2d at 663 (finding that defendant farmers "could not have obtained a license" for the excavation of their irrigation pond "because a license is not available for an expressly prohibited zoning use"). A finding of conflict preemption is therefore unwarranted. *See Park v. Ford Motor Co.*, 844 A.2d 687, 694 (R.I. 2004) (quoting *Rhode Island Higher Education Assistance Authority v. Rhode Island Conflict of Interest Commission*, 505 A.2d 427, 430 (R.I. 1986)) ("'The clear preference is for the court to construe the statutes so that both may be given effect.'").

B

The State Building Code and the Zoning Code

Next, R.I. Grows argues that the State Building Code preempts any attempt by the Town to classify the Greenhouse as a "permanent structure" that is subject to its Zoning Code. (Appellants' Mem. 10-11.) In support, R.I. Grows points to the Building Committee Decision that

[2] R.I. Grows has also made allegations of bad faith and animus on the part of the Zoning Inspector. *See* Compl. ¶ 29 ("[The Zoning Inspector] has singled out RI Grows as a reflection of personal animosity he harbors against [Richard J.] Schartner, and the Schartner family as a whole."). As the Court will discuss in more detail when addressing R.I. Grows' equal protection arguments, these allegations are not supported by the record.

the Greenhouse is a "fabric structure" which does not require a building permit because it is an "agricultural and horticultural greenhouse used primarily for growing." *Id.* at 11. Highlighting the State Building Codes' status as state law, R.I. Grows also asserts that the State Building Code and the Zoning Code must be read *in pari materia* and identifies the State Building Code as the controlling provision because it, unlike the Zoning Code, specifically addresses greenhouses. *Id.* at 12-14. From this, R.I. Grows concludes that the SBCSC Decision indicates that the Zoning Board committed legal error when it determined that the Greenhouse is a permanent structure that must comply with the Zoning Code. *Id.* at 12-15; *see* Decision 3; SBCSC Decision 2.

Rejecting the argument that the State Building Code conflicts with the Zoning Code, the Zoning Board argues that the two enactments serve distinct and complementary purposes and that the State Building Code expressly resolves any possible conflict by providing when local zoning ordinances shall control. (Defs.' Mem. 24-29.) As such, the Zoning Board argues that the SBCSC's Decision that the Greenhouse does not require a building permit has no bearing on the Zoning Board's ability to enforce the Zoning Code. *Id.* at 24.

As previously stated, an "ordinance is invalid when it is 'in direct and material conflict with a state law[,]'" and the "presence or absence of such a conflict 'depends on what the Legislature intended when it enacted the statute.'" *Auger*, 44 A.3d at 1229 (quoting *Town of Glocester*, 120 R.I. at 607, 390 A.2d at 349). In this area, our Supreme Court has endorsed the "well-settled principle that 'statutes relating to the same subject matter should be considered together so that they will harmonize with each other and be consistent' with their general objective scope." *Such v. State*, 950 A.2d 1150, 1156 (R.I. 2008) (quoting *State ex rel. Webb v. Cianci*, 591 A.2d 1193, 1203 (R.I. 1991)).

Under state law, the State Building Code's

> "expressed intent . . . is to insure public health, safety, and welfare insofar as they are affected by building construction, through structural strength, adequate egress facilities, sanitary conditions, equipment, light and ventilation, and fire safety; and in general, to secure safety to life, property, and community from all hazards incidental to the design, erection, repair, removal, demolition, or use and occupancy of buildings, structures, or premises." G.L. 1956 § 23-27.3-100.3(a).

Pertinently, the State Building Code also provides that:

> "When the provisions in this code specified for structural strength, adequate egress facilities, sanitary conditions, equipment, light and ventilation, and fire safety conflict with the local zoning ordinances, this code shall control the erection or alteration of buildings. In respect to location, use and type, permissible area, and height, the local zoning ordinance shall control." Section 23-27.3-101.3.

Under the State Building Code, the SBCSC is also "empowered to adopt" regulations in the form of "codes and standards[.]" Section 23-27.3-109.1. One such regulation is State Building Code § 3112, which governs fabric structures, defined as "structures utilizing wood, metal or plastic frames and covered with cloth, canvas, glass or plastic material, excluding tents, and furnishings such as umbrellas, awnings and canopies or portable shade canopies." State Building Code § 3112.1. Pursuant to § 3112.2, fabric structures "shall be located in accordance with applicable local zoning code provisions" and "[p]ermits shall be required for all fabric structures[,]" although an exception exists for "[a]gricultural and horticultural greenhouses used primarily for growing." State Building Code § 3112.2.

On the face of § 3112, the list of exceptions follows the full text of § 3112.2 and does not specifically refer only to building permits. *See* State Building Code § 3112.2. However, any potential inconsistency with the Zoning Code is resolved by § 23-27.3-101.3, which provides that the State Building Code "shall control the erection or alteration of buildings" with respect to

"structural strength, adequate egress facilities, sanitary conditions, equipment, light and ventilation, and fire safety" in cases of "conflict with the local zoning ordinances," but that those "local zoning ordinance[s] shall control" with "respect to location, use and type, permissible area, and height[.]" Section § 23-27.3-101.3.

This line of demarcation, which is "'consistent' with [the] general objective scope" of the two sets of provisions, was properly observed in the instant matter. *Such,* 950 A.2d at 1156 (quoting *Webb,* 591 A.2d at 1203). Following R.I. Grows' appeal from a stop-work order issued by the Town's Building Official, the SBCSC found that R.I. Grows did not need a building permit for the erection of the "fabric structure" of the Greenhouse; this decision rested on "exception # 1 of § 3112.2 for agricultural and horticultural greenhouse[s] used primarily for growing wherein a building permit is not required[.]" (SBCSC Decision 2.) The SBCSC did not purport to excuse the Greenhouse from compliance with the dimensional regulations of the Zoning Code, and the narrow scope of its decision is underlined by its finding that "none of the mechanical, plumbing, or electrical components of the [Greenhouse] have begun and that [R.I. Grows] has acknowledged that the appropriate permit(s) will be obtained at that juncture." *Id.* at 2-3.

Turning to the Order, the Zoning Inspector's determination that R.I. Grows had violated two separate procedural provisions of the Zoning Code rested on his finding that the Greenhouse, with its "steel frame and rigid glass panels[,]" was a "structure" as defined by the Zoning Code and the Zoning Enabling Act. Order 1-2; *see* § 45-24-31(63) ("Structure. A combination of materials to form a construction for use, occupancy, or ornamentation, whether installed on, above, or below the surface of land or water."). The only substantive provisions of the Zoning Code specifically referenced in the Order were § 11.1.1, which governs the construction of solar energy facilities, and the dimensional regulations codified at § 2.4.2; however, the Greenhouse's

compliance with those provisions could "only be evaluated based on site plans which [had] not been submitted" due to R.I. Grows' failure to engage with the Zoning Code's procedural requirements.[3] (Order 2.)

Based on the above, the Court cannot conclude that the State Building Code and the Zoning Code "are irreconcilable and cannot both be given effect" in this matter. *Park*, 844 A.2d at 694. There is nothing particularly novel about the application of both the State Building Code and the operative local zoning ordinances to a single property or structure. *See, e.g., Town of Richmond v. Wawaloam Reservation, Inc.*, 850 A.2d 924, 926-27 (R.I. 2004) (discussing town's enforcement of separate decisions "from the local zoning board of review and from the state building-code board" finding "sundry zoning and building-code violations at [defendants'] campground"). No conflict exists between the determinations that the Greenhouse is an agricultural fabric structure as defined by the State Building Code and a structure as defined by the Zoning Code, as those determinations were made under different provisions that were enacted for distinct purposes. As a result, both the SBCSC Decision and the Zoning Board Decision "'may stand and be operative.'" *Tiernan v. Magaziner*, 270 A.3d 25, 30 (R.I. 2022) (quoting *Such*, 950 A.2d at 1156).

[3] Noting that the Order does not state that the alleged zoning violations are use violations, R.I. Grows concludes that they must necessarily be dimensional violations; R.I. Grows also asserts that the Greenhouse is exempt from dimensional regulations because the Zoning Code does not set forth specific dimensional requirements for greenhouses. (Appellants' Reply 3-5.) This argument fails because, as the Zoning Board points out, dimensional zoning regulations do not differentiate based on the type of use or structure; instead, they broadly apply to all structures within a particular zone. Suppl. Mem. 8-9; *see, e.g., Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 694 (R.I. 2003) ("The petitioners would require a dimensional variance for *any* proposed project in a general business zone and for *any* project in a low-density residential or rural residential zone.").

C

Permanent and Temporary Structures

R.I. Grows also challenges the Zoning Inspector's decision to classify the Greenhouse as a "permanent structure" that is subject to the Zoning Ordinances on the grounds that the Greenhouse includes a foundation. (Appellants' Mem. 15.) R.I. Grows argues that the Zoning Inspector's decision to base a greenhouse's need for zoning approval on the distinction between "permanent" and "temporary" structures is arbitrary and capricious and without legal basis. *Id.* at 16-18. To the extent that the Zoning Inspector based that distinction on the State Building Code, R.I. Grows argues that the Zoning Inspector exceeded his legal authority. *Id.* at 18. At oral argument before this Court, R.I. Grows argued that the Zoning Inspector's consideration of the Greenhouse's foundation was an *ultra vires* act.

In support, R.I. Grows offers case law to the effect that if a local official's determination is made "upon a ground other than one that comes within the scope of the official's authority, it constitutes an arbitrary act[.]" *Pitocco v. Harrington*, 707 A.2d 692, 696 (R.I. 1998); *see Zeilstra v. Barrington Zoning Board of Review*, 417 A.2d 303, 308 (R.I. 1980) (quoting *Arc-Lan Co. v. Zoning Board of Review of North Providence*, 106 R.I. 474, 476, 261 A.2d 280, 282 (1970)) ("When presented with petitioner's application for a building permit, the inspector had no authority whatsoever 'other than to determine that the proposed construction conform[ed] precisely to the terms of the pertinent provisions of the zoning ordinance.'").

The Zoning Board contends that the Zoning Inspector acted appropriately and within his authority in issuing the Order and that his determinations were properly upheld. (Defs.' Mem. 2.) First, the Zoning Board argues that the Greenhouse is clearly a "structure" as that term is unambiguously defined under both state law and the Zoning Code; accordingly, the Zoning Board

argues that the Zoning Inspector did not err in holding that the Greenhouse is subject to the Zoning Code. *Id.* at 11-14. The Zoning Board notes that the Decision includes an explicit finding of fact, based on the Hearing testimony of the Zoning Inspector and R.I. Grows' CFO, that the Greenhouse "'constituted a permanent structure as it included fixed concrete pier foundation supports for the greenhouse structure and perimeter retaining walls.'" *Id.* at 14 (quoting Decision 3).

The Zoning Board also notes that the plain language of the Zoning Code requires a builder or landowner to apply for a zoning certificate before erecting any new structure, but that R.I. Grows did not apply before it began constructing the Greenhouse. *Id.* at 15-16. Similarly, while the Zoning Code mandates development plan review for all permitted uses other than one- or two-family dwellings or accessory buildings, the Zoning Board asserts that R.I. Grows has failed to provide the Town with site plans and other basic information about the Project. *Id.* at 17-19. The Zoning Board contends that it is therefore attempting to enforce basic requirements of the Zoning Code that apply to all structures in the Town. *Id.* at 19-20. At oral argument, the Zoning Board highlighted the statutory definition of a structure and emphasized that the Greenhouse easily qualifies as a structure under that definition.

The fundamental flaw in R.I. Grows' argument that the Zoning Inspector's references to foundations and the distinction between permanent and temporary structures constitute reversible error is that the Zoning Inspector did not utilize that distinction to hold the Greenhouse to an improper legal standard. As previously indicated, the basis for the Order is R.I. Grows' noncompliance with two procedural requirements of the Zoning Code, including the requirement that "'[n]o building or structure shall hereafter be erected, enlarged or relocated . . . until a zoning certificate has been issued by the zoning inspector indicating that the proposed use and structure

conforms to the provisions of this ordinance.'"[4] (Order 2 (quoting Zoning Code, § 1.6.A.8).) The Zoning Inspector's determination that the Greenhouse qualifies as a structure answered the narrow threshold question of whether § 1.6.A applies, and the reasoning given by the Zoning Inspector in the Order—namely, that the Greenhouse is "constructed with a steel frame and rigid glass panels"—is squarely responsive to the plain language of the Zoning Enabling Act. Order 1-2; *see* § 45-24-31 ("[T]he words and phrases defined in this section are controlling in all local ordinances created under this chapter[.]"); § 45-24-31(63) ("Structure. A combination of materials to form a construction for use, occupancy, or ornamentation, whether installed on, above, or below the surface of land or water."). Having made that particular finding, the conclusion "'that the proposed construction conform[s] precisely to the terms of the pertinent provisions of the zoning ordinance'" was well within the legal authority of the Zoning Inspector. *Pitocco*, 707 A.2d at 696 (quoting *Zeilstra*, 417 A.2d at 308).

It was only at the Hearing, during counsel for R.I. Grows' cross-examination of the Zoning Inspector regarding his application of § 1.6.A to other greenhouses, that the question of whether the Greenhouse is a permanent structure arose. *See* Hr'g Tr. 60:6-61:13. Although R.I. Grows characterizes the Zoning Inspector's Hearing testimony as an impermissible attempt to engraft additional terms onto the Zoning Code and achieve the desired result of subjecting the Greenhouse to the Town's authority, the record indicates that the Zoning Inspector offered the permanent/temporary distinction to explain why he had previously *exempted* other greenhouses in the Town from the plain language of § 1.6.A of the Zoning Code. *See id.* at 60:15-16 ("I don't

[4] The Zoning Inspector also found R.I. Grows in violation of § 2.5.1.A of Appendix A of the Zoning Code, which states that "'[d]evelopment plan review is required for all permitted uses other than one or two-family dwellings or accessory buildings.'" (Order 2 (quoting Zoning Code § 2.5.1.A).) Accordingly, that violation forms a separate and independent basis for the Order.

issue zoning certificates for temporary structures."); *id.* at 61:22-25 (stating that the presence of a "foundation" is the "primary thing" that distinguishes permanent and temporary greenhouse structures); *see also id.* at 62:4-8 ("If it's one that's just iron pipes driven in the ground and they bolt another iron pipe to it or plastic hoops, that's not a permanent structure. That can come down in a windstorm, and they move them all over the place.").

Our Supreme Court addressed a comparable situation in *Town of Johnston v. Pezza*, 723 A.2d 278 (R.I. 1999). In *Pezza*, the operative local ordinance—known as zoning ordinance 796—mandated that applicants for proposed industrial uses submit and obtain approval of their site plan from the planning board before applying for a building permit; however, a building official issued a permit for the applicants' proposed asphalt plant despite the fact that the applicants had failed to submit a site plan as required. *See Pezza*, 723 A.2d at 279, 281-82. When a new building official took office, the town revoked the building permit and sued the applicants in Superior Court to enjoin construction of the asphalt plant. *Id.* at 281. The trial justice found that compliance with zoning ordinance 796 was mandatory and that applicants had not complied; nevertheless, because the requirement of planning board review had been enforced only once in the course of the sixty-two previous industrial use applications under zoning ordinance 796, the trial justice held that revocation of the building permit was "too drastic a sanction" for the applicants' noncompliance with "a mere procedural exercise." *Id.* at 282-83. However, on appeal, our Supreme Court reinstated the town's revocation of the permit:

> "No matter how many times the building official may have ignored this requirement in the past, the law remained unchanged when the [applicants] applied for this permit: the building official had no authority to issue a building permit for an industrial use without the applicant first obtaining board approval of a proposed site plan that conformed to the requirements of zoning ordinance 796. Accordingly, we hold that the trial justice's finding that the building official could waive compliance with this ordinance because it was

> merely a procedural exercise constitutes reversible error."[5] *Id.* at 284.

Here, whatever the propriety of the exemptions that the Zoning Inspector has afforded to temporary greenhouses in the past—which are not at issue in this appeal—it remains true as a matter of law that R.I. Grows' Greenhouse is subject to § 1.6.A of the Zoning Code so long as it constitutes a structure as that term is defined by § 45-24-31(63). At no point in the Hearing—or indeed, throughout the appeal proceedings—did R.I. Grows challenge the Zoning Inspector's description of the Greenhouse in the Order as having been "constructed with a steel frame and rigid glass panels[.]" Order 1; *see* Hr'g Tr. at 48:15-19 (Zoning Inspector confirming that "the whole basis" for the Order "is the fact that the [G]reenhouse is considered a structure [and] is therefore subject to the zoning laws."). At the close of the Hearing, the Zoning Board voted unanimously to uphold the Order as issued, and the subsequent written Decision incorporates the Zoning Board's factual finding that "the Project greenhouse constituted a permanent structure as it included fixed concrete pier foundation supports for the greenhouse structure and perimeter retaining walls[.]"[6] Decision 3; *see id.* at 4 ("[I]n consideration of the foregoing, the Zoning

[5] *Pezza* is also relevant to this case at hand in that our Supreme Court stressed that zoning ordinance 796's application and approval process, while procedural in nature, was not "a mere empty formality" because it served as the mechanism by which the town was able to ensure compliance with the substantive provisions of the zoning ordinance. *Town of Johnston v. Pezza*, 723 A.2d 278, 283 (R.I. 1999). Additionally, and regardless of their exact content, compliance with the procedures was a clear "condition precedent to the issuance of a building permit[.]" *Id.*

[6] As this Court noted when denying R.I. Grows' Motion to Supplement the Record, that factual finding is supported by substantial evidence in the record. The Zoning Board heard testimony from the Zoning Inspector, who had spoken about the Greenhouse with R.I. Grows on multiple occasions and saw concrete being poured at the Property to create a "foundation" as well as footings for steel posts, that he "unequivocal[ly]" considered the Greenhouse to be a structure. (Hr'g Tr. 45:9-18, 67:8-69:1.) The Zoning Inspector acknowledged the distinction between concrete "footings" for the Greenhouse's steel "posts" and a foundation, which he defined as "a continuous piece of concrete that runs around the periphery of the building[,]" but stated that the Greenhouse has both footings and a foundation. *Id.* at 68:6-69:1. The Zoning Board also heard Laist's testimony that while the Greenhouse does not have "foundations proper[,]" it does have

Inspector did not commit error in his determination that the Project was subject to compliance with Sections 1.6.A.8. and 2.5.1.A. of the Exeter Zoning Ordinance."); *see also* Hr'g Tr. 91:14-93:23 (discussion by Zoning Board).

While the language of that finding is also responsive to the distinction between permanent and temporary greenhouses and the auxiliary factual question of whether the Greenhouse has a foundation, those were issues which R.I. Grows vigorously disputed at the Hearing as it pursued its line of inquiry into the Zoning Inspector's previous actions. *See, e.g.*, Hr'g Tr. 66:4-11, 69:2-22. In the Court's view, the Zoning Board's addition of the qualifier "permanent" in its factual determination that the Greenhouse constitutes a structure was therefore, at worst, an unnecessary reference to an extraneous factual issue that did not affect the legal import of the Zoning Board's ultimate decision. *See Preservation Society of Newport County v. City Council of City of Newport*, 155 A.3d 688, 693 (R.I. 2017) (quoting *Thorpe v. Zoning Board of Review of North Kingstown*, 492 A.2d 1236, 1237 (R.I. 1985)) (requiring "'the making of findings of fact and the application of legal principles in such a manner that a judicial body might review a decision with a reasonable understanding of the manner in which evidentiary conflicts have been resolved and the provisions of the [zoning] ordinance applied'"). In the final analysis, if the Greenhouse is a structure as that term is defined by law—and the Court sees no basis to overturn the Zoning Board and Zoning Inspector on that question—R.I. Grows cannot claim that its "substantial rights . . . have been prejudiced" by the decision to treat the Greenhouse as a structure. Section 45-24-69(d).

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both "footings" and a "retraining [*sic*] parameter [*sic*] wall." *Id.* at 70:24-71:1. "[If] it cannot be said after a review of the conflicting evidence that the [zoning] board's findings were clearly erroneous[,]" the Court cannot disturb those findings. *Mendonsa v. Corey*, 495 A.2d 257, 263 (R.I. 1985).

The Court also cannot agree with R.I. Grows that the Zoning Inspector acted in an *ultra vires* fashion by impermissibly attempting to enforce the State Building Code. At oral argument, counsel for R.I. Grows argued that any consideration of whether the Greenhouse has a foundation was outside the Zoning Inspector's purview because such considerations necessarily implicate the State Building Code. While the Court has no doubt that a zoning official could exceed his or her authority by attempting to enforce the substantive provisions of the State Building Code, that is not what happened in this case. *Cf. Pitocco*, 707 A.2d at 693 ("At trial, plaintiffs proved that [the building official] had denied their building permit application for an improper reason: namely, his belief that their bringing heavy construction equipment onto their property to rebuild their home constituted a zoning-ordinance violation that precluded issuance of the building permit.").

The Order does not rely on or even reference the State Building Code, and the Decision only does so when acknowledging the preemption arguments advanced by R.I. Grows. Decision 2; *see* Order. As with the permanent/temporary distinction, the Zoning Inspector's discussion of the State Building Code at the Hearing only arose when counsel for R.I. Grows cross-examined the Zoning Inspector regarding his treatment of other greenhouses in the Town:

> "Q. Mr. Morgan, do you have any idea how many greenhouses exist in the town of Exeter?
> " . . .
> "A. What is your definition of a greenhouse? Temporary structures covered with plastic film over plastic hoops or 25 acre tempered glass on steel frames?
> "Q. Well, let's use the state building code[ ] definition.
> "A. I don't work with the state building code.
> " . . .
> "Q. Well, I'm going to ask these questions based on this definition."
> (Hr'g Tr. 59:10-23.)

Additionally, as this Court has stated, the Order does not enforce *any* substantive provisions, whether of the State Building Code or otherwise. *See* Order. To the extent that the Zoning Inspector considered the Greenhouse's "concrete foundations" and "footings" for its "steel

posts"—or its "tempered glass on steel frames"—he did so to answer the threshold question of whether the Greenhouse needed to comply with the procedural requirements of the Zoning Code. (Hr'g Tr. 59:16, 66:9-11, 67:22-69:1.) The Zoning Inspector made no determinations regarding the Greenhouse's "structural strength" or any other substantive purpose of the State Building Code. Section 23-27.3-101.3. As previously explained, no conflict arises from requiring the Greenhouse to comply with both the State Building Code and the Zoning Code, and R.I. Grows has offered no persuasive argument for why the Zoning Inspector's references at the Hearing to State Building Code or the materials used to construct the Greenhouse—many of which were offered in response to R.I. Grows' questions—have irreparably tainted the Decision.

D

Legal Effect of Zoning Certificates

Next, R.I. Grows argues that its failure to obtain a zoning certificate for the Greenhouse cannot constitute a violation of the Zoning Code or serve as a basis for the Order because zoning certificates are not legally binding and cannot create, extend, abridge, or modify a party's legal rights. (Appellants' Mem. 20-21.) In support, R.I. Grows cites *Parker v. Byrne*, 996 A.2d 627 (R.I. 2010) and two Superior Court cases, *NI, Ltd. v. Duncan*, No. NC-2002-0573, 2004 WL 1541918 (R.I. Super. June 23, 2004) and *Cohen v. Duncan (Cohen I)*, Nos. 2002-599 and 2001-380, 2004 WL 1351155 (R.I. Super. June 9, 2004), *quashed by Cohen v. Duncan (Cohen II)*, 970 A.2d 550 (R.I. 2009)). The Zoning Board responds by citing *Town of Foster v. Lamphere*, 117 R.I. 541, 368 A.2d 1238 (1977) and arguing that the Town may properly require R.I. Grows to obtain a zoning certificate as a prerequisite for construction of the Greenhouse; in turn, R.I. Grows argues that the Zoning Board's arguments rely on outdated case law. (Defs.' Mem. 29-31; Appellants' Reply Appellees' Mem. Law Opp'n Appeal Compl. (Appellants' Reply) 3-4, 6.)

The Zoning Enabling Act defines a zoning certificate as "[a] document signed by the zoning-enforcement officer, as required in the zoning ordinance, that acknowledges that a use, structure, building, or lot either complies with, or is legally nonconforming to, the provisions of the municipal zoning ordinance or is an authorized variance or modification therefrom." Section 45-24-31(70). "In order to provide guidance or clarification, the zoning enforcement officer or agency shall, upon written request, issue a zoning certificate or provide information to the requesting party as to the determination by the official or agency within fifteen (15) days of the written request." Section 45-24-54. Pursuant to § 45-24-54, the responsibilities of "the person or persons charged with [the] administration and enforcement" of a local zoning ordinance also include "(1) the issuing of any required permits or certificates; . . . (4) authorizing commencement of uses or development under the provisions of the zoning ordinance; (5) inspection of suspected violations; [and] (6) issuance of violation notices with required correction action[.]" *Id; see West v. McDonald*, 18 A.3d 526, 536 (R.I. 2011) (emphases omitted) (quoting § 45–24–29(b)(3)) ("[M]unicipal zoning regulations are necessary 'to establish and enforce standards and procedures for the proper management and protection of land, air, and water as natural resources, and to employ contemporary concepts, methods, and criteria in regulating the type, intensity, and arrangement of land uses[.]'").

Thus, while zoning officials may issue informative zoning certificates in response to requests for information, the Zoning Enabling Act also contemplates that "required permits [and] certificates" will play a more formal role in the zoning application enforcement process. Section 45-24-54; *see* § 45-24-33(a)(1) (listing "[p]ermitting, prohibiting, limiting, and restricting the development of land and structures in zoning districts, and regulating those land and structures according to their type and the nature and extent of their use" as one of the "general provisions"

that zoning ordinances must address "through reasonable objective standards and criteria"). *NI, Ltd.*, cited *supra*, addressed this distinction in a case in which a party appealed to the Superior Court from a zoning board's decision upholding the issuance of an informational zoning certificate; in reversing that decision, this Court held that informational certificates cannot be appealed to zoning boards because they represent "advisory determination[s]" as to the "*present status* of [an] *existing* use, structure, building or lot" and therefore do "not operate to create any enforceable rights or to divest existing rights." *NI, Ltd.*, 2004 WL 1541918, at *4. "'Where the use, structure, building or other development is proposed, as opposed to existing, it is only through the submission of proper applications for necessary permits that a party can gain an enforceable approval of proposed plans.'" *Id.* at *5 (quoting *Tompkins v. Zoning Board of Review of Town of Little Compton*, No. 2001-204, 2003 WL 22790829, at *14 (R.I. Super. Oct. 29, 2003)); *see Cohen I*, 2004 WL 1351155, at *28 (same).

Here, § 1.6.A of the Zoning Code states that "[n]o building or structure shall hereafter be erected, enlarged or relocated, and no nonstructural use shall be initiated until a zoning certificate has been issued by the zoning inspector indicating that the proposed use and the structure conforms to the provisions of this ordinance." Zoning Code § 1.6.A. Although that provision uses the "zoning certificate" terminology that the *NI, Ltd.* decision associated with information regarding existing uses and structures, the context of the provision indicates that it applies to "proposed use[s] and . . . structure[s.]" *Id.*; *see 5750 Post Road Medical Offices, LLC v. East Greenwich Fire District*, 138 A.3d 163, 167 (R.I. 2016) (quoting *Western Reserve Life Assurance Co. of Ohio v. ADM Associates, LLC*, 116 A.3d 794, 798 (R.I. 2015)) ("'The plain meaning approach, however, 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.'").

Additionally, the following sentence of § 1.6.A states that "[t]he zoning inspector may require that information necessary to ensure compliance with the provisions of this ordinance be filed with the application for such permit." Zoning Code § 1.6.A. A subsequent paragraph provides that "[w]here the inspector denied the issuance of a zoning certificate, within 15 days, a written statement shall be given to the applicant, the zoning board of review, and the president of the town council, indicating the reason(s) for such refusal." *Id.*; *cf. NI, Ltd.*, 2004 WL 1541918, at *4-*6 (explaining that informational zoning certificates are unappealable). Reasonably understood, these provisions speak to the Zoning Inspector's authority to enforce an applicant's compliance with the substantive provisions of the Zoning Code in connection with a proposed use or structure, and it was R.I. Grows' refusal to engage with this compliance process that prompted the Order.[7] Only in its final paragraph does § 1.6.A provide that "[i]n order to provide guidance or clarification, the zoning inspector shall, upon written request, issue a zoning certificate or provide information to the requesting party as to the determination by the inspector within 15 days of the written request." Zoning Code § 1.6.A; *cf. NI, Ltd.*, 2004 WL 1541918, at *4 (quoting § 45-24-54) ("By writing a distinct provision for the officer's informational determination, the Legislature clearly distinguished the nature of this additional duty from the acts of 'administration and enforcement,' which describes those core functions of the zoning officer expressly enumerated.").

Parker, cited *supra*, which R.I. Grows relies on for the statement that "a zoning certificate is not legally binding[,]" is factually distinct from this case, as it involved a breach of contract action in the wake of a failed real-estate transaction for the sale of two adjoining lots. *Parker*, 996

[7] As previously mentioned, the Order also rests on the independent basis that R.I. Grows failed to comply with § 2.5.1.A of the Zoning Code, which requires development plan review for all approved uses other than one- or two-family dwellings or accessory buildings. *See* Order 2.

A.2d at 633. The zoning certificate at issue, obtained by defendants' title attorney before closing, "expressly disclaimed any 'guarantee or warrant [of] the accuracy of the information contained' in it" and "erroneously represented that the two lots had merged." *Id.* at 630-31. After attempts to resolve the issue with the town, "defendants' agent informed plaintiffs' agent that he had reached an impasse, that he could not resolve the matter himself, and that defendants did not wish to close until the question of whether the two lots could be sold separately was resolved." *Id.* at 632-33. "The plaintiffs, however, did not take any action to resolve the matter[,] [t]he closing date came and went, and approximately three weeks after the scheduled closing, one of the lots was sold at a foreclosure auction, thereby making performance of both agreements impossible." *Id.* at 633.

After plaintiffs sued, the Rhode Island Supreme Court held that plaintiffs breached their contractual duty "by failing to present two marketable titles to defendants within a reasonable time after the scheduled closing date, thereby excusing defendants from performance under the agreements." *Id.* at 633. The significance of the zoning certificate to this holding was that despite the fact that it was not "legally binding[,]" and "coupled with the town solicitor's warning that the town could take enforcement action," it "raised sufficient concerns to warrant a postponement of the closing for a reasonable period" in order to resolve the issue. *Id.* Thus, *Parker* had very little to do with the ordinary operations of zoning enforcement.

Conversely, *Lamphere*, cited *supra*, involved an enforcement action ordering the defendant "to remove a mobile home which he had placed on his property in violation of the Zoning Ordinance of the Town of Foster." *Lamphere*, 117 R.I. at 542, 368 A.2d at 1239. Both the trial justice and the Rhode Island Supreme Court rejected defendants' counterarguments, including his contention that he was "being unreasonably prevented from placing a trailer on his property[,]" in

part because the "defendant never even applied for a zoning certificate as required by . . . the zoning ordinance." *Id.* at 546, 368 A.2d at 1241.

> "Thus he failed to take the procedural step that was required in order to legally place any new structure on property. . . . Instead, defendant comes to this court asking us to relieve him of his alleged hardship by acting as a zoning board of review. This we will not do. Our holding here does not foreclose defendant from seeking relief from the zoning board of review which is the proper agency from which to seek relief. As we perceive this case, defendant is asking this court for relief from those portions of the zoning ordinance which require a zoning certificate and limit lots to single structures. Both of those provisions appear to be permissible objects of a zoning ordinance. . . . We see no reason to allow [defendant] to circumvent the statutory process and now apply to this court for an exception to the ordinance." *Id.* at 546-47, 368 A.2d at 1241-42.

As R.I. Grows notes, *Lamphere* predates the current version of the Zoning Enabling Act; nevertheless, its animating principle remains valid.[8] The Zoning Inspector and the Zoning Board are empowered by state law to enforce the procedural steps required in order to legally place any new structure on the Property. *See* § 45-24-54 (providing for the "administration and enforcement" of zoning ordinance); *see also Pezza*, 723 A.2d at 283 (discussing necessity of compliance with procedure mandated by zoning ordinance as a condition precedent for obtaining building permit). R.I. Grows' contention that the zoning certificate referred to in the Zoning Code and the Order necessarily refers to a non-binding, informational zoning certificate—rather than the approval of an application for a proposed structure—focuses on form over substance and ignores the plain text of § 1.6.A of the Zoning Code. It is evident that the Order was issued in response to R.I. Grows' failure "to get binding approval" for the proposed structure of the Greenhouse "through a formal

[8] Also, as in *Lamphere*, this Court's Decision does not foreclose R.I. Grows from obtaining zoning approval through the proper procedural channels. *See Town of Foster v. Lamphere*, 117 R.I. 541, 547, 368 A.2d 1238, 1241 (1977).

application process[,]" and R.I. Grows cannot evade that obligation through verbal sleight-of-hand. *Tompkins*, 2003 WL 22790829, at *5.

E

Constitutional Arguments

Finally, R.I. Grows raises several constitutional arguments. *See* Appellants' Mem. 22. First, R.I. Grows raises a due process challenge by arguing that the governing definition of "structure" in § 45-24-31(63) is void for vagueness because it is not sufficiently definite and allows for arbitrary and discriminatory enforcement.[9] *Id.* at 22-26. R.I. Grows also raises a "class of one" equal protection challenge by arguing that the Zoning Inspector impermissibly singled out R.I. Grows for arbitrary and discriminatory treatment to hinder the construction of the Greenhouse. *Id.* at 26-29. To support its claims of selective enforcement and malicious intent, R.I. Grows points to the Zoning Inspector's testimony that he has only required one other greenhouse in Town to obtain a zoning certificate. *Id.* at 30-31.

The Zoning Board rejects R.I. Grows' contention that the Town has acted inappropriately or in a discriminatory fashion and argues that R.I. Grows cannot meet the high burden necessary to satisfy its due process and equal protection claims. (Defs.' Mem. 32-34.) The Zoning Board argues that the statutory definition of "structure" applied by the Zoning Inspector, while broad, is not ambiguous or vague and has not been enforced against R.I. Grows in an arbitrary manner. *Id.* at 34-38. Similarly, the Zoning Board argues that R.I. Grows' equal protection claim must fail because R.I. Grows cannot identify any similarly situated parties who were treated differently by the Zoning Inspector. *Id.* at 38-41.

[9] On June 15, 2022, the Office of the Attorney General acknowledged receipt of notice from R.I. Grows' counsel regarding the constitutional challenge for vagueness and declined to intervene. Notice, June 15, 2022; *see* Super. R. Civ. P. 24(d).

1

Due Process

The Rhode Island Supreme Court "presumes that legislative enactments are valid and constitutional." *Mackie v. State*, 936 A.2d 588, 595 (R.I. 2007). A statute will not be deemed unconstitutional unless the party challenging the statute is able to "'prove beyond a reasonable doubt that the act violates a specific provision'" of the state or federal constitutions. *Id.* (quoting *Cherenzia v. Lynch*, 847 A.2d 818, 822 (R.I. 2004)). A statute is "void for vagueness in violation of the Fourteenth Amendment Due Process Clause if it 'fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits . . . [or] authorize[s] and even encourage[s] arbitrary and discriminatory enforcement.'" *State v. Russell*, 890 A.2d 453, 459 (R.I. 2006) (quoting *State ex rel. Town of Westerly v. Bradley*, 877 A.2d 601, 605 (R.I. 2005)).

"In determining whether a statute is unconstitutionally vague as applied to [a party]," the Court "considers the enactment in light of the facts." *Id.* at 458 (citing *State v. Berberian*, 416 A.2d 127, 129 (R.I. 1980)). The standard for "evaluating the notice part of a vagueness challenge" is "whether a person of ordinary intelligence has a reasonable opportunity to know what is prohibited[.]" *Id.* at 460 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)). "When the facts show that [a] defendant had adequate notice that his conduct was proscribed," there is "'no reason to speculate whether the statute notifies a hypothetical defendant.'" *Id.* at 458 (quoting *State v. Sahady*, 694 A.2d 707, 708 (R.I. 1997)).

"[T]he void-for-vagueness doctrine" also "prohibits enactments that 'encourage arbitrary and discriminatory enforcement.'" *Auger*, 44 A.3d at 1235 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *see Kolender*, 461 U.S. at 358 (internal quotation marks and citation omitted) ("[T]he more important aspect of vagueness doctrine is not actual notice, but . . . the requirement

that a legislature establish minimal guidelines to govern law enforcement.") Another relevant factor in this case is that the United States Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Village of Hoffman Estates*, 455 U.S. at 498-99 (citations omitted).

Here, R.I. Grows argues that the Zoning Inspector's consideration of the fact that the Greenhouse incorporates a "steel frame and rigid glass panels" in determining that it qualifies as a structure as defined by the Zoning Enabling Act and the Zoning Code indicates that the definition does not provide sufficient guidance and allows for arbitrary and discriminatory enforcement. Appellants' Mem. 24-25; *see* Order 1 ("I made my position clear that a greenhouse constructed with a steel frame and rigid glass panels was indeed a structure."). The relevant statutory definition is certainly broad, but it is not particularly vague: the Zoning Enabling Act, and thus the Zoning Code, defines a structure as "[a] combination of materials to form a construction for use, occupancy, or ornamentation, whether installed on, above, or below the surface of land or water[,]" thereby employing commonly used, objective, and nontechnical terms. Section 45-24-31(63); *see Lescault v. Zoning Board of Review of Town of Cumberland*, 91 R.I. 277, 280, 162 A.2d 807, 809 (1960) ("The words 'building,' 'dwelling' and 'structure' are all words in ordinary use and each has a well-defined meaning."); *cf. State v. Diaz*, 46 A.3d 849, 864 (R.I. 2012) (quoting *State v. Hallenbeck*, 878 A.2d 992, 1009 (R.I. 2005)) ("[T]he terms 'wanton' and 'reckless' [are] of 'such common usage as to provide sufficient guidance to a jury of ordinary intelligent lay people[.]'").

R.I. Grows also takes issue with the Zoning Inspector's "consideration of terms not expressly stated" in § 45-24-31(63)—namely, a steel frame and rigid glass panels—and contends that such a "discriminatory application" indicates that the statutory definition of a structure lacks objective standards of enforcement. (Appellants' Mem. 24-25.) This argument is without merit.

The question of whether a law "'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis'" centers on whether the law's "plain language supplies sufficient standards to allow police officers, judges, and fact-finders *to apply the law to the facts of a particular case*." *Russell*, 890 A.2d at 460-61 (emphasis added) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)); *see Grayned*, 408 U.S. at 114 ("As always, enforcement requires the exercise of some degree of . . . judgment[.]"). Moreover, a "vagueness challenge to an enactment that 'do[es] not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.'" *Bradley*, 877 A.2d at 606 (quoting *Village of Hoffman Estates*, 455 U.S. at 495 n.7). As such, it is unclear to this Court how the Zoning Inspector's identification of steel and glass as the particular "combination of materials" used to construct the Greenhouse can be considered as anything other than the garden-variety enforcement of an unambiguous civil enactment. *Cf. Auger*, 44 A.3d at 1236 (finding that "'reasonable person' language sets forth a straightforward and constitutionally sustainable standard for the enforcement of" criminal noise ordinance).

2

Equal Protection

To establish an equal protection violation based on the selective enforcement of government regulations, a claimant must show that: "'(1) [he or she], compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of City of Providence*, 888 A.2d 948, 954 (R.I. 2005) (quoting *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980), *cert. denied*, 450 U.S.

959 (1981)); *see id.* at 956 n.10 (citations omitted) ("[A]t least under federal law, an equal-protection claim may be advanced by an individual as a 'class of one.'"). "[W]here no invidious discrimination or interference with the exercise of other express constitutional rights has occurred, the malice/bad faith standard should be scrupulously met.'" *Id.* at 954 (quoting *LeClair*, 627 F.2d at 611). "As a general matter, the equal protection clause serves to protect suspect classes and fundamental interests against inequitable treatment, but other types of inequities and classifications may be justified by a showing of mere rationality." *LeClair*, 627 F.2d at 611 (citing *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)).

R.I. Grows is unable to establish either element of its claim. On the first element, R.I. Grows has pointed to nothing in the record that would indicate that a comparable greenhouse had been exempted from compliance with the Zoning Code. *See Snyder v. Gaudet*, 756 F.3d 30, 34 (1st Cir. 2014) (quoting *Cordi–Allen v. Conlon*, 494 F.3d 245, 250 (1st Cir. 2007)) (stating that "proof of a similarly situated, but differently treated, comparator is essential" to "a class of one equal protection claim" and "'must be enforced with particular rigor in the land-use context because zoning decisions 'will often, perhaps almost always, treat one landowner differently from another'"). According to his Hearing testimony, the Zoning Inspector has been consistent in requiring "permanent" greenhouses to obtain zoning certificates while exempting "temporary" greenhouses from that obligation. *See* Hr'g Tr. 60:6-62:14. While the exemption of temporary greenhouses on the basis that they do not have foundations may not have an explicit basis in the text of the Zoning Code, it satisfies the "mere rationality" standard. *LeClair*, 627 F.2d at 611. For the Zoning Code's legitimate purposes of regulating land use, including through dimensional regulations governing the siting of structures, a greenhouse that can readily be uprooted and "move[d] . . . all over the place" does not implicate the same concerns as one that cannot. Hr'g Tr.

62:8; *cf. Cordi-Allen*, 494 F.3d at 254 (citing *Bell v. Duperrault*, 367 F.3d 703, 708 (7th Cir. 2004)) (finding that plaintiffs "plainly have not carried their burden of demonstrating that they are similarly situated" to a proposed comparator because "the record reflects a wholly rational explanation for the disparate treatment").

Moreover, because R.I. Grows has not claimed that any suspect classifications or fundamental constitutional rights are implicated in this matter, "'the malice/bad faith standard'" of the second element "'should be scrupulously met.'" *Providence Teachers' Union*, 888 A.2d at 954 (quoting *LeClair*, 627 F.2d at 611). R.I. Grows' allegations of bad faith and malicious intent on the part of the Zoning Inspector do not suffice, as they are supported only by *ipse dixit* accusations of bias and intimations that the Zoning Inspector was improperly influenced by the Town Council or other persons. *See* Appellants' Mem. 30-31; Hr'g Tr. 52:25-53:21; *see also* Compl. ¶ 29 ("[The Zoning Inspector] has singled out RI Grows as a reflection of personal animosity he harbors against [Richard J.] Schartner, and the Schartner family as a whole."); R. at 42, 98 (e-mail from Timothy Schartner to John Leyden, State Building Code Commissioner, stating in part that the Zoning Inspector "is not a fan of my father or anything we do").

At the Hearing, the Zoning Inspector testified that he "unequivocal[ly]" considered the Greenhouse to be a structure that was therefore subject to the Zoning Code, and that he was "compelled" to enforce the Zoning Code to the best of his ability. Hr'g Tr. 45:14-17, 48:14-19, 49:7-10; *cf. Pezza*, 723 A.2d at 284 ("Here, the building official had no authority to waive compliance with an entire section of the town's zoning ordinance and issue the permit anyway."). The Zoning Inspector also testified that he was aware of only one other greenhouse that had been constructed in the Town during his tenure that qualified as a permanent structure, and that he had also required that greenhouse to obtain a zoning certificate. (Hr'g Tr. 60:17-22, 61:12-13, 63:2-6.)

In response to the questions posed by counsel for R.I. Grows about "who was involved" in the decision to issue the Order, the Zoning Inspector testified that he drafted the contents of the Order by himself, without input from others. *Id.* at 52:25-53:6, 55:1-5. The Zoning Inspector also testified that the only person he consulted with before issuing the Order was the President of the Town Council and that the purpose of that conversation was to ensure that the Town would support the Zoning Inspector with legal representation in the event that the Order was challenged. *Id.* at 53:7-21; 55:24-56:8. Ultimately, "'[o]nly in extreme circumstances will a land-use dispute give rise to an equal protection claim[,]'" and nothing in the record before the Court comes remotely close to establishing an objective basis for R.I. Grows' allegations of bad faith and malicious intent. *Najas Realty, LLC v. Seekonk Water District*, 821 F.3d 134, 144 (1st Cir. 2016) (quoting *Torromeo v. Town of Fremont*, 438 F.3d 113, 118 (1st Cir. 2006)).

IV

Conclusion

For the foregoing reasons, R.I. Grows' appeal from the Decision of the Zoning Board is hereby denied and dismissed, and that Decision is affirmed. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Rhode Island Grows, LLC, et al. v. Richard Booth, et al.**
CASE NO:	**WC-2022-0057**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**August 11, 2022**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**Michael A. Kelly, Esq.** **Dane E. Ardente, Esq.** **Michael Resnick, Esq.**
For Defendant:	**James P. Marusak, Esq.** **Stephen J. Sypole, Esq.**