STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 10, 2026)

MILL ROAD REALTY ASSOCIATES, LLC, MORRIS MAGLIOLI and WILLIAM L. RICCI Jr. d/b/a WRIGHT'S AUTO PARTS	:	
Plaintiffs,	:	
v.	:	**C.A. No. PC-2022-04591**
TOWN OF FOSTER; RHODE ISLAND DEPARTMENT OF BUSINESS REGULATION; MANNY LINHARES JR, in his capacity as Chairman of the Foster Zoning Board of Review; JAMES FINNEGAN, in his capacity as Vice Chairman of the Foster Zoning Board of Review; BOB MOREAU, in his capacity as Secretary of the Foster Zoning Board of Review; JONATHAN HAYTER, in his capacity as a Member of the Foster Zoning Board of Review; TIMOTHY DANNENFELSER, in his capacity as a Member of the Foster Zoning Board of Review; BARBARA FELL, in her capacity as an Alternate Member of the Foster Zoning Board of Review; and STEVEN BELLUCCI, in his capacity as an Alternate Member of the Foster Zoning Board of Review; KELLI RUSS, in her capacity as Foster Town Treasurer/Finance Director.	:	
Defendants.	:	

DECISION

MCHUGH, J. Before the Court are Motions to Dismiss from the two Defendants in this case: first, the Town of Foster (Town), the Town Treasurer, Kelli Russ, and members of the Foster

Zoning Board of Review—Manny Linhares, Jr., James Finnegan, Bob Moreau, Jonathan Hayter, Timothy Dannenfelser, Barbara Fell, and Steven Bellucci—(collectively the Town Defendants), and second, the Rhode Island Department of Business Regulation (DBR). Both DBR and the Town bring Motions to Dismiss for failure to serve the Attorney General under G.L. 1956 § 9-30-11. Both DBR and the Town bring Motions to Dismiss for failure to state a claim and failure to join an indispensable party under Rules 12(b)(6) and 12(b)(7) of the Superior Court Rules of Civil Procedure. The Town also brings Motions to Dismiss for insufficiency of service of process and lack of personal jurisdiction under Rules 12(b)(2) and 12(b)(5).

I

Compliance with § 9-30-11

As a preliminary matter, the Court will address the Motions to Dismiss regarding alleged noncompliance with § 9-30-11, which requires a party challenging the constitutionality of a statute to serve the Attorney General a copy of the proceeding.

A

Facts and Travel Related to Compliance with § 9-30-11

At a hearing on March 21, 2023, this Court dismissed Plaintiffs' action pursuant to Rule 12(b)(1) of the Superior Court Rules of Civil Procedure for lack of subject matter jurisdiction because Plaintiffs failed to notify the Attorney General of their constitutional claims under § 9-30-11. (Docket; Mot. to Dismiss; Order (April 21, 2023) (granting Motion to Dismiss)). On appeal, the Rhode Island Supreme Court reversed and remanded the case for further proceedings and directed that "the parties [be permitted] to present evidence on the issue of compliance with § 9-30-11, along with the grounds for their initial motions." *Mill Road Realty Associates, LLC, et al. v. Town of Foster et al.*, 326 A.3d 1085, 1089 (R.I. 2024).

To address the issue of compliance with § 9-30-11, DBR filed a Supplemental Memorandum on March 3, 2025. (Def. DBR's Supplemental Mem. in Supp. Mot. to Dismiss (DBR's Suppl. Mem.) 1.) The Town filed a Supplemental Memorandum on March 3, 2025. (Def. Town's Supplemental Mem. in Supp. Mot. to Dismiss (Town's Suppl. Mem.) 1.) Plaintiffs objected and filed a memorandum on March 3, 2025. (Pls.' Mem. in Resp. to Mot. to Dismiss (Pls.' Resp. Mem.) 1.) DBR filed an additional reply memorandum on March 10, 2025. (Def. DBR's Reply Mem. (DBR's Reply Mem.) 1.) Defendants' Motions to Dismiss on the issue of compliance with § 9-30-11 are now before the Court for decision. The Court will address additional facts pertaining to this issue as needed below.

B

Section 9-30-11 Analysis

Section 9-30-11 mandates that in any proceeding, "if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard." Section 9-30-11. Compliance with § 9-30-11 is a "threshold question regarding [the Plaintiffs'] ability to bring [this] suit and the [Court's] ability to hear [this] suit[.]" *Mill Road Realty Associates, LLC et al.*, 326 A.3d at 1089. The Rhode Island Supreme Court holds that "without notification of the Attorney General, the constitutional attack [is] not ripe for consideration." *Kingstown Mobile Home Park v. Strashnick*, 774 A.2d 847, 852 (R.I. 2001).

Section 9-30-11 is indisputably applicable here, as Plaintiffs challenge the constitutionality of both the Town's secondhand licensure requirement to comply with the Town's Zoning Ordinance and DBR's requirement to have a Secondhand License from the Town prior to the issuance of an Auto Wrecking and Salvage License (AWS License) from the State under G.L. 1956

§ 42-14.2-8. DBR argues that the Attorney General was not properly served with notice of Plaintiffs' intent to contest the constitutionality of a statute as required by § 9-30-11. (DBR's Suppl. Mem. 2.) DBR argues that Plaintiffs merely attempted to serve DBR by mailing a copy of the Complaint to the Attorney General in his capacity as counsel for DBR. *Id.* DBR further argues that a representative of the Attorney General stipulated to service on behalf of DBR, not in their capacity as a member of the Attorney General's office. *Id.* DBR avers that the Court should not consider this satisfactory under § 9-30-11 because the Attorney General's ability to intervene in constitutional challenges is different than the Attorney General's responsibility to represent state agencies. *Id.* at 4. DBR also contends that if the Attorney General does not receive separate notice of a complaint challenging the constitutionality of a state statute or city ordinance, the office's process for determining whether the Attorney General should intervene is not triggered. *Id.* at 5.

The Town similarly contends that Plaintiffs failed to serve the Attorney General as required prior to contesting the constitutionality of the statute. (Town's Suppl. Mem. 1.) The Town argues that Plaintiffs attempted service on the parties in this matter through registered mailings and did not attempt to serve the Attorney General himself. *Id.* at 2. The Town avers that no service package was served upon the Attorney General as notice of the constitutional challenge. *Id.* at 3. The Town argues that even if an attempt to serve the Attorney General directly was made, Plaintiffs failed to serve all required documents together and failed to have the required documents served in an appropriate manner. *Id.* Further, the Town argues that Plaintiffs additionally failed to comply with § 9-30-11 because it did not join each municipality in Rhode Island, all of which may be affected by the statute being declared unconstitutional. *Id.* at 4.

Plaintiffs maintain that the Attorney General was properly served in compliance with § 9-30-11 because the Attorney General's office acknowledged service of Plaintiffs' Complaint in

multiple ways. (Pls.' Resp. Mem. 4.) Under *Owners-Operators Independent Drivers Association of America v. State*, 541 A.2d 69 (R.I. 1988) and *Westerly Residents for Thoughtful Development, Inc. v. Brancato*, 565 A.2d 1262 (R.I. 1989), Plaintiffs aver that evidence demonstrating that the Attorney General had notice of the claims and an opportunity to respond satisfies the procedural objectives of § 9-30-11 in cases. *Id*. Here, Plaintiffs argue that the Attorney General accepted the service package, and that proof of service was filed and accepted by the Court. *Id.* Plaintiffs further argue that a stipulation to accept service on behalf of DBR also indicates that the statute was complied with. *Id.* Plaintiffs also point to the fact that DBR was represented by a representative of the Attorney General at the March 23, 2023 hearing. *Id.* at 5. Plaintiffs argue that an appearance and acknowledgement of service by a Special Assistant Attorney General is sufficient in the instant matter to satisfy § 9-30-11. *Id.* Plaintiffs conclude by contending that DBR cannot show any actual prejudice in the present matter because they received notice and were afforded an opportunity to be heard. *Id*.

In response to Plaintiffs' arguments regarding § 9-30-11 compliance, DBR filed a reply memorandum arguing that the statute requires proper service on the Attorney General, not merely notice, and that proper service was not effectuated. (DBR's Reply Mem. 2.) DBR contends that Plaintiffs never provided the Attorney General's Office with direct and explicit notice that their Complaint raised constitutional challenges to both a state statute and municipal ordinances. *Id.* DBR further argues that Plaintiffs' attempt to serve by mail did not constitute proper service on the Attorney General. *Id.* On this point, DBR argues that Plaintiffs were required to effectuate personal service on the Attorney General, and that service by mail was improper. *Id.* at 3. DBR asks the Court to find that the stipulation accepting service on DBR's behalf does not cure Plaintiffs' failure to comply with § 9-30-11. *Id.* Additionally, DBR asks the Court to distinguish

Owner-Operators and *Westerly Residents for Thoughtful Development* from the current matter because, in each of those cases, a representative of the Attorney General made an appearance on behalf of the office itself, and not a state agency. *Id.* at 5-6.

The Rhode Island Supreme Court has repeatedly held that § 9-30-11's requirements are mandatory, and as a rule relating to service of process, it must be strictly followed and construed. *See Griffin v. Bendick*, 463 A.2d 1340, 1344 (R.I. 1983); *Brown v. Samiagio*, 521 A.2d 119, 121 (R.I. 1987); *Crossman v. Erickson*, 570 A.2d 651, 654 (R.I. 1990); *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208, 1214 (R.I. 2000); *Kingstown Mobile Home Park*, 774 A.2d 847.

In *Griffin*, the Court vacated a default judgment where the plaintiff failed to serve the Attorney General, holding that the Attorney General is an indispensable party under § 9-30-11. *Griffin,* 463 A.2d at 1344. In that case, the plaintiff brought a declaratory-judgment action against the directors of the state's Department of Environmental Management and Department of Transportation, alleging that the statutory scheme by which the state condemned portions of her shoreline property for the public use and benefit was unconstitutional. *Id*. The plaintiff's failure to serve the Attorney General "effectively voided any default judgment entered," and under such circumstances, the defendant had an "unqualified right to relief." *Id*.

Subsequent Rhode Island Supreme Court decisions have reaffirmed this principle, emphasizing that awareness of the action by the Attorney General's office is not a substitute for formal service. *Brown*, 521 A.2d at 121. However, the Court has also recognized that procedural objectives of § 9-30-11 may be satisfied where the Attorney General has had an opportunity to participate. *Owners-Operators*, 541 A.2d at 71.

In *Owners-Operators*, the Rhode Island Supreme Court was "satisfied that the procedural objectives were effectuated" despite the plaintiff's failure to formally serve the Attorney General. *Id*. The Court reasoned that

> "after vigorous inquiry at oral argument plaintiffs' produced documentation of a certificate of service, and in addition counsel from the attorney general's office acknowledged that an attorney had made an appearance at the proceedings below on behalf of the attorney general's office. The appearance by the assistant attorney general was made within the period that an answer was due in response to plaintiffs' complaint." *Id*.

The Court reached a similar result in *Westerly Residents for Thoughtful Development*, 565 A.2d at 1265, finding that the statute's procedural objectives were effectuated when the plaintiff notified the Attorney General of his right to intervene and served the Attorney General with a copy of the complaint and other pleadings.

The Court has not specifically addressed whether appearance and acknowledgement of service by a Special Assistant Attorney General who represents a state agency is sufficient to satisfy § 9-30-11. However, the Court finds persuasive a rule adopted by our sister jurisdiction in Massachusetts under a similar statutory scheme.

Massachusetts G.L. c. 231A, § 8 requires that in a declaratory judgment action, "[i]f a question of constitutionality is involved in any proceeding. . . the attorney general shall also be notified of the proceeding and be entitled to be heard." While this statute differs from § 9-30-11 in that it requires that the Attorney General be *notified* of the proceeding rather than *served* with a copy of the proceeding, the purpose of both statutes is to ensure that "parties with a necessary interest be apprised of an impending action in order to be afforded an opportunity to present objections." *Owners-Operators*, 541 A.2d at 71.

In interpreting § 8, the Supreme Judicial Court of Massachusetts found in *Pioneer Credit Corp. v. Commissioner of Banks*, 207 N.E.2d 51 (Mass. 1965) that even when a plaintiff seeking declaratory relief failed to notify the Attorney General that a question of constitutionality was involved in his claim, he was not barred from raising constitutional questions where the Attorney General appeared as counsel for the defendants. The Massachusetts court stated:

> "The defendants assert that the plaintiff is barred under G.L. c. 231A, § 8, from raising any constitutional questions since the record is devoid of evidence indicating that notice to the Attorney General was sent pursuant to that section to the effect that 'a question of constitutionality is involved.' However, the Attorney General appears as counsel for the defendants, and we think that the purpose of § 8 has thus been served." *Id*. at 55 n.3 (internal quotations omitted).

The Court recognizes this clarification by our sister jurisdiction as persuasive authority, as, "[a]lthough [this case involves] our sister court['s] interpretation of their own states'. . . statute[], [its] value is in showing their approach to the problem and not the result." *State v. Day*, 911 A.2d 1042, 1052 (R.I. 2006) (internal quotation omitted).

Here, the record demonstrates that the Rhode Island Attorney General had notice of and participated in the proceedings, satisfying § 9-30-11. Plaintiffs describe several instances in which the Attorney General was aware of and participated in the proceedings. (Pls.' Resp. Mem. 4-5.)

First, Plaintiffs mailed their Complaint to the Rhode Island Attorney General's office at 150 South Main Street, Providence, Rhode Island on August 18, 2022, where receipt was acknowledged by "P. Neronha." *Id.*, Ex. A. Plaintiffs then filed proof of service with the court on August 30, 2022. *Id.* Following this delivery, a Special Assistant Attorney General reached out to Plaintiffs' counsel to offer a stipulation to accept service on behalf of DBR. *Id.* Ex. B. Later, that Special Assistant Attorney General appeared on behalf of DBR at the March 23, 2023 hearing. (Pls.' Resp. Mem. 5.) There is no indication that the Plaintiffs' constitutional claim was litigated

without the Attorney General's awareness. To the contrary, the Attorney General's Office, in their capacity as counsel for DBR, was present, involved, and in a position to respond to the constitutional challenge from the inception of the case.

DBR and the Town's arguments that service was defective because it was not made personally upon the Attorney General or because the Attorney General appeared only as counsel for DBR elevate form over substance. The Rhode Island Supreme Court has cautioned against such a rigid application of § 9-30-11 when the statutory purpose has been fulfilled. *See Owners-Operators*, 541 A.2d at 71. That reasoning applies with equal force here. The Special Assistant Attorney General's participation on behalf of DBR demonstrates that the Attorney General had an opportunity to protect the State's interest in the validity of the challenged statute. The Court agrees with our Massachusetts counterparts that when the Attorney General appears as counsel for the defendants, the purpose of a statute mandating service on the Attorney General when a constitutional issue is raised is served. *Pioneer Credit Corp.*, 207 N.E.2d at 55 n.3.

The Court further rejects the Town's argument that Plaintiffs were required to join every municipality in Rhode Island that might be affected by a declaration of unconstitutionality. (Town's Suppl. Mem. 4.) The Rhode Island Supreme Court has instructed that dismissal for failure to join indispensable parties in a § 9-30-11 action is not mandatory when a defendant fails to establish that the parties have "a direct claim upon the subject of the action such that joinder of that party will cause it to lose anything by operation of the judgment rendered." *Middle Creek Farm, LLC v. Portsmouth Water & Fire District*, 252 A.3d 745, 754 (R.I. 2021). When a defendant "fail[s] to establish that any of the [allegedly indispensable parties] have 'an actual, present, adverse, and antagonistic interest' in the judgment" . . . [the defendant's argument] is purely speculative, and an unsubstantiated or speculative risk is insufficient and will not satisfy the § 9-30-11 criteria." *Id*. at

754-55 (quoting *Town of Warren v. Bristol Warren Regional School District*, 159 A.3d 1029, 1037 (R.I. 2017). Here, without naming specific municipalities, the Town merely contends that "[a]ny challenge to [DBR's statutory authority] would materially affect each of Rhode Island's municipalities that operate any sort of junkyard licensing scheme." (Town's Suppl. Mem. 4.) This contention does not amount to a level of specificity required to show that every Rhode Island town with a junkyard licensing program has an actual, present, adverse, and antagonistic interest in the judgment. *Middle Creek Farm,* 252 A.3d at 754.

Finally, even if the Court were to agree with DBR and the Town on their points about a technical deficiency in service, dismissal would not be warranted. As *Owners-Operators* makes clear, when the Attorney General has received actual notice and has meaningfully participated, the procedural purpose of § 9-30-11 is met. *Owners-Operators*, 541 A.2d at 71. The Court finds that Plaintiffs substantially complied with § 9-30-11 and that the Attorney General's rights under the statute were fully protected.

Accordingly, the Court finds that Plaintiffs properly satisfied the requirements of § 9-30-11. The Attorney General was served with the Complaint, acknowledged receipt, and actively participated in the litigation through counsel representing DBR. The procedural objectives of the statute, notice and opportunity to be heard, were fully achieved.

For these reasons, the Court concludes that Plaintiffs' service upon the Attorney General's Office, coupled with the Attorney General's participation in these proceedings through counsel representing DBR, fulfills the statutory requirement. Defendants' Motions premised on noncompliance with § 9-30-11 are therefore **DENIED**, and the Court will proceed to consider the Defendants' initial Rule 12 motions.

II

Initial Rule 12 Motions

The Court now turns to multiple Motions to Dismiss under Rule 12 of the Superior Court Rules of Civil Procedure. Both DBR and the Town request dismissal under Rules 12(b)(6) and 12(b)(7). The Town alone requests dismissal under Rules 12(b)(2) and 12(b)(5). The following facts are relevant to these Motions.

A

Facts and Travel Relevant to Defendants' Rule 12 Motions

Plaintiffs filed their Complaint on July 25, 2022 and an Amended Complaint on January 9, 2023. The following facts are drawn from Plaintiffs' verified amended complaint. Plaintiffs Morris Maglioli (Mr. Maglioli), William L. Ricci, Jr. (Mr. Ricci), and Mill Road Realty Associates, LLC (Mill Road Realty) (collectively Plaintiffs) own and operate Wright's Auto Parts—an auto-wrecking and salvage yard (the Junkyard) located at 37 Mill Road in Foster, Rhode Island (the Property). (Verified Compl. for Appeal from Town of Foster Zoning Board of Review, Declaratory J., and Additional Counts (Am. Compl.) ¶¶ 1, 4, 18 (Feb. 2, 2023).) Mr. Ricci is the sole member and manager of Mill Road Realty, the entity that owns the Property upon which the Junkyard is situated. *Id.* ¶ 1. Although the Property is currently zoned Agricultural/Residential, various owners have operated the Junkyard on the Property since the 1950s. *Id.* ¶ 18.

The Defendants named in the Amended Complaint include the Town, the Town Treasurer, Kelli Russ, and members of the Foster Zoning Board of Review—Manny Linhares, Jr., James Finnegan, Bob Moreau, Jonathan Hayter, Timothy Dannenfelser, Barbara Fell, and Steven Bellucci—(collectively the Town Defendants), and the Rhode Island Department of Business

Regulations (DBR). *Id.* ¶¶ 5-14. The Town has a junkyard licensing program through which it issues "Secondhand License[s]" to applicants seeking to operate junkyards. *Id.* ¶ 24.

From 2003-2017, the Junkyard's Secondhand License was renewed annually. *Id.* ¶ 25. Plaintiffs also held an AWS License issued by DBR. *Id.* To obtain an AWS License from DBR, the Junkyard was required to provide a copy of their Secondhand License issued by the Town. *Id.*

On February 23, 2017, the Town of Foster's Zoning Officer—i.e., Rhett Bishop (Mr. Bishop)—"sent a letter to Mill Road Realty indicating he would be coming to inspect the [P]roperty, and included a copy of the stipulations that were on the Secondhand License for 37 Mill Road." *Id.* ¶ 26. At that time, Mr. Maglioli and Mr. Ricci were unaware of the stipulations attached to their Secondhand License for operation of the Junkyard. *Id.* After conducting an inspection of the Junkyard on March 8, 2017, Mr. Bishop—the Town's Zoning Officer—sent a letter to the Foster Town Council (the Town Council) with an inspection report noting three deficiencies on the Property. *Id.* ¶ 27. In particular, Mr. Bishop noted that: "the [Junk]yard held approximately 2000 cards [*sic*], the trees used for fencing had grown too tall and the lower branches were no longer full enough to provide proper screening from the road, and the abandoned house on the [P]roperty was open and needed to be secured." *Id.*

Thereafter, on December 14, 2017, the Town Council declined to renew the Junkyard's Secondhand License based on the deficiencies noted in Mr. Bishop's inspection report. *Id.* ¶ 28. As a result, the Junkyard's Secondhand License expired on January 1, 2018. *Id.* DBR subsequently denied Plaintiffs' application for renewal of their AWS License due to the lack of a corresponding Secondhand License from the Town. *Id.* ¶ 29.

Thereafter, "[o]n or around January 8, 2018, Mr. Bishop issued a cease and desist letter to Mill Road Realty for operating [the Junkyard] without a license, citing the Town's . . . Ordinances

concerning dealers of junk/old metals and other second-hand articles[.]" *Id.* ¶ 30; *see also* Town of Foster, R.I. Code of Ordinances (Foster Code), Supp. No. 4, § 12-221 (April 8, 2021). In the winter of 2018, Plaintiffs' counsel communicated with the Town Council "in order to formulate an agreement on the terms of the license and operation of the [J]unkyard." (Am. Compl. ¶ 31.)

Plaintiffs attempted to cooperate with the Town to formulate an agreement on the terms of a renewed Secondhand License. *Id.* ¶¶ 31-34. The Town Council granted Mr. Ricci a sixty-day temporary Secondhand License to afford him time to get the Property in compliance. *Id*. ¶ 32. On March 24, 2018, however, the Town Council voted to revoke the temporary Secondhand License. *Id.* ¶ 33.

On March 12, 2019, the Junkyard received a second cease and desist notice for violation of § 12-221 under the Foster Code. *Id.* ¶ 35; *see also* Foster Code § 12-221 ("All persons selling, purchasing, bartering and dealing in junk, old metals and any other secondhand articles and all persons establishing, operating or maintaining automobile junkyards shall be required to obtain a license from the town council."). Months later, on May 9, 2019, the Town Council determined that (1) negotiations between the Town and the Junkyard were complete and (2) Mr. Ricci still needed to bring the Property into compliance with local zoning regulations. *Id.* ¶ 36.

Starting in 2020, Plaintiffs' current counsel communicated with the Town's counsel regarding renewal of the Secondhand License. *Id.* ¶ 37. Those efforts did not bear fruit, and on September 20, 2021, the Town sent a third cease and desist regarding the Property on the basis that the Junkyard violated § 38-193 of the Foster Code, entitled "Prohibited uses; Automobile, truck, or other vehicle junkyard." *Id.* ¶ 38; *see also* Foster Code § 38-193. As a result, the Town imposed a daily fine of $100 on the Junkyard starting on October 20, 2021 that will continue "to accrue until the violation is rectified." *See* Am. Compl. ¶¶ 35, 38-41.

On October 19, 2021, Mill Road Realty filed an appeal with the Town of Foster Zoning Board of Review (the ZBR), challenging the September 2021 cease and desist order pursuant to G.L. 1956 § 45-24-64.[1] *Id.* ¶ 39; *see* Am. Compl. Ex. B (ZBR Decision) at 1. On June 8, 2022, the ZBR heard Mill Road Realty's appeal. *Id.* ¶ 40. After the hearing, the ZBR issued its decision on July 5, 2022 (ZBR Decision), rejecting Mill Road Realty's appeal and upholding the Town's imposition of fines for violation of § 38-193 of the Foster Code. (Am. Compl. ¶ 41; *see also* ZBR Decision at 4.)

On July 25, 2022, Plaintiffs instituted the present action by filing their eleven-count Verified Complaint. (Docket; *see also generally* Verified Compl. for Appeal from Town of Foster Zoning Board of Review, Declaratory J., and Additional Counts (Compl.), July 25, 2022.) On February 23, 2023, the Court granted Plaintiffs' motion to amend the Complaint, thereby joining Defendant Kelli Russ, in her capacity as Treasurer/Finance Director for the Town, as a party to this action. *See* Am. Compl. ¶ 14.

Counts I-IV of Plaintiffs' Complaint are brought under the Uniform Declaratory Judgments Act. *Id.* ¶¶ 44-67. Count I requests an order declaring that the Town of Foster's junkyard licensing program is unconstitutional based on our Supreme Court's holding in *Metals Recycling Co. v. Maccarone*, 527 A.2d 1127 (R.I. 1987). (Am. Compl. ¶ 51.) Count II seeks a declaration that the Town's secondhand licensure requirement to comply with the Town's Zoning Ordinance is unconstitutional. *Id.* ¶ 57. Count III seeks a declaration that Plaintiffs have not lost their protections for the nonconforming, "grandfathered" use of the Property under § 45-24-39. *Id.* ¶ 62.

[1] The Verified Complaint does not identify which cease and desist letter was challenged (Am. Compl. ¶ 39); however, the Town Zoning Board of Review's (ZBR) subsequent decision specifies that Plaintiffs challenged the September 20, 2021 "Notice of Violation." *See* Compl. ¶ 38; Am. Compl. Ex. B (ZBR Decision) 4, § IV.

Count IV requests an order declaring that the DBR's requirement to have a Secondhand License from the Town prior to the issuance of an AWS License from the State is unconstitutional. *Id.* ¶ 67. Count IV also requests a declaration that DBR is required to accept an application for an AWS License without the need for a Secondhand License. *Id.*

Next, Count V appeals the ZBR on the basis that it was arbitrary and capricious. (Am. Compl. ¶¶ 68-82.) Counts VI and VII assert that the ZBR Decision was in violation of Plaintiffs' constitutional rights, specifically their right to due process and equal protection. *Id.* ¶¶ 83-96. As such, Counts VI and VII seek declarations that the Town is in violation of their state and federal rights to due process and equal protection. *Id.* ¶¶ 87, 96.

Count VIII of Plaintiffs' Complaint asks that the fines imposed by the Town be considered a violation of the prohibition against excessive fines under the Eighth Amendment to the United States Constitution and article 1, section 8 of the Rhode Island Constitution. (Am. Compl. ¶¶ 97-103.) As such, Plaintiffs also request a temporary restraining order to prevent the Town from enforcing any fines or penalties related to their nonconforming use of the Property. *Id.* ¶¶ 125-29 (Count XI). Finally, Counts IX and X seek monetary damages from the Town for violation of 42 U.S.C. § 1983 (Count IX) and for tortious interference with a business relationship, respectively. (Am. Compl. ¶¶ 104-124.)

On November 22, 2022, DBR filed its Motion to Dismiss pursuant to Rule 12(b)(6). (Docket; DBR's Mot. to Dismiss the Compl. 1.) On October 25, 2022, the Town filed their Motion to Dismiss pursuant to Rules 12(b)(2), 12(b)(5), 12(b)(6), and 12(b)(7). (Docket; Town's Mot. to Dismiss the Compl. 1.) On February 2, 2023, Plaintiffs moved to amend their Complaint to add Kelli Russ as a defendant, which the Court heard and granted on February 23, 2023. (Docket; Mot. to Am. Compl. 1; Order (Feb. 28, 2023) (granting Motion to Amend).). On February 24, 2023,

Plaintiffs filed their Objection in response to DBR and the Town's motions to dismiss. (Docket.) On March 7, 2023, DBR filed its Reply to Plaintiffs' Objection. (Docket.) On March 9, 2023 the Town filed their Reply to Plaintiffs' Objection. (Docket.) On February 28, 2023, the Court (1) granted Plaintiffs' Motion to Amend, (2) ordered that Kelli Russ be deemed one of the Town Defendants, (3) decreed that the pending Motions to Dismiss will be deemed responsive to the Amended Complaint, and (4) ordered that the pending Motions to Dismiss be heard on March 21, 2023. (Order 1 (Feb. 28, 2023).)

The matter came before this Court on March 21, 2023, where this Court dismissed Plaintiffs' action due to the previously discussed § 9-30-11 issue. (Order (April 21, 2023) (granting Motion to Dismiss)). On appeal, the Rhode Island Supreme Court reversed and remanded the case for further proceedings. Accordingly, the Defendants' initial Rule 12 motions are now before the Court for decision.

B

Defendants' Rule 12(b)(6) Arguments

DBR makes three arguments regarding dismissal under Rule 12(b)(6). First, DBR argues that Count IV should be dismissed under Rule 12(b)(6) because DBR's requirement that applicants provide proof of a Secondhand License to apply for an AWS license—that Plaintiffs claim violates the nondelegation doctrine—is no longer unconstitutional as a matter of law. (DBR's Mem. in Supp. of Mot. to Dismiss (DBR's Mem.) 8-16.) Second, DBR argues for dismissal of Count IV because it is not properly before the Court under the Uniform Declaratory Judgments Act. *Id*. at 17. Third, DBR argues that Plaintiffs lack standing. *Id*. at 21.

The Town makes two arguments regarding dismissal under Rule 12(b)(6). First, the Town argues that this Court should dismiss Plaintiffs' complaint for failure to state a claim because they

failed to present their legal claims to the Town Council as required by G.L. 1956 § 45-15-5. (Town's Mem. 1.) Second, the Town argues that Plaintiffs' claims are time-barred because the relief sought in Plaintiffs' Complaint is tantamount to an appeal of the Town Council's decisions to (1) deny the Junkyard's Secondhand License renewal application on December 14, 2017 and (2) the Town's decision to revoke the Junkyard's temporary Secondhand License on March 24, 2018. *Id*. at 6-7.

1

Rule 12(b)(6) Standard of Review

"[T]he sole function of a motion to dismiss is to test the sufficiency of the complaint." *Rhode Island Affiliate, American Civil Liberties Union, Inc. v. Bernasconi*, 557 A.2d 1232, 1232 (R.I. 1989). "All that is required is that the complaint give the opposing party fair and adequate notice of the type of claim being asserted." *Haley v. Town of Lincoln*, 611 A.2d 845, 848 (R.I. 1992). When considering a Rule 12(b)(6) motion to dismiss, the trial justice looks solely to the complaint and assumes that all allegations contained within are true. *Pontarelli v. Rhode Island Department of Elementary and Secondary Education*, 176 A.3d 472, 476 (R.I. 2018). However, "[a]llegations that are more in the nature of *legal* conclusions rather than factual assertions are not necessarily assumed to be true." *Doe ex rel. His Parents and Natural Guardians v. East Greenwich School Department*, 899 A.2d 1258, 1262 n.2 (R.I. 2006).

The court should grant a motion to dismiss "when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim." *Ellis v. Rhode Island Public Transit Authority*, 586 A.2d 1055, 1057 (R.I. 1991). "[B]ut unless amendment could avail the plaintiff nothing, the order

of dismissal should usually be with leave to amend." Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure* § 12:9 (2022 update).

2

DBR's Arguments

i

The Nondelegation Doctrine

First, the Court turns to DBR's argument that the licensing scheme is no longer unconstitutional as a matter of law. "In Rhode Island, the nondelegation doctrine is derived from article 6, sections 1 and 2 of the Rhode Island Constitution[.]" *Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1, 11 (R.I. 2005). The purpose of the nondelegation doctrine is to protect citizens against arbitrary actions by public officials and to assure that politically accountable officials make fundamental policy decisions. *Marran v. Baird*, 635 A.2d 1174, 1179 (R.I. 1994).

In substance, the nondelegation doctrine provides that "the General Assembly's unbridled delegation of its legislative power is unconstitutional and void." *Metals Recycling Co.*, 527 A.2d at 1129. "The delegation will be deemed reasonable, and therefore lawful, if it is limited by standards sufficient to confine the exercise of that power for the purpose for which the delegation was made." *Id.* Therefore, a "delegation will be upheld if the statute declares a legislative purpose, establishes a primary standard for carrying out the use, or lays out an intelligent principle to which [the municipality] must conform." *Davis v. Wood*, 427 A.2d 332, 336 (R.I. 1981). Of relevance here, the nondelegation doctrine has been applied to limit the delegation of legislative power to agencies and to municipalities. *See id.* at 335-36 (analyzing the delegation of power to an agency);

Metals Recycling Co., 527 A.2d at 1129 (declaring the delegation of legislative power to the town council unconstitutional under the nondelegation doctrine).

When determining whether a statute contains sufficient standards, the court must "read the act as a whole; the provision in question should not be isolated, but must be construed with reference to the entire act." *Davis*, 427 A.2d at 336 (citing *United States v. Gordon*, 580 F.2d 827, 839 (5th Cir. 1978); *Sheeran v. Nationwide Mutual Insurance Co.*, 404 A.2d 625, 630 (N.J. 1979); *Narragansett Electric Co. v. Harsch*, 368 A.2d 1194, 1199 (R.I. 1977)). Further, when interpreting the enabling statute, the court must apply the clear and ambiguous language of the statute literally, giving words their plain and ordinary meaning. *Marran*, 635 A.2d at 1180.

Under Count IV, Plaintiffs challenge the constitutionality of DBR's rule that it will only issue or renew an AWS License subject to a municipal junkyard ordinance if the applicant provides proof of a Secondhand License. (Am. Compl. ¶¶ 63-67.) In 1902, the General Assembly codified the Act Regulating the Issue of Licenses to Dealers in Junk, Old Metals, and other Second Hand Articles (the Act), thereby granting municipalities the authority to pass ordinances providing for the issuance, renewal, and revocation of junkyard licenses, now codified as G.L. 1956 § 5-21-1. *See* P.L. 1902, ch. 1058, § 1; § 5-21-1. However, in 1987 the Rhode Island Supreme Court held that § 5-21-1 was unconstitutional because it constituted "an unconstitutional delegation of legislative power in that it allows . . . unlimited discretion to renew or revoke licenses." *See Metals Recycling Co.*, 527 A.2d at 1129. Plaintiffs argue that the *Metals Recycling Co.* decision invalidated the entirety of § 5-21-1 and thus renders DBR's requirement that AWS License applicants provide proof of their local Secondhand License unconstitutional. (Pls.' Resp. in Opp'n to DBR's Mot. to Dismiss (Pls.' Opp'n) 21; Am. Compl. ¶¶ 63-67.)

a

***Metals Recycling Co., Inc.* and Statutory Construction**

The relevant portion of § 5-21-1 has not been amended since our Supreme Court's decision in *Metals Recycling Co.* and provides in pertinent part as follows:

> "The city or town council of any city or town is authorized to provide by ordinance for the issuing and revocation *at pleasure* of licenses to all persons selling, purchasing, bartering, and dealing in junk, old metals, and any other second-hand metal articles, and to all persons establishing, operating, or maintaining automobile junkyards, subject to any conditions and restrictions and for a term not exceeding one year that may be in the like manner prescribed[.]" Section 5-21-1(a)(emphasis added); *see also Metals Recycling Co., Inc.*, 527 A.2d at 1129 (quoting § 5-21-1 with the same operative language).

The *Metals Recycling Co.* Court reasoned that this delegation of power to the town council to renew or revoke Secondhand Licenses "at pleasure" was unconstitutional because the statute articulates no legislative purpose, sets forth no standards, and contains no intelligent principle to guide the municipalities while exercising the powers delegated to them under § 5-21-1. *See Metals Recycling Co*., 527 A.2d at 1130. Thus, our Supreme Court held that § 5-21-1 was unconstitutional because it left the decision to revoke or renew Secondhand Licenses to the "pleasure" of Rhode Island municipalities. *Id.*

Notwithstanding the *Metals Recycling Co.* decision, DBR offers several arguments as to why § 5-21-1—and by proxy their requirement that AWS License applicants obtain a local Secondhand License pursuant to § 5-21-1—is constitutional. *See generally* DBR's Mem. Each argument will be addressed in turn below.

b

Severability

DBR argues that the *Metals Recycling Co.* decision must be read in conjunction with the severability clause contained within the Act. (DBR's Mem. 23.) To that end, they contend that *Metals Recycling Co.* only invalidated § 5-21-1 to the extent that it enables municipalities to issue or revoke licenses at the Town's pleasures. *Id.* at 23. They maintain that the Town did not rely on the constitutionally invalid language of § 5-21-1 in its decision declining to renew Plaintiffs' Secondhand License. *Id.* at 23-24. The implication of this argument is that DBR's subsequent rejection of Plaintiffs' renewal application was constitutional. *See id.*

The *Metals Recycling Co.* Court did not address the severability of the constitutionally infirm "at pleasure" language from the remainder of that section. *See generally*, *Metals Recycling Co*., 527 A.2d 1129-30. Instead, the Court simply held that § 5-21-1 constituted an impermissible delegation of power by the General Assembly because it left the question of license renewal and revocation to the pleasure of the municipalities. *See id.* at 1130.

In reviewing the constitutionality of a statute, the Court must attach "'every reasonable intendment in favor of constitutionality' and will not 'declare a statute void unless [it] find[s] it to be constitutionally defective beyond a reasonable doubt.'" *Zab v. Rhode Island Department of Corrections*, 269 A.3d 741, 747 (R.I. 2022) (quoting *Moreau v. Flanders*, 15 A.3d 565, 573-74 (R.I. 2011)). To that end, "a court may hold a portion of a statute unconstitutional and uphold the rest when the unconstitutional portion is not indispensable to the rest of the statute and can be severed without destroying legislative purpose and intent." *Landrigan v. McElroy*, 457 A.2d 1056, 1061 (R.I. 1983). A court may sever the constitutionally invalid elements of an act while sustaining the valid elements even absent a savings clause. Norman J. Singer & Shambie Singer, *Sutherland*

Statutes and Statutory Construction § 44:6 (7th ed. 2022). Furthermore, the presence or absence of a savings clause is not determinative of the issue of severability, and the Court may decline to sever even if the statute contains a savings clause. *Bouchard v. Price*, 694 A.2d 670, 678 (R.I. 1997). The decisive factor is legislative intent; therefore, the Court will sever a constitutionally infirm portion of a statute if "at the time the statute was enacted, the legislature would have passed it absent the constitutionally objectional provision." *Landrigan*, 457 A.2d at 1061 (internal quotations omitted).

Before addressing legislative intent, the Court must determine if the unconstitutional language is indispensable such that the remaining law cannot function fully without the unconstitutional language. *See id.*; Singer & Singer, *Sutherland Statutes and Statutory Construction* § 44:7.

In striking the constitutionally infirm "at pleasure" language, § 5-21-1 would read as follows:

> "(a) The city or town council of any city or town is authorized to provide by ordinance for the issuing and revocation ~~at pleasure~~ of licenses to all persons selling, purchasing, bartering, and dealing in junk, old metals, and any other second-hand articles, and to all persons establishing, operating, or maintaining automobile junkyards, subject to any conditions and restrictions and for a term not exceeding one year that may be in the like manner prescribed; and also for charging and collecting fees for those licenses. The fees in the like manner prescribed shall not exceed the sum of one hundred dollars ($100) for the keeper of an establishment or storehouse for the reception of any junk, old metals, or second-hand metal articles which is not an automobile junkyard; the sum of five dollars ($5.00) for any foundry person or other person receiving the same for the purpose of melting or converting the junk, old metals, or second-hand metal articles into castings; the sum of five dollars ($5.00) for any gatherer of these items in any bag, wagon, or cart; or the sum of one hundred dollars ($100) for any person establishing, operating, or maintaining an automobile junkyard; and also to fix a penalty for carrying on that business without a license, or in violation of any ordinance or regulation made as authorized in this

> chapter, not exceeding for any one offense a fine of five hundred dollars ($500) or imprisonment not exceeding six (6) months." Section 5-21-1 (striking "at pleasure").

Clearly, without the unconstitutional "at pleasure" language, the statute may still be carried into effect because it still coherently flows and makes grammatical sense. *See* Singer & Singer, *Sutherland Statutes and Statutory Construction* § 44:1.

Second, removing the "at pleasure" language does not conflict with the essential subject matter of the Act. *Cf. D & J Enterprises, Inc. v. Michaelson*, 401 A.2d 440, 446 (R.I. 1979) (striking down the entire act criminalizing the promotion of obscene material when the act's definition of obscene work was unconstitutional). Instead, the severed statute still authorizes municipalities to enact ordinances for the issuing and revocation of Secondhand Licenses, but it does so without the language impermissibly giving the municipalities unfettered discretion. *See* § 5-21-1. As such, § 5-21-1 can still function as an operating law without the unconstitutional "at pleasure" language. *See id.*

Next, the Court must consider if the Legislature would have passed the statute absent the constitutionally infirm provision. *See Landrigan*, 457 A.2d at 1061. The Court uses several methods to determine legislative intent, including examining the statute's history, purpose, title, and subsequent amendments. *See id.*; *Baffoni v. State Department of Health*, 373 A.2d 184, 189 (R.I. 1977); Singer & Singer, *Sutherland Statutes and Statutory Construction* §§ 44:2, 45:5. The existence of a savings or severability clause is also indicative of the Legislature's intent that the statute remain in force without the constitutionally invalid provision. Singer & Singer, *Sutherland Statutes and Statutory Construction* § 44:6; *see also* § 5-21-7 (severability clause under the Act).

Here, it is clear that the Legislature would have passed the Act, even absent the statute's constitutionally invalid "at pleasure" language for the following reasons.

First, the statute contains a severability clause which reads:

> "If any clause, sentence, paragraph, or part of this chapter or their application to any person or circumstance is, for any reason, adjudged by a court of competent jurisdiction to be invalid, that judgment does not affect, impair, or invalidate the remainder of this chapter or its application to other persons or circumstances." Section 5-21-7.

This clause, although not determinative, indicates that the Legislature intended the statute to remain in effect without the unconstitutional provision. *See* Singer & Singer, *Sutherland Statutes and Statutory Construction* § 44:6.

Next, in examining the statute's history and the title of the Act when initially passed, it is clear that the statute's purpose is to regulate the issuance of Secondhand Licenses. *See* P.L. 1902, ch. 1058, § 1. Even without the "at pleasure" language, the Act still provides the municipalities with authority to issue and revoke Secondhand Licenses; therefore, the purpose of the Act is still fulfilled without the constitutionally invalid language. *See id.*; *see also Landrigan*, 457 A.2d at 1061-62 (examining the statute's history to determine legislative intent).

Finally, the subsequent amendments to § 5-21-1 indicate that the Legislature did not intend the entire section to be void in the wake of *Metals Recycling Co.* Although the key "at pleasure" language of § 5-21-1 has not been amended since *Metals Recycling Co.*, the section has been amended twice since that decision. *See* P.L. 1990, ch. 521, § 1; P.L. 2008, ch. 216, § 1. Section 5-21-1 was first amended in 1990 to change the permissible maximum fee for a second-hand license to $100.00. *See* P.L. 1990, ch. 521, § 1. Next, the statute was amended in 2008 to require ordinances enacted pursuant to the section to provide that each person purchasing or receiving old metals other than junked automobiles or automobile parts shall maintain a record of each purchase. *See* P.L. 2008, ch. 216, § 1. Therefore, it is clear that the Legislature intended § 5-21-1 to have effect apart from the constitutionally invalid "at pleasure" language because they have since passed

amendments that relate to a municipality's authority to issue Secondhand Licenses. *See* P.L. 1990, ch. 521, § 1; P.L. 2008, ch. 216, § 1.

For the foregoing reasons, the language of § 5-21-1 that the *Metals Recycling Co.* Court declared unconstitutional is severable from the remainder of the section. Therefore, the Court must next determine whether, in light of the severed statute, the Plaintiffs are entitled to their requested relief under Count IV as a matter of law. *See Landrigan*, 457 A.2d at 1061 (severing the unconstitutional portion of the statute before interpreting the hearing requirements under the now-severed statute).

For the reasons discussed below, the severed statute provides intelligible principles to guide the municipalities' authority to grant a new Secondhand License and to renew a "grandfathered" Secondhand License. In isolation, § 5-21-1 may still appear to leave no principles to guide a municipality when deciding to issue or renew Secondhand Licenses; however, the Court must read the Act as a whole. *Davis*, 427 A.2d at 336 (citing *Gordon*, 580 F.2d at 839).

Section 5-21-4 should be read as "restrict[ing] the broad delegation of authority granted in [§] 5-21-1 by providing that no license shall be granted for an automobile junkyard under [§] 5-21-1 unless certain enumerated conditions are first satisfied." *Lambert v. Town Council of Town of West Greenwich*, 256 A.2d 1, 4 (R.I. 1969). Section 5-21-4 provides that:

> "No license shall be granted for an automobile junkyard under § 5-21-1 unless:
>
> (1) It is to be operated and maintained entirely within a building;
>
> (2) It is to be operated and maintained exclusively for the purpose of salvaging the value as scrap of the material collected, as opposed to reselling parts to be used for the purpose for which they were originally manufactured, and is to be located in a built-up industrial area, or contiguous to a railroad siding, or on or contiguous to docking facilities; or

> (3) It is:
>
> (i) More than one thousand feet (1,000') from the nearest edge of any highway on the interstate or primary system;
>
> (ii) More than six hundred feet (600') from any other state highway;
>
> (iii) More than three hundred feet (300') from any park, bathing beach, playground, school, church, or cemetery and is not within ordinary view from those places; and
>
> (iv) Screened from view either by natural objects or well constructed and properly maintained fences at least six feet (6') high acceptable to that city or town and in accordance with regulations as promulgated by the director of public works and as specified on the license." Section 5-21-4.

Therefore, when the severed Act is read as a whole, § 5-21-1's grant of power to the municipalities to issue new Secondhand Licenses is limited by the intelligible principles contained in § 5-21-4 and does not violate the nondelegation doctrine. *See Lambert*, 106 R.I. at 81, 256 A.2d at 4.

Furthermore, § 5-21-6 limits the power of the municipalities to reissue an existing and grandfathered Secondhand License. *See* § 5-21-6. The section provides:

> "The provisions of §§ 5-21-4(1), (2), (3)(ii), and (3)(iii) and 5-21-5(a)(1), (a)(2), (a)(3)(ii), and (a)(3)(iii) do not apply to any automobile junkyard in existence and having a valid license issued pursuant to § 5-21-1 on May 6, 1966." Section 5-21-6.

Consequently, the provisions §§ 5-21-4(3)(i) and 5-21-4(3)(iv) *do* apply to limit the authority of municipalities to reissue an existing junkyard license that was issued to a junkyard in existence prior to May 6, 1966. *See id.* By providing the circumstances in which a municipality may *not* reissue a "grandfathered" Secondhand License, § 5-21-6 provides sufficiently intelligible principles to guide the municipality's decision to renew a "grandfathered" Secondhand License "by negative implication." *See Kaveny*, 875 A.2d at 10. Therefore, the severed § 5-21-1's delegation of authority to the Town Council to renew a "grandfathered" license does not violate

the nondelegation doctrine because § 5-21-6 provides sufficient intelligible principles to guide the municipalities' discretion. *See id.*

Importantly, however, even without the constitutionally invalid "at pleasure" language, no other sections of the Act provide any principles to guide municipalities when deciding to "revoke" a Secondhand License. *See* §§ 5-21-1 to 5-21-8. The lack of intelligible principles guiding a municipality's discretion to revoke Secondhand Licenses is evident in the Town's ordinance which provides that "[a]ll [junkyard] licenses issued under this article shall expire on December 31 next following the date of issuance and may be revoked *at the pleasure of the town council*." Foster Code of Ordinances § 12-228 (emphasis added).

Nevertheless, while Plaintiffs are challenging *the Town's* revocation of their temporary Secondhand License in Counts I and V, Count IV against DBR does not implicate the Town's potentially unconstitutional revocation of Plaintiffs' temporary license. *See* Am. Compl. ¶¶ 44-50, 58-82. Instead, Count IV requests an order specifically declaring that:

> "DBR'S requirement for Plaintiffs to have a Secondhand License from the Town of Foster prior to issuing an Auto Wrecking and Salvage Yard License from the State is unconstitutional, and requiring DBR to accept an application for a State Auto Wrecking and Salvage Yard license without a town issued license." *Id.* ¶ 67.

Under the facts alleged in the Complaint, Plaintiffs applied for an AWS License with DBR after the Town declined to *renew* their "grandfathered" Secondhand License in December of 2017. *Id.* ¶¶ 28-29. DBR subsequently rejected their AWS License application due to their failure to present their Secondhand License. *Id.* ¶ 28. Therefore, this Court cannot declare that DBR's requirement that Plaintiffs have a Secondhand License from the Town was unconstitutional because, as explained above, § 5-21-1's delegation of authority to renew "grandfathered" Secondhand Licenses to the Town is guided by the principles of § 5-21-6 and is therefore not

unconstitutional. Consequently, Plaintiffs' claim that the Town's denial of their renewal application is unconstitutional fails as a matter of law such that DBR's subsequent requirement that Plaintiffs provide their Secondhand License should not be declared unconstitutional in the manner argued by Plaintiffs. Accordingly, it is beyond a reasonable doubt that the declaration prayed for is an impossibility and Count IV of Plaintiffs' Amended Complaint should be dismissed as a matter of law. *See Family Dollar Stores of R.I. v. Araujo*, 204 A.3d 1089, 1098 (R.I. 2019); *Benson v. McKee*, 273 A.3d 121, 128 (R.I. 2022).[2] Thus, DBR's Motion to Dismiss on this basis is **GRANTED**.

Because this Court should dismiss Count IV of Plaintiffs' Complaint as a matter of law, it need not address DBR's remaining arguments. However, for the sake of completeness, they are discussed below.

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[2] The Court also cannot grant the second half of Plaintiffs' requested declaration in Count IV as a matter of law because by statute DBR has considerable discretion in deciding whether to accept or deny a renewal application. *See* G.L. 1956 § 42-14.2-9. Section 42-14.2-9 provides as follows:

> "The department may deny an application for a license, or suspend or revoke a license after it has been granted, or refuse to renew a license for any of the following reasons:
>
> (1) Proof of unfitness of the applicant or licensee to engage in this business.
>
> (2) A material misstatement by the applicant or licensee in the application for a license or renewal thereof.
>
> (3) Willful failure of the applicant or licensee to comply with the provisions of this chapter or with any rule or regulation promulgated by the department.
>
> (4) Proof that the applicant or licensee has willfully defrauded the owner of a motor vehicle." *Id.*

Therefore, this Court cannot "require[e] DBR to accept an application for a State Auto Wrecking and Salvage Yard license without a town issued license," *see* Am. Compl. ¶ 67, because even without the Secondhand License requirement, DBR is still granted discretion to deny an application for a junkyard license on a number of bases. *See* § 42-14.2-9.

c

G.L. § 1956 45-22.2-1

DBR argues that the enactment of the Rhode Island Comprehensive Planning and Land Use Regulation Act, §§ 45-22.2-1 to 45-22.2-14, since the *Metals Recycling Co.* decision, has cured the constitutional problem with § 5-21-1 because it provided an intelligible principle to guide the localities' discretion in granting licenses under § 5-21-1. (DBR's Mem. 9.) Specifically, DBR argues that § 45-22.2-3 applies to ordinances enacted under § 5-21-1 because § 45-22.2-3 was intended to harmonize "land use regulations," which DBR contends includes § 5-21-1. *Id.* at 10. Consequently, DBR urges the Court to refrain from reading § 5-21-1 in isolation, and instead favor an interpretation of the statute that is constitutional by reading § 45-22.2-3 as limiting the phrase "at pleasure" in § 5-21-1 such that it no longer violates the nondelegation doctrine. *Id.* at 11-12.

When analyzing a statutory provision under the nondelegation doctrine, courts should not read the provision in isolation. However, courts are also required to read the provision in the context of *the Act* as a whole. *Davis*, 427 A.2d at 336. Importantly, §§ 5-21-1 and 45-22.2-3 were not adopted as part of the same act. Section 5-21-1 was originally enacted in 1902 as part of An Act Regulating the Issue of Licenses to Dealers in Junk, Old Metals, and Other Second-Hand Articles. P.L. 1902, ch. 1058, § 1. In contrast, § 45-22.2-3 was enacted as part of the Rhode Island Comprehensive Planning and Land Use Regulation Act in 1988. *See* P.L. 1988, ch. 601, § 1. Therefore, there is no reason to read the legislative findings and intent section of the Rhode Island Comprehensive Planning and Land Use Regulation Act articulated in § 45-22.2-3 as limiting the language of § 5-21-1. *See Davis*, 427 A.2d at 336.

Further, although a statute may be construed with a separate, but related, statute on the same subject in order to preserve the statute's constitutionality, *see* Singer & Singer, *Sutherland*

Statutes and Statutory Construction § 51:1, DBR has offered no argument as to why §§ 5-21-1 and 45-22.2-3 should be considered *in pari materia*. *See* DBR's Mem. 9-13. Statutes that are *in pari materia* should be read in relation to each other even when they contain no reference to each other and are passed at different times. *Horn v. Southern Union Co.*, 927 A.2d 292, 294-95 (R.I. 2007). DBR contends that § 45-22.2-3 should be applied to junkyard licensing ordinances enacted pursuant to § 5-21-1 because junkyard licensing ordinances control the allowable uses of real property and are thus "land use regulations" under § 45-22.2-4. (DBR's Mem. 10.)

However, statutes are not automatically considered *in pari materia* simply because they deal in similar subject matters. *See* Singer & Singer, *Sutherland Statutes and Statutory Construction* § 51:3; *Narragansett Food Services, Inc. v. Rhode Island Department of Labor*, 420 A.2d 805, 807 (R.I. 1980) ("statutes are in pari materia if they relate to the same subject matter and are not inconsistent with one another"). The crux of the inquiry is whether the two statutes (1) have the same object or purpose and (2) are not inconsistent with one another. Singer & Singer, *Sutherland Statutes and Statutory Construction* § 51:3; *Narragansett Food Services, Inc.*, 420 A.2d at 807-08. DBR has offered no argument as to why §§ 45-22.2-4 and 5-21-1 have the same object or purpose. *See* DBR's Mem. 9-13. Therefore, DBR has failed to establish that § 45-22.2-3 renders § 5-21-1 constitutional as a matter of law. *See Hyatt v. Village House Convalescent Home, Inc.*, 880 A.2d 821, 824 (R.I. 2005). As such, DBR's Motion to Dismiss cannot be granted on this basis.

d

Applicability of Nondelegation to Town Councils

Finally, DBR argues that Count IV should be dismissed as a matter of law because in *Newport Court Club Associates v. Town Council of the Town of Middletown*, 800 A.2d 405, 417 (R.I. 2002), our Supreme Court held that the nondelegation doctrine either does not apply to duties

delegated to town councils or is less applicable to the legislative decisions made by municipalities. (DBR's Mem. 15-16.)

In *Newport Court Club Associates*, our Supreme Court stated, "*this case* does not implicate the accountability concerns that arise when the General Assembly delegates decision-making power to unelected administrative bodies or agents." *Newport Court Club Associates*, 800 A.2d at 417 (emphasis added). Accordingly, DBR's reliance on *Newport Court Club Associates* for the proposition the nondelegation doctrine applies with less force to municipal delegations is unavailing because our Supreme Court clearly cabined its statement in that respect. *See id.*

Moreover, the *Newport Court Club Associates* Court did not overturn *Metals Recycling Co*. *See Newport Court Club Associates*, 800 A.2d at 405-18. What is more, the *Newport Court Club Associates* Court ultimately concluded that the statute did not violate the nondelegation doctrine because the statute provided sufficiently intelligible principle such that the nondelegation doctrine argument was without merit. *See id.* at 417. As such, the *Newport Court Club Associates* decision does not stand for the proposition that the nondelegation doctrine should no longer be used to limit legislative delegations to the municipalities, and DBR's Motion to Dismiss cannot be granted on this basis. *See id.*

ii

Standing

Second, the Court will address DBR's argument that Plaintiffs lack standing to pursue its declaratory judgment claim because: (1) their injury is not fairly traceable to the challenged action of the DBR; and (2) their injury is not redressable. (DBR's Mem. 20-21.)

The threshold determination in a declaratory judgment action is whether the Superior Court is presented with a justiciable controversy. *N & M Properties, LLC v. Town of West Warwick ex rel.*

Moore, 964 A.2d 1141, 1144-45 (R.I. 2009). A claim is justiciable when the plaintiff has standing and some legal hypothesis which will entitle them to relief. *Lacera v. Department of Children, Youth, and Families*, 272 A.3d 1064, 1067 (R.I. 2022). "[S]tanding is satisfied when a plaintiff alleges that the challenged action has caused him [or her] injury in fact, economic or otherwise . . . ." *Key v. Brown University*, 163 A.3d 1162, 1168-69 (R.I. 2017) (internal quotation omitted). Injury in fact is "'an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.'" *Mruk v. Mortgage Electronic Registration Systems, Inc.*, 82 A.3d 527, 535 (R.I. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Additionally, the challenged action causes the plaintiff's injury when it is "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* (quoting *Lujan*, 504 U.S. at 560).

a

Injury in Fact

Here, Plaintiffs have sufficiently alleged standing because they have alleged that DBR's challenged action caused them injury in fact. *See Pontbriand v. Sundlun*, 699 A.2d 856, 862 (R.I. 1997). Plaintiffs are challenging the DBR's action in rejecting their application for a state AWS License. (Am. Compl. ¶ 29.) Plaintiffs claim that this act was unlawful because the DBR's requirement that the Plaintiffs have a local Secondhand License in order to acquire an AWS License is unconstitutional. *Id.* ¶ 67. Finally, Plaintiffs have alleged that the DBR's unlawful actions further caused them economic injury because without a license to operate their junkyard, Plaintiffs have been fined $100 a day based on their lack of license. *Id.* ¶ 79.

This injury suffered by Plaintiffs is concrete and particularized since Plaintiffs are alleging that DBR unconstitutionally required them to provide proof of a Secondhand License before they would grant them an AWS License which is particular to Plaintiffs, not general among all members of the public. *Cf. N & M Properties, LLC*, 964 A.2d at 1145-46 (finding that the loss of a right to use municipal parking lots was not an injury in fact because it was not personalized to the plaintiffs). Further, the injury is actual, not conjectural, because DBR actually rejected Plaintiffs' AWS License application based on an allegedly unconstitutional provision. *See* Am. Compl. ¶ 29; *cf. Benson*, 273 A.3d at 131 (finding no actual injury when the plaintiffs had not been in danger or threatened danger). Therefore, Plaintiffs have alleged sufficient facts to demonstrate that they have an injury in fact. *See McKenna v. Williams*, 874 A.2d 217, 226 (R.I. 2005) (injury in fact is the invasion of a legally protected interest that is concrete and particularized and actual or imminent).

b

Traceability and Redressability

DBR's argument that Plaintiffs lack standing because their injury is not fairly traceable to the allegedly unconstitutional provisions of § 5-21-1 is unavailing because "[f]or purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of law that is challenged." *Collins v. Yellen*, 594 U.S. 220, 222 (2021); *see also Mruk*, 82 A.3d at 535 (explaining that the plaintiff must show a "causal connection between the injury and the conduct complained of . . .").

DBR nevertheless still argues that Plaintiffs lack standing because they failed to show that granting Plaintiffs' requested relief will redress their injuries. (DBR's Mem. 25.) Specifically, they argue that even if DBR's Secondhand License requirement was declared unconstitutional, Plaintiffs would still not be able to obtain an AWS License through § 42-14.2-8(2) because his

property did not provide sufficient screening from the road and because the Town's zoning ordinances prohibit junkyards altogether. *Id.* However, when a plaintiff is challenging an unlawful government action that they were subjected to, ordinarily a judgment condemning that action as unconstitutional will redress the injury. *See Lujan*, 504 U.S. at 562.

Here, Plaintiffs are challenging an allegedly unconstitutional licensing requirement that they were subject to when DBR denied their application for an AWS License. (Am. Compl. ¶¶ 29, 67.) As such, granting judgment in Plaintiffs' favor under Count IV would redress their alleged injury—even if their application is ultimately rejected—because they would no longer be subject to what they maintain is an unconstitutional license requirement. *See Lujan*, 504 U.S. at 562.

Furthermore, Plaintiffs' injury is still redressable even though the Town of Foster's Code of Ordinances prohibits the use of land for an automobile junkyard because Plaintiffs have also requested a declaration that their "grandfathered," nonconforming use was not abandoned under § 45-24-39. *See* Am. Compl. ¶¶ 58-62. As a result, if all Plaintiffs' requested relief under Count III is granted, they will no longer be unlawfully barred from operating their junkyard under § 38-193 of the Town's Code of Zoning Ordinances. *See id.* Accordingly, DBR's Motion to Dismiss cannot be granted on the basis that Plaintiffs lack standing.

3

The Town's Argument

The Court now turns to the Town's arguments for dismissal under Rule 12(b)(6): (1) Plaintiffs did not comply with § 45-15-5.

i

Compliance with § 45-15-5

The Town argues that Plaintiffs' claims should be dismissed for failure to comply with § 45-15-5. (Foster Defs' Mem. of Law in Supp. of Mot. to Dismiss (Town's Mem.) 5-6.) The Town contends that contrary to Plaintiffs' assertions, the Complaint does not constitute presentment of their claim because doing so is a condition *precedent* to filing suit. (Town's Reply 1-2.)

Section 45-15-5 provides in pertinent part as follows:

> "Every person who has any money due him or her from any town or city, or any claim or demand against any town or city, for any matter, cause, or thing whatsoever, shall . . . present to the town council of the town, or to the city council of the city, a particular account of that person's claim, debt, damages, or demand, and how incurred or contracted; which being done, in case just and due satisfaction is not made to him or her by the town or city treasurer of the town or city within forty (40) days after the presentment of the claim, debt, damages, or demand, the person may commence his or her action against the treasurer for the recovery of the complaint." Section 45-15-5.

Section 45-15-5 sets forth a "condition precedent to a valid suit and is intended to afford a municipality time to settle a claim rather than undergoing the expense of litigation." *Martel Investment Group, LLC v. Town of Richmond*, 982 A.2d 595, 602 (R.I. 2009) (internal citation omitted). Our Supreme Court has held that the language of § 45-15-5 denotes its applicability "in a monetary context." *See State v. Eight Cities and Towns*, 571 A.2d 27, 29 (R.I. 1990). Thus, in general, compliance with § 45-15-5 is not required before filing an action for equitable relief. *See Diorio v. Hines Road., LLC*, 226 A.3d 138, 149 n.11 (R.I. 2020). Although our Supreme Court has recognized that some equitable claims fall under the purview of the Act, *see United Lending Corp. v. City of Providence*, 827 A.2d 626, 632 (R.I. 2003), our Supreme Court has also recognized that

a claim "such as one for a declaration of rights and liabilities does not come within the reach" of the statute. *See Eight Cities and Towns*, 571 A.2d at 29.

Only Counts IX and X seek monetary relief. (Am. Compl. ¶¶ 104-124.) As such, they will now be addressed in turn.

a

Count IX

Although Count IX seeks monetary relief, § 45-15-5 does not apply because Count IX is a claim for violation of 42 U.S.C. § 1983. *See Felder v. Casey*, 487 U.S. 131, 139-153 (1988).

In *Felder*, the United States Supreme Court held that a Wisconsin notice-of-claim statute did not apply to federal civil rights actions brought in state court under 42 U.S.C. § 1983 because the notice-of-claim statute was preempted as inconsistent with federal law. *Felder*, 487 U.S. at 142 ("We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries."). The United States District Court for the District of Rhode Island has consistently applied *Felder* to § 45-15-5. *See, e.g.*, *Lanmar Corp. v. Rendine*, 811 F. Supp. 47, 53-54 (D.R.I. 1993); *Nuey v. City of Cranston*, 524 F. Supp. 3d 1, 4 (D.R.I. 2021). As such, § 45-15-5 is not applicable to 42 U.S.C. § 1983 claims brought in state court, including Count IX, so Count IX should not be dismissed due to Plaintiffs' failure to comply with § 45-15-5. *See Lanmar Corp.*, 811 F. Supp. at 53-54; *Nuey*, 524 F. Supp. 3d at 4.

b

Count X

Count X is a claim for monetary relief to which the notice provisions of § 45-15-5 apply. *See Diorio*, 226 A.3d at 149. Specifically, Count X of Plaintiffs' Complaint requests an award of

monetary damages for the Town's tortious interference with a business relationship. (Am. Compl. ¶ 124.) As such, Count X is a tort claim seeking monetary damages and is governed by § 45-15-5. *See Diorio*, 226 A.3d at 149.

Yet, Plaintiffs argue that pursuant to *United Lending Corp*., the filing of their Complaint constitutes an adequate presentment such that they should be found to have complied with the statute since the Town did not respond within forty days of the filing of the Complaint. (Pls.' Obj. to Town's Mot. to Dismiss 8.) Plaintiffs' arguments are unavailing for the following reasons.

The *United Lending Corp.* Court found that a post-filing presentment to the City Council was sufficient to satisfy § 45-15-5 because the City Council raised the issue of compliance at the summary judgment stage. *See United Lending Corp.*, 827 A.2d at 633-34. Therefore, strict compliance with § 45-15-5 by abating the case for forty days would not satisfy the purpose of the statute since the City Council was already presented with the claim and declined to respond for forty days. *Id.*

Here, Plaintiffs have not furnished a post-filing presentment of their monetary claims to the Town. *See generally* Pls.' Obj. to Town's Mot. to Dismiss. Instead, Plaintiffs argue that their Complaint should be considered a valid presentment of their claims. *See id.* at 8. Plaintiffs' interpretation of § 45-15-5 would render the statute useless since the statute is intended to give the Plaintiffs and the Town an opportunity to settle their claims "*without* putting the municipality to the expense of defending an action at law." *See United Lending Corp.*, 827 A.2d at 632 (internal quotation omitted) (emphasis added). If the Complaint were considered an adequate presentment of Plaintiffs' monetary claims, the Town would not be able to avoid the costs of litigation by settling the claim because the litigation would have already begun. *See id.*

Despite Plaintiffs' failure to provide notice under § 45-15-5, dismissal of Count X pursuant to Rule 12(b)(6) is still not appropriate. *See Bernard v. Alexander*, 605 A.2d 484, 485-86 (R.I. 1992). Provided that a plaintiff has originally filed suit within the applicable statute of limitations—a point which the Town does not argue—their complaint should be abated or dismissed as prematurely brought, rather than dismissed on the merits when the plaintiff failed to notify the town council of their claims under § 45-15-5. *See Serpa v. Amaral*, 635 A.2d 1196, 1197-99 (R.I. 1994). Alternatively, if a plaintiff has filed a presentment, but filed suit prior to the expiration of the forty-day waiting period, the case should be stayed, and the statute of limitations tolled, until the expiration of the forty days. *See Bernard*, 605 A.2d at 485-86.

Here, Plaintiffs have not filed a presentment with the Town Council. *See generally*, Pls.' Obj. to Town's Mot. to Dismiss. However, Plaintiffs have filed their tortious interference claim within the applicable statute of limitations—i.e., G.L. 1956 § 9-1-13(a). *See* Am. Compl. ¶¶ 38, 121; *McBurney v. Roszkowski*, 687 A.2d 447, 448 (R.I. 1997) (holding that the ten-year limitations period under § 9-1-13(a) applies to claims for tortious interference with contractual relationship). For instance, the Town issued a cease and desist letter on September 20, 2021, and Plaintiffs claim this interfered with their junkyard business. *See* Am. Compl. ¶¶ 38, 121. Clearly, Plaintiffs' tortious interference claim under Count X would not be barred by the ten-year limitations period provided by § 9-1-13(a) at this juncture. *See* Am. Compl. ¶¶ 38, 121; *McBurney*, 687 A.2d at 448.

Section 9-1-22 states:

> "[i]f an *action* is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same claim within one year after the termination." Section 9-1-22 (emphasis added).

Thus, to be sure, it must be noted that one of the key operative words under § 9-1-22 is the word "action" instead of "claim." *Id.* Here, as already established, only Count X of Plaintiffs' Amended Complaint required presentment to the Town under § 45-15-5. This should not preclude application of § 9-1-22, however, because § 9-1-22 is "remedial in nature and therefore should be liberally applied." *Frazier v. Liberty Mutual Insurance Co.*, 229 A.3d 56, 60 (R.I. 2020). Therefore, this Court should not "unduly restrict the applicability of the savings statute" and preclude Plaintiffs from refiling Count X within one year under the savings statute, especially since Defendants are indisputably aware of Plaintiffs' claim for tortious interference with a contractual relationship. *See id.*

As such, this Court **GRANTS** in part the Town's Motion to Dismiss, as Count X of Plaintiffs' Complaint as prematurely brought, without prejudice.[3] *See United Lending Corp.*, 827 A.2d at 633.

4

Alleged Impropriety of UDJA Claim

Lastly, the Court will address the time-barred argument made by both the Town and DBR in their Motions to Dismiss. Both Defendants argue that Plaintiffs' declaratory judgment claim should be dismissed because it is time-barred. (DBR's Mem. 18-21; Town's Mem. 6.) DBR argues that Count IV is not properly before the Court because Plaintiffs are using the Declaratory Judgment claim "to back its way into [a time-barred] appeal of the Foster Town Council's [non-renewal] decision[.]" DBR's Mem. at 17; *see also id.* at 17-19 (providing full extent of argument).

[3] Under G.L. 1956 § 9-1-22, Rhode Island courts, confronted with plaintiffs who failed to satisfy G.L. 1956 § 45-15-5, have routinely dismissed without prejudice, giving the plaintiffs one year under § 9-1-22 to refile their action. *See, e.g.*, *United Lending Corp. v. City of Providence*, 827 A.2d 626, 633 (R.I. 2003); *Blessing v. Town of South Kingstown*, 626 A.2d 204, 205 (R.I. 1993).

The Town similarly argues that Plaintiffs' claims are time-barred because the relief sought in Plaintiffs' Complaint is tantamount to an appeal of the Town Council's decisions to (1) deny the Junkyard's Secondhand License renewal application on December 14, 2017 and (2) the Town's decision to revoke the Junkyard's temporary Secondhand License on March 24, 2018. (Town's Mem. 6-7.)

The argument that a declaratory judgment claim is time-barred due to a plaintiff's failure to appeal a decision of the Town Council was rejected by our Supreme Court in *Tucker Estates Charlestown, LLC v. Town of Charlestown*, 964 A.2d 1138, 1139-40 (R.I. 2009). In *Tucker Estates Charlestown, LLC*, the plaintiff brought a UDJA claim seeking a declaration that a zoning ordinance was void because it was enacted in violation of the town charter and the Rhode Island Zoning Enabling Act. *Tucker Estates Charlestown, LLC*, 964 A.2d at 1139. The defendant moved to dismiss arguing that the action was time-barred because appeals of the enactment of a zoning ordinance must be appealed within thirty days, and plaintiffs never appealed. *Id.* The trial justice agreed, but our Supreme Court reversed holding that the trial justice erred by treating the UDJA claim as "no more than a type of appeal." *Id.* at 1140. The Court recognized that a party is not barred from asserting a declaratory judgment claim simply because there are other avenues of relief available, especially when '"the complaint seeks a declaration that the challenged ordinance or rule is facially unconstitutional or in excess of statutory powers, or that the agency or board had no jurisdiction."' *Id.* (quoting *Kingsley v. Miller*, 120 R.I. 372, 374, 388 A.2d 357, 359 (1978)).

Here, there is no dispute that Plaintiffs did not appeal the 2017 and 2018 decisions of the Town Council. However, contrary to the Town and DBR's arguments, Plaintiffs are not seeking to appeal those decisions; instead, they are seeking a declaration that the Town's junkyard licensing program is unconstitutional. *See* Am. Compl. ¶ 51. As such, this Court should not treat their

request for declaratory relief as an untimely appeal of the Town Council decisions. *See Tucker Estates Charlestown, LLC*, 964 A.2d at 1140.

Furthermore, Plaintiffs' declaratory judgment claims are not precluded despite the existence of other avenues of relief because Plaintiffs seek declarations that the Town's junkyard licensing program, along with the accompanying zoning ordinances and state licensing program, are unconstitutional. *See* Am. Compl. ¶¶ 51, 57, 62, 67; *Tucker Estates Charlestown, LLC*, 964 A.2d at 1140. As such, the Court cannot grant the Town or DBR's Motions to Dismiss on this basis.

C

Defendants' Rule 12(b)(7) Arguments

Both DBR and the Town also bring Motions to Dismiss under Rule 12(b)(7) for failure to join all required parties. The Court will address each Defendants' arguments in turn.

1

Rule 12(b)(7) Standard of Review

A party may bring a motion to dismiss under Rule 12(b)(7) for failure to join an indispensable party. Super. R. Civ. P. 12(b)(7). However, "[t]he complaint should not be dismissed for failure to join an indispensable party where the defect can be cured by making the person a party." Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure* § 12:11. Thus, "the action will be dismissed only if the absent party is indispensable and cannot be brought before the court." *Id.*

2

DBR's Argument

DBR argues that the declaratory judgment claim should be dismissed because Plaintiffs have failed to join all required parties. (DBR's Mem. 20-21.) They argue that all cities and towns that have a junkyard licensing program in the state are required to be joined to protect their interests in this action because "Plaintiff[s'] desired relief would vitiate every municipal junkyard licensing program in the state enacted pursuant to . . . § 5-21-1." *Id.* The Court previously addressed this argument, as it was made by the Town in their supplemental pleadings regarding alleged noncompliance with § 9-30-11.

Like the Town, DBR has provided no evidence of other towns who have junkyard licensing ordinances similar to the Town of Foster. *See* Am. Compl. ¶ 67; *see generally*, DBR's Mem. As such, absent evidence that other towns have junkyard licensing ordinances that are similar to the Town of Foster's ordinances, the argument that other towns will be affected by the requested relief is purely speculative. *See Middle Creek Farm, LLC*, 252 A.3d at 754. Consequently, DBR's Motion to Dismiss is **DENIED** on this basis.

3

The Town's Argument

The Town argues that dismissal is warranted because Plaintiffs failed to name the Town of Foster's treasurer as an indispensable party and because Plaintiffs failed to name every member of the Zoning Board which they contend is required by § 45-15-17. (Town's Mem. 9-10.)

Rule 19(a) of the Superior Court Rules of Civil Procedure describes indispensable parties, *see Rosano v. Mortgage Electronic Registration Systems, Inc.*, 91 A.3d 336, 339-40 (R.I. 2014), providing that a party is indispensable if:

> "(1) In the person's absence complete relief cannot be accorded among those already parties; or (2) The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (A) As a practical matter impair or impede the person's ability to protect that interest; or (B) Leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest." Super. R. Civ. P. 19(a).

Our Supreme Court has adopted a "pragmatic approach" to determine whether a party is indispensable, rather than a formulaic approach. *Retirement Board of Employees' Retirement System v. DiPrete*, 845 A.2d 270, 285 (R.I. 2004). Thus, the Court may only determine if a party is indispensable after a thorough examination of the practical factors of the case. *See Anderson v. Anderson*, 283 A.2d 265, 268-271 (R.I. 1971). Our Supreme Court has described an indispensable party as one "whose interests could not be excluded from the terms or consequences of the judgment . . . as where the interests of the absent party are inextricably tied in to the cause . . . or where the relief really is sought against the absent party alone." *Rosano*, 91 A.3d at 340 (internal quotation omitted). However, when the interests of the absent party are purely speculative or unsubstantiated, the absent party is not indispensable. *Middle Creek Farm, LLC*, 252 A.3d at 754.

Here, Plaintiffs have since named the Town Treasurer as a party, so the Town's argument regarding Plaintiffs' failure to join her is moot. *See* Docket (Plaintiffs' motion to amend their Complaint heard and Granted); Am. Compl. ¶ 14.) Additionally, their argument that § 45-15-17 renders the Zoning Board an indispensable party is unavailing because § 45-15-17 only states that it is "sufficient to name the board or commission itself as a party respondent or as a defendant without the necessity of naming individual members . . . ," but the statute does not require the naming of the Zoning Board. *See* § 45-15-17. Therefore, the Town Defendants' Motion to Dismiss on this basis is **DENIED**.

D

The Town's 12(b)(2) and 12(b)(5) Arguments

Lastly, the Court turns to the Town's Motions to Dismiss under Rules 12(b)(2) and 12(b)(5). The Town argues that Plaintiffs failed to effectuate proper service of process upon them such that the Court lacks personal jurisdiction over the Town Defendants. (Town's Mem. 7-8.) Additional facts to discuss this argument are presented below.

1

Facts Related to the Town's Rule 12(b)(2) and 12(b)(5) Motions

On July 28, 2022, the paralegal for Plaintiffs' counsel e-mailed Foster Town Solicitors Julia Chretien (Attorney Chretien) and Joanna Achille, asking if they would be accepting service on behalf of the Town. (Pls.' Obj. to Town's Mot. to Dismiss Ex. 15 (Waiver E-mail).) If the Town Solicitors were willing to accept service, the e-mail proposed to "send a request to waive service with copies of the summons and complaint." *See id.* On August 2, 2022, Attorney Chretien responded stating that the Town Council would have to make the decision to waive service. *See id.* Therefore, Attorney Chretien explained that she would not have a substantive response to the Plaintiffs' request for waiver of service until after the Council has an opportunity to discuss and decide. *Id.*

Nevertheless, on August 11, 2022, Plaintiffs sent a "service package" to the Foster Town Hall for the Town Defendants via certified mail, with attention to Foster Town Attorney Chretien. (Pls.' Opp'n Ex. 16 (August 11, 2022 Letter).) The service package contained a copy of the Complaint, a Language Assistance Notice, and a summons for the Town of Foster, Manny Linhares Jr., James Finnegan, Bob Moreau, Jonathan Hayter, Timothy Dannenfelser, Barbara Fell, and Steven Bellucci. *See id.* Additionally, the package was sent via priority mail to the Foster Town

Hall and the tracking data from the United States Postal Service states that a person named "B Canuel" signed for receipt of the package on August 29, 2022. (Pls.' Opp'n Ex. 17 (USPS Receipt).)

In September of 2022, Plaintiffs mailed another service package to the Town Treasurer at the Town of Foster City Hall, containing only a copy of the summons. *See* Pls.' Opp'n Ex. 18; Proof of Summons Upon Town of Foster (Sept. 19, 2022). Attorney Chretien confirmed receipt of this package by e-mail on September 15, 2022. (Pls.' Opp'n Ex. 19 (Attorney Chretien Confirmation E-Mail).) In her e-mail, Attorney Chretien attached a proposed stipulation and asked Plaintiffs' counsel whether she would agree to give the Town Defendants an additional twenty days to respond to the Complaint. *Id.* Plaintiffs' counsel agreed and the resulting stipulation was subsequently filed on September 29, 2022, giving the Town Defendants through October 25, 2022 to respond to Plaintiffs' first Complaint. *See id.*; Pls.' Opp'n Ex. 20 (Stipulation).

The Town contests that service upon a so-called "B Canuel" was insufficient because human resources records from that time period reveal that no such person was employed with the Foster Town Hall when the service package was delivered. (Town's Reply 7.) The Town also takes issue with the fact that the request to waive service was presented to the Town's attorney, rather than the Town Council. *Id.* at 6.

2

Rules 12(b)(2) and 12(b)(5) Standards of Review

The question of whether service was properly effectuated within the requisite timeframe is a factual one for the hearing justice to decide. *See Bowden v. Lombardi*, 744 A.2d 402, 403 (R.I. 1999). Thus, a case may be dismissed under Rule 12(b)(5)—without prejudice—for insufficient service of process. *See Nichola v. Fiat Motor Co., Inc.*, 463 A.2d 511, 513 (R.I. 1983) ("Insufficient

service of process and the like are matters in abatement which, at most, should result in a dismissal of an action without prejudice.").

Yet, as our Supreme Court has stated, '"cases in our system are not to be disposed of summarily on arcane or technical grounds."' *Hendrick v. Hendrick*, 755 A.2d 784, 791 (R.I. 2000) (quoting *Haley*, 611 A.2d at 848). Therefore, "[a] dismissal under [Rule] 12(b)(5) for insufficiency of process does not have the effect of res judicata . . . because it is not an adjudication on the merits." *School Committee of the Town of North Providence v. North Providence Federation of Teachers, Local 920, American Federation of Teachers (AFL-CIO)*, 404 A.2d 493, 495 (R.I. 1979). Moreover, the hearing justice has discretion to deny an otherwise appropriate Rule 12(b)(5) motion and direct that service be affected within a specified time where "good cause can be shown for why service was not made within that period[,]" *Gucfa v. King*, 865 A.2d 328, 331 (R.I. 2005), or under the amended rule, where direction of service, rather than dismissal is otherwise justified. *See* Super. R. Civ. P. 4(l) Advisory Committee Note.

Further, to overcome a defendant's Rule 12(b)(2) motion for lack of personal jurisdiction, a plaintiff must allege sufficient facts to establish a prima facie case of personal jurisdiction. *Martins v. Bridgestone Americas Tire Operations, LLC*, 266 A.3d 753, 757 (R.I. 2022). In examining a Rule 12(b)(2) motion, the court draws the facts "from the pleadings and the parties' supplementary filings, taking facts affirmatively alleged by plaintiff as true and viewing disputed facts in the light most advantageous to plaintiff." *Cerberus Partners, L.P. v. Gadsby & Hannah, LLP*, 836 A.2d 1113, 1117 (R.I. 2003). "Although the burden of proof is light, [the plaintiff] may not rely on the mere allegations of its complaint, but must point to specific facts in the record that support those allegations." *Jet Wine & Spirits, Inc. v. Bacardi & Co.*, 298 F.3d 1, 8 (1st Cir. 2002); *see also Cerberus Partners, L.P.*, 836 A.2d at 1117 ("In reviewing a lower court's dismissal of an

action for failure to make a *prima facie* showing of personal jurisdiction, we draw the facts from the pleadings and the parties' supplemental filings, taking facts affirmatively alleged by plaintiff as true and viewing disputed facts in the light most advantageous to plaintiff.").

3

Service of Process and Personal Jurisdiction Analysis

The Town Defendants argue that Plaintiffs failed to properly serve the Town Defendants because: (1) the summonses were not accompanied by a copy of Plaintiffs' Complaint or any Language Assistance Notices; (2) the Plaintiffs failed to include the summonses to all individually named members of the Foster Zoning Board; and (3) service was made by mail, not a "duly authorized officer" pursuant to G.L. 1956 § 9-5-6. (Town's Mem. 7-8.)[4]

Rule 4(l) requires that service of the summons, complaint, Language Assistance Notice, and all other documents be made upon a defendant within 120 days after the commencement of the action. Super. R. Civ. P. 4(l). The Rhode Island Supreme Court has not determined whether

[4] Neither the Town Defendants nor Plaintiff makes any argument regarding the propriety of service pursuant to Rule 80 and Rule 5 of the Superior Court Rules of Civil Procedure. *See generally*, Town's Mem.; Pls.' Obj. to Town's Mot. to Dismiss. However, it is worth noting that Count V of Plaintiffs' Complaint would not need to be served in accordance with Rule 4 of the Superior Court Rules of Civil Procedure because the service of the Complaint in zoning appeals is governed by Rules 80 and 5, rather than Rule 4. *See* Super. R. Civ. P. 80(b); *Caran v. Freda*, 751, 279 A.2d 405, 407 (R.I. 1971) (Rule 80(b) applies to Zoning Appeals); Super. R. Civ. P. 80 Reporters Notes (service in accordance with Rule 80(b) does not require service of process pursuant to Rule 4).

Rule 80(b) provides that a "copy of the complaint shall be served upon the governmental agency, department, board, commission or officer, and upon all other parties to the proceeding to be reviewed in the manner provided by Rule 5." Super. R. Civ. P. 80(b). Rule 5 requires that service upon a represented party be upon their attorney, which must be accomplished by electronic filing. Super. R. Civ. P. 5(b)(1)-(2). Nonetheless, Plaintiffs failed to electronically serve the Complaint upon the Town Defendants. *See generally* Verified Compl. for Appeal from Town of Foster Zoning Board of Review, Declaratory J., and Additional Counts (Original Compl.) (lacking a Certificate of Service page). Therefore, even acknowledging that Count V need not be served in accordance with Rule 4, it was also not properly served in accordance with Rule 5.

service upon individuals in their official capacities must satisfy the rule for service upon an individual or the rule for service upon a public corporation. *See Ciprian v. City of Providence*, No. 12-651-ML, 2014 WL 1330748, at *1 (D.R.I. Mar. 31, 2014). However, at least one Rhode Island Superior Court Magistrate (Keough, Magistrate J.) has applied the rules governing service upon a public corporation for service upon members of a zoning board and determined that service is sufficient as long as the plaintiff properly serves the organization itself. *See Medina v. Kostas*, No. PC/05-0676, 2006 WL 1892226, at *4 (R.I. Super. July 10, 2006).

Service upon a public corporation is governed by Rule 4(e) of the Superior Court Rules of Civil Procedure, which provides in pertinent part as follows:

> "Summons: Personal Service. The summons, complaint, Language Assistance Notice, and all other required documents shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made . . .
>
> " . . .
>
> "(3) Upon a public corporation, body, or authority or a private corporation, domestic or foreign, from which a waiver of service has not been obtained and filed, by delivering a copy of the summons, complaint, Language Assistance Notice, and all other required documents to an officer, director, manager, a managing or general agent, or by leaving a copy of the summons, complaint, Language Assistance Notice, and all other required documents at an office of the corporation with a person employed therein . . . ." Super. R. Civ. P. 4(e)(3).

Such service of process may be made either by a "duly authorized officer in accordance with Title 9, Chapter 5 . . . or by any person who is not a party and who is at least eighteen (18) years of age." Super. R. Civ. P. 4(c).

Plaintiffs argue that service was proper under Rule 4(e)(3) because in August of 2022 they left a copy of the summons, Complaint, and Language Assistance Notice at the Town Hall with a

person named "B. Canuel," by mailing it to the Foster Town Hall.[5] (Pls.' Obj. to Town's Mot. to Dismiss at 20-23.) They thus contend they left the requisite documents at an office of the corporation with a person employed therein and argue that mailing the documents is sufficient under Rule 4 because service can be effectuated by a person over eighteen, which would include the postal worker who delivered the mail. *Id.* at 22-23.

First, it is highly unlikely that Rule 4(e) permits process to be served by mail because the rule governs "Personal Service," and utilizes the language "delivering" and "leaving . . . with," rather than "mailing . . . by certified mail" which is used elsewhere in the Rule. *Compare* Super. R. Civ. P. 4(e), *with* Super. R. Civ. P. 4(f); *see also* Black's Law Dictionary (11th ed. 2019) (defining "personal service" as "[a]ctual delivery of the notice or process to the person to whom it is directed."). Additionally, although Rhode Island's Rule 4 differs from the Federal Rule 4, the language "delivery" and "leaving," which appears in both the state and federal rule, has been interpreted by Federal Courts as excluding service by mail. *See Larsen v. Mayo Medical Center*, 218 F.3d 863, 868 (8th Cir. 2000); *Austin v. Lyft, Inc.*, No. 21-cv-09345-JC5, 2021 WL 6617452, at *1-2 (N.D. Cal. Dec. 13, 2021). As such, Plaintiffs' service of the Town Defendants by mailing the requisite documents to the Town Hall is insufficient under Rule 4(e)(3) which, unlike Rule 4(f), does not permit service by certified mail. *Compare* Super. R. Civ. P. 4(e), *with* Super. R. Civ. P. 4(f).

Additionally, even if service were proper via mail, Plaintiffs have provided no evidence to show that B. Canuel was an employee of the Town such that service upon him at the Town Hall

[5] Plaintiff acknowledges that the attempted service on September 14, 2022 did not include a copy of the Complaint or Language Assistance Notice, so such service is clearly insufficient pursuant to Rule 4(e)(3). *See* Pls.' Obj. to Town's Mot. to Dismiss 21; Super. R. Civ. P. 4(e)(3). Therefore, this section will only address whether Plaintiffs' attempt to effectuate service in August 2022 was sufficient.

was sufficient under Rule 4(e)(3), even under a broad construction of the statute. *See* Super. R. Civ. P. 4(e)(3).

In *Plushner v. Mills*, 429 A.2d 444 (R.I. 1981), the Court interpreted a similar provision of Rule 4 and held that service was proper even though the plaintiff failed to strictly comply with the Rule 4 requirement to leave the required documents at the defendant's '"dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . ."' *Plushner*, 429 A.2d at 445 (quoting then-Rule 4(d)(1) of the District Court Rules of Civil Procedure). The *Plushner* plaintiff left a copy of the requisite documents at the defendant's abode with the defendant's daughter, but the defendant's daughter did not reside there at that time. *See id.* at 445-46. Notwithstanding those issues, the *Plushner* Court still deemed the service to be adequate under a broad construction of the rule because the daughter was still a trusted member of the household and because the process server witnessed the daughter leaving the house, so he in good faith served her as a member of the defendant's household. *See id.*

In contrast, here, there is no indication that B. Canuel was an employee of the Town, or *appeared* to be an employee of the Town, such that the unknown postal worker could in good faith serve B. Canuel as such an employee. *See* Docket, Proof of Service (containing no details regarding how B. Canuel was served). Additionally, the Town Defendants have provided evidence that "B. Canuel" was *not* an employee of the Town by submitting the affidavit of Kelli Russ, who attests that the Foster Town Hall did not employ any individual with a name beginning with the letter "B" or otherwise identified as "B. Canuel" in August and September of 2022. (Town's Reply Ex. A (Affidavit of Kelli Russ) ¶¶ 4-6.)

For the foregoing reasons, Plaintiffs have failed to serve sufficient process upon the Town Defendants in accordance with Rule 4(e)(3) within 120 days of filing the Complaint as required

by Rule 4(l). Yet, under Rule 4(l), failure to timely serve does not automatically result in dismissal of the action as to the defendant in question. Super. R. Civ. P. 4(l). Instead, the Court may either dismiss the action without prejudice or direct that service be affected within a specified time. *See id.* If the plaintiff shows good cause for their failure to timely serve, then the Court *must* extend the time for service. *Id.* Even absent good cause shown, the Court may extend the time for service where justified. Super. R. Civ. P. 4 Committee Notes.[6] "Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a default in attempted service." *Id.* (quoting the Advisory Committee Notes to the Federal Rules of Civil Procedure Rule 4(m), which the 2006 Amendment to Rule 4(l) follows).

Here, Plaintiffs have not argued that there exists good cause for their failure to timely serve because they contend that their service was proper. Even still, granting them further time to respond is still justified in these circumstances for the following reasons.

The failure of a defendant to waive service may be considered in determining if the Court should grant further time to serve pursuant to Rule 4(l) or dismiss. *See* Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure* § 4:3. Here, Plaintiffs attempted to request a waiver of service from the Town Defendants, but Attorney Chretien never followed up after Plaintiffs' initial attempt to secure waiver of service. (Pls.' Obj. to Town's Mot. to Dismiss Ex. 15 (Waiver-E-mail).)

[6] Prior to the 2006 Amendment to the Rules, Courts could only extend the time for service upon "good cause." *See Gucfa v. King*, 865 A.2d 328, 331-32 (R.I. 2005). However, the 2006 Amendment provided the Court with an option to either "dismiss the action without prejudice as to that defendant *or* direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." Super. R. Civ. P. 4(l) (emphasis added). This amendment thus enlarges the power of a judge ruling on the motion to dismiss under the rule. *See* Super. R. Civ. P. 4 Committee Notes.

Furthermore, Plaintiffs were diligent in their attempt to serve the Town Defendants. After filing the Complaint on July 25, 2022, Plaintiffs first attempted to obtain a waiver of service on July 28, 2022, and Attorney Chretien responded that she would have to wait until the Town Council discussed the matter to give a response. *See id.* Without further response from the Town or its legal counsel, the Plaintiffs attempted to serve the Town Defendants by mail on August 11, 2022, and when the Town Defendants still failed to respond, they attempted to serve again on September 14, 2022. *See* Pls.' Obj. to Town's Mot. to Dismiss Ex. 16-19. Plaintiffs only stopped attempting service when the Town's attorney e-mailed Plaintiffs' counsel and indicated that their correspondence to the Town had been received. (Pls.' Obj. to Town's Mot. to Dismiss Ex. 19.) As such, even though the attempted service was insufficient, Plaintiffs were not lacking in diligence. *Cf. Gucfa*, 865 A.2d at 332 (affirming the trial justice's determination that it was unreasonable for plaintiff to only begin attempting service until three months after filing suit).

For the foregoing reasons, although Plaintiffs' attempted service upon the Town Defendants by mail was ineffective pursuant to Rule 4(e)(3), Plaintiffs should be given additional time to properly serve the Town Defendants given their attempt to waive service and their diligence in attempting to serve. *See also Hendrick*, 755 A.2d at 791 ("[C]ases in our system are not to be disposed of summarily on arcane or technical grounds.").

The Town Defendants argue that this Court does not have personal jurisdiction over the Defendants because proper service was not made. (Town's Mem. 8-9.) It is well settled that "jurisdiction of the court over the person of a defendant is dependent upon proper service having been made." *Shannon v. Norman Block, Inc.*, 256 A.2d 214, 218 (R.I. 1969) (citing *Geyer v. Callan Construction Co.*, 101 A.2d 876 (R.I. 1954); *Home Savings Bank v. Rolando*, 57 R.I. 205, 189 A. 27 (1937)). Thus, "[a]bsent a waiver of personal jurisdiction or proper service of legal process,

the court lacks jurisdiction to entertain a suit or to enter judgment against a party who has not been properly served[.]" *Theta Properties v. Ronci Realty Co., Inc.*, 814 A.2d 907, 913 (R.I. 2003).

Nevertheless, as stated above, Plaintiffs should be given further time to properly serve the Town Defendants to ensure the Court can properly exercise personal jurisdiction over said Defendants. Therefore, dismissal for lack of personal jurisdiction against those Defendants is not warranted at this time.

As such, the Town's Motions to Dismiss under Rules 12(b)(2) and 12(b)(5) are **DENIED**.

III

Conclusion

For the foregoing reasons, this Court **GRANTS in part** and **DENIES in part** DBR and the Town's Motions to Dismiss.

First, this Court **DENIES** both Defendants' Motions to Dismiss for noncompliance with § 9-11-30.

Second, this Court **GRANTS** DBR's Motion to Dismiss Plaintiffs' complaint under Rule 12(b)(6) on the grounds that the constitutional claim cannot be sustained as a matter of law. The Court **DENIES** DBR's request for dismissal on the grounds that the matter is improperly before the Court, that the Plaintiffs lack standing, and that Plaintiffs have failed to join indispensable parties.

Lastly, this Court **GRANTS** the Town Defendants' motion to dismiss Count X of Plaintiffs' Complaint as prematurely brought and orders that Plaintiffs shall be given further time to properly serve the Town Defendants. However, this Court **DENIES** the remainder of the Town Defendants' requests for dismissal under Rules 12(b)(2), 12(b)(5), and 12(b)(7). Notwithstanding the grounds for denial of those requests, the Court **ORDERS** Plaintiffs to cure the defects with service of

process for the Town Defendants to permit the proper exercise of personal jurisdiction over said Defendants.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Mill Road Realty Associates, LLC v. Town of Foster**
CASE NO:	**PC-2022-04591**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 10, 2026**
JUSTICE/MAGISTRATE:	**McHugh, J.**

ATTORNEYS:

For Plaintiff:	**Megan E. Sheehan, Esq.**
For Defendant:	**Julia Chretien, Esq.** **Jeff B. Kidd, Esq.**