STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: March 30, 2012)

NARRAGANSETT IMPROVEMENT COMPANY; UBS REALTY, INC.; AND RANKIN PATH REALTY, LLC	:	
v.	:	**C.A. No. PC-2008-6504**
VINCENT MARCANTONIO, IN HIS CAPACITY AS CHAIRMAN OF THE TOWN OF NORTH SMITHFIELD ZONING BOARD OF APPEALS; STEVEN SCARPELLI, IN HIS CAPACITY AS VICE-CHAIRMAN OF THE TOWN OF NORTH SMITHFIELD ZONING BOARD OF APPEALS; STEPHEN KEARNS, WILLIAM JUHR, GUY DENIZARD, MARIO DINUNZIO, AND DEAN NAYLOR, IN THEIR CAPACITIES AS MEMBERS OF THE TOWN OF NORTH SMITHFIELD ZONING BOARD OF APPEALS	:	

NARRAGANSETT IMPROVEMENT COMPANY; UBS REALTY, INC.; AND RANKIN PATH REALTY, LLC	:	
v.	:	**C.A. No. PC-2008-7468**
JILL GEMMA, IN HER CAPACITY AS FINANCE DIRECTOR FOR THE TOWN OF NORTH SMITHFIELD, RHODE ISLAND; MICHAEL PHILLIPS, IN HIS CAPACITY AS THE TOWN PLANNER FOR THE TOWN OF NORTH SMITHFIELD, RHODE ISLAND; DONALD GAGNON, IN HIS CAPACITY AS THE CHAIRMAN OF THE TOWN OF NORTH SMITHFIELD CONSERVATION COMMISSION AND IN HIS INDIVIDUAL CAPACITY;	:	

ROBERT V. ROSSI, ESQ., IN HIS CAPACITY AS THE FORMER ASSISTANT TOWN SOLICITOR FOR THE PLANNING BOARD OF THE TOWN OF NORTH SMITHFIELD AND IN HIS INDIVIDUAL CAPACITY; JOSEPH CARDELLO III, IN HIS CAPACITY AS CHAIRMAN OF THE TOWN OF NORTH SMITHFIELD PLANNING BOARD AND IN HIS INDIVIDUAL CAPACITY; BRUCE SANTA ANNA, IN HIS CAPACITY AS A MEMBER OF THE TOWN OF NORTH SMITHFIELD PLANNING BOARD AND IN HIS INDIVIDUAL CAPACITY; JOHN O'DONNELL, JR., EDWARD MCGILL, AND JOHN CZYZEWICZ, IN THEIR CAPACITIES AS MEMBERS OF THE TOWN OF NORTH SMITHFIELD PLANNING BOARD; JOHN DOES 1 THROUGH 5, IN THEIR CAPACITIES AS MEMBERS OF THE TOWN OF NORTH SMITHFIELD TOWN COUNCIL; JANE DOES 1 THROUGH 5, IN THEIR CAPACITIES AS MEMBERS OF THE TOWN OF NORTH SMITHFIELD TOWN COUNCIL; JOHN DOES 1 THROUGH 5, IN THEIR CAPACITIES AS MEMBERS OF THE TOWN OF NORTH SMITHFIELD ZONING BOARD OF REVIEW; JOHN DOES 1 THROUGH 7, IN THEIR CAPACITIES AS MEMBERS OF THE TOWN OF NORTH SMITHFIELD CONSERVATION COMMISSION; JANE DOES 1 THROUGH 7, IN THEIR CAPACITIES AS MEMBERS OF THE TOWN OF NORTH SMITHFIELD CONSERVATION COMMISSION :

DECISION

GIBNEY, P.J. This litigation arises from the attempt of Plaintiffs Narragansett Improvement Company, UBS Realty, Inc., and Rankin Path Realty, LLC (collectively "Plaintiffs") to gain approval to develop a residential subdivision in the Town of North Smithfield, Rhode Island. North Smithfield Neighborhood Coalition, Inc. ("the Coalition") is a non-profit corporation comprised of North Smithfield residents, including abutters to Plaintiffs' proposed subdivision. The Coalition opposes Plaintiffs' development plans. In 2008, Plaintiffs filed two actions: (1) an appeal to the Superior Court from an adverse decision of the Town of North Smithfield Zoning Board of Appeals (PC-2008-6504) and (2) a declaratory judgment action against various Town of North Smithfield officials (PC-2008-7468). On December 16, 2011, the Coalition moved to intervene in both actions, either as of right or permissively. Jurisdiction is pursuant to Super. R. Civ. P. 24 ("Rule 24"). For the reasons stated herein, the Coalition's Motions to Intervene are denied.

I

Facts & Travel

Plaintiffs are owners of several properties in North Smithfield, Rhode Island. In November 2005, Plaintiffs filed a master plan application for a major land development project with the North Smithfield Planning Board ("the Planning Board"). From September 2006 to August 2007, the Planning Board reviewed Plaintiffs' application. Narragansett Improvement Co. v. Wheeler, 21 A.3d 430, 433-34 (R.I. 2011). As part of its review, the Planning Board held four informational meetings on Plaintiffs' application between December 2006 and August 2007. Id. at 434. At the fourth meeting, North

Smithfield residents and other interested persons had an opportunity to raise concerns with Plaintiffs' master plan application to the Planning Board.

On August 16, 2007, the Planning Board unanimously voted to deny Plaintiffs' master plan application. The Planning Board formalized the denial in a written decision dated November 15, 2007. Id. at 435.[1] Plaintiffs appealed the Planning Board's decision to the Town of North Smithfield Zoning Board of Appeals ("Board of Appeals"). After holding two public meetings on Plaintiffs' appeal on March 13 and March 31, 2008, the Board of Appeals affirmed the Planning Board's decision.

Following the Board of Appeals' decision, Plaintiffs filed numerous lawsuits against various state and municipal entities and officials. This Decision addresses the Coalition's attempt to intervene in two of these actions: (1) an appeal of the Board of Appeals' decision ("the Planning Appeal") and (2) a declaratory judgment action ("the Declaratory Judgment Action"). On October 10, 2008, Plaintiffs filed the Planning Appeal with this Court,[2] naming various members of the Board of Appeals as defendants

[1] The Planning Board made numerous factual findings in support of its denial of Plaintiffs' master plan application. These included findings that Plaintiffs (1) "failed to correct and/or provide additional information as specified in the [m]aster [p]lan checklist;" (2) failed to comply with subdivision regulations with respect to design standards; (3) improperly included later-acquired land in a revised plan in derogation of a consent order; (4) improperly designated existing roadways in the plan; (5) failed to comply with the standards for subdivisions set forth in G.L. 1956 § 45-23-60 (2009); and (6) failed to comply with the general purposes for subdivisions set forth in § 45-23-30 and the subdivision regulations. Wheeler, 21 A.3d at 435 n.10 (brackets in original).

[2] Plaintiffs purported to file the Planning Appeal pursuant to § 45-24-69. Although this Court does have jurisdiction to hear Plaintiffs' appeal of the Board of Appeals' decision, this Court derives such authority from § 45-23-71. Section 45-24-69 authorizes appeals of zoning matters to the Superior Court. Section 45-23-71 governs appeals of planning board decisions to the Superior Court. Plaintiffs seem to have recognized this error, as their motion to remand addresses this Court's authority under § 45-23-71.

("Planning Defendants").[3] Plaintiffs allege that severe procedural inadequacies at the Planning Board level deprived them of a fair hearing and ask this Court to remand their application to the Planning Board for a new hearing. Plaintiffs sent notice of the Planning Appeal to owners of land abutting the proposed development. Aff. of Matthew Shaw ¶ 2 & Ex. A, Abutters List. Three of the Coalition's directors are abutters and received the notice. The notice informed recipients of the Planning Appeal and of the recipients' rights to participate in the appeal. Shaw Aff., Ex. B, Notice of Appeal.

On November 24, 2008, Plaintiffs filed the Declaratory Judgment Action against various Town officials ("Declaratory Judgment Defendants").[4] Plaintiffs allege that Declaratory Judgment Defendants violated Plaintiffs' rights to substantive and procedural due process under the Rhode Island Constitution and ask this Court to declare the Planning Board's decision null and void. Plaintiffs also assert that Declaratory Judgment Defendants interfered with Plaintiffs' expected business advantage, expectation and opportunity and violated the Open Meetings Act, G.L. 1956 § 42-46-6 (2007).

Since Plaintiffs filed the Planning Appeal and the Declaratory Judgment Action,

[3] The defendants in the Planning Appeal are Vincent Marcantonio, in his capacity as chairman of the Board of Appeals; Steven Scarpelli, in his capacity as vice-chairman of the Board of Appeals; and Stephen Kearns, William Juhr, Guy Denizard, Mario Dinunzio and Dean Naylor, in their capacities as members of the Board of Appeals.

[4] The defendants in the Declaratory Judgment Action are Jill Gemma, in her capacity as finance director for North Smithfield; Michael Phillips, in his capacity as the town planner for North Smithfield; Donald Gagnon, in his capacity as the chairman of the North Smithfield Conservation Commission and in his individual capacity; Robert V. Rossi, Esq., in his capacity as the former assistant town solicitor for the Planning Board and in his individual capacity; Joseph Cardello III, in his capacity as chairman of the Planning Board and in his individual capacity; Bruce Santa Anna, in his capacity as a member of the Planning Board and in his individual capacity; and John O'Donnell, Jr., Edward McGill, and John Czyzewicz, in their capacities as members of the Planning Board. Plaintiffs also named various John and Jane Does in their capacities as members of the North Smithfield Town Council, North Smithfield Zoning Board of Review, and North Smithfield Conservation Commission.

the two cases have progressed. Plaintiffs have engaged in substantial discovery following the Board of Appeals' decision, with most—if not all—of the discovery filings occurring in the Declaratory Judgment Action. As discovery continued through 2011, Plaintiffs and the North Smithfield Town Council ("Town Council") entered into talks to settle the Planning Appeal and the Declaratory Judgment Action.[5] Plaintiffs' litigation with Planning Defendants and Declaratory Judgment Defendants was a matter of public knowledge. The status of the litigation, including the possibility of settlement, was a subject of inquiry at various Town Council meetings. Aff. of Kenneth C. Murphy ¶¶ 7-8.

On September 2, 2011, individual members of the Coalition moved to intervene in the Planning Appeal and the Declaratory Judgment Action. Plaintiffs objected. On October 5, 2011, this Court issued an Order denying the individual Coalition members' Motions as untimely.

On December 16, 2011, the Coalition itself moved to intervene in the Planning Appeal and the Declaratory Judgment Action. The Coalition alleges that settlement negotiations between Plaintiffs and the Town Council broke off in the late summer of 2011 following a leak of a proposed settlement agreement, the terms of which the Coalition strongly disapproves. The Coalition argues that these changed circumstances justify its Motion. Plaintiffs and Declaratory Judgment Defendants object. Plaintiffs allege that settlement talks were ongoing at the time of the Coalition's Motions to Intervene, but are now on hold pending this Court's resolution of the instant Motions.[6]

[5] The North Smithfield Town Council has authority to settle lawsuits against North Smithfield entities and officers. See Town of North Smithfield Charter, Art. IV, § 8.

[6] As this Decision does not address the merits of the Planning Appeal or the Declaratory Judgment Action and does not discuss the actions of individual town officials, this Court

II

Analysis

Intervention enables persons who are not parties to the original proceeding to assert their interests in all pending aspects of a lawsuit already instituted. State v. Cianci, 496 A.2d 139, 145 (R.I. 1985). "In effect, an intervenor attains the status of a party to the original action, joining either the plaintiff or the defendant or opposing both." Id. Intervention "is not a matter of absolute right but rather requires a showing that the party seeking to intervene has a substantial interest in the subject matter of the original litigation." Id. (citing 59 Am. Jur. 2d Parties §§ 129, 138 (1971)).

Rule 24 of the Superior Court Rules of Civil Procedure governs intervention in this state. Super. R. Civ. P. 24. Rule 24 defines two modes of intervention: (1) intervention as of right and (2) permissive intervention. Id. The Coalition maintains that it is entitled to intervene in the Planning Appeal and the Declaratory Judgment Action as of right and/or permissively. This Court shall address the Coalition's Motions to Intervene one action at a time.[7]

A

Intervention in the Planning Appeal

On October 10, 2008, Plaintiffs appealed the Board of Appeals' decision affirming the Planning Board's denial of Plaintiffs' master plan application to this Court. Plaintiffs contend that they were deprived of their right to a fair hearing and move to

---

shall hereinafter refer to Planning Defendants, Declaratory Judgment Defendants, and the Town Council as simply "the Town."

[7] As Rule 24 is "modeled after its federal counterpart," Cianci, 496 A.2d at 146, and Rhode Island law on intervention is sparse, "this Court may properly look to the federal courts for guidance." Credit Union Central Falls v. Groff, 871 A.2d 364, 367 (R.I. 2005) (citing Kirios v. Arsenault, 632 A.2d 15, 16-17 (R.I. 1993)).

remand their application to the Planning Board for a new hearing. The Town opposes remand and argues that the Board of Appeals' decision should be upheld. The Coalition wishes to intervene in support of the Board of Appeals' decision because it believes "that the municipal government of the Town of North Smithfield is not acting in the best interest of the Town's residents in its handling of its various litigation matters involving the [P]laintiffs . . . ." Coalition's Mem. in Supp. of Mot. to Intervene at 1. The Coalition argues that it may intervene as of right or permissively.

1

Intervention as of Right

Rule 24(a)(2) governs intervention as of right. The Rule provides:

> "Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Super. R. Civ. P. 24(a)(2).[8]

Thus, a party seeking to intervene as of right must satisfy four conjunctive prerequisites: (1) a timely application for intervention; (2) a demonstrated interest relating to the property or transaction that forms the basis of the ongoing action; (3) a satisfactory showing that the disposition of the action threatens to create a practical impairment or impediment to its ability to protect that interest; and (4) a satisfactory showing that

[8] Rule 24(a)(1) provides for intervention as of right "when a statute of this state confers an unconditional right to intervene . . . ." Super. R. Civ. P. 24(a)(1). The Coalition does not argue that it is entitled to intervene by statutory right and this Court has found no such statute permitting intervention as of right in the circumstances presented in the Planning Appeal or the Declaratory Judgment Action. In both cases therefore, this Court's intervention as of right analysis is limited to whether the Coalition is entitled to intervene under Rule 24(a)(2).

existing parties inadequately represent its interest. Tonetti Enters., LLC v. Mendon Road Leasing Corp., 943 A.2d 1063, 1072-1073 (R.I. 2008); Marteg Corp. v. Zoning Bd. of Review of the City of Warwick, 425 A.2d 1240, 1242 (R.I. 1981). An applicant for intervention as of right "must run the table and fulfill all four of these preconditions." Pub. Serv. Co. of N.H. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998). Failure to satisfy any one of them "dooms intervention." Id. (citing Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 637 (1st Cir. 1989)).

In an October 5, 2011 Order, this Court denied as untimely a Motion by various Coalition members to intervene as of right in the Planning Appeal. Over two months later, on December 16, 2011, the Coalition itself moved to intervene as of right in the Planning Appeal. This Court concludes that the Coalition's Motion is also untimely and therefore must be denied as well. For the sake of comprehensiveness, however, this Court shall perform the complete intervention as of right analysis.

i

Timeliness

As Rule 24 is silent regarding what constitutes a timely application for intervention, it is well settled that the timeliness consideration "is a matter committed to the sound discretion of the trial justice." Marteg Corp., 425 A.2d at 1242; see Direct Action For Rights & Equality v. Gannon, 713 A.2d 218, 222 (R.I. 1998). Certain factors, nevertheless, guide this Court's discretion. Timeliness of intervention is judged principally by two criteria: "(1) the length of time during which the proposed intervenor has known about his interest in the suit without acting and (2) the harm or prejudice that results to the rights of other parties by delay." Marteg Corp., 425 A.2d at 1243. Of these

two factors, "the latter is the more important consideration." Id.

One of the core purposes of the timeliness requirement is to prevent disruptive, late-stage intervention that could have been avoided by the exercise of reasonable diligence. R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 584 F.3d 1, 9 (1st Cir. 2009). As such, a motion to intervene is timely if it is filed promptly after the putative intervenor "obtains actual or constructive notice that a pending case threatens to jeopardize [its] rights." Id. at 8. "Perfect knowledge of the particulars of the pending litigation is not essential to start the clock running; knowledge of a measurable risk to one's rights is enough." Id.; see Sokaogon Chippewa Cmty. v. Babbitt, 214 F.3d 941, 949 (7th Cir. 2000) ("As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene."). Thus, putative intervenors who take a "wait-and-see attitude" towards intervention when their interests are clearly at stake from the outset of the litigation are met with disfavor. See Marteg Corp., 425 A.2d at 1243 (holding intervention would prejudice parties where delayed motion to intervene resulted from prospective intervenor's "wait-and-see attitude" towards intervention); see also Harris v. Pernsley, 113 F.R.D. 615, 621 (E.D. Pa. 1987) (refusing to permit intervention where intervenor's delay "was a tactical decision.").

Upon examination of the applicable law and the circumstances surrounding the Coalition's Motion to Intervene as of Right, this Court holds the Coalition's Motion untimely. In drawing this conclusion, this Court considers Sokaogon instructive. In Sokaogon, the St. Croix Chippewa Indians tried to intervene in litigation between the Sokaogon Chippewa Indians and the United States Department of the Interior over a

Sokaogon application to construct a casino in Wisconsin in 1994. 214 F.3d at 943-45. The St. Croix owned two casinos in the region and opposed the Sokaogon application on the ground that a Sokaogon casino would lessen the revenues of the St. Croix casinos. Id. at 943-44. The St. Croix had participated in a lengthy administrative process regarding the Sokaogon application, which culminated in the application's denial in June 1995. Id. at 944. The Sokaogon filed suit against the Department of the Interior shortly thereafter, but the St. Croix refrained from intervening. Id. In early 1999, the Sokaogon and the Department entered publicized settlement negotiations. Id. at 944-45. As negotiations approached a successful conclusion in late 1999, the St. Croix filed an emergency motion to intervene as of right or permissively, nearly five years after the Sokaogon filed suit. Id. at 945. The district court denied the motion for lack of timeliness. Sokaogon, 214 F.3d at 949.

The United States Court of Appeals for the Seventh Circuit affirmed. Id. at 949-50. The Seventh Circuit observed that the St. Croix had "ample notice (five years) that settlement was possible and ample opportunity" to intervene at an earlier stage of the litigation. Id. at 949. Moreover, the court noted that "the St. Croix ha[d] known all along that its [economic] interests [were] directly pitted against those of [the Sokaogon]." Id. at 950. Therefore, the Seventh Circuit concluded that the district court properly denied the St. Croix's motion for lack of timeliness, noting that "[i]f the St. Croix wanted a voice in the litigation, it should have asked the district court to allow it to intervene much sooner." Id.

Confronted with a putative intervenor possessed of notice and an opportunity to intervene similar to that in Sokaogon, this Court concludes that the Coalition's Motion is

untimely. Plaintiffs filed their master plan application with the Planning Board in November of 2005. Four informational public meetings were held on the application between December 2006 and August 2007. At the fourth of these hearings, North Smithfield residents had the opportunity to raise concerns about Plaintiffs' master plan application. Following the Planning Board's denial of Plaintiffs' application, Plaintiffs appealed to the Board of Appeals, which held two public meetings on Plaintiffs' application in March 2008 before affirming the Planning Board. Plaintiffs then appealed the Board of Appeals' decision to this Court and sent out notice of its appeal on October 17, 2008 to abutters of Plaintiffs' proposed development.

As Plaintiffs' master plan application has been a matter of public debate since at least 2006, the Coalition had ample notice of Plaintiffs' application and any threat it posed to the Coalition's interest. Indeed, Plaintiffs sent notice of the Planning Appeal to three of the Coalition's directors, informing the directors of their rights as abutters to participate in the appeal.[9] The Coalition does not contend that the directors did not receive notice of the Planning Appeal. Further, the status of Plaintiffs' litigation with the Town, including the possibility of settlement, was a topic at Town Council meetings. Murphy Aff. ¶¶ 7-8. Nonetheless, the Coalition—like the St. Croix in Sokaogon—waited over three years before it sought to intervene, despite the fact that it knew—or should have known—that its interests "were pitted directly against" Plaintiffs' interests. 214 F.3d at 949; see Marteg Corp., 425 A.2d at 1242 (denying motion to intervene where putative intervenors "clearly were aware" of the Superior Court zoning appeal and did

[9] The three directors receiving notice were Michael Black, Mali Jones, and Paul Keenan. Shaw Aff., Ex. A, Abutters List; Pls.' Mem. in Opp'n to the Coalition's Mot. to Intervene, Ex. B, Summary of the Coalition's Corporate Information from Rhode Island Secretary of State's Website.

not seek to intervene until after entry of judgment).[10] The Coalition's three year delay before moving to intervene in the Planning Appeal weighs heavily against allowing the Coalition's Motion. See Sokaogon, 214 F.3d at 948-50 (denying intervention as of right where intervenor knew that its interests were at stake, but waited five years to intervene).

The Coalition asserts that its Motion is timely because it did not learn that its interests could be adversely affected until terms of a purported settlement proposal between Plaintiffs and the Town became public in the late summer of 2011. The Coalition argues that it moved promptly to intervene after reading and disapproving of the draft settlement's terms. Thus, it contends that its Motion is not too late.

The Coalition, however, knew or should have known that settlement of the Planning Appeal in a way unfavorable to the Coalition's interest was not entirely out of the question. In spite of this knowledge, the Coalition did not seek to become involved in the Planning Appeal at the outset of the litigation. As with the St. Croix in Sokaogon, if the Coalition "wanted a voice in the litigation, it should have asked [this Court] to allow it to intervene much sooner." See id. at 950.

Moreover, intervention at this late hour would prejudice the original parties. Plaintiffs and the Town have already engaged in substantial discovery regarding the Planning Board's decision. Introducing a new party to this action would require more discovery and result in substantial delay in the Planning Appeal's progress. Additionally, Plaintiffs and the Town previously engaged in settlement talks throughout 2011 and Plaintiffs express a desire to continue to pursue settlement.

[10] Such delay is all the more puzzling given that the Coalition "knew, or should have known, that a zoning board has no legal standing to seek [Supreme Court] review of an adverse Superior Court judgment . . . ." Marteg Corp., 425 A.2d at 1243.

The Coalition suggests that there has been little action in the three years since Plaintiffs filed the Planning Appeal and therefore, the Coalition's intervention would prejudice neither Plaintiffs nor the Town. However, the original parties have already engaged in substantial discovery regarding the Planning Board's decision.[11] The Town responded to Plaintiffs' Complaint, objected to Plaintiffs' Motion to Remand, and had been actively participating in settlement negotiations. Cf. Standard Heating & Air Conditioning v. City of Minneapolis, 137 F.3d 567, 573 (8th Cir. 1998) (suggesting that original parties' participation in settlement talks constitutes progress in litigation that might be prejudiced by intervention).

Further, that the Coalition waited until the original parties had engaged in settlement talks before trying to intervene—and only did so upon disapproving of the terms of a purported draft settlement—strongly suggest that the Coalition is not interested in intervening in the litigation, but in blocking settlement. Sokaogon, 214 F.3d at 949-50; see R & G Mortg. Corp., 584 F.3d at 9 (holding that where proposed intervention was aimed at disrupting settlement, "the harm that intervention would have worked to the original parties was manifest"). Indeed, the Coalition's behavior smacks of the sort of "wait-and-see attitude" towards intervention that our Supreme Court frowns upon. See Marteg Corp., 425 A.2d at 1243. The Coalition's Motion to Intervene as of Right in the Planning Appeal is therefore denied as untimely. For sake of comprehensiveness, however, this Court shall perform the remainder of the intervention as of right analysis.

[11] Plaintiffs' theories of the case in the Planning Appeal and the Declaratory Judgment Action seem to substantially overlap. Thus, this Court will not impugn Plaintiffs and the Town for failing to file duplicative discovery requests in both the Planning Appeal and the Declaratory Judgment Action.

ii

A Demonstrated Interest

To intervene as of right, a putative intervenor must show an interest relating to the property or transaction that forms the basis of the ongoing action. Super. R. Civ. P. 24. Our Supreme Court has held that such an interest "must be 'significantly protectable' for intervention to be allowed." Tonetti Enters., 943 A.2d at 1073 (quoting Donaldson v. United States, 400 U.S. 517, 531 (1971)). That is, an intervenor's interest must bear a sufficiently close relationship to the dispute between the original litigants and the interest must be direct, not contingent. Id. (citing Conservation Law Found. of New Eng., Inc. v. Mosbacher, 966 F.2d 39, 42 (1st Cir. 1992)).

Interests in property are the most elementary type of right that Rule 24(a) is designed to protect "and many of the cases in which a sufficient interest has been found . . . have been cases in which there is a readily identifiable interest in land . . . ." Credit Union Central Falls v. Groff, 871 A.2d 364, 367 (emphasis in original) (quoting 7C Charles A. Wright et al., Federal Practice and Procedure § 1908 at 272-75 (1986)). Our Supreme Court has held that "abutting landowners could invoke the mandatory provisions of Rule 24(a) in appeals from [a] zoning board to the Superior Court." Town of Coventry v. Hickory Ridge Campground, Inc., 111 R.I. 716, 722, 306 A.2d 824, 828 (1973) (citing Caran v. Freda, 108 R.I. 748, 279 A.2d 405 (1971)). Thus, members of the Coalition who own property abutting Plaintiffs' proposed development have an interest in the disposition of Plaintiffs' appeal of the Board of Appeals' decision. See id. The Coalition itself, however, does not allege that it owns property adjacent to Plaintiffs' proposed development or that it has any other readily identifiable interest in land

justifying intervention as of right. Groff, 871 A2d. at 367. Therefore, the Coalition cannot satisfy the "demonstrated interest" element on its own.

The trickier question is whether the Coalition may derive a "demonstrated interest" from its members' possession of such an interest? This Court concludes that the Coalition may do so. Well-settled, organizational standing principles guide this Court's conclusion. See, e.g., In re Review of Proposed Town of New Shoreham Project, 19 A.3d 1226, 1227 (holding that an organization has standing when the organization's "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit"); Blackstone Valley Chamber of Commerce v. Pub Utils. Comm'n, 452 A.2d 931, 934 (R.I. 1982) (observing that an organization has standing to challenge an action of a public utility commission where the organization's members are aggrieved by that action); R.I. Ophthalmological Soc'y v. Cannon, 113 R.I. 16, 25-27, 317 A.2d 124, 129-30 (1974) (holding that an ophthalmological organization has standing to represent its members who have shown an injury in fact). The Coalition's membership includes owners of property abutting Plaintiffs' proposed development and who therefore have an interest in the disposition of the Planning Appeal. Thus, the Coalition may represent their interests. R.I. Ophthalmological Soc'y, 113 R.I. at 25-27, 317 A.2d at 129-30.

Plaintiffs contend that the Coalition has no interest capable of supporting intervention in the Planning Appeal because the Coalition has not alleged or shown that they are aggrieved parties under G.L. 1956 § 45-23-71 (2009). Section 45-23-71 provides that only "aggrieved parties" have standing to appeal a board of appeals'

decision. An "aggrieved party" is: "Any person or persons or entity or entities who can demonstrate that their property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town . . . ." Sec. 45-24-31(4).[12]

Although the Coalition fails to use the term "aggrieved party," it does allege that its members, "including the owners of properties abutting [Plaintiffs' proposed development], have valid concerns that the substantial excavation work proposed as part of [the development] will endanger their properties both physically . . . and economically . . . ." Coalition's Mem. in Supp. of Mot. to Intervene at 4. Abutting landowners whose property faces possible devaluation as a result of a planning or zoning appeal are "aggrieved parties" and have an interest sufficient to satisfy the second prong of the intervention as of right analysis. Sec. 45-24-31(4); see Hickory Ridge, 111 R.I. at 722, 306 A.2d at 828. Because some of the Coalition's members have a stake in the Planning Appeal, the Coalition may represent their interest. See R.I. Ophthalmological Soc'y, 113 R.I. at 25-27, 317 A.2d at 129-30. The Coalition therefore asserts a derivative interest in the Planning Appeal sufficient to satisfy the second prong of the intervention as of right analysis.[13]

---

[12] Section 45-23-32 provides: "Where words or phrases used in this chapter are defined in the definitions section of either the Rhode Island Comprehensive Planning and Land Use Regulation Act, § 45-22.2-4, or the Rhode Island Zoning Enabling Act of 1991, § 45-24-31, they have the meanings stated in those acts." "Aggrieved party" appears in Chapter twenty-three, but is not defined therein. As such, Chapter twenty-four's definition of "aggrieved party" is applicable. Sec. 45-23-32.

[13] Plaintiffs also contend that the Coalition, "as a registered, Rhode Island Non-Profit Corporation . . . does not have standing to be involved in" the Planning Appeal. Pls.' Mem. in Opp'n to Coalition's Mot. to Intervene in Planning Appeal at 3-4. Plaintiffs rest this contention on Smithfield Voters for Responsible Development, Inc. v. LaGreca, 755 A.2d 126 (2000). In Smithfield Voters, our Supreme Court held that a non-profit

iii

Impede Interest

Nevertheless, to qualify to intervene as of right, the putative intervenor must not only demonstrate that it has an interest in the action, but also show that the disposition of the action threatens to impede the intervenor's ability to protect that interest. Tonetti Enters., 943 A.2d at 1072-1073. The Coalition opposes Plaintiffs' proposed development and wishes to intervene so that it may argue in favor of the Board of Appeals' decision affirming the denial of Plaintiffs' master plan application. The Coalition's interest, however, would not be harmed, regardless of whether the Town or Plaintiffs prevail in the Planning Appeal.

The Town asks this Court to affirm the Board of Appeals' decision. Thus, if the Town prevails in the Planning Appeal, the Coalition's anti-development interest is served. Conversely, Plaintiffs seek remand of the Planning Board's denial of Plaintiffs' master plan application to the Planning Board for a new hearing. If Plaintiffs prevail in the Planning Appeal, the Coalition shall have an opportunity to again raise its concerns before the Planning Board and take part in any subsequent appeal of the Planning Board's new decision. Therefore, the Coalition's interest is unaffected regardless of the ultimate outcome of the Planning Appeal. See Pub. Serv. Co., 136 F.3d at 207 (rejecting motion

---

corporation made up of residents of a municipality did not have standing under § 45-24-71 to challenge an amendment to a zoning ordinance. Id. at 128-30.

Plaintiffs' reliance on Smithfield Voters is mistaken. First, the Planning Appeal is pursuant to § 45-23-71, not § 45-24-71, and therefore Smithfield Voters does not control. Second, and more importantly, in the wake of Smithfield Voters, the General Assembly amended § 45-24-71 to specifically permit "any group of residents or landowners" of a municipality to appeal an amendment to a zoning ordinance "whether or not [the group is] incorporated." See Pub. L. 2001, ch. 89, § 2 (codified at § 45-24-71). With such action, our legislature effectively overrode Smithfield Voters. The Coalition's status as a non-profit corporation is irrelevant to the instant matter.

to intervene partially because intervenor's interest in participating in drafting of utility rate plan would not be harmed whether plaintiff or defendant prevailed).

The Coalition, however, raises the specter that possible settlement of the Planning Appeal could effectively authorize Plaintiffs' proposed development and therefore damage the Coalition's interest by depriving the Coalition of a voice in the plan approval process. The Coalition bases this contention on a purported draft of a proposed settlement agreement between Plaintiffs and the Town. According to the Coalition, this "draft settlement," if approved, would: (1) obligate "the Town to approve a revised version of plaintiffs' master plan application containing unspecified and previously unreviewed design changes;" (2) marginalize "the North Smithfield Planning Board's role in the consideration of any revised master plan application submitted by plaintiffs to that of a mere technical review committee in violation of the Development Review Act;" and (3) bar "the Town, its officials, boards and commissions, from directly or indirectly objecting to or interfering with plaintiffs' applications or approvals in their official capacities . . . ." Coalition's Mem. in Supp. of Mot. to Intervene at 3. This Court, however, cannot review the terms of a draft settlement agreement. The rules of evidence and our Supreme Court's caselaw bar consideration of such evidence. R.I.R. Evid. 408; Votolato v. Merandi, 747 A.2d 455, 461-64 (R.I. 2000).

Moreover, the Coalition ignores a key aspect of the alleged objectionable settlement terms it brings to this Court's attention. That is, the alleged terms presume some sort of action on the part of the Town and Planning Board before Plaintiffs' master

plan application can be approved.[14] Thus, if the settlement agreement is unlawful, the Coalition and/or its members—assuming they are "aggrieved parties"—could bring suit under § 45-23-71 to challenge the validity of the Planning Board's post-settlement decisions. See Sokaogon, 214 F.3d at 949 ("If the Settlement Agreement is unlawful, as the St. Croix claims it is, it can bring a suit under the APA challenging as arbitrary and capricious the Secretary's ultimate decision."); Leech Lake Area Citizens Cmty. v. Leech Lake Band of Chippewa Indians, 486 F.2d 888, 889 (8th Cir. 1973) (concluding that if state officials act illegally in "effecting a settlement of the underlying litigation, such contention raises an issue separate from the matters heretofore litigated and settled in the underlying litigation" and should be resolved in a separate lawsuit challenging those illegal actions). In that appeal, the Coalition might argue, for example, that the Planning Board's decision is arbitrary and capricious because such action was commanded by an unlawful settlement agreement. Sokaogon, 214 F.3d at 949; see § 45-23-71(c)(6) (permitting superior court to remand, reverse, or modify a planning board's decision upon a finding that the decision is arbitrary and capricious).[15] Because § 45-23-71 affords the Coalition such opportunity, denial of the Coalition's Motion to Intervene will not impede the Coalition's ability to protect its interest. See id. The Coalition therefore fails to satisfy the "impedes interest" element of the intervention as of right inquiry.[16]

[14] Counsel for Plaintiffs also conceded at a hearing on January 12, 2012 that any settlement between Plaintiffs and the Town would not result in the approval of Plaintiffs' master plan application and that further action on the part of the Planning Board or Board of Appeals would be necessary.

[15] This Court will not speculate here as to whether a planning board decision that is dictated by an unlawful settlement agreement is arbitrary and capricious and nothing in today's ruling is to be construed as doing so.

[16] The Coalition contends that if this Court denies its Motions to Intervene then the Coalition will suffer the same fate as the abutter plaintiffs in Meyer v. City of Newport,

iv

Adequate Representation

Even assuming that the Coalition could satisfy the first three elements of the intervention as of right analysis, it has failed to demonstrate that its interest is not adequately represented by the Town. "As noted above, an otherwise eligible party may not be entitled to intervene if 'the applicant's interest is adequately represented by existing parties.'" Groff, 871 A.2d at 368 (quoting Super. R. Civ. P. 24(a)(2)). The burden of showing inadequate representation is on the putative intervenor. Harris, 113 F.R.D. at 622. To demonstrate inadequate representation, a putative intervenor must "produce some tangible basis to support a claim of purported inadequacy." Groff, 871 A.2d at 368; see Town of Coventry v. Baird Props., LLC, 13 A.3d 614, 620 (R.I. 2011) (noting that the United States Supreme Court has stated that the burden of demonstrating

---

844 A.2d 148, 151 (R.I. 2004). In Meyer, the City of Newport and a marina operator entered a consent judgment to resolve the City's lawsuit against the marina operator over riparian rights to the Newport waterfront. Id. at 149-50. A year and a half later, abutting landowners learned of the consent judgment. Id. at 150. Believing that it was too late to intervene in the City's suit against the marina operator, the abutters filed a declaratory judgment action and asked the trial justice to vacate the consent judgment. Id. The trial justice held that the abutter plaintiffs could not challenge the consent judgment because they were not parties to the judgment. Id. Our Supreme Court affirmed, holding that the abutter plaintiffs lacked standing to challenge the consent judgment. Id. at 151.

The Coalition argues that if this Court denies its Motions, then any subsequent action it brings to challenge the validity of a settlement agreement between Plaintiffs and the Town will fail under Meyer for lack of standing. The Coalition, however, ignores a key distinction between Meyer and the instant matters: the cases before this Court involve a planning dispute. Our legislature has established a specific statutory scheme permitting aggrieved parties to seek judicial review of acts of planning boards. See § 45-23-71. Thus, assuming it is an aggrieved party, the Coalition could argue that any future Planning Board approval of Plaintiffs' application is unconstitutional and/or arbitrary and capricious because the approval was commanded by an unlawful settlement. Id.; see Sokaogon, 214 F.3d at 949. Whether the Coalition would succeed on this argument is a matter beyond the scope of this Decision. No avenue to challenge the City of Newport's actions existed in Meyer as it does here. See 844 A.2d at 150-52. Meyer is therefore inapposite to the present proceedings.

inadequate representation "should be considered minimal"). The putative intervenor need only show that representation may be inadequate, not that it is inadequate. Baird Props., 13 A.3d at 620.

Nevertheless, the inadequate representation "requirement is more than a paper tiger." See Pub. Serv. Co., 136 F.3d at 207. This is especially so "[w]here a party litigant is charged with representing the proposed intervenor's interests." United States v. Am. Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors, 442 F. Supp. 1072, 1082 (N.D. Ill. 1977). In such cases, there is a presumption of adequacy and a "compelling showing is required to demonstrate that this representation is inadequate." Id.; see Pub. Serv. Co., 136 F.3d at 207. The strength of this presumption is "ratcheted upward" when the intervenor attempts to intervene on the same side as a government agency to defend the agency's decision. Pub. Serv. Co., 136 F.3d at 207; see Standard Heating, 137 F.3d at 572 ("Where the interests asserted fall within the realm of 'sovereign interests,' and the government is a party, a presumption that the government adequately represents the interests of its citizens arises."). To rebut this presumption, the putative intervenor must make "a strong affirmative showing" that the government is not fairly representing the applicant's interests. Pub. Serv. Co., 136 F.3d at 207 (quoting United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 985 (2d Cir. 1984)).

As the Coalition seeks to intervene to defend the Board of Appeals' decision, the Coalition must rebut the presumption that the Town adequately represents the Coalition's interests. Id.; Am. Inst., 442 F. Supp. at 1082. To do so, the Coalition "must show that [its] position in the [litigation] is not the same as that of [the Town], or that [the Coalition] would represent the asserted interests differently than the" Town. Standard

Heating, 137 F.3d at 572. The Coalition fails to make such a showing.

The Coalition rests its case for inadequate representation on assertions "that the Town Council is willing to abdicate its responsibilities to uphold the rule of law governing the orderly development of land in North Smithfield in exchange for a quick and inexpensive exit from the pending litigation." Coalition's Mem. in Supp. of Mot. to Intervene at 3-4. Amorphous claims that the Town can no longer be trusted, however, do not constitute a "compelling showing" of inadequate representation. See Am. Inst., 442 F. Supp. at 1082. The Coalition does not explain how its position in the Planning Appeal—that the Board of Appeals' decision should be affirmed—differs from that of the Town. Nor does the Coalition suggest how it "would represent the asserted interests differently than" the Town. See Standard Heating, 137 F.3d at 572. Absent such elaboration, the Coalition cannot satisfy the inadequate representation prong.

In claiming inadequate representation, the Coalition relies principally on the terms of an alleged draft settlement agreement and contends that "the Town is not capable of adequately representing the [Coalition's] interests because the Town very nearly abdicated its state and local planning and development responsibilities in exchange for [sic] bad settlement agreement." Coalition's Mem. in Supp. of Mot. to Intervene at 3. This Court has already addressed the various flaws in the Coalition's reliance on an alleged draft settlement agreement. Supra at 19-20. Assuming, however, that the alleged settlement terms are accurate, the Coalition fails to provide much in the way of argument or authority indicating how accepting such terms would constitute an unlawful act on the part of the Town. See Am. Inst., 442 F. Supp. at 1081 ("[E]ntry into a proposed settlement does not constitute . . . collusion per se."). Rather, the Coalition simply asserts

that the Town would "abdicate its responsibilities to uphold the rule of law governing the orderly development of land in North Smithfield" if the Town executed the alleged agreement.[17] Coalition's Mem. in Supp. of Mot. to Intervene at 3. Such allegations do not constitute "a strong affirmative showing" that the Town is not fairly representing the Coalition's interest sufficient to merit intervention. Pub. Serv. Co., 136 F.3d at 207. As such, the Coalition's Motion to Intervene as of Right in the Planning Appeal is denied.[18]

2

Permissive Intervention

The Coalition also argues that it is entitled to permissive intervention. Rule

[17] The Coalition cites Munroe v. Town of East Greenwich, 733 A.2d 703, 706-08 (R.I. 1999), and contends that the draft settlement proposal would marginalize "the North Smithfield Planning Board's role in the consideration of any revised master plan application submitted by the plaintiffs to that of a mere technical review committee in violation of the Development Review Act . . . ." Coalition's Mem. in Supp. of Mot. to Intervene at 3. The Coalition, however, fails to elaborate upon this assertion. It does not explain, for example, how the settlement would convert the Planning Board into "a mere technical review committee in violation of the Development Review Act." Assertions of illegal acts on the part of the Town, unaccompanied by argument or other support, are insufficient to rebut the presumption that the Town adequately represents the Coalition's interests. See Pub. Serv. Co., 136 F.3d at 207; Am. Inst., 442 F. Supp. at 1081-1082.

[18] The Coalition levels serious allegations against the Town. Although the Coalition is not entitled to intervene in the Planning Appeal, this Court has considered the Coalition's claims and does not take them lightly. A settlement agreement that requires a municipal government to abdicate its police power to regulate on behalf of the general welfare is of suspect enforceability. See, e.g., OyGard v. Town of Coventry, No. CV950059237S, 2001 WL 1004155, at *2-*4 (Conn. Super. Ct. 2001); Chung v. Sarasota Cnty., 686 So. 2d 1358, 1359-1361 (Fla. Dist. Ct. App. 1996); Warner Co. v. Sutton, 644 A.2d 656, 659-66 (N.J. Super. Ct. App. Div. 1994); see also Nicholson v. Tourtellotte, 110 R.I. 411, 413-16, 293 A.2d 909, 910-13 (1972) (considering whether contractual zoning and planning arrangements between developers and municipalities are valid, but declining to decide); 3 Arden H. Rathkopf et al., Rathkopf's The Law of Zoning and Planning § 44:11 (Edward H. Ziegler, Jr. et al. eds., 2011) ("Illegal contract zoning is disfavored by courts because of the risk of fraud, corruption and undue influence but is disapproved largely on the basis of the principle that a municipality may not contract away its police power to regulate on behalf of the general welfare."). Plaintiffs and the Town would do well to keep this in mind when/if they resume settlement talks.

24(b)(2) provides in pertinent part:

> "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Super. R. Civ. P. 24(b)(2).[19]

Thus, to intervene permissively, the putative intervenor must (1) file a timely application and (2) show that there is a common question of law or fact. Id. Upon satisfactory completion of this threshold inquiry, it is within this Court's discretion as to whether to allow intervention. Id.; see United States v. Puerto Rico, 227 F.R.D. 28, 30 (D.P.R. 2005). Permissive intervention is more likely to be granted where the common question of law or fact arises in a claim or defense not raised by the original parties. See Standard Heating, 137 F.3d at 570, 573.

Application of the permissive intervention analysis dictates that this Court must deny the Coalition's Motion for lack of timeliness. "[W]hen a putative intervenor seeks both intervention as of right and permissive intervention, a finding of untimeliness with respect to the former normally applies to the latter (and, therefore, dooms the movant's quest for permissive intervention)." R & G Mortg. Corp., 584 F.3d at 11. This Court has already determined that the Coalition's Motion to Intervene as of Right in the Planning Appeal is untimely. Supra at 9-14. Moreover, there are no special circumstances which

[19] Rule 24(b)(1) provides for permissive intervention "when a statute of this state confers a conditional right to intervene." The Coalition does not argue that it is entitled to intervene by conditional statutory right and this Court has found no such statute permitting conditional intervention in the circumstances presented in the Planning Appeal or the Declaratory Judgment Action. In both cases therefore, this Court's permissive intervention analysis is limited to whether the Coalition is entitled to intervene under Rule 24(b)(2).

might merit different treatment of the Coalition's request for permissive intervention. As such, this Court concludes that the Coalition's Motion to Intervene Permissively is untimely for the same reasons that the Coalition's Motion to Intervene as of Right is untimely. Supra at 9-14.

Even assuming the timeliness of the Coalition's Motion, the Coalition would still not be entitled to intervene permissively. The Coalition fails to address the permissive intervention standard. That is, the Coalition does not identify a claim or defense which differs from those already in the case, but features a question of law or fact in common with the original parties' claims or defenses. See Standard Heating, 137 F.3d at 570, 573 (suggesting permissive intervention is inappropriate where intervenor fails to "raise any claim or defense different from those already in the case"); Am. Inst., 442 F. Supp. at 1083 ("Where the proposed intervenor merely underlines issues of law already raised by the primary parties, permissive intervention is rarely appropriate.").

Rather, instead of identifying a claim or defense featuring a question of law or fact in common with the Planning Appeal, the Coalition asserts that it should be allowed to intervene "because its claims raise important questions of law regarding the extent to which the Town Council may negotiate a binding settlement agreement that subverts the statutorily mandated functions of the Town's Planning Board and ignores development regulations adopted pursuant to that Board's exclusive statutory authority." Coalition's Mem. in Supp. of Mot. to Intervene at 5. The extent of the Town's settlement authority, however, is not relevant as it relates to the question of whether the Board of Appeals' decision should be affirmed. Indeed, even if this Court granted the Coalition's Motion,

the Town's settlement authority would not be an issue in the Planning Appeal.[20] The Coalition cannot use challenges to the Town's settlement authority or issues with a proposed settlement "to bootstrap itself into this litigation." See Sokaogon, 214 F.3d at 948. As this Court noted earlier, if the Coalition wanted a voice in the Planning Appeal—including a role in settlement talks—it should have moved to intervene much sooner. Id. at 950. The Coalition's Motion to Intervene Permissively in the Planning Appeal is denied.

B

Intervention in the Declaratory Judgment Action

On November 24, 2008, Plaintiffs filed the Declaratory Judgment Action. Plaintiffs allege that the Town violated their rights to substantive and procedural due process under the Rhode Island Constitution and ask this Court to declare the Planning Board's decision null and void. Plaintiffs also assert that the Town interfered with Plaintiffs' expected business advantage, expectation and opportunity and violated the Open Meetings Act. The Town denies these allegations. Plaintiffs and the Town have engaged in substantial discovery and made substantial efforts to settle the Declaratory Judgment Action over the course of 2011.

The Coalition seeks to intervene because it believes "that the municipal government of the Town of North Smithfield is not acting in the best interest of the Town's residents in its handling of its various litigation matters involving [P]laintiffs. . . ." As with the Planning Appeal, the Coalition maintains it is entitled to intervene in

[20] That is, if permitted to intervene, the Coalition would have the power to block settlement and therefore would not need to litigate whether the Town is exceeding its settlement authority.

the Declaratory Judgment Action as of right or permissively.

1

Intervention as of Right

A party seeking to intervene as of right must satisfy four conjunctive prerequisites: (1) a timely application for intervention; (2) a demonstrated interest relating to the property or transaction that forms the basis of the ongoing action; (3) a satisfactory showing that the disposition of the action threatens to create a practical impairment or impediment to its ability to protect that interest; and (4) a satisfactory showing that the existing parties inadequately represent its interest. Tonetti Enters., 943 A.2d at 1072-1073. Failure to satisfy any one of these elements forecloses intervention. Pub. Serv. Co., 136 F.3d at 204.

This Court has previously denied the Motion of various Coalition members to intervene as of right in the Declaratory Judgment Action for lack of timeliness. Now, the Coalition itself moves to intervene. This Court concludes that the Coalition's Motion is also untimely and therefore must be denied as well. For the sake of completeness, however, this Court shall perform the entire intervention as of right analysis.

i

Timeliness

This Court concludes that the Coalition's Motion to Intervene as of Right in the Declaratory Judgment Action is untimely for much the same reasons that the Coalition's Motion to Intervene as of Right in the Planning Appeal is untimely. Supra at 9-14. In brief, Plaintiffs' litigation with the Town was a matter of public knowledge and a subject at various Town Council meetings. Murphy Aff. ¶¶ 7-8. Thus, the Coalition knew, or

should have known, of the Declaratory Judgment Action and the alleged threat it posed to the Coalition's interest. Nonetheless, the Coalition waited over three years after the filing of the Declaratory Judgment Action before seeking to intervene. Such lethargy weighs strongly against permitting the Coalition to intervene as of right. Sokaogon, 214 F.3d at 949-50 (denying intervention as of right where intervenor knew that its interests were at stake, but waited five years to intervene).

Moreover, intervention would prejudice the parties. Plaintiffs and the Town have already engaged in substantial discovery regarding the circumstances surrounding the Planning Board's decision and partaken in settlement negotiations. That the Coalition waited three years to attempt to intervene and only did so upon disapproving of the terms of a draft settlement strongly suggests that the Coalition is only interested in intervening to block a settlement. Sokaogon, 214 F.3d at 949-50; see R & G Mortg. Corp., 584 F.3d at 9 (holding that allowing intervention aimed at stopping settlement would harm the original parties)).[21]

[21] Counsel for the Coalition's statements at a January 12, 2012 hearing also suggest that the Coalition is primarily interested in intervening so that it may supervise settlement discussions between Plaintiffs and the Town:

> "What we do feel that we need to know and what the Town is entitled to know is if this settlement provision is going to include any provisions that set aside the existing Planning Board decision without following through with the appeal . . . . [The Coalition is also concerned about] any attempt for this settlement to handcuff the Planning Board's statutory duties to review this project to preclude them from fully and properly enforcing the local rules and regulations, or to issue without Planning Board review and approval some sort of variance or alteration to the Town's local planning requirements. It's that aspect of their decision that the interveners are most concerned with; making sure that the established planning procedures are not given away or tucked away in secrecy in some executive sessions."

Faced with the same sort of "wait-and-see" tactics in the Declaratory Judgment Action that the Coalition employed towards the Planning Appeal, this Court reaches the same conclusion. See Marteg Corp., 425 A.2d at 1243; supra at 9-14. The Coalition's Motion to Intervene as of Right in the Declaratory Judgment Action is denied as untimely.

ii

A Demonstrated Interest

Intervention as of right is only proper where the putative intervenor shows an interest relating to the property or transaction that forms the basis of the ongoing action. Super. R. Civ. P. 24. That is, a prospective intervenor's interest must bear a sufficiently close relationship to the dispute between the original litigants and the interest must be direct, not contingent. Tonetti Enters., 943 A.2d at 1072-1073 (citing Conservation Law Found. of New Eng., Inc. v. Mosbacher, 966 F.2d 39, 42 (1st Cir. 1992)).

The Coalition has an interest in the outcome of the Declaratory Judgment Action, although such interest is not apparent at first blush. On its face, the Declaratory Judgment Action is personalized to Plaintiffs. Plaintiffs are, after all, seeking a declaration that the Town violated Plaintiffs' rights. However, because Plaintiffs not only seek damages, but also ask this Court to declare the Planning Board's decision null and void, the Declaratory Judgment Action implicates the same interest of the Coalition as the Planning Appeal. In other words, the Declaratory Judgment Action touches the Coalition's derivative interest as the representative of owners of property adjacent to Plaintiffs' proposed development. Therefore, to the extent that the Declaratory Judgment Action poses a threat to the continued viability of the Planning Board's decision, the

Coalition possesses an interest in the Declaratory Judgment Action for the same reasons that the Coalition has such an interest in the Planning Appeal. Supra at 15-17.

iii

Impede Interest

Despite having an interest in the Declaratory Judgment Action, the Coalition cannot show that disposition of the Declaratory Judgment Action threatens to impede the Coalition's ability to protect that interest. The same logic underlying this Court's resolution of the "impedes interest" element regarding the Planning Appeal is equally applicable to the Declaratory Judgment Action. Supra at 18-20.

Briefly, the Coalition's interest in blocking Plaintiffs' proposed development would not be harmed regardless of whether the Town or Plaintiffs prevail in the Declaratory Judgment Action. The Town denies that it violated Plaintiffs' rights and opposes nullification of the Planning Board's decision. Thus, if the Town prevails in the Declaratory Judgment Action, the Coalition's anti-development interest is served. Conversely, Plaintiffs ask for nullification of the Planning Board's decision, which would require the Planning Board to rehear Plaintiffs' master plan application. If Plaintiffs prevail, the Coalition shall have another opportunity to raise its concerns before the Planning Board. Therefore, the Coalition's interest is unaffected regardless of the ultimate outcome of the Declaratory Judgment Action. See Pub. Serv. Co., 136 F.3d at 207 (rejecting motion to intervene partially because intervenor's interest in participating in utility rate plan would not be harmed whether plaintiff or defendant prevailed).

Nevertheless, the Coalition argues—as it does regarding the Planning Appeal—that possible settlement of the Declaratory Judgment Action could effectively authorize

Plaintiffs' proposed development and therefore damage the Coalition's interest by depriving the Coalition of a voice in the plan approval process. This Court rejects this argument for the same reasons it did so in the context of the Planning Appeal. Supra at 19-20.

iv

Adequate Representation

Finally, even if the Coalition could satisfy the first three requisite elements of intervention as of right, the Coalition has failed to show that the Town may not adequately represent the Coalition's interests in the Declaratory Judgment Action. This Court has already discussed the "adequate representation" element of the intervention as of right analysis in detail. Supra at 21-24. Thus, it shall repeat only the essentials here.

The burden of showing inadequate representation is on the putative intervenor. Harris, 113 F.R.D. at 622. To carry this burden, a putative intervenor must "produce some tangible basis to support a claim of purported inadequacy." Groff, 871 A.2d at 368; see Pub. Serv. Co., 136 F.3d at 207. The putative intervenor generally need only show that representation may be inadequate, not that it is inadequate. Baird Props., 13 A.3d at 620. Adequacy of representation is presumed by default, however, "when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor." Am. Nat'l Bank & Trust Co. of Chi. v. City of Chicago, 865 F.2d 144, 148 (7th Cir. 1989) (quoting Keith v. Daley, 764 F.2d 1265, 1270 (7th Cir. 1985)). When "the government is being sued, the presumption rests primarily on the premise that the government as an institution is likely to do an adequate job of defending its own conduct." Cotter v. Mass. Ass'n of Minority

Law Enforcement Officers, 219 F.3d 31, 35 (1st Cir. 2000). As such, a "compelling showing is required to demonstrate that this representation is inadequate." Am. Inst., 442 F. Supp. at 1082. Because the Coalition seeks to intervene to oppose Plaintiffs' claims, the Coalition must rebut the presumption that the Town adequately represents the Coalition's interests. To do so, the Coalition "must show that [its] position in the [litigation] is not the same as that of [the Town], or that [the Coalition] would represent the asserted interests differently than the" Town. Standard Heating, 137 F.3d at 572.

The Coalition fails to make such a showing for the same reasons it failed to do so regarding the Planning Appeal. Supra at 22-24. As with the Planning Appeal, the Coalition simply asserts "that the Town Council is willing to abdicate its responsibilities to uphold the rule of law governing the orderly development of land in North Smithfield in exchange for a quick and inexpensive exit from the" Declaratory Judgment Action. Coalition's Mem. in Supp. of Mot. to Intervene at 3-4. The Coalition does not address how its position in the Declaratory Judgment Action would differ from that of the Town, nor does the Coalition suggest how its defense of the Town would be superior to the Town's own. See Standard Heating, 137 F.3d at 572.

In claiming inadequate representation, the Coalition relies principally on the alleged terms of the draft settlement agreement and contends that "the Town is not capable of adequately representing the [Coalition's] interests because the Town very nearly abdicated its state and local planning and development responsibilities in exchange for [sic] bad settlement agreement." Coalition's Mem. in Supp. of Mot. to Intervene at 4. This Court has already addressed the defects in the Coalition's attempt to use problems with an alleged draft settlement agreement to bootstrap its way into this litigation and will

not repeat itself. Supra at 19-20, 23-24. It suffices to note here that the Coalition presents scant argument or precedent explaining how accepting the alleged terms would constitute an unlawful act on the part of the Town. Am. Inst., 442 F. Supp. at 1081-1082. Rather, the Coalition simply asserts that the Town would abdicate its responsibilities to enforce the law governing the orderly development of land in North Smithfield if the Town executed the alleged settlement agreement. Allegations absent elaboration, however, do not form a "compelling showing" that the Town is inadequately representing the Coalition's interest in the Declaratory Judgment Action. Id. at 1082. As such, the Coalition's Motion to Intervene as of Right in the Declaratory Judgment Action is denied.

2

Permissive Intervention

The Coalition also argues that it is entitled to permissive intervention in the Declaratory Judgment Action. To intervene permissively, the putative intervenor must (1) file a timely application and (2) show that there is a common question of law or fact. Super. R. Civ. 24(b)(2). Upon satisfactory completion of this threshold inquiry, it is within this Court's discretion as to whether to allow intervention. Super R. Civ. P. 24(b)(2).

As the Coalition's application for intervention as of right in the Declaratory Judgment Action failed for lack of timeliness, so too must the Coalition's Motion for Permissive Intervention. Again, "when a putative intervenor seeks both intervention as of right and permissive intervention, a finding of untimeliness with respect to the former normally applies to the latter (and, therefore, dooms the movant's quest for permissive intervention)." R & G Mortg. Corp., 584 F.3d at 11. This Court has already determined

that the Coalition's Motion to Intervene as of Right in the Declaratory Judgment Action is improper because it is untimely. Supra at 28-30. The Coalition is not entitled to intervene permissively in the Declaratory Judgment Action for the same reason. Supra at 28-30.

Nonetheless, even assuming the timeliness of the Coalition's Motion, the Coalition could still not intervene permissively in the Declaratory Judgment Action. As with its case for permissive intervention in the Planning Appeal, the Coalition does not address the permissive intervention standard. Rather, instead of identifying a claim or defense featuring a question of law or fact in common with the Declaratory Judgment Action, the Coalition makes the now familiar argument about the purported draft settlement agreement. See Standard Heating, 137 F.3d at 570, 573.

The Coalition argues that it should be allowed to intervene "because its claims raise important questions of law regarding the extent to which the Town Council may negotiate a binding settlement agreement that subverts the statutorily mandated functions of the Town's Planning Board and ignores development regulations adopted pursuant to that Board's exclusive statutory authority." This Court has already addressed why this argument does not justify allowing the Coalition to intervene permissively in the Planning Appeal and the same logic applies in the context of the Declaratory Judgment Action. Supra at 26-27. Simply put, the Coalition cannot use challenges to the Town's settlement authority or alleged legal problems with a proposed settlement to force its way into the Declaratory Judgment Action. See Sokaogon, 214 F.3d at 948-50. The extent of the Town's settlement authority is not pertinent to the question of whether the Town violated Plaintiffs' rights. The Coalition's Motion to Intervene Permissively in the

Declaratory Judgment Action is therefore denied.

IV

Conclusion

For the foregoing reasons, this Court concludes that North Smithfield Neighborhood Coalition, Inc. is not entitled to intervene as of right or permissively in the Planning Appeal (PC-2008-6504) and the Declaratory Judgment Action (PC-2008-7468). The Coalition's Motions are therefore denied. Counsel shall submit an appropriate Order for entry.