STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: April 24, 2013)

NORTH END REALTY, LLC	:	
	:	
v.	:	**C.A. No. KC 07-1008**
	:	
THOMAS MATTOS, in his capacity as Finance Director for the Town of East Greenwich, Rhode Island; and,	:	
LEE R. WHITAKER, in his capacity as Town Planner for the Town of East Greenwich,	:	
MICHAEL B. ISAACS	:	
KIM A. PETTI	:	
MARK SCHWAGER	:	
HENRY V. BOEZI, and	:	
JOHN M. McGURK, in their capacities as Members of the Town Council for the Town of East Greenwich, Rhode Island	:	

DECISION

NUGENT, J. Before the Court are Plaintiff's motion for summary judgment and Defendants' cross-motion for summary judgment. For the reasons set forth in this Decision, the Court denies Plaintiff's motion for summary judgment and grants Defendants' motion in part. Jurisdiction is pursuant to Superior Court Rules of Civil Procedure 56(c).

I

Facts and Travel[1]

As a means of addressing the state's affordable housing shortage, G.L. 1956 § 45-53-1 et

[1] The following facts, stipulated to by the parties and filed with the Court on February 22, 2008, were subsequently used by the Supreme Court in the opinion, North End Realty v. Mattos, 25 A.3d 527 (R.I. 2011).

seq.,[2] the Rhode Island Low and Moderate Income Housing Act (LMIHA or the Act), requires all local towns and cities to provide affordable housing that "is in excess of ten percent (10%) of the year-round housing units reported in the census." Sec. 45-53-3(4)(i). The Act stipulates that any municipality lacking the requisite number of affordable housing units must have prepared a comprehensive plan by December 31, 2004, including a "housing element," that would serve to bring the municipality into compliance with the Act. Sec. 45-53-4(c). The LMIHA further provides that the municipality's comprehensive plan must be adopted and approved pursuant to G.L. § 45-22.2-1 et seq., the Rhode Island Comprehensive Planning and Land Use Regulation Act. Sec. 45-53-3(4)(ii). Pursuant to this latter act, the municipality's comprehensive plan must be enacted by the municipality's legislative body and then submitted for approval to the State Director of Administration. Sec. 45-22.2-8(c).

In 2004, a study conducted by the Rhode Island Housing and Mortgage Finance Corporation determined that only 4.36 percent of the available housing in the Town of East Greenwich (Town) qualified as affordable and that the Town needed 292 additional units of affordable housing to meet the ten percent (10%) requirement outlined in the Act. N. End Realty, 25 A.3d at 531. Due to this shortage, the Town prepared a comprehensive plan to bring the municipality into compliance with the Act. Id. Prior to the 2004 year-end deadline established by the LMIHA, the East Greenwich Town Council (Town Council) adopted a comprehensive plan, which was then submitted to the State Director of Administration for approval. Id. This plan was approved on September 26, 2005 by the State Director of Administration, and on November 6, 2006, the Town Council adopted three ordinances designed to implement the strategies outlined in the plan. Id.

[2] The LMIHA was originally enacted in 1991 and subsequently amended.

These ordinances—numbered 778, 779, and 780—included a requirement that real estate developers either designate fifteen percent (15%) of the units in any subdivision or major residential land development as affordable housing or pay the Town $200,000 as a "fee-in-lieu" of constructing the required number of affordable housing units. Id. at 532. According to the ordinances, the "fee-in-lieu"—or a fractional percentage thereof—was to be paid for each affordable housing unit that should be built in order to meet the fifteen percent (15%) affordable units required out of the total approved number of units. Id. Pursuant to ordinance 780, an "Affordable Housing Commission" would receive fees paid and would deposit such fees into an "Affordable Housing Trust Fund." This commission would then oversee distribution of the funds to different loan and grant programs which would be established for the purpose of developing and preserving affordable housing.

Plaintiff North End Realty, LLC (Plaintiff or North End), is a real estate developer which owns real property located in East Greenwich, comprised of approximately 20.72 acres, which is specifically designated as Assessor's Plat 19C, Lots 31 and 32 (Property). Id. at 528. On March 28, 2006, North End filed a pre-application with the Town of East Greenwich Planning Board (Planning Board) for the development of a five-lot subdivision on the Property. Id. On November 6, 2006, subsequent to the Plaintiff's filing, the Town adopted the three new above-mentioned ordinances for the purpose of promoting development of affordable housing within the Town. Id. at 529.

On February 20, 2007, North End filed a petition for both master and preliminary plan review and approval with the Planning Board for development of the planned subdivision, pursuant to the Town's Planning Board requirements. Id. These plans outlined Plaintiff's intention to build five residential dwellings and also indicated that North End did not intend to

include any affordable housing units as part of the subdivision. Id. On May 16, 2007, the Town approved North End's preliminary plan with conditions, one of which required that North End pay a fee-in-lieu before Plaintiff would be allowed to record the subdivision approval or begin to develop the Property.[3] Id.

On September 13, 2007, North End filed a Complaint seeking declaratory and injunctive relief against Thomas Mattos, in his capacity as Finance Director for the Town; Lee R. Whitaker, in his capacity as Town Planner; and Michael B. Isaacs, Kim A. Petti, Mark Schwager, Henry V. Boezi and John M. McGurk, all in their capacities as members of the Town Council (collectively Defendants). In the Complaint, North End alleged that the fee-in-lieu requirement contained in the Town's ordinances violated its right to substantive due process, constituted a regulatory taking in violation of Article 1, section 16 of the Rhode Island Constitution, and was an illegal tax in violation of Article 13, section 5 of the Rhode Island Constitution.

On January 7, 2008, North End filed a motion for injunctive relief, requesting that the Town be "enjoined from mandating a fee-in-lieu of construction of affordable housing units to be assessed and charged upon [North End] and similarly situated property owners seeking to develop and/or subdivide their property." In this motion for injunctive relief, North End made the same allegations as it had in its Complaint, with additional claims that the Town's fee-in-lieu requirement violated Plaintiff's right to procedural due process and equal protection under the

[3] The amount of the fee-in-lieu required to be paid by Plaintiff is currently disputed. Although the parties filed stipulated facts with the Court on February 22, 2008, stating that Plaintiff was required to pay a fee of $200,000—the figure used by the Supreme Court throughout its decision—the preliminary plan approval clearly states that "fifteen percent of the units in a five lot subdivision, which is equal to .75 of an affordable unit, is required and payment to the Affordable Housing Trust Fund for the fraction of a unit not built shall be provided." The fractional amount that would therefore be required, $150,000, is supported by an affidavit, submitted by Defendants, of Lisa Bourbonnais, Planning Director for the Town of East Greenwich.

Rhode Island Constitution, and also that the Town had imposed the fee-in-lieu "without any explicit authority from the General Assembly." This motion was heard on February 22, 2008, before a Superior Court justice who issued a written Decision on April 22, 2008, denying North End's motion for injunctive relief.

After final judgment entered, North End filed an appeal with our Supreme Court. Our Supreme Court held that state statutory provisions which require municipalities to provide affordable housing do not authorize the Town to charge a fee-in-lieu of undertaking the construction of affordable housing, and thus the Town could not require developers to pay such a fee in the absence of legislative authority. Id. at 538. Because the Supreme Court determined that the Town could not properly impose a fee-in-lieu without specific legislative authorization, it did not entertain Plaintiff's other arguments on appeal. Id. at n.10.

Plaintiff filed an Amended Complaint on September 14, 2011, and on February 12, 2013, filed the instant motion for summary judgment as to Counts I, III, and VI, claiming that no genuine issues of material fact remain and that Plaintiff is entitled to judgment as a matter of law. Defendants filed an objection to this motion, claiming that Plaintiff has failed to exhaust all available administrative remedies prior to pursuing the matter with this Court, warranting dismissal of the action. Defendants also filed a cross-motion for summary judgment, claiming that if the Court will entertain Plaintiff's claims at this time, Defendants are instead entitled to summary judgment on Counts I, III, and VI of Plaintiff's Amended Complaint. At a March 25, 2013 hearing, the parties offered their respective arguments, and this Court reserved decision on all issues presented.

II

Exhaustion of Administrative Remedies

As a preliminary matter, this Court must first determine whether Plaintiff has failed to exhaust all administrative remedies available before pursuing an action before this Court. Defendants maintain that Plaintiff failed to appeal the Planning Board's preliminary decision to the Town's Zoning Board of Review, as provided for in both the General Laws and the Town's Code of Ordinances, and has also failed to return to the Planning Board to complete the appeal process after the Supreme Court issued its opinion.[4] Defendants assert that this Court should therefore dismiss Plaintiff's action for failure to exhaust its administrative remedies and not adjudicate Plaintiff's motion for summary judgment.

As a general rule, an aggrieved party must exhaust all administrative remedies before resorting to the judicial system for relief. Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992). This exhaustion rule mandates the withholding of judicial review "until the administrative process has run its course." U.S. v. Western Pac. R.R. Co., 352 U.S. 59, 63 (1956); R.I. Emp't Sec. Alliance v. Dep't of Emp't & Training, 788 A.2d 465, 467 (R.I. 2002). There are exceptions to this general rule, however, and a court may forego the exhaustion of administrative remedies when an appeal to an administrative review board would be futile or uselessly delay judicial review. Burns, 617 A.2d at 117; M.B.T. Construction Corp. v. Edwards, 528 A.2d 336, 228 (R.I. 1987).

In Nardi v. City of Providence, 89 R.I. 437, 153 A.2d 136 (1959), our Supreme Court stated that the exhaustion rule is applicable to cases where a litigant contends that an ordinance is unconstitutional in its application to only a specific property. Id. The Court reasoned that in such instance, an appeal to a zoning board—seeking a variance or an exception—could be met with

[4] The right to, and process for, an appeal of a planning board decision is pursuant to §§ 45-23-66 and 45-23-77, respectively.

success, thus avoiding a needless judicial determination. Id. at 446, 153 A.2d at 141.

However, in the later case Frank Ansuini, Inc, v. City of Cranston, 107 R.I. 63, 73, 264 A.2d 910, 915-16 (1970), the Court determined that there is no need to seek administrative relief where the basis of a suit is the contention that an ordinance is invalid on its face. Id. In such a situation, the Court reasoned, it is futile for the complainant to appeal to a board of review because the board lacks the authority to grant the relief sought; namely, the ability to declare a provision null and void. Id. at 73, 264 A.2d at 916. Therefore, in such circumstances, seeking administrative relief "would only delay judical determination of those issues which of necessity must be resolved in court rather than at the administrative level," and thus, "courts will not deny judicial relief on the ground that one invoking its protection has first failed to do that which would be futile." Id.

Here, Plaintiff, in its Amended Complaint, seeks a declaratory judgment challenging the constitutionality of the Town's ordinances which require payment of a fee-in-lieu of construction of affordable housing and seeks a declaration from this Court that such ordinances contravene state law and are thus patently invalid. Plaintiff's allegations focus on how the ordinances apply in their general scope and effect, and not as they pertain specifically to Plaintiff's property. Furthermore, a review of the ordinances in question shows that they were adopted by the Town Council in the Town's effort to comply with § 45-53-1 et seq., the "Rhode Island Low and Moderate Income Housing Act," and allow the Town to charge fees when a developer has not provided the required number of low and moderate income housing units in its development project. As such, there is no indication that either the planning board or the zoning board of review has the authority to declare the ordinance void. Thus, here, like the situation in Ansuini, it would have been futile for Plaintiff to have appealed to the board of review, since that agency

lacked authority to declare the ordinance void.

Moreover, our Supreme Court has stated that an exhaustion of administrative remedies serves two important roles; namely, (1) "aid[ing] judicial review by allowing the parties and the agency to develop the facts of the case," and (2) "promot[ing] judicial economy by avoiding needless repetition of administrative and judicial fact finding, perhaps avoiding the necessity of any judicial involvement." Doe v. East Greenwich School Department, 899 A.2d 1258, 1266 (R.I. 2006) (quoting Almeida v. Plasterers' and Cement Masons' Local 40 Pension Fund, 722 A.2d 257, 259 (R.I. 1998)). Consequently, the Supreme Court has stated that if there is essentially little or no material fact-finding at hand, then remanding or dismissing a case for failure to exhaust administrative remedies results in useless delay. Burns, 617 A.2d at 117.

Here, the current action was filed with this Court in 2007, since which time the parties have engaged in discovery, and the court file has grown to encompass three volumes. In 2008, the parties also filed four pages of stipulated facts with the Court. Additionally, this action has traveled to the Supreme Court, where a full-length written opinion was issued based on the facts presented. Hence, at this stage in the litigation, there would be no factual record that an appeals board could develop that would assist this Court, and remanding or dismissing this case for failure to exhaust administrative remedies would clearly result in useless delay. Accordingly, this Court finds that the case is ripe for judicial review and now turns to Plaintiff's motion for summary judgment in conjunction with Defendants' cross-motion.

III

Standard of Review

"Summary judgment is 'a drastic remedy,' and a motion for summary judgment should be dealt with cautiously." Estate of Giuliano v. Giuliano, 949 A.2d 386, 390 (R.I. 2008). This

Court will grant a motion for summary judgment only if "after reviewing the admissible evidence in the light most favorable to the nonmoving party[,]" "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting Roe v. Gelineau, 794 A.2d 476, 481 (R.I. 2002)). Alternatively, the nonmoving party "'has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions.'" Liberty Mut., 947 A.2d at 872 (quoting D'Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I. 2004)). To meet this burden, "'[a]lthough an opposing party is not required to disclose in its affidavit all its evidence, he [or she] must demonstrate that he [or she] has evidence of a substantial nature, as distinguished from legal conclusions, to dispute the moving party on material issues of fact.'" Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (quoting Gallo v. Nat'l Nursing Homes, Inc., 106 R.I. 485, 489, 261 A.2d 19, 21-22 (1970)).

IV

Analysis

Our Supreme Court has already determined that "before a municipality may impose a fee-in-lieu on developers, it must have specific statutory authorization from the General Assembly." N. End Realty, 25 A.2d at 537. In said opinion, which specifically concerned the instant parties, the Court held that "[t]he imposition by East Greenwich of the fee-in-lieu 'constitutes an action ultra vires of the authority delegated by the home rule charter' to the town council—due to the fact that, in imposing the fee-in-lieu, the council was not exercising its 'authority over purely local concerns,' which authority inures to the [T]own by virtue of its

charter." Id. at 537-38 (citing Town of East Greenwich v. O'Neil, 617 A.2d 104 at 111, 112 (R.I. 1992)). Our Supreme Court then remanded the case with directions that this Court "issue an order enjoining East Greenwich from imposing, assessing, or collecting the fee-in-lieu." Id. at 538.

Accordingly, it was our Supreme Court's directive to this Court that such an order must enter, and Plaintiff shall prepare this order for entry by the Court. This Court will now continue to address Plaintiff's motion, discussing and rendering a decision upon only those issues which were not previously addressed in our Supreme Court's Decision.

A

Substantive Due Process

The Court now turns to Plaintiff's motion for summary judgment—and Defendants' cross-motion—on Count I of the Amended Complaint, which seeks a declaratory judgment as to Defendants' violation of Plaintiff's substantive due process rights under article I, section 2 of the Rhode Island Constitution.[5] In moving for summary judgment on this Count, Plaintiff relies on § 45-23-41, L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202 (R.I. 1997), and Jeffrey v. Platting Board of Review of the Town of South Kingstown, 103 R.I. 578, 239 A.2d 731 (1968), for the proposition that under Rhode Island law, Plaintiff's preliminary development plan, which was approved by the Planning Board with conditions, is a vested right and a protected property interest. Plaintiff also argues that the Planning Board had no discretion to

[5] Article I, section 2 of the Rhode Island Constitution states, in pertinent part:

> All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws . . . . Id.

disapprove Plaintiff's request for final subdivision approval of the Property, claiming the project conformed to all Town zoning and subdivision requirements. Plaintiff further contends that the Defendants' ultra vires enactment and imposition of the ordinances which required payment of a fee-in-lieu of construction of affordable housing are arbitrary, capricious, and a violation of the substantive due process clause of the Rhode Island Constitution.

Pursuant to G.L. 1956 § 45-23-41(f), "[a] complete application for a major subdivision or development plan shall be approved, approved with conditions[,] or denied in accordance with the requirements of §§ 45-23-60 and 45-23-63 . . . ." Id. Section 45-23-60, entitled "Procedure," mandates that a town's regulations include a provision requiring planning and zoning board authorities to make required findings, as part of a proposed project's record prior to approval, including that "[t]he proposed development is consistent with the comprehensive community plan and/or has satisfactorily addressed the issues where there may be inconsistencies," and that "[t]he proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance." Sec. 45-23-60(a)(1),(2). Once approved, a preliminary plan is vested for a period of two years with the right to extend for two, one-year extensions upon written request of the applicant. Sec. 45-23-41(h). However, pursuant to § 45-23-43, entitled "Major land development and major subdivision—final plan," "if the administrative officer determines that an application for final approval does not meet the requirements set by local regulations *or by the planning board at preliminary approval*, the administrative officer shall refer the final plans to the planning board for review." Sec. 45-23-43(c) (emphasis added). At that point, the planning board is given sufficient time to "approve or deny the final plan as submitted." Id.

Here, on February 20, 2007, North End filed a petition for preliminary plan review and

approval with the Planning Board for development of the planned subdivision, pursuant to the Town's Planning Board requirements. These plans affirmed that North End did not intend to include any affordable housing units as part of the subdivision. On May 16, 2007, the Town approved North End's preliminary plan; however, it included sixteen separate conditions to this approval, many not related to the affordable housing requirement. The Planning Board's decision also made specific findings as to Plaintiff being notified of the Town's affordable housing requirement on June 21, 2006; the requirement of affordable housing in the district in which Plaintiff sought to develop real estate; and Plaintiff's objection to the affordable housing requirement due to a lack of municipal subsidy. North End, however, did not seek final approval of the development plans, nor did Plaintiff seek an exemption from the Town's affordable housing requirement.

Notably, our Supreme Court—in its opinion concerning these parties—stated that it was "unable to sustain *those provisions* in the town's ordinances that provide for the imposition of the fee-in-lieu." North End Realty, 25 A.3d at 538 (emphasis added). While the Supreme Court ordered that this tribunal must "issue an order enjoining East Greenwich from imposing, assessing, or collecting the fee-in-lieu," the Court neither struck down the ordinances in their entirety, nor mandated that the Town be enjoined from enforcing other provisions which relate to affordable housing requirements.[6] Id. As such, it is clear that Plaintiff would still be required to

[6] It is worth noting that the East Greenwich Town Code of Ordinances contains a severability provision:

> [i]t is hereby declared to be the intention of the Town Council that the sections, paragraphs, sentences, clauses and phrases of this Code are severable, and if any phrase, clause, sentence, paragraph or section of this Code shall be declared unconstitutional, invalid or unenforceable by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality, invalidity or unenforceability shall not affect any of the remaining phrases,

comply with those provisions requiring construction of affordable housing—or seek an exemption therefrom—before final approval of any development plans would be granted.

Moreover, this Court finds Plaintiff's reliance on L.A. Ray Realty, 698 A.2d 202, and Jeffrey, 103 R.I. 578, 239 A.2d 731, for the proposition that a planning board has no discretion to disapprove a subdivision application that conforms to its rules, misplaced. In Jeffrey, the Court addressed whether a planning board had abused its discretion when it approved a proposed subdivision plan after the planning board had recommended to its city council that the existing zoning requirement that proposed subdivisions average 20,000 square feet be increased to 80,000 square feet. Id. at 581, 239 A.2d at 734. The Supreme Court upheld the planning board's approval of the proposed subdivision which averaged 40,000 square feet, noting that the board had approved the subject proposal before the city council had voted to change the zoning regulation, and that the planning board had "no discretion to disapprove a plat that conforms" to the board's rules. Id. at 588, 239 A.2d at 737.

However, in Restivo v. Lynch, the Court clarified that in Jeffrey, "[i]t was in the context of the discussion of *this narrow issue* that the Court reasoned that planning board and city council members must act pursuant to rules and regulations pertaining to subdivisions that they have enacted, 'and they have no discretion to disapprove a plat that conforms to those rules.'" Restivo, 707 A.2d 663, 668 (R.I. 1998) (quoting Jeffrey, 103 R.I. at 588, 239 A.2d at 737) (italics in original). The Court explained that "we do not view this language, when considered in its appropriate context, as dictating that a planning board may in no circumstances reject a proposed plan that conforms to existing zoning regulations but might otherwise be problematic."

> clauses, sentences, paragraphs and sections of the Code, since such part of the code would have been enacted by the Town Council without the incorporation in this Code of any unconstitutional phrase, clause, sentence, paragraph or section. Art. I, § 1-5.

Id. The Court further clarified that its subsequent use of this particular language from Jeffrey in L.A. Ray Realty case—where the Court struck down a zoning amendment—was "because *the only basis for denial* [of the plaintiffs' subdivision applications] was the application of the town's invalid referendum amendment[;] [otherwise the] plaintiffs were entitled as a matter of law to final approval of those subdivisions." Restivo, 707 A.2d at 668 (quoting L.A. Ray Realty, 698 A.2d at 210 (emphasis in original).[7]

In the present case, however, despite the striking down as ultra vires the imposition of a fee-in-lieu of construction of affordable housing, it would be pure speculation for this Court to find that Plaintiff is entitled as a matter of law to final approval of a development plan at some point in the future when such a plan was never submitted, and if it does not otherwise comply with the Planning Board's decision or those provisions of the Town's zoning ordinances still in effect. See L.A. Ray Realty, 698 A.2d at 210 (no protected property interest exists in a proposed subdivision at a preliminary stage, with the possibility of denial for a number of reasons). Thus, Plaintiff has not shown that it has a vested right to final approval at some point in the future of a land development plan that did not comport with the Planning Board's decision or include an affordable housing component as required by the Town's ordinances. See Town of Coventry Zoning Bd. of Review v. Omni Dev. Corp., 814 A.2d 889, 900 (R.I. 2003) (communities that do

[7] Plaintiff's argument that a planning board lacks discretion to deny approval of a plan that comports to its requirements also fails because of this Court's standard applied when reviewing a planning board's decision. See Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977) ("It is well settled that the Superior Court does not engage in a de novo review of board decisions pursuant to [§45-23-20]; [r]ather, the Superior Court reviews the decisions of a plan commission or board of review under the 'traditional judicial review' standard applicable to administrative agency decisions."); see also Restivo, 707 A.2d at 668 ("Grossman established that "any competent evidence" in the record will obligate a trial justice to affirm a planning board's decision. The Grossman Court did not hold, and we decline to so hold today, that a trial justice must affirm a planning board's denial of an application only when any competent evidence exists on the record *and* the proposed subdivision fails to comply with existing zoning regulations.") (emphasis in original).

not reach the established minimum number of low and moderate income housing units must apply zoning and land use ordinances relating to low and moderate income housing "evenhandedly to all development proposals and not intended to frustrate or defeat low and moderate income housing initiatives").

Plaintiff further argues that Defendants' ultra vires enactment and imposition of the ordinances which required payment of a fee-in-lieu of construction of affordable housing was arbitrary, capricious, and a violation of the substantive due process clause of the Rhode Island Constitution.[8] "Substantive due process, as opposed to procedural due process, addresses the 'essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible.'" L.A. Ray Realty, 698 A.2d at 211 (quoting Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 751 (R.I. 1995)). "Substantive due process prevents the use of governmental power for purposes of oppression, or abuse of governmental power that is shocking to the conscience, or legally irrational action that is not keyed to a legitimate state interest." Id. (quoting PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 31-32, (1st Cir. 1991), cert. granted in part, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991), cert. dismissed as improvidently granted, 503 U.S. 257, 112 S. Ct. 1151, 117 L. Ed. 2d 400 (1992)).

Substantive due process is violated when "'the constitutional line has been crossed'" by state actions that transgress "some basic and fundamental principle." Id. Accordingly, the substantive due process standard employed in this jurisdiction is meant to protect individuals against state actions that are "egregiously unacceptable, outrageous, or conscience-shocking." Id.

[8] As the drafters of the Rhode Island Constitution intended that document's Due Process Clause to parallel the Due Process Clause of the Fourteenth Amendment, the Court's analysis implicates both. See Jones v. Rhode Island, 724 F. Supp. 25, 34-35 (D.R.I. 1989); Pawtucket Transfer Operations, LLC v. City of Pawtucket, 539 F. Supp. 2d 513, 517 n.4 (D.R.I. 2008).

(quoting Jolicoeur, 653 A.2d at 751). Moreover, a plaintiff claiming deprivation of a protected property interest in violation of his or her substantive due process rights "must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Brunelle v. Town of South Kingstown, 700 A.2d 1075, 1084 (R.I. 1997).

Notably, our Supreme Court, as well as a majority of courts in other jurisdictions, have been hesitant to find violations of substantive due process purely based on legislative conduct, instead looking to "only the most egregious official [or executive] conduct" when considering actions that are "arbitrary in the constitutional sense." Collins v. Harker Heights, 503 U.S. 115, 129 (1992); see also L.A. Ray Realty, 698 A.2d at 211. Moreover, the First Circuit "has repeatedly held that local planning disputes 'do not ordinarily implicate substantive due process.'" Pawtucket Transfer Operations, LLC v. City of Pawtucket, 539 F. Supp. 2d 513 (2008) (quoting Licari v. Ferruzzi, 22 F.3d 344, 348 (1st Cir. 1994)). Speaking specifically to ultra vires enactments, it has consistently been held that "[a] regulatory board does not transgress constitutional due process requirements merely by making decisions for erroneous reasons or by making demands which arguably exceed its authority under the relevant state statutes." Id. (quoting Licari, 22 F.3d at 350) (internal quotation marks omitted); see also Amsden, 904 F.2d at 757; Chiplin Enters., Inc. v. City of Lebanon, 712 F.2d 1524, 1528 (1st Cir. 1983); Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 832 n.9 (1st Cir. 1982) (adversarial claims are "too typical of the run of the mill dispute between a developer and a town planning agency, regardless of the plaintiff's characterization of it and the defendants' alleged mental states, to rise to the level of a due process violation"); Mongeau v. City of Marlborough, 492 F.3d 14, 17-18 (1st Cir. 2007) ("a defendant must have engaged in behavior that is 'conscience-shocking'; the

substantive due process doctrine may not, in the ordinary course, be invoked to challenge discretionary permitting or licensing determinations of state or local decision makers").

Here, the Town of East Greenwich prepared a comprehensive plan, which included the provision allowing for payment of a fee-in-lieu of constructing affordable housing, following a mandate from our General Assembly that all municipalities provide affordable housing that "is in excess of ten percent (10%) of the year-round housing units reported in the census." Sec. 45-53-3(4)(i). The East Greenwich Town Council adopted a comprehensive plan that would bring it into compliance with our General Laws, and then submitted the plan to the State Director of Administration, who approved the plan containing the fee-in-lieu provision. The Town then enacted the ordinances and assessed a fee that would be used to create affordable housing options in the area if a developer chose not to include affordable housing in their development plan. Accordingly, the most that Plaintiff can establish is that Defendants acted erroneously or in excess of their authority and, indeed, this is essentially what our Supreme Court has stated. See N. End Realty, 25 A.3d at 538. However, such behavior does not reach the 'conscience-shocking' threshold for a denial of substantive due process as outlined in our case law. See L.A. Ray Realty, 698 A.2d at 211 ("egregiously unacceptable" and "outrageous" actions implicate constitutionally protected property rights); Licari, 22 F.3d at 350 (the threshold for establishing an "abuse of government power is a high one indeed," reserved for "truly horrendous" circumstances); Amsden, 904 F.2d at 754 ("the constitutional line has been crossed" only when some basic and fundamental principle has been transgressed); Pawtucket Transfer Operations, 539 F. Supp. 2d at 521 (substantive due process claims rejected even "where premised on outright maliciousness"). Accordingly, Plaintiff has failed to show that the Defendants' actions in enacting ordinances which required payment of a fee-in-lieu of constructing affordable

housing rose to the level of 'conscience-shocking' conduct that is necessary to establish a violation of substantive due process as a matter of law. Thus, Plaintiff's motion for summary judgment on this count is denied, and Defendants' cross-motion on this count is granted.

B

Regulatory Taking

Count III of Plaintiff's Amended Complaint alleges a violation of article I, section 16 of the Rhode Island Constitution, claiming that a fee-in-lieu of construction of affordable housing units is so excessive that it amounts to an unconstitutional taking.[9] Plaintiff further claims that the Town's enactment and imposition of the ordinances requiring payment of the fee-in-lieu rendered Plaintiff's property worthless and useless, and without building permits or being subdivided, the Property would only have value as passive land. At hearing, Plaintiff also argued that it was entitled to judgment for a temporary taking of the Property, based on the claim that Plaintiff was unable to have any beneficial use of the Property from 2006 to 2011. In opposition, Defendants acknowledge the Supreme Court holding that the Town exceeded its authority in adopting payment of a fee-in-lieu of building affordable housing; however, Defendants claim that Plaintiff has not shown that it was deprived of its Property by adoption of the ordinance.

In arguing that the Town's imposition of a fee-in-lieu has resulted in an unconstitutional

[9] Article I, section 16 of the Rhode Island Constitution states:

> Private property shall not be taken for public uses, without just compensation. The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property. Id.

deprivation of its Property, Plaintiff relies primarily on the case Q.C. Construction Company, Inc. et al. v. Frank Gallo et al., 649 F. Supp. 1331 (R.I. Dist. 1986) aff'd, 836 F.2d 1340 (1st Cir. 1987). In Q.C. Construction, a developer purchased over thirty (30) lots with the intention of developing them. Id. While a number of the lots were developed, the town subsequently imposed a moratorium on development which rendered the plaintiff unable to obtain building and sewer permits for the final fifteen (15) lots, thus effectively making it impossible for the plaintiff to develop the remaining lots. Id. The Q.C. Construction court stated that in order for the plaintiff to establish unconstitutional deprivation of property without due process, the owner must show that the regulation interferes so severely with use of property as to render the property worthless or useless. Id. (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922)). The court went on to note that it is insufficient to show only that a regulation deprives a landowner of best use of his property or that the regulation has caused a severe decrease in the value of the property. Id.

Here, unlike the situation in Q.C. Construction, where the town's moratorium rendered the plaintiff's land unbuildable, North End was required to comply with the Town's affordable housing requirements prior to developing the Property. Accordingly, this Court acknowledges particularly instructive language on this issue, taken from the Supreme Court opinion regarding the instant parties: "[t]he ordinances included a requirement that developers *either* designate 15 percent of the units in any subdivision or major residential land development as affordable housing *or* pay the sum of $200,000 as a 'fee-in-lieu' of constructing the required number of affordable housing units." N. End Realty, 25 A.3d at 529 (italics in original). Thus, Plaintiff had a choice to either build affordable housing units or be assessed a fee—albeit one that was later declared ultra vires. Consequently, Plaintiff was never denied the ability to develop the land—

despite having to comply with affordable housing requirements—and has the ability to develop the land in the future, albeit in compliance with those affordable housing provisions still in effect. See contra Q.C. Construction, 649 F. Supp. 1331.

Here, there is an absence of proof that a total taking has occurred. However, it is well settled that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997) (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). In determining whether a taking has occurred, this Court must analyze "(1) [t]he economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment backed expectations, and (3) the character of the governmental action." Id.

With respect to the first prong, North End claims that the affordable housing requirement—with or without payment of a fee-in-lieu—prevents Plaintiff from pursuing what it deems to be the most profitable use of the land; namely, developing five residential homes on the Property. However, as our Supreme Court pointed out in Alegria, "a property owner does not have a vested property right in maximizing the value of his property." 687 A.2d at 1253 (quoting Annicelli v. Town of South Kingstown, 463 A.2d 133, 140 (R.I. 1983)). In fact, our case law makes clear that "a zoning ordinance is not confiscatory merely because the property cannot be put to its most profitable use." Annicelli, 463 A.2d at 140 (citing with approval, Agins v. City of Tiburon, 447 U.S. 225 (1980), for the proposition that an ordinance may properly limit what is considered to be the best use of the land without denying an owner all "economically viable use" of the property).

Here, the Town's ordinances did not deny Plaintiff all economic use of the Property during the time Plaintiff claims there was a taking, or otherwise. As stated earlier, even with

removal of the ability to make a payment of a fee-in-lieu of constructing affordable housing, Plaintiff has not shown entitlement to the final approval of a development plan that does not include an affordable housing component as required by those ordinances still in effect. Thus, Plaintiff may not develop its land without first complying with those affordable housing regulations in place, or seeking an exemption therefrom, and "any diminution in the value of [its] property resulting" from this requirement does "not in itself rise to the level of interference with a vested property right" that our takings jurisprudence requires. Id.

Turning to the next prong, "the extent to which the regulation has interfered with distinct investment-backed expectations," this Court recognizes that our Supreme Court has stated that "prior knowledge of applicable regulations is relevant in determining whether a claimant's investment-backed expectations were reasonable under the Penn Central analysis." Alegria, 687 A.2d at 1253. Here, the Town's affordable housing requirements were adopted by the Town Council pursuant to its comprehensive plan prior to Plaintiff's purchase of the land. The ordinances which codified these affordable housing requirements were also in place prior to Plaintiff submitting its preliminary development plan to the Planning Board for approval. Moreover, the Rhode Island Low and Moderate Income Housing Act, originally enacted in 1991 and subsequently amended, mandated that municipalities enact legislation to comply with the ten percent (10%) affordable housing quota by December 31, 2004. Accordingly, any investment-backed expectation to develop the Property without having to comply, or seeking an exemption from, the Town's affordable housing requirement is unreasonable and supported. See id. (any investment-backed expectation to develop the property was unreasonable in light of this state's pervasive wetlands regulations).

With respect to the last prong of this Court's analysis, "the character of the governmental

action," this Court notes that the municipal ordinance that Plaintiff challenges "neither compelled 'the property owner to suffer a physical invasion of his property' nor denied 'all economically beneficial or productive use of land'"; namely, "two takings situations that the United States Supreme Court has found to carry special constitutional significance." Id. (quoting Penn Central, 438 U.S. at 124). Here, the Town promulgated its affordable housing requirements to comply with the mandate of our General Laws. Furthermore, our Supreme Court in North End Realty, 25 A.3d at 538, despite holding that the Town did not have the authority to impose a fee-in-lieu of constructing affordable housing, pointed out that "[t]he development of affordable housing is a critical statewide need," and "fees-in-lieu may ultimately be determined to be an effective means of achieving compliance with the statutory mandate for some municipalities in this state." N. End Realty, 25 A.3d at 538. Consequently, this Court does not find the character of the "governmental action" present here weighing in favor of a taking. This Court, therefore, finds that Plaintiff has not shown an entitlement to judgment as a matter of law on its takings claims, and Defendants' motion for summary judgment on this Count is granted.

C

Damages

Finally, Count VI of Plaintiff's Amended Complaint seeks damages. Plaintiff claims that as a result of Defendants' actions in imposing, assessing, and mandating a fee-in-lieu of construction of affordable housing units, it was unable to effectuate its master and preliminary plan approval for the development of the Property and has thus suffered damages in the amount of $480,000. In opposition, Defendants claim that the evidence relied upon by Plaintiff in support of its claim of damages is insufficient and speculative.

This Court has already determined that at the preliminary approval stage before the Planning Board, Plaintiff did not have an entitlement to final approval of a plan that did not comply with the Town's zoning regulations or ordinances, including those requiring the construction of affordable housing. This Court has also determined that Plaintiff has failed to prove a substantive due process violation, or that being assessed a fee-in-lieu of constructing affordable housing resulted in an unconstitutional taking of Plaintiff's land. Moreover, this Court notes that Plaintiff continues to own the Property and still has the ability to develop or sell the Property, which may very well result in a profit to Plaintiff. See Annicelli, 463 A.2d at 140 ("The mere fact that [a] plaintiff may not have received the anticipated return on his investment does not render nugatory the remaining value of the land."). Accordingly, as this Court has found that no taking has occurred or that Plaintiff has suffered a violation of substantive due process, this Court finds that Plaintiff is not entitled to damages on those Counts. Id. (reiterating the proposition that "pecuniary loss or diminution in value is not controlling on the issue of confiscation because a property owner does not have a vested property right in maximizing the value of his property"). However, as counts still remain to be adjudicated and issues of material fact still exist as to the damages issue, Defendants are not entitled to summary judgment on Count VI.

V

Conclusion

For the foregoing reasons, this Court denies Plaintiff's motion for summary judgment on Counts I, III, and VI, and grants Defendants' cross-motion for summary judgment on Counts I and III. Furthermore, pursuant to our Supreme Court's directive in North End Realty v. Mattos, this Court will enter an order "enjoining East Greenwich from imposing, assessing, or collecting

the fee-in-lieu." N. End Realty, 25 A.3d at 538. Counsel shall prepare the appropriate orders.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: North End Realty, LLC v. Thomas Mattos, et al.

CASE NO: KC 07-1008

COURT: Kent Superior Court

DATE DECISION FILED: April 24, 2013

JUSTICE/MAGISTRATE: Nugent, J.

ATTORNEYS:

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For Defendant: Peter A. Clarkin, Esq.