STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

[Filed: March 21, 2019]

GREEN DEVELOPMENT, LLC A/K/A WIND ENERGY DEVELOPMENT, LLC, Plaintiff,	:	
v.	:	**C.A. No. WC-2018-0636**
TOWN OF EXETER; MARIA LAWLER, in her capacity as the Treasurer of the Town of Exeter; CALVIN A. ELLIS, in his capacity as Member of the Town of Exeter Town Council; FRANCIS PAUL DiGREGORIO, in his capacity as Member of the Town of Exeter Town Council; ROBERT M. CONN, in his capacity as Member of the Town of Exeter Town Council; MANUEL ANDREWS, in his capacity as Member of the Town of Exeter Town Council; and DANIEL W. PATTERSON, in his capacity as Member of the Town of Exeter Town Council, Defendants.	:	

DECISION

LANPHEAR, J. Before this Court is Green Development, LLC a/k/a Wind Energy Development, LLC's (Plaintiff) request for injunctive and declaratory relief. Plaintiff requests the Court to enjoin the Town of Exeter and its Town Council members (Town) from enforcing an emergency ordinance passed on December 10, 2018 (Moratorium Ordinance) that halted the review of all solar photovoltaic project applications for sixty days because the Moratorium Ordinance is invalid. Jurisdiction is pursuant to Super. R. Civ. P. 65(a) and G.L. 1956 § 9-30-1. For the reasons set forth below, the Court denies Plaintiff's request for injunctive and declaratory relief.

I

Findings of Fact

Plaintiff[1] submitted multiple applications to the Town requesting permission to construct commercial solar fields[2] in the town. Mr. Mark DePasquale is a principal of Green Development, LLC and Wind Energy Development, LLC and testified on their behalf at a hearing on Plaintiff's Motion for Preliminary Injunctive Relief.

By 2016, the Plaintiff was actively working toward installing solar energy fields in Exeter. To do so, it needed to procure properties' rights to maintain solar energy fields, ensure installation of interconnections from the fields to National Grid's Lafayette substation[3] in East Greenwich, Rhode Island, and procure all of the necessary regulatory permits. Permits were not only needed from the Town of Exeter Planning Commission, but also from National Grid. National Grid's approvals were necessary to ensure the transmission designs were acceptable, and that there would be adequate capacity for transmission of power to the substation and beyond.

Exeter is one of Rhode Island's largest towns by geographical land area. However, it is dominated by rural and suburban uses and has a relatively small population. Likewise, the Town government is trim. For example, the Town has no town police department, is dependent on volunteer fire companies, and has a limited number of town employees. The Town has only one Town Planner that is part-time and uses a secretary that is shared by other town officials.

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[1] During cross-examination, the Town questioned the legal existence of Green Development, LLC, but it does not press that argument in its memorandum, and Wind Energy Development, LLC appears to be an existing holding company.

[2] More specifically, Plaintiff seeks to construct several utility scale, ground mounted, solar photovoltaic facilities.

[3] Another substation is being built near the Lafayette substation, which may serve as a conduit to some of the solar power Plaintiff hopes to produce through its solar photovoltaic facilities.

During the period of August 2017 through November 2018, the Town received at least eleven separate applications requesting permission to construct solar fields in Exeter. (Pl.'s Ex. 2). Applicants filed an "Application for Land Development, Subdivision of Land, and/or Development (Site) Plan Review." The Town treated the applications as applications for Master Plan review in an effort to process them promptly and within the time limitations set by state law. (Ashley Sweet Dep. 123-24, Jan. 16, 2019.) This process required the Town Planner to review each of the applications to see if the documents were complete, issue letters of completeness or non-completeness, and then schedule the applications to be reviewed by the Planning Commission. The Commission would first have a pre-application hearing pursuant to G.L. 1956 § 45-23-15 and then a Master Plan Review. Several of these steps have time limitations for the government to respond, which is set by statute. *See* § 45-23-40. In October and November 2018, the Town received seven new applications. Some eleven applications were pending before the Planning Commission or the Town Planner at various stages of the review process. The Planning Commission and Town Planner were reviewing all of these applications alongside the residential subdivision proposals, zoning reviews and other work of the planners.

Plaintiff undertook substantial work in order to place these solar energy fields on-line with National Grid, the major electrical transmitter for the area. At the same time, Plaintiff was negotiating a tax treaty with the Town and filing applications with the Rhode Island Department of Environmental Management concerning wetlands on the sites. All of these efforts required a substantial investment. The transmission line from the solar fields was problematic and expensive because National Grid was upgrading the Lafayette substation, and transmission lines needed to be laid before reconstruction of a state road in the area was complete. Even before the

Planning Board's final approval, Plaintiff paid at least $1,175,474 just for infrastructure and transmission line supplies, along with additional monies for labor and equipment not yet fully tallied. Plaintiff also paid approximately $550,000 to procure the property rights to the various Exeter properties. In addition, the Plaintiff continues to incur significant bills for reserving space on the transmission lines and for permitting costs. Clearly, Plaintiff paid substantial funds upfront. The costs are detailed in Plaintiff's Exhibit 1.[4] Accordingly, the Plaintiff was negotiating with and applying for interconnection approvals with National Grid while they were applying for local approvals for the solar fields.

Plaintiff filed numerous applications for review by the Exeter planning officials. Four of Plaintiff's applications had been certified as complete by the Town Planner and, therefore, were ready for Master Plan consideration by the Planning Commission. Those proposals were for properties located at 84 Exeter Road, Ten Rod Road, Tripps Corner Road and 99 Ten Rod Road. (Pl.'s Ex. 2). Plaintiff's Exhibit 2 reflects that the first Master Plan application, 84 Ten Rod Road, was denied by the Planning Commission and is pending appeal. The other three applications, Ten Road Road, Tripps Corner Road and 99 Ten Road, all certified as complete on February 1, 2018, were then pending Planning Board approval. The Planning Board had forty-five days to consider these plans, or the plans would be deemed approved. Sec. 45-23-43 (c) and (d). The town officials were aware of this deadline and strived to place these certifications on their agenda promptly.

On February 26, 2018, the Plaintiff, through its counsel, notified the Town in writing: "As to the remaining three (3) applications . . . , we agree to a moratorium from the ninety (90) day requirement for action from the Board at which time, we are prepared to go forward with the

[4] The unnumbered second page of Plaintiff's Exhibit 1 summarizes total costs in Exeter to be $4,406,361.94.

remaining three (3) applications." (Pl.'s Ex. O.) In following e-mails, the Town Planner confirmed "[Plaintiff's] voluntary suspension of the time clock."[5]

With the rapid influx of various applications, the Planning Board and the Town Planner grew concerned about the sufficiency of the solar ordinance in effect at the time, including the potential of overdevelopment of solar field installations. (Ashley Sweet Dep. 88, Pl.'s Ex. 7.) At the same time, Plaintiff grew concerned about the success of its applications. At the hearing, Mr. DePasquale testified concerning the limited lot size, and testified that Ms. Ashley Sweet, the Town Planner, appeared to be concerned that the proposed solar projects would not be in compliance with the Town's Comprehensive Plan. Mr. DePasquale also indicated that National Grid was growing concerned with whether Plaintiff's proposed projects would be in compliance with the Town Ordinance.

The so-called "Green Ordinance"[6] was considered in late spring, and lessened some of the restrictions on the solar-field applications. (Pl.'s Ex. 16.) For example, one of the proposed changes would remove the requirement that a solar field be allowed only by special permit in certain R-4 zones. Another proposed change would permit solar fields in certain R-3 zones where they were previously prohibited completely. The changes proposed in the Green Ordinance would remove many of the restrictions for the Plaintiff's applications.

[5] On August 31, 2018, one of the Plaintiff's engineers acknowledged in an email that the three master plans were "voluntarily put on hold." (Defendant's Ex. O) The Town Planner responded that she would need a letter from the applicant "to restart the time clock on the applications." (Defendant's Ex. O).

[6] While the Court cannot find, with the evidence presented, that the "Green Ordinance" was initiated by its namesake, Green Development, LLC, Mr. DePasquale's testimony strengthened the connection. While describing the proposal stages of the Green Ordinance, Mr. DePasquale testified that "we cleaned up definitions" and "we made corrections and submitted it."

On May 29, 2018, the Town Planner sent a memo from the Planning Board to the Town Council expressing her concern for the proposed Green Ordinance. (Pl.'s Ex.7, at 150-153.) Nevertheless, the Town Council adopted the Green Ordinance in July 2018.[7]

Several Town Council members were replaced in the November 2018 election. Mr. DePasquale testified at the hearing on January 25, 2019 that two of the three councilpersons who had been favorable to Plaintiff's applications were not re-elected. On November 19, 2018, the Plaintiff filed new pre-applications for the three properties that had previously been placed on hold: Ten Rod Road, Tripps Corner Road, and 99 Ten Rod Road.

By November 27, 2018, the Planning Board Chair and the Town Council Chair had copies of the proposed Moratorium Ordinance. (Sweet Dep. 131.) The Town Planner had assisted in drafting the earlier version of the Moratorium Ordinance. The Moratorium Ordinance was scheduled to be voted on by the Town Council on December 3, 2018, but the crowd was so large that the meeting needed to be moved. (Pl.'s Ex. 23.) When the Town Council reconvened on December 10, 2018, it enacted the temporary Moratorium Ordinance. (Defs.' Ex. 28A, at 8-9.)

The Plaintiff's new applications submitted on November 19 were still pending before the Planning Board when the Moratorium was enacted. Based on Plaintiff's Exhibit 2, those applications were not certified as complete before the Moratorium took effect.

On December 11, 2018, the Plaintiff filed a Complaint requesting the Court declare the Moratorium Ordinance invalid and to enjoin the Town from enforcing the ordinance. Specifically, Plaintiff alleges that the Town did not have the authority to enact the Moratorium

[7] On September 4, 2018, the Town Council adopted another change referred to by the parties as the "Solar 8" ordinance. Oddly, this ordinance passed by a 3 to 2 vote. However, when the Town Council met the next month, it voted to rescind Solar 8. (Pl.'s Ex. 20.)

because it violates state law, the Exeter Town Ordinance, the doctrine of equitable estoppel and Plaintiff's substantive and procedural due process rights. In the alternative, Plaintiff asks that if the Court finds the Moratorium Ordinance valid, the Court find its solar applications are vested and therefore exempt from the Ordinance. Lastly, Plaintiff requests the Court award it costs and reasonable attorneys' fees.

On January 22, 2019, Plaintiff filed a Motion for Preliminary Injunctive Relief and supporting memoranda. Plaintiff asserts that the Court should enjoin enforcement of the Moratorium Ordinance because it is unlawful for the reasons stated in its Complaint, the Plaintiff will suffer irreparable harm if it is enforced, and the balance of the equities tips in its favor. (Pl.'s Mem. Supp. of Mot. for Prelim. Inj.) In response, the Town contends that the Plaintiff cannot show a likelihood of success on the merits because the Moratorium Ordinance was enacted in compliance with the Town Ordinance, state statutes, and constitutional requirements. (Defs.' Mem. Supp. of Obj. to Pl.'s Mot. for Prelim. Inj.) The Town also contends that the Plaintiff will not suffer irreparable harm if the Court denies injunctive relief because the Moratorium Ordinance does not affect the Plaintiff's vested rights, and leaves the Plaintiff administrative remedies. *Id.* Lastly, the Town asserts that the Town's equities outweigh the Plaintiff's.

On January 24 and 25, 2019, the Court conducted a hearing on Plaintiff's Motion for Preliminary Injunctive Relief. At the hearing, the parties presented testimony and introduced exhibits.

II

Analysis

When deciding on a motion for a preliminary injunction, the Court must consider "whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." *Iggy's Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999).

A

Likelihood of Success on the Merits

1

Vesting

Plaintiff alleges that its vested rights have been impaired by the Moratorium Ordinance and its effect and that the vesting clause in the Moratorium Ordinance is illegal. (Pl.'s Mem. Supp. Mot. for Prelim. Inj. 24.) Rights in property which are vested are constitutionally protected and cannot be taken without, at the very least, notice and opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67 (1972). The Court does not need to struggle with the question of whether a mere application creates a vested right as the town ordinances make it explicitly clear:

> "General provisions; creation of vested rights. Applications for development that are substantially complete and have been submitted for approval to the appropriate review agency in the Town of Exeter prior to enactment of the new zoning ordinance or any amendment to the Exeter zoning ordinance shall be considered vested." Exeter, R.I., Code of Ordinances, ch. 1.3, art. I, § 3.H.

This ordinance fits nicely within the parameters of state law, which sets strict deadlines for the processing of Master Plan developments by local planning offices. Section 45-23-40(b)

of the Rhode Island General Laws requires that an application be certified by the local planner as complete or incomplete within twenty-five days of its submission. If the town planner does not act within 25 days, the application is deemed complete. Section 45-23-40(e) requires approval or rejection of the Master Plan by the local planning commission within ninety days of the certificate of completeness. Local planning officials are on a statutorily designed tight schedule. Even though the application is still in the review stages, the ordinance above clarifies that certain rights vest once the application is certified as complete. Exeter's statutory scheme provides significant protections to mere applicants at an early stage.

The Moratorium Ordinance challenged here provides parallel protection. The language of the Moratorium Ordinance specifically provides that applications which are certified complete "shall be considered vested and may proceed under applicable regulations in effect at the time of certification of completeness." (Moratorium Ordinance, Pl.'s Ex. A § 5.) Oddly, Plaintiff claims that this Moratorium Ordinance is unlawful because its language is inconsistent with the Zoning Ordinance and state statutes. (Pl.'s Mem. Supp. of Mot. for Prelim. Inj. 24-25.) However, Plaintiff fails to specify how any vested rights are harmed by the Moratorium Ordinance, though the Court acknowledges that whether vested rights are harmed may depend on the town's interpretation of vested rights after the Moratorium Ordinance has expired.[8] Accordingly, Plaintiff has not established that vested rights were impaired by the Moratorium Ordinance or that the ordinance's language is contrary to state law.

[8] Plaintiff seems to assert that other provisions of state law use the term "substantially complete" and hence the vesting occurs earlier. They reference no authority for the proposition that rights are vested before the planner certifies the application as complete.

2

Emergency Ordinance

Plaintiff claims that the procedure which the Town Council utilized to enact the Moratorium Ordinance violated the Exeter Town Charter. (Pl.'s Mem. Supp. of Mot. for Prelim. Inj. 11). The Town does not dispute that there was no advance advertising or notice of the proposed ordinance. The Town asserts that Plaintiff received adequate notice because the Town Council conducted a hearing at which Plaintiff's counsel, as well as others, were heard and correspondence was admitted. (Defs.' Ex. A, subpart 28A.)

Article IV, § 411 of the Exeter Town Charter provides for emergency ordinances: where an emergency is designated, the emergency is described in clear and specific terms, without following the pre-passage publication and hearing requirements of routine ordinances. Sec. 411(a). Emergency ordinances may become effective immediately and take effect for sixty days. Sec. 411(b).

Though Plaintiff suggests that advertisements and pre-passage distribution are required, Plaintiff references Exeter Town Charter § 410. This section of the Town Charter applies only to the passage of routine ordinances, not those which are declared on their face to be an emergency ordinance. Section 411 of the Town Charter is dedicated to emergency ordinances, and explicitly limits advertisements and advance notice.[9] The Moratorium Ordinance was enacted

[9] Section 411 of the Town Charter provides:

> "(a) To meet a public emergency affecting life, health, property or the public peace, the Council may adopt one or more emergency ordinances. An emergency ordinance shall be introduced in the form and manner prescribed for ordinances generally, except that it shall be plainly designated as an emergency ordinance and shall contain, after the enacting clause, a declaration stating that an emergency exists and describing it in clear and specific terms. An emergency ordinance may be adopted with or without amendment

pursuant to § 411 of the Town Charter, and thus the notice and hearing requirements set forth in § 410 do not apply. In interpreting a specific section of an ordinance, the Court will consider the entire ordinance as a whole and construe the ordinance as to avoid reaching a meaningless or absurd result. *Ryan v. City of Providence*, 11 A.3d 68, 71 (R.I. 2011). Thus, when considering both §§ 410 and 411 of the Town Charter, this Court finds § 411 must be interpreted to require different procedures than those required under § 410 in order to give effect to the Legislature's purpose in providing the Town Council the ability to act quickly when enacting emergency ordinances under § 411.

Additionally, the procedural requirements of §§ 45-24-51 through 45-24-53 for enacting a zoning ordinance do not apply to the Moratorium Ordinance because it is not a zoning ordinance. Under § 45-24-31 a zoning ordinance is defined as

> "[a]n ordinance enacted by the legislative body of the city or town pursuant to this chapter and in the manner providing for the adoption of ordinances in the city or town's legislative or home rule charter, if any, that establish regulations and standards relating to the nature and extent of uses of land and structures; that is consistent with the comprehensive plan of the city or town as defined in chapter 22.2 of this title; that includes a zoning map; and that complies with the provisions of this chapter." Sec. 45-24-31(72).

> or may be rejected at the meeting at which it is introduced, without following the publication and hearing procedures set forth in Section 410, but the affirmative vote of at least three (3) members shall be required for adoption. All emergency ordinances shall be published as soon as practicable following adoption.
>
> "(b) All emergency ordinances shall become effective upon adoption or at such later time as may be specified therein and shall automatically stand repealed as of the sixty-first day following the date on which they took effect but may be reenacted in the manner specified in this section for a period of no more than sixty days if the emergency still exists. An emergency ordinance may also be repealed by a repealing ordinance in the same manner specified in this section for adoption of emergency ordinances."

Here, the Moratorium Ordinance does not "relat[e] to the nature and extent of uses of land and structures" but only places a temporary hold on the review of pending applications.[10] *See Merlino Enters., Inc. v. Fenlon*, 112 R.I. 653, 655, 314 A.2d 155, 156 (1974) (rejecting the plaintiff's argument that an ordinance relating to the licensing of the placement of mobile homes was "for all practical purposes a zoning ordinance or a zoning ordinance in disguise"); *see also West v. McDonald*, 18 A.3d 526, 538 (R.I. 2011) (recognizing that when interpreting a statute, "[w]e presume that the [Legislature] intended to attach significance to every word, sentence and provision of a statute").

The Moratorium Ordinance at issue describes the emergency at length in its Preamble:

> "The Town Council, upon due and proper consideration, finds as follows:
>
> "A) . . .
>
> "B) The Planning Department and Planning Board have expressed that residential areas of the Town are under threat of excessive development from commercial, utility scale ground-mounted solar photovoltaic installations; and
>
> "C) The Planning Department and Planning Board have expressed that there is a strong likelihood that all areas of the Town are subjected to development pressure due to the amount of undeveloped land and the demand for such ground-mounted solar photovoltaic installations; and
>
> "D) The Planning Department and Planning Board have advised that the Town has received numerous applications for ground-mounted solar photovoltaic installations and that several others are expected to be received which, if installed, may be incompatible with residential and other land uses; and
>
> "E) The Planning Department and Planning have expressed that development of such ground-mounted solar photovoltaic

[10] Although the Town Council has changed the zoning ordinance during the moratorium period, that action is not before the Court at this time.

> installations pose serious threats to the public health, safety and welfare of the residents of Exeter through the potential overdevelopment of areas of Town in a manner that conflicts with the Town's Comprehensive Plan; and
>
> "F) The previous Town Council has acted within a condensed period of time, and in a fashion which has led the Planning Department to express uncertainty in the application, processing and consideration of photovoltaic installation projects; and
>
> "G) The current Town Council requires an opportunity to carefully review and consider the actions of the previous Town Council and the recommendations and concerns of the Planning Department and the Planning Board in order to ensure that a fully considered and appropriate solar ordinance is enacted for the protection of the entire Town; and
>
> "H) A temporary Moratorium on ground-mounted solar voltaic installations is necessary to prevent an overburdening of municipal and natural resources and facilities that is reasonably foreseeable as the result of ground-mounted solar photovoltaic installations being located in the Town during the current state of solar ordinance study, revision and consideration; and
>
> "I) The Town Council hereby finds that these circumstances create an emergency pursuant to Article IV of the Home Rule Charter of the Town of Exeter requiring the immediate adoption of an emergency temporary Ground Mounted Solar Photovoltaic Installation Moratorium Ordinance for the preservation of the public health, safety and welfare." Moratorium Ordinance § 2.

While the ordinance is remarkable for describing the emergency and the breadth thereof, it is also remarkable for what it doesn't say. The Ordinance does not declare an overbroad emergency, but indicates that there is a threat of overdevelopment and that the Town is struggling to keep up with the large number of applications—nothing more.

Plaintiff deposed the Town Planner at length, and uses that deposition to suggest that an emergency never existed. (Posthr'g Mem. 6, Jan. 29, 2019.) First and foremost, it is the responsibility of the legislative body—the Town Council, not the individual town employees—to

define the emergency and determine whether the emergency exists.[11] Second, the Town Planner underscored the Town's findings with what was happening daily in the Town's offices. (Pl.'s Ex. 7.)

Finally, Plaintiff claims that there is no urgency as there is no "imminent danger." (Pl.'s Mem. Supp. of Mot. for Prelim. Inj. 12.) Town Charter § 411 requires a public emergency, not imminent danger. An emergency need not encompass imminent danger[12] and the Town Charter does not require imminent danger. Rather, the emergency must be one "affecting life, health, property or the public peace." Id. The Preamble for the Moratorium Ordinance adequately and appropriately describes the emergency for what it is. It does not claim any imminent danger to life or the public peace, but describes the need for immediate action to address unforeseen circumstances. To reference just one section of the multi-faceted emergency declaration, the ordinance declares that the "uncertainty in the application, processing and consideration of photovoltaic installation projects pose serious threats to the public health, safety and welfare of the residents of Exeter through the potential overdevelopment . . . ." (Moratorium Ordinance § 2(E)(F).) The Court finds that the ordinance sufficiently states an emergency.

Parenthetically, although it was never raised, and the duration of an emergency ordinance is limited by Town Charter, the Court notes that the Moratorium only endures for sixty days. Additionally, pursuant to the Moratorium, vested matters may still go forward and only non-

[11] The Court continues to be concerned with the interrogation of employees to determine legislative actions. When deciding a motion to quash on January 4, 2019, and on January 23, 2019, the Court noted that *Maynard v. Beck*, appears to provide immunity to planning officials in similar circumstances. 741 A.2d 866 (R.I. 1999). Counsel previously noted that in *Holmes v. Farmer*, the high court held that one of the witnesses, the highly respected Senator Lila M. Sapinsley, could not waive the privilege on her own. 475 A.2d 976, 985 (R.I. 1984).

[12] "Emergency" is defined as "an unforeseen combination of circumstances or the resulting state that calls for immediate action" or "an urgent need for assistance or relief." *Emergency*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/emergency.

vested matters are stayed. *See* Moratorium Ordinance § 4. Thus, the Moratorium Ordinance gives the town officials not only a brief respite, but also a limited respite to amend the ordinances and attempt to quell the emergency. In other words, some applications may still be reviewed during the moratorium period.

3

Due Process

Plaintiff also asserts that the Court should enjoin enforcement of the Moratorium Ordinance because it violates Plaintiff's procedural and substantive due process rights provided under the United States Constitution and the Rhode Island Constitution. Article I, section 2 of the Rhode Island Constitution provides: "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."

a

Substantive Due Process

Plaintiff contends that the Town Council violated its substantive due process rights by enacting the Moratorium Ordinance through procedures that violate state law. This conduct, Plaintiff contends, was arbitrary and unreasonable. (Pl.'s Suppl. Memo Supp. of Mot. for Prelim. Inj. 4.) Additionally, Plaintiff asserts that "there exists no justification, or rational basis, to support the Town Council's adoption of the Moratorium." *Id.* In response, the Town contends that the Moratorium Ordinance satisfies rational basis review because it was enacted for the purpose of preventing overdevelopment, is time-limited to sixty days, and preserves the rights of vested applications.

When a court is analyzing a claim under substantive due process, it must first determine "whether the challenged government action affects a fundamental right." *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 794 (R.I. 2014) (citing *Riley v. Rhode Island Dep't of Envtl.*

Mgmt., 941 A.2d 198, 205-06 (R.I. 2008)). If no fundamental right is involved, "a party seeking to establish a substantive due process violation must show that the challenged statute or action is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" *Id.* (citing *East Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006)). Substantive due process seeks to "prevent[] 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." *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202, 211 (R.I. 1997).

As discussed above, Plaintiff fails to show how the Moratorium Ordinance harms any of its vested rights. The Moratorium Ordinance specifically provides that the rights of vested applications are preserved and will be decided based on the Ordinances in effect at the time the application was certified complete. Additionally, the Town has not denied approval for any of the Plaintiff's applications based on a new or amended ordinance enacted during the moratorium period. Thus, the Court finds that Plaintiff has not been deprived of any protected interest.

Moreover, even if the Moratorium Ordinance deprives Plaintiff of a protected interest, the Town's action in enacting the Moratorium Ordinance was not arbitrary and unreasonable. As stated in the Moratorium Ordinance and discussed above, the Town is concerned that "photovoltaic installation projects pose serious threats to the public health, safety and welfare of the residents of Exeter through the potential overdevelopment of areas of Town in a manner that conflicts with the Town's Comprehensive Plan." A town has a legitimate interest in preventing overdevelopment and ensuring compliance with the Comprehensive Plan as it relates to the general welfare of its residents. *See Brunelle v. Town of S. Kingstown*, 700 A.2d 1075, 1084

(R.I. 1997) (finding a town council's denial of a zone change petition was legitimately related "to the town council's interest and concern for the health and welfare of the local residents and abutting residential land owners"). Plaintiff contends that this case is similar to *Johnson & Wales Coll. v. DiPrete*, in which the Supreme Court found that the city's denial of an otherwise legal use was impermissible because the city's sole objective was to prevent the plaintiff from using the premises as a college facility. 448 A.2d 1271, 1282 (R.I. 1982). However, here, unlike in Johnson and Wales, the Town did not enact the Moratorium Ordinance for the direct purpose of preventing Plaintiff's project. *See id.* The Moratorium Ordinance affects all pending solar applications, not only Plaintiff's applications, while keeping other applications active.

Additionally, the Moratorium Ordinance was rationally related to serving that interest. The emergency ordinance was enacted primarily to allow the Town Council time "to carefully review and consider the actions of the previous Town Council and the recommendations and concerns of the Planning Department and the Planning Board in order to ensure that a fully considered and appropriate solar ordinance is enacted for the protection of the entire Town; . . . ." Sec. 2(G.) Also, the Moratorium Ordinance only lasted for 60 days, which is a reasonable amount of time to allow the Town Council to evaluate the circumstances and decide how to proceed. Thus, the Court finds that Plaintiff failed to demonstrate that the Moratorium Ordinance violated Plaintiff's substantive due process rights. The Moratorium Ordinance has not been shown to be clearly arbitrary or unreasonable.

b

Procedural Due Process

Plaintiff also contends that the Moratorium Ordinance violates its procedural due process rights but does not elaborate on this argument. To determine if there has been a due process violation, the court must "'look[] at whether a litigant was afforded the fair-play notions of proper notice and the right to a hearing.'" *East Bay Cmty. Dev. Corp.*, 901 A.2d at 1153 (quoting *In re Advisory Opinion to House of Representatives Bill 85–H–7748*, 519 A.2d 578, 581 (R.I. 1987)). Such minimum procedures must be provided '"before a governmental agency may effectively deprive an individual of life, liberty, or property."' *Id.* (quoting *State v. Manocchio*, 448 A.2d 761, 764 n.3 (R.I. 1982)).

Here, as previously stated, the Plaintiff has failed to show how the Moratorium Ordinance deprives it of any protected interest as none of its application has been denied. Furthermore, the Moratorium Ordinance complies with the due process requirements of fairness as it was limited to sixty days and, as discussed previously, was enacted in compliance with the emergency ordinance procedures of § 411 of the Exeter Home Rule Charter. Thus, the Court finds that the Moratorium Ordinance does not violate Plaintiff's procedural due process rights.

In sum, Plaintiff has not shown that the Moratorium Ordinance violates state law or the Town Charter or that its vested rights have been harmed by the Moratorium Ordinance. Additionally, the Moratorium does not violate Plaintiff's due process rights. For these reasons, the Court finds that Plaintiff has failed to demonstrate a reasonable likelihood of success on the merits.

c

Equal Protection

In *Johnson & Wales Coll.*, 448 A.2d at 1280, the high court held that the city had failed to demonstrate that its new ordinances limiting college dormitories were rationally related to the health, safety and welfare of the city. That case is distinguished from the case at bar on several grounds:

- In *Johnson & Wales Coll.*, the college was opposing a new, hastily written ordinance. Here, Exeter is defending a mere 60 day moratorium which explicitly describes the emergency, preserves vested rights, describes the need to act promptly and protect open space and the need to craft a solution during the moratorium.
- Second, in *Johnson & Wales Coll.*, the college had demonstrated that the ordinance (mandating minimum requirements for dormitories) when considered in light of other laws was not reasonable for health and safety purposes. The city did little to rebut, except to claim that its ordinance was "debatable." *Id.* at 1281. The Supreme Court found this view inconsistent with the factfinder's role of determining credible testimony and determining facts. The trial court had concluded that the city's only motive "was to prevent the entry of Johnson & Wales into Cranston." *Id.* at 1277. In Exeter, the plain language of the moratorium declared "serious threats to the public health, safety and welfare . . . through potential overdevelopment . . . that conflicts with the Town's Comprehensive Plan" and "The current Town Council requires an opportunity to carefully review . . . for the protection of the entire Town." Pl.'s Ex. A. In *Town*

of Smithfield v. Churchill & Banks Companies, LLC, 924 A.2d 796, 815 (R.I. 2007) the high court used similar language to justify its enforcement of a statewide moratorium.

- In Exeter, the moratorium is a temporary delay based on the town's receipt of numerous commercial solar applications from several applicants. It is not focused on one applicant, or one property, and it preserves rights already vested.

B

Irreparable Harm

The Court must next determine if the Plaintiff will suffer irreparable harm if the injunctive relief it requests is denied. Our high court has stated that the irreparable harm must be both "imminent and for which no adequate legal remedy exists." *Fund for Cmty. Progress v. United Way of Se. New England*, 695 A.2d 517, 521 (R.I. 1997). Plaintiff contends that it will face irreparable harm if the Court fails to enjoin enforcement of the Moratorium Ordinance because the Town will, and already has, changed its zoning ordinance. Plaintiff contends that the Town's modifications to the ordinances will render its projects impossible to develop.

Here, Plaintiff has not shown it will suffer irreparable harm if the Court denies the injunctive relief it is requesting. None of Plaintiff's project applications has been denied based on the enforcement of the Moratorium Ordinance. Plaintiff's rights in three of its applications were certified as complete prior to the enactment of the Moratorium Ordinance and thus, are vested and will be reviewed under the ordinance in effect at the time they were certified complete. As to the Plaintiff's remaining applications, they are still under review. Moreover, if the Town Council denies any of Plaintiff's applications, Plaintiff may appeal those decisions through the appropriate channels. Thus, there exists an adequate remedy at law, and Plaintiff

will not suffer irreparable harm if the Court denies injunctive relief. *See Fund for Cmty. Progress*, 695 A.2d at 521.

C

Balance of the Equities

In deciding whether injunctive relief is appropriate, the Court also must balance the equities of each party to determine if equity tips in the Plaintiff's favor. *Iggy's Doughboys, Inc.*, 729 A.2d at 705. In addition to the parties' interests and hardships, the Court "may consider the interests of third parties and of the public in general." *Rose Nulman Park Found. ex rel. Nulman v. Four Twenty Corp.*, 93 A.3d 25, 32 (R.I. 2014).

Plaintiff asserts that the equities tip in its favor because the Town's conduct in enacting the Moratorium Ordinance was an unlawful effort to halt its development projects. However, Plaintiff has three vested projects applications that will remain unaffected by any new ordinances passed. As described in the Moratorium Ordinance and demonstrated through evidence presented to the Court, the Town Council was simultaneously faced with an influx of solar project applications and a change in the membership of the Town Council itself. The Moratorium allowed the Town Council a short period of time to evaluate the current solar ordinances and to create a plan for the future of the Town. Additionally, the Court may consider the interests of third parties such as the residents of Exeter. *See Rose Nulman Park Found. ex rel. Nulman*, 93 A.3d at 32. The residents have an interest in how the land surrounding their property is developed, and they rely on the Town Council, at least in part, to protect those interests. Thus, the Court finds that the equities tip in favor of denying Plaintiff's request for injunctive relief.

D

Preserving the Status Quo

Plaintiff must also show that "the issuance of a preliminary injunction will preserve the status quo." *Iggy's Doughboys, Inc.*, 729 A.2d at 705. In this case, the relationship between the parties prior to the enactment of the Moratorium Ordinance was that Plaintiff had multiple solar project applications pending approval by the Planning Board and Town Council. Regardless of whether or not the Court grants or denies Plaintiff's requested injunctive relief, Plaintiff's applications will remain in the same position. Thus, the Court finds that injunctive relief is not necessary to preserve the status quo. *See Coolbeth v. Berberian*, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974).

IV

Conclusion

In its original motion, Plaintiff sought an order declaring the Moratorium void, enjoining enforcement of the Moratorium, and awarding costs and fees. (Pl.'s Emergency Mot., Dec. 12, 2018.) After the Court denied temporary relief, the Plaintiff's first memorandum in support of this motion requested: (1) An order declaring the Moratorium Ordinance to be *ultra vires* and void *ab initio*; (2) enjoining enforcement of the Moratorium; (3) adjudging the projects advanced by Plaintiff to be vested and subject to continued review; and, any other relief. (Pl.'s Mem. Supp. of Mot. for Prelim. Inj. 2.) For the reasons stated, the Court denies the request to enjoin enforcement of the Moratorium and denies Plaintiff's prayers for injunctive relief.

The third prayer requests that the Court find the projects advanced by Plaintiff be vested. A detailed analysis of each project was discussed, but it appears to the Court that the Town is taking the position that three of the applications are vested but were put on hold by Plaintiff's

counsel and that Plaintiff has not yet moved that they proceed. One application was denied, and it appears to be currently proceeding on appeal. Three others, the resubmitted applications for those on hold, have not yet reached the certificate of completeness stage. While at this point the Court does not understand how those can be claimed to be vested, the parties did not brief this issue to a significant extent, perhaps because it is unclear how the parties will act toward those applications when the Moratorium is concluded. Accordingly, the Court denies without prejudice the Plaintiff's request that projects be adjudged to be vested.

The first prayer asks for a declaration. Declaratory relief is limited by Rhode Island Superior Court Rules of Civil Procedure and, pursuant to §§ 9-30-1, *et seq*. In the exercise of its discretion and because the issues presented have been addressed elsewhere in this Decision, the Court denies Plaintiff's Request for Declaratory Relief.

Counsel shall prepare an appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Green Development, LLC v. Town of Exeter, et al.
CASE NO:	WC-2018-0636
COURT:	Washington County Superior Court
DATE DECISION FILED:	March 21, 2019
JUSTICE/MAGISTRATE:	Lanphear, J.

ATTORNEYS:

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