STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[Filed: November 8, 2017]

FOUR CORNERS PROPERTIES, LLC, Plaintiff,	:	
v.	:	
	:	**C.A. No. NC-2016-0239**
TOWN OF TIVERTON; NEIL J. HALL, solely in his capacity as Building & Zoning Official of the Town of Tiverton; and MATTHEW WOJCIK, solely in his capacity as Town Administrator of the Town of Tiverton, Defendants.	:	

DECISION

STERN, J. This comes before this Court on Plaintiff Four Corners Properties, LLC's (Four Corners) motion for summary judgment, asserting that it is entitled to judgment as a matter of law to the following: (1) an order permanently enjoining the Town of Tiverton (the Town); Neil J. Hall (Hall), solely in his capacity as Building & Zoning Official of the Town; and Matthew Wojcik (Wojcik), solely as Town Administrator of the Town (collectively, Defendants), from taking any additional enforcement actions against Four Corners with respect to the matters set forth in three notices of violations (NOVs) issued against Four Corners; (2) an order declaring that Defendants' actions, as evidenced by the NOVs, are unlawful exercises of municipal authority; and (3) an order finding that Defendants are liable for tortious interference with existing and prospective economic advantage and violation of Four Corners' due process rights under 42 U.S.C. § 1983. Defendants object to Four Corners' motion, claiming that Four Corners has failed to exhaust its administrative remedies, and that there are genuine issues of material

fact which would prohibit this Court from entering judgment as a matter of law in favor of Four Corners. Jurisdiction is pursuant to Super. R. Civ. P. 56(c).

I

Facts and Travel

Four Corners is the record owner of property located in Tiverton, Rhode Island identified as 0 East Road, 28 East Road, 18 East Road, 3852 Main Road, 3842 Main Road, 3838 Main Road, 3841 Main Road, 3845 Main Road, 3847 Main Road, 3851 Main Road, 3879 Main Road, 17 Neck Road, and 3895 Main Road (collectively, the Premises). Am. Verified Compl. ¶ 11. Located on the Premises is a building known as the Meeting House, which, along with other commercial properties owned by a sister corporation of Four Corners, compose what is commonly referred to as Tiverton Four Corners. Id. ¶¶ 11, 13. Rosalind Weir (Ms. Weir) and her late husband's trust, for which Ms. Weir serves as the sole trustee, own the Meeting House. Id. ¶ 11.

The Tiverton Building Inspector issued a permit to Four Corners to build the Meeting House. Id. ¶ 14. Ms. Weir and her late husband, James Weir, organized Four Corners and built the Meeting House in 1995, and, shortly after its construction, Four Corners was issued a certificate of conformance for the septic system servicing the Meeting House from the Rhode Island Department of Environmental Management (RIDEM). Id. ¶¶ 11, 14, 15. The certificate of conformance indicated that the maximum capacity for the septic system was twenty-seven people based on the retail use of the Meeting House, as well as the retail and office use of two other buildings served by the septic system. See Notice of Violation, Mar. 29, 2011. In addition, RIDEM issued an on-site wastewater treatment system (OWTS) permit for an onsite septic system for the Meeting House and two nearby small office buildings in 1998. Am. Verified

Compl. ¶ 15. The application for the OWTS permit stated that the use of the Meeting House would be an art gallery/retail location. Id. Since then, the Meeting House has never been used for retail purposes and only occasionally as an art gallery. Id.

Between 1991 and 2016, Four Corners has hosted concerts, art exhibits, theatrical performances and weddings on the Premises, averaging approximately fifty-five (55) events per year since 2000. Id. ¶ 16. Moreover, Four Corners has contracted with third parties for the use of the Meeting House as a venue for hosting private events within the past year. Id. ¶ 17.

On May 28, 2009 and June 5, 2009, the Town issued NOVs to Four Corners, citing various items on the Premises that it deemed non-compliant with the Town's building code. Id. ¶ 19. In addition, the Town informally raised an issue with the septic system servicing the Meeting House. Id. ¶ 20. Mr. Weir informed the Town that he would investigate the concerns raised by the Town and engaged Anthony DeSisto, Esq. as counsel to assist Four Corners in having the Town withdraw its cease and desist orders. Id. ¶ 21. Mr. Weir also engaged environmental engineers to assist in addressing the Town's septic concerns and, in April 2010, Mr. Weir informed the Town of his plans to upgrade the water and septic systems on the Premises. Id. ¶ 22. Working with Attorney DeSisto, Four Corners contacted RIDEM to discuss the sustainability of the on-site wastewater treatment system. Id. ¶ 23.

On March 29, 2011, the Town formally issued a NOV to Four Corners. The March 29, 2011 NOV stated:

> "It has come to my attention that you are advertising the presentation of certain performing arts productions to take place at the 'Meeting House' on the subject property. This structure was permitted as a proposed 'retail – art gallery' on 3/1/1995 . . . . A septic system application approved on 2/21/95 for this structure and two other buildings indicates a design capacity for 27 persons total . . . .

> "For approximately the last two years this office has contacted you either by phone, in writing, or in person in an attempt to gain compliance with the actual use of this structure . . . which under Chapter 3 of the Rhode Island State Building Code (RISBC) is Assembly A1 . . . .
> "The building permit cited above indicates 1600 square feet of floor space proposed. RISBC Chapter 10 table allows the maximum occupancy load to be 5 square feet per person or 320 for this structure . . . Clearly this far exceeds the 27 person capacity of the present system. While the above occupancy load may vary by type of seating etc., as well as a likely more stringent calculation by Fire Prevention, an unacceptable overload of the system is likely.
> "It is understood that problems with an overload have been avoided by use of portable toilets, however, RISBC Chapter 29 Section 2901 requires 3 water closets and 2 lavatories for males and 5 water closets and 2 lavatories for females. In addition, 1 drinking fountain and 1 service sink are required for this structure and use . . . .
> "You are hereby ordered to immediately cease and desist from any and all assembly use of the subject property." Notice of Violation, Mar. 29, 2011; see also Am. Verified Compl. ¶¶ 24-25.

The March 29, 2011 NOV concluded with the signature of the then-Building/Zoning Official, Gareth Eames (Eames). See Notice of Violation, Mar. 29, 2011.

Attorney DeSisto, in or around April 2011, thereafter drafted a complaint (Draft Complaint) for injunctive relief on behalf of Four Corners against the Town and Eames. Id. ¶ 26. The Draft Complaint stated that the March 29, 2011 NOV "does not state that the septic system for the Meeting House has failed, and cites no instance of an improper public assembly." Id. ¶ 27. In addition, the Draft Complaint asserted that "[t]here is no basis for the issuance of [a NOV] barring public gatherings at the Meeting House" and that the NOV was "unreasonable and serve[d] no compelling public interest because it fail[ed] to take into account the use of portable toilets on the Premises for public gatherings when appropriate." Id. ¶ 28. The Draft Complaint also claimed that RIDEM "has jurisdiction over the regulation of septic systems, preempting [the Town's] efforts to regulate the same by way of NOV." Id. ¶ 29. The Draft Complaint lastly

stated that Four Corners' "use of the Meeting House and Premises for public gatherings is an appropriate and lawful use." Id. ¶ 30. Four Corners asserts that these allegations were and continue to be supported by meter readings that prove that the septic systems servicing the Premises are in accordance with RIDEM requirements. Id. ¶ 31.

Four Corners also engaged an environmental engineering firm, Mount Hope Engineering, in 2011, and applied for a Suitability Determination with RIDEM. Id. ¶ 33. In April 2011, Four Corners' environmental engineer communicated to the Town that any issues with the septic capacity would be reported to the Town. Id. Subsequently, on December 11, 2011, Mount Hope Engineering wrote to Eames to report that the septic system servicing the Premises had a maximum capacity of 405 gallons per day and that the Meeting House septic system had a daily usage of 108 gallons per day. Id. ¶ 34.

Thereafter, on March 7, 2012, RIDEM issued to Four Corners a Certificate of Conformance for the septic system on the Premises. Id. ¶ 35. In its application, Four Corners stated that the original use of gallery/retail had not occurred and that the Premises were being used for a variety of theater/auditorium purposes. Id. The original Certificate of Conformance issued by RIDEM allowed twenty-seven occupants in the Meeting House and the two small office buildings located nearby based on a retail employee and an office worker each requiring fifteen gallons per day of septic capacity. Id. ¶ 36. However, as an auditorium/theater, the Meeting House's required daily septic capacity is only three gallons per day per seat. Id. When RIDEM issued the Certificate of Conformance in March 2012, it mistakenly left the occupancy/use figure on the certificate as twenty-seven persons rather than 107 persons. Id.

The Town sent Four Corners a NOV on December 17, 2013, which stated that the NOVs would remain in effect until the Town received a Certificate of Conformance from RIDEM.

Id. ¶ 37. The December 17, 2013 NOV also acknowledged that the Meeting House had the required number of bathrooms. Id.

During the year 2015, the Town's management changed: Attorney DeSisto became Tiverton's Town Solicitor, Eames was replaced by Defendant Hall as the Town's Building and Zoning Official, and Defendant Wojcik became the Town Administrator for the Town. Id. ¶ 38. Hall quickly went into action, transmitting a cease and desist order to Four Corners, citing an "unsafe condition" on the Premises; in support of its cease and desist, Hall referenced G.L. 1956 §§ 22-27.3-120.3, 23-27-120.4, 23-27.3-124.1(10), (11). Id. ¶ 39. This cease and desist order was responsive to a notice from the Rhode Island Department of Health issued on August 21, 2015, which stated that the cloriform was non-acute and requested that Four Corners post a sign and undertake remediation efforts. Id. Four Corners did as the Rhode Island Department of Health notice requested. Id. The Department of Health then informed Four Corners in early 2016 that the cloriform issues had been remediated. Id. ¶ 40. However, the Town did not withdraw its September 23, 2015 cease and desist order as Four Corners had requested. Id.

Four Corners also alleged that, while working to design a new parking plan—which requires an acknowledgement of awareness by the Town—Hall has refused to provide the acknowledgement, incorrectly stating that Planning Board approval is required. Id. ¶ 42.

On January 13, 2016, the Town though Hall, transmitted a "Final Notice of Violation" to Four Corners, citing RIDEM regulatory provisions and ordered Four Corners to "immediately cease and desist from any and all assembly use of the Premises." Notice of Violation, Jan. 13, 2016 (emphasis added). Hall sent another similar letter on January 20, 2016. Am. Verified Compl. ¶ 44. Attorney DeSisto's office informed Four Corners that only Wojcik has the authority to withdraw the NOVs. Id. ¶ 45. Thereafter, Four Corners contacted the Town on

several occasions to insist that the 2011 and 2016 cease and desist orders be withdrawn. Id. ¶ 46. In April 2016, Attorney DeSisto's law office responded, mostly ignoring the requests. Id. ¶ 47. Attorney DeSisto has recused himself from this matter. Id.

In June 2016, RIDEM issued a new Certificate of Conformance for the septic system servicing the Meeting House and the two nearby offices. Id. ¶ 48. The new Certificate of Conformance confirmed a legal occupancy of 100 seats for "assembly" use of the Meeting House; however, the Town has still not agreed to lift the cease and desist orders premised on the old Certificate of Conformance which stated that the occupancy of the Meeting House and office buildings was twenty-seven persons. See id. ¶ 48. The new certificate was transmitted to Hall along with a letter stating that there were legal and factual errors in the cease and desist orders. Id. ¶ 49. Nevertheless, Hall and Wojcik have stated that the Town is unequivocally determined to enforce the 2016 cease and desist orders except with respect to certain specified events that Four Corners has booked. Id. ¶ 51.

II

Standard of Review

Super. R. Civ. P. 56(c) provides that a court should grant summary judgment "if 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." Super. R. Civ. P. 56(c). "When 'ruling on a motion for summary judgment the [hearing] justice must consider affidavits and pleadings in the light most favorable to the opposing party, and only when it appears that no genuine issue of material fact is asserted can summary judgment be ordered.'" Multi-State Restoration, Inc. v. DWS Properties, LLC., 61 A.3d 414, 418 (R.I. 2013) (quoting O'Connor v. McKanna, 116 R.I.

627, 633, 359 A.2d 350, 353 (1976)). The nonmoving party "carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996). Accordingly, summary judgment is appropriate if the nonmoving party "'fails to make a showing sufficient to establish the existence of an element essential to that party's case.'" Beauregard v. Gouin, 66 A.3d 489, 493 (R.I. 2013) (quoting Lavoie v. Ne. Knitting, Inc., 918 A.2d 225, 228 (R.I. 2007)). The mere existence of a factual dispute alone will not preclude summary judgment; rather, "'the requirement is that there be no genuine issue of material fact.'" Bucci v. Hurd Buick Pontiac GMC Truck, LLC, 85 A.3d 1160, 1170 (R.I. 2014) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

III

Analysis

A

Injunctive Relief

Four Corners claims that it is summarily entitled to an order permanently enjoining Defendants from taking additional enforcement actions with respect to the three NOVs. Four Corners first asserts that the violation underlying the September 23, 2015 NOV has long since been remediated. As such, Four Corners contends that this Court should enjoin any further enforcement of the September 23, 2015 NOV. As it pertains to the March 29, 2011 and January 13, 2016 NOVs, Four Corners argues that this Court should enjoin further enforcement because they are expressly predicated upon a Certificate of Conformance which mistakenly lists the septic capacity as twenty-seven persons. Four Corners points out that it has secured a revised

Certificate of Conformance stating that the septic capacity for Four Corners' septic system is 100 persons. In response, Defendants assert that Four Corners is not entitled to injunctive relief because it has not exhausted its administrative remedies—i.e., appealing the NOVs to the Town's zoning board of review under G.L. 1956 § 45-24-64.

This Court first addresses Defendants' contention that Four Corners was obligated to exhaust its administrative remedies by appealing the NOVs to the zoning board of review because if Defendants are correct, then jurisdiction of this matter would divest to the zoning board of review.

"'It is well settled that a plaintiff aggrieved by a state agency's action first must exhaust administrative remedies before bringing a claim in court.'" Bellevue–Ochre Point Neighborhood Ass'n v. Pres. Soc'y of Newport Cty., No. 2015-241-Appeal (NC 14-98), 2017 WL 75446, at *7 (R.I. Jan. 9, 2017) (quoting Richardson v. R.I. Dep't of Education, 947 A.2d 253, 259 (R.I. 2008)). "The doctrine 'aids judicial review by allowing the parties and the agency to develop the facts of the case, and . . . promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, perhaps avoiding the necessity of any judicial involvement.'" Bellevue-Ochre Point Neighborhood Ass'n, 2017 WL 75446, at *7 (quoting Doe ex rel. His Parents and Natural Guardians v. East Greenwich School Dep't, 899 A.2d 1258, 1266 (R.I. 2006)). However, Rhode Island Courts recognize "'an exception to the exhaustion requirement when exhaustion of administrative remedies would be futile.'" Bellevue-Ochre Point Neighborhood Ass'n, 2017 WL 75446, at *10 (quoting DeLuca v. City of Cranston, 22 A.3d 382, 385 (R.I. 2011) (mem.)). As recently noted by our Supreme Court, the futility exception to the exhaustion requirement exists in instances where the zoning board of review lacks authority to grant the relief sought by the appellant. See Bellevue-Ochre Point

Neighborhood Ass'n, 2017 WL 75446, at *7; Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 73, 264 A.2d 910, 915 (1970). In addition, the futility exception applies when a plaintiff challenges the validity and enforceability of a zoning ordinance. See M.B.T. Construction Corp. v. Edwards, 528 A.2d 336, 338 (R.I. 1987).

Thus, whether Four Corners was required to appeal the NOVs to the zoning board of review pivots on whether the zoning board of review had the authority to hear such appeals. "'[Z]oning boards are statutory bodies whose powers are legislatively delineated.'" Bellevue-Ochre Point Neighborhood Ass'n, 2017 WL 75446, at *6 (quoting Duffy v. Milder, 896 A.2d 27, 36 (R.I. 2006)). The jurisdiction of a zoning board is statutorily delineated in the Zoning Enabling Act, §§ 45-24-31 et seq. The Zoning Enabling Act mandates that:

> "A zoning ordinance adopted pursuant to this chapter shall provide that the zoning board of review shall:
>
> "(1) Have the following powers and duties:
>
> "(i) To hear and decide appeals * * * where it is alleged there is an error in any order, requirement, decision, or determination made by an administrative officer or agency in the enforcement or interpretation of this chapter, or of any ordinance adopted pursuant hereto . . . ." Sec. 45-24-57 (emphasis added).

Accordingly, the Tiverton Zoning Code provides that the zoning board of review's appellate jurisdiction is limited to instances "where it is alleged there is an error in any order, requirement, decision or determination made by the zoning officer in the enforcement of this ordinance." Tiverton Zoning Code, art. XV, § 3(a) (emphasis added). The Tiverton Zoning Code also provides that "[i]t shall be the duty of the zoning enforcement officer of the Town of Tiverton to administer and enforce the provisions of this ordinance, including . . . (6) Issuance of violation notices with required correction action . . . ." Tiverton Zoning Code, art. XVIII, § 1(b).

In examining the March 29, 2011, September 23, 2015, and January 13, 2016 NOVs, this Court is not convinced that the NOVs were issued pursuant to the zoning enforcement officer's enforcement powers under the Zoning Enabling Act and the Tiverton Zoning Code. See § 45-24-57; Tiverton Zoning Code, art. XV, § 3(a). In issuing NOVs for the violation of the zoning ordinance, the Town's zoning enforcement officer is required to "notify in writing the person responsible for such violation, indicating the nature of the violation and ordering the action necessary to correct it." Tiverton Zoning Code, art. XVIII, § 5(b). However, the March 29, 2011 and January 13, 2016 NOVs only cite to the Rhode Island State Building Code.[1] See Notice of Violation, Jan. 13, 2016; Notice of Violation, Mar. 29, 2011. Similarly, the September 23, 2015 NOV cites only to the Rhode Island State Building Code and Rhode Island Property Maintenance Code.[2] See Notice of Violation, Sept. 23, 2015. Wholly lacking from each of these NOVs is any reference to the Tiverton Zoning Code which the zoning enforcement officer was purporting to enforce. Indeed, none of the NOVs issued to Four Corners even mention the word "zoning." Accordingly, this Court does not construe the NOVs issued by the Town's zoning enforcement officer to be indicative of his enforcement powers under the Zoning Enabling Act or the Town's zoning ordinance.

Because the NOVs issued in this case were not in the enforcement of the Town's zoning ordinance, an appeal of the NOVs would fall outside the zoning board of review's jurisdiction. See § 45-24-57; Tiverton Zoning Code, Art. XV, Sec. 3(a). As stated previously, a zoning board of review's jurisdiction is limited by statute. See § 45-24-57; Bellevue-Ochre Point

[1] The March 29, 2011 and January 13, 2016 NOVs specifically cite R.I. State Building Codes chs. 3, 10, and 29.

[2] Specifically, the September 23, 2015 NOV cites to G.L. 1956 §§ 23-27.3-124.1(10)-(11), 23-27.3-120.4 (unsafe conditions); 23-27.3-124.3 (appeals); and R.I. Property Maintenance Code §§ 120.3, 120.4, 505, 505.2, and 506.1.

Neighborhood Ass'n, 2017 WL 75446, at *5. Accordingly, Four Corners was not required—and would not have been able—to appeal the NOVs to the zoning board of review because the zoning enforcement officer's decision was not enforcing the zoning code. In other words, Four Corners was not obligated to exhaust its administrative remedies because no administrative remedies existed for it to exhaust. For the same reasons, any appeal of the NOVs by Four Corners to the zoning board of review would be futile. Frank Ansuini, Inc., 107 R.I. at 73, 264 A.2d at 915. Thus, Defendants' exhaustion argument fails as a matter of law.

Having determined that Four Corners was not required to exhaust its administrative remedies and that any such attempt would have been futile, this Court now moves on to address Four Corners' prayer for relief—that Defendants should be enjoined from enforcing the NOVs. "A party seeking injunctive relief 'must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.'" Nye v. Brousseau, 992 A.2d 1002, 1010 (R.I. 2010) (quoting Nat'l Lumber & Bldg. Materials Co. v. Langevin, 798 A.2d 429, 434 (R.I. 2002)). "Irreparable injury must be either 'presently threatened' or 'imminent'; injuries that are prospective only and might never occur cannot form the basis of a permanent injunction." Nat'l Lumber & Bldg. Materials Co., 798 A.2d at 434.

1

The September 23, 2015 NOV

The September 23, 2015 NOV was issued as a result of a puncture in the septic system. See Notice of Violation, Sept. 23, 2015. This puncture was cited as an unsafe condition under § 23-27.3-124.1. See id.; see also Hall Dep. Tr. 82:5-8, Oct. 11, 2016. Hall and Wojcik concede that after the issuance of the September 23, 2015 NOV, Four Corners remediated the underlying

condition within one week. See Hall Dep. Tr. 87:11-16; Wojcik Dep. Tr. 25:10-26:3, Oct. 21, 2016. Nevertheless, Defendants contended—up until it was conceded in its supplementary memorandum opposing a preliminary injunction which was filed in November 2016—that Four Corners was still belabored by the September 23, 2015 cease and desist order. See Email from Wojcik to the Members of the Tiverton Town Council, Oct. 1, 2015 ("[A]s far as [Hall] and I are concerned, [Ms. Weir] is still under a cease and desist order at the present and must comply."). Hall stated in his deposition that this was due to Four Corners failing to request that the cease and desist order be lifted. See Hall Dep. Tr. 87:20-89:5. However, Hall also testified at his deposition that a complaint filed in the Superior Court stating that the specific NOV was void would be sufficient to demand its withdrawal. Id. at 88:17:23. Four Corners has acknowledged Defendants' concession of the September 23, 2015 NOV's continued validity; however, it nonetheless asks this Court to permanently enjoin enforcement of the September 23, 2015 NOV.

This Court is satisfied that the injunctive relief sought by Four Corners, specifically as it relates to the September 23, 2015 NOV, is warranted. Although Defendants have conceded that the September 23, 2015 NOV and the accompanying cease and desist order are no longer in effect because the underlying violation was remediated, the cease and desist order still has yet to be formally withdrawn. In other words, the September 23, 2015 NOV—despite being null and void due to remediation of the underlying violation—continues to belabor "any and all" use of the Meeting House. Therefore, Four Corners has satisfied its burden in proving, as a matter of law, that an irreparable injury is presently threatened or imminent because the cease and desist order accompanying the September 23, 2015 NOV, which has been in effect since that date, bars all use of the Meeting House property. See Nye, 992 A.2d at 1010.

2

The March 29, 2011 and January 13, 2016 NOVs

The March 29, 2011 NOV, as described previously by this Court, was issued due to a "likely" overload of Four Corners' septic system. See Notice of Violation, Mar. 29, 2011. The January 13, 2016 NOV was identical to the March 29, 2011 NOV except that the January 13, 2016 NOV bore the signature of Hall rather than Eames. See Notice of Violation, Jan. 13, 2016. Both NOVs were expressly predicated on Four Corners' septic system capacity being twenty-seven persons, as it was stated in the 1995 RIDEM Certificate of Conformance. See Notice of Violation, Jan. 13, 2016; Notice of Violation, Mar. 29, 2011. In fact, Hall expressly stated that the January 13, 2016 NOV was based on septic capacity:

> "Q: And your January 13th Notice of Violation is predicated on your belief that the DEM had only said that septic system can be used by 27 people; correct?
> "A: Correct, yes." Hall Dep. Tr. 91:7-11.

However, Hall thereafter maintained that the January 13, 2016 NOV was also predicated on an expansion of a nonconforming use:

> "Q: So that notice of violation is no longer valid; correct?
> "A: No, I disagree.
> . . .
> "Q: Why is that?
> "A: Well, I believe it was an expansion. Again, I go back to -- the applicant has not -- in my eyes, I believe there's question of expansion of a nonconforming use, expansion over the years of their existing certificate of occupancy based on a number of other issues which would trigger occupancy; whether it would be parking, updated calculations, and a true indication of what the property is being used as.
> . . .
> "Q: But there's no notices of violation about nonconforming use; right?
> "A: I'm not aware of.
> "Q: Well, you're the building official?
> "A: Not that I've written." Hall Dep. Tr. 91:7-92:1, 96:17-21.

The new Certificate of Conformance from RIDEM—which stated the septic capacity as 100 persons—was not issued until June 2016.

Defendants, in their supplementary memorandum supporting their opposition to Four Corners' request for a preliminary injunction, contend that the March 29, 2011 and January 13, 2016 NOVs are no longer in effect except with respect to the "zoning issues" cited therein. As this Court articulated previously, however, there are no "zoning issues" cited in any of the NOVs in this case; the NOVs were specifically predicated on a purported violation of Rhode Island State Building Codes. Therefore, Four Corners has also satisfied its burden in proving, as a matter of law, that an irreparable injury is presently threatened or imminent from the March 29, 2011 and January 13, 2016 NOVs because the cease and desist order bars all use of the Meeting House property. See Nye, 992 A.2d at 1010.

B

Declaratory Relief

Four Corners also seeks a declaration that Defendants' continuing actions, as evidenced by the March 29, 2011 and January 13, 2016 NOVs[3] are void and the issuance of such NOVs were unlawful exercises of municipal authority. Four Corners argues that regulation of septic systems falls squarely under the statutory authority of RIDEM, and, accordingly, the Town's regulatory actions are preempted by statute.

A preemption argument "requires an analysis of whether the issue is implicitly reserved within the state's sole domain." Amico's Inc. v. Mattos, 789 A.2d 899, 908 (R.I. 2002). A

[3] This Court is satisfied that the September 23, 2015 NOV does not require an analysis with respect to declaratory relief, since the Defendants conceded in their November 2016 supplementary memorandum opposing a preliminary injunction that Four Corners is no longer belabored by that NOV. See Prelimin. Inj. Supplementary Mem. of Defs. ("Exhibit 3 [September 23, 2015 NOV] is complied with and no longer in force and effect.").

"local ordinance or regulation may be preempted in two ways. First, a municipal ordinance is preempted if it conflicts with a state statute on the same subject. Second, a municipal ordinance is preempted if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject." Id. (citing Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1261 (R.I. 1999)).

> "'[W]here a state legislature has made provision for the regulation of conduct in a given situation and has provided punishment for the failure to comply therewith, it has shown its intention that the subject matter is fully covered by the statute and that a municipality under its general powers cannot regulate the same conduct or make the same act an offense also against a municipal ordinance.'" Amico's Inc., 789 A.2d at 914 (quoting Wood v. Peckham, 80 R.I. 479, 483, 98 A.2d 669, 670 (1953)).

Our Supreme Court "ha[s] stated previously that ordinances are inferior in status and subordinate to the laws of the state; an ordinance that is inconsistent with a state law of general character and state-wide application is invalid." Borromeo v. Personnel Bd. of Town of Bristol, 117 R.I. 382, 385, 367 A.2d 711, 713 (1977) (citing Wood, 80 R.I. at 482, 98 A.2d at 670).

The determination of whether the Town was permitted to send NOVs to Four Corners with respect to its septic system depends on the powers granted to RIDEM under statute. Pursuant to § 42-17.1-2,

> "The director of environmental management shall have the following powers and duties:
> . . .
> "(12) To establish minimum standards, subject to the approval of the environmental standards board, relating to the location, design, construction, and maintenance of all sewage-disposal systems;
> "(13) To enforce, by such means as provided by law, the standards for the quality of air, and water, and the design, construction, and operation of all sewage-disposal systems; any order or notice issued by the director relating to the location, design, construction, or maintenance of a sewage-disposal system shall be eligible for recordation under

> chapter 13 of title 34. The director shall forward the order or notice to the city or town wherein the subject property is located and the order or notice shall be recorded in the general index by the appropriate municipal official in the land evidence records in the city or town wherein the subject property is located. Any subsequent transferee of that property shall be responsible for complying with the requirements of the order or notice. Upon satisfactory completion of the requirements of the order or notice, the director shall provide written notice of the same, which notice shall be similarly eligible for recordation. The original written notice shall be forwarded to the city or town wherein the subject property is located and the notice of satisfactory completion shall be recorded in the general index by the appropriate municipal official in the land evidence records in the city or town wherein the subject property is located. A copy of the written notice shall be forwarded to the owner of the subject property within five (5) days of a request for it, and, in any event, shall be forwarded to the owner of the subject property within thirty (30) days after correction . . . ." Sec. 42-17.1-2.

The minimum standards referenced in § 42-17.1-2(12) were adopted by the RIDEM's Office of Water Resources and entitled "Rules Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Onsite Wastewater Treatment Systems" (hereinafter RIDEM OWTS Rules). The RIDEM OWTS Rules provide that the septic capacity of a "Theater, auditorium" is three gallons per day per seat. See RIDEM OWTS Rules, tbl. 21.1. In contrast, the septic capacity of a retail store/office building is fifteen gallons per day per employee. See id. Moreover, "[t]he terms and provisions of [the RIDEM OWTS] Rules shall be liberally construed to allow the [RIDEM] to effectuate the purposes of state laws, goals, and policies." RIDEM OWTS Rule 3.

In addition, the director of RIDEM is obligated

> "[t]o give notice of an alleged violation of law to the person responsible therefor whenever the director determines that there are reasonable grounds to believe that there is a violation of any provision of law within his or her jurisdiction or of any rule or

> regulation adopted pursuant to authority granted to him or her, unless other notice and hearing procedure is specifically provided by that law." Sec. 42-17.1-2(21).[4]

However, Rhode Island law also allows "[a]ny city or town council in the state . . . to adopt ordinances creating waste water management districts (WWMD), which may be empowered to . . . (9) Levy fines for noncompliance." Sec. 45-24.5-4. The Town has done just that. See Tiverton Code of Ordinances App. C, art. IX. Notably, however, RIDEM "and the department of health retain all of their existing authority regarding individual sewage disposal systems." Sec. 45-24.5-5. Therefore, once RIDEM revised its determination on the Plaintiff's septic suitability, the March 29, 2011 and January 13, 2016 NOVs became moot. For this reason, then, there is no genuine dispute as to material fact that these NOVs are declared to be void.

C

Deprivation of Due Process Rights

Four Corners also asserts that Defendants, under color of state law, have deprived Four Corners of the full economic use of its property interest in the Premises. Specifically, Four Corners argues that Defendants failed to provide Four Corners due process of law prior to issuing the cease and desist orders, that Defendants' actions were arbitrary and capricious, and that as a result, Four Corners has suffered damages in the form of lost business.

Under 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

[4] Sec. 42-17.1-2(21) also goes on to state that "[n]othing in this chapter shall limit the authority of the attorney general to prosecute offenders as required by law."

"'Section 1983 supplies a private right of action against a person who, under color of state law, deprives another of rights secured by the Constitution or by federal law.'" Jarvis v. Vill. Gun Shop, Inc., 805 F.3d 1, 7 (1st Cir. 2015), cert. denied, 136 S. Ct. 2020 (2016) (quoting Redondo-Borges v. U.S. Dep't of Hous. & Urban Dev., 421 F.3d 1, 7 (1st Cir.2005)). "A cause of action under this provision comprises two essential elements: first, the conduct complained of must have been carried out 'under color of state law,' and second, that conduct must have worked a deprivation of rights guaranteed by the Constitution or laws of the United States." Jarvis, 805 F.3d at 7 (citing Grajales v. P.R. Ports Auth., 682 F.3d 40, 46 (1st Cir. 2012)).

1

Substantive Due Process

"The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (citation omitted). "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 v. Town Council of Town of Cumberland, 698 A.2d 202, 211 (R.I. 1997) (quoting Jolicoeur Furniture Co., Inc. v. Baldelli, 653 A.2d 740, 751 (R.I. 1995)). "A regulation that takes property violates the substantive due process clause if it is arbitrary, discriminatory, or irrelevant to a legislative policy." L.A. Ray Realty, 698 A.2d at 211 (citing Tenoco Oil Co., Inc. v. Dep't of Consumer Affairs, 876 F.2d 1013, 1021 (1st Cir. 1989)). "Furthermore, as to substantive due process claims, 'the constitutional violation actionable under § 1983 is complete when the wrongful action is taken.'" L.A. Ray Realty, 698 A.2d at 211 (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)). "Moreover, 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." L.A. Ray Realty, 698 A.2d at 211. Thus, "[s]ubstantive due process is violated when 'the constitutional line has been crossed' by state actions that transgress 'some basic and fundamental principle.'" L.A. Ray Realty, 698 A.2d at 211 (quoting Amsden v. Moran, 904 F.2d 748, 754 (1st Cir. 1990)).

In this case, there is a genuine issue of material fact regarding whether the Town officials' enforcement actions against Four Corners were arbitrary. Four Corners has demonstrated that the violation underlying the September 23, 2015 NOV had been remediated, yet the Town has failed to formally withdraw the cease and desist order. In addition, the March 29, 2011 and January 13, 2016 NOVs were explicitly predicated on the capacity of the septic system servicing the Meeting House. The septic capacity was revised by RIDEM in the June 2016 Certificate of Conformance to 100 persons, thus making the NOVs moot. However, besides these facts proven, there is not enough evidence at this point for the Court to rule, as a matter of law, that the Town's enforcement of these otherwise invalid NOVs was "arbitrary, discriminatory, or irrelevant to a legislative policy." L.A. Ray Realty, 698 A.2d at 211 (citing Tenoco Oil Co., 876 F.2d at 1021). Although a NOV constitutes a government regulation that restricts the use of an individual's property, there still exists a genuine issue of material fact regarding whether the Town had enforced such a regulation arbitrarily or capriciously. See id. For this reason, summary judgment with respect to Four Corners' substantive due process claim is denied.

2

Procedural Due Process

Moreover, Four Corners asserts that it was deprived of its procedural due process rights. Four Corners does not assert that the procedures available to them were inadequate, but rather that the Town's officials abused their positions. Four Corners likens the Town's governmental actions to those accused by the plaintiffs in L.A. Ray Realty, who asserted that the town officials' decisions "were preordained to deprive plaintiffs of their constitutionally protected property interest, which action, in the absence of an adequate postdeprivation remedy, gave rise to plaintiffs' procedural due process claim." 698 A.2d at 213.

"The United States Supreme Court has stated that, '[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.'" L.A. Ray Realty, 698 A.2d at 213 (quoting Zinermon, 494 U.S. at 125). Unlike substantive due process violations, a procedural due process "violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." Zinermon, 494 U.S. at 126.

In L.A. Ray Realty, the plaintiffs, who were real estate developers, sued the Town of Cumberland for refusing their subdivision applications. 698 A.2d at 205. The crux of their argument rested on the Town harboring a particular personal and political animus towards the plaintiffs. Id. When the applications were filed, members of the town council and the mayor sought to amend the zoning ordinance to prevent their application from passing; after these amendments failed, the zoning ordinances were eventually amended by referendum. Id. Among numerous other claims, the plaintiffs claimed a violation of their procedural due process rights.

Id. at 209. The Rhode Island Supreme Court recognized that predeprivation hearings were provided for; however, they were meaningless, because "the animosity and actions of some town officials resulted in a procedural due process violation, regardless of the availability of a postdeprivation remedy." Id. at 211.

Here, there is also a genuine issue of material fact regarding whether there was a violation of Four Corners' procedural due process rights. The Town disagrees with Four Corners on its regulation of the property's septic capacity, it pleaded its case to RIDEM in August and September of 2015, and it continues to enforce its opinion after RIDEM's issuance of the revised certificate of conformance. However, the Defendants have proven that this is not enough evidence for this Court to decide at this moment that the Town engaged in a "preordained [decision] to deprive [Four Corners] of their constitutionally protected property interest." Id. at 213. Instead, more facts are needed at trial in order for this Court to make such a determination; therefore, Four Corners' summary judgment motion with respect to their procedural due process claim is denied.

3

Municipal Liability

"[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." Monell v. Dep't of Social Services of City of New York, 436 U.S. 658, 694 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. "Further, the Supreme Court has imposed two additional requirements: 1) that the municipal policy or custom actually have caused the plaintiff's injury, and 2) that the municipality possessed the

requisite level of fault, which is generally labeled in these sorts of cases as 'deliberate indifference.'" Young v. City of Providence ex rel. Napolitano, 404 F.3d 4, 26 (1st Cir. 2005) (citing Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown, 520 U.S. 397, 404 (1997)). "Causation and deliberate indifference are separate requirements, although they are often intertwined in these cases." Id. Thus, a municipality can only be found liable under § 1983 if "the municipality itself causes the constitutional violation at issue. Respondeat superior or vicarious liability will not attach under § 1983." City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989) (citing Monell, 436 U.S. at 694-95). Therefore, in order to find no issue of material fact with respect to the Town's deprivation of Four Corners' due process rights, the Town, as a municipality, must be liable for Wojcik and Hall's actions, as analyzed under § 1983 case law. The three elements to proving municipal liability are discussed below.

a

The Town's Policy and Custom

"'A plaintiff can establish the existence of an official policy by,' inter alia, 'showing that the alleged constitutional injury was caused . . . by a person with final policymaking authority.'" Walden v. City of Providence, 596 F.3d 38, 55 (1st Cir. 2010) (quoting Welch v. Ciampa, 542 F.3d 927, 941 (1st Cir. 2008) (internal citations omitted)). "Whether an official is a final policymaker is also a question of law for the trial judge to decide." Id. (quoting Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989)). "This determination requires a showing that 'a deliberate choice to follow a course of action [was] made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" Id. (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 484 (1986), superseded in part by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072). "When

determining whether a decisionmaker exercises final authority, '[c]ourts must look to state law, including valid local ordinances and regulations, for descriptions of the duties and obligations of putative policymakers in the relevant area at issue.'" Freeman v. Town of Hudson, 714 F.3d 29, 38 (1st Cir. 2013) (quoting Walden, 596 F.3d at 56) (internal citations omitted). However,

> "[t]his does not mean that [the courts] look simply to state law labels to determine whether an official is a final policymaker, '[b]ut [the court's] understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law.'" Walden, 596 F.3d at 56 (quoting McMillian v. Monroe Cnty., Ala., 520 U.S. 781, 786 (1997)).

With respect to proving custom, it is a "persistent and widespread" course of conduct that must be '"so permanent and well settled as to constitute a "custom or usage" with the force of law.'" Monell, 436 U.S. at 691 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 168 (1970)); see also Bisbal-Ramos v. City of Mayagüez, 467 F.3d 16, 23-24 (1st Cir. 2006) (quoting Silva v. Worden, 130 F.3d 26, 31 (1st Cir. 1997)) ("[A] municipality may be liable under § 1983 where a custom or practice is so 'well-settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice.'").

Here, this Court finds that there is a genuine issue of material fact whether Wojcik, in his official capacity as Town Administrator, exercised "final policymaking authority." Walden, 596 F.3d at 55 (quoting Welch, 542 F.3d at 941). In determining whether an official is a final policymaker for purposes of imposing liability on a municipality, "'[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, [the policymakers] have retained the authority to measure the official's conduct for conformance with their policies.'" Walden, 596 F.3d at 57 (quoting City of St. Louis v. Praprotnik, 485 U.S. 112, 127

(1988)). As defined by the Tiverton Code of Ordinances, "[t]he Town Administrator shall be responsible to the Town Council for the administration and management of the Town government." Tiverton Code of Ordinances art. V, § 503. Additionally, "[t]he Town Administrator shall . . . see that all laws, provisions of this charter and acts of the council, subject to his/her direction and supervision, are faithfully executed." Id.

Here, there is not enough evidence at this moment for this Court to determine, as a matter of law, whether Hall's action in issuing the NOV was subject to Wojcik's review as Town Administrator. See Walden, 596 F.3d at 57. Wojcik testified: "I don't direct Mr. Hall. Mr. Hall informs me of what he observes to be violations, and that he intends to go forward with a notice of violation or not depending upon his interpretation of the various codes that he juggles and his understanding of his job." Wojcik Dep. Tr. 19:2-7. Although Wojcik's job description requires him to see that all laws are "faithfully executed," see Tiverton Code of Ordinances art. V, § 503, it is unclear to this Court whether Wojcik, in his capacity as Town Administrator, enforced the NOVs in this particular case. Thus, summary judgment with respect to finding Wojcik had "final policymaking authority" as required under § 1983 is denied. Walden, 596 F.3d at 55.

Additionally, this Court also finds that there is a genuine issue as to a material fact whether Hall, in his capacity as Building and Zoning Official, also had acted with final policymaking authority. As stated in the Tiverton Code of Ordinances: "It shall be the duty of the zoning officer of the Town of Tiverton to administer and enforce the provisions of this ordinance, including . . . [i]ssuance of violation notices with required correction action . . . ." Tiverton Code of Ordinances art. XVIII, § 1(b)(6). However, "'[s]imply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make policy.'" Walden, 596 F.3d at 57 (quoting Praprotnik, 485 U.S. at 130).

Although Wojcik testified that Hall could have issued the violation notices on his own, see Wojcik Dep. Tr. 19:2-7, this is evidence that Wojcik was agreeing with Hall's discretionary decisions and thus is not enough evidence by itself for this Court to determine, as a matter of law, whether this was a delegation of authority. See Walden, 596 F.3d at 57. Moreover, there has been no evidence presented at this point indicating whether the issuance of NOVs is solely within the authority of the Town Zoning and Building Official, or whether the Town Zoning and Building Official must receive approval from the Town Administrator. Based on the evidence presented at this point, there is a genuine dispute whether both Wojcik and Hall, acting in their respective official capacities, had "final policymaking authority" as required under § 1983; therefore, summary judgment with respect to this issue is denied. Walden, 596 F.3d at 55.

Additionally, Four Corners has failed to prove that no genuine issue of material fact exists with respect to proving that the Town's actions constituted custom. In attempting to prove custom, Four Corners cites to two prior Superior Court decisions that were lawsuits against the Town, and in particular, against Eames when he was the Building and Zoning Official. See Town of Tiverton v. Tosi, No. N3-2013-0238, 2014 WL 1641035 (R.I. Super. Ct. Apr. 17, 2014); Town of Tiverton v. Pelletier, Nos. N3/09-0238A, N3/09-0238B, 2011 WL 4802835 (R.I. Super. Ct. Oct. 7, 2011). Specifically, Four Corners uses these two cases to illustrate a "pattern of wrongful enforcement efforts to harass its citizens." Pl.'s Mem. in Supp. of Obj. to Defs.' Mot. for Leave to File Post-Summary J. Hr'g Mem. 8. However, the Plaintiff fails to indicate that both decisions upheld the violations brought by the Town. See Tosi, 2014 WL 1641035, at *11; Pelletier, 2011 WL 4802835, at *13. Four Corners' reference to the trial justice's remark that "the facts and travel of this case certainly raise suspicions about Mr. Eames and the Town's motivations and protocol . . ." is nothing more than dicta. Tosi, 2014 WL 1641035, at *11. In

fact, the remainder of that sentence in the decision states that the defendant residents "have not identified any extreme or substantial prejudice that would warrant dismissal." Id. Therefore, the inclusion of these two Superior Court cases against the Town of Tiverton, along with the facts presented in this case at this point, is not enough evidence for this Court to find no genuine issue that a "persistent and widespread" custom or practice exists. Monell, 436 U.S. at 691; see also Murray v. City of Boston, No. 96-1848, 1996 WL 728171, at *2 (1st Cir. Dec. 17, 1996) (Plaintiff pointing to three lawsuits and one complaint filed against the Mayor and City to prove a custom of violations under § 1983 created "considerable doubt that . . . even if each made allegations comparable to [the plaintiff's], would suffice to show a custom with the force of law.").

Furthermore, there is not enough evidence to grant summary judgment for the Plaintiff in establishing custom even if the Court were to consider just the actions committed by the Town in this case. Although these NOVs span over six years, and positions in government have changed, the only alleged deprivations made by the Plaintiff have only been suffered by the Plaintiff. See also Massó-Torrellas v. Municipality of Toa Alta, 845 F.3d 461, 469 (1st Cir. 2017) (Plaintiff's complaint referring to municipality's "policies and customs" was a bare assertion because it did not refer to any specific action). Besides the two Superior Court cases cited above, there is no other evidence indicating that other residents have suffered the same fate the Plaintiff is alleging. Therefore, summary judgment with respect to proving the Town engaged in custom is denied.

b

Direct Causal Link between the Town's Policy and Deprivation of Due Process Rights

Additionally, this Court finds that Four Corners has failed to prove that no issue of material fact exists with respect to proving a direct causal link between a policy or custom by the Town and the deprivation of Four Corners' due process rights. The second prong to proving a § 1983 claim against a municipality is whether "the municipal policy or custom actually have caused the plaintiff's injury." Young, 404 F.3d at 26. A causal connection "'can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'" Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 561 (1st Cir. 1989) (quoting Springer v. Seaman, 821 F.2d 871, 879 (1st Cir. 1987)).

Here, not enough evidence has been presented for this Court to make a determination that the Town's actions in issuing the NOVs deprived Four Corners of their due process rights. As indicated above, there is a genuine dispute determining whether there was policy or custom conducted by the Town, as well as whether the Town's actions constituted a violation of Four Corners' due process rights. Furthermore, there is not enough evidence for this Court to rule as a matter of law that Wojcik and Hall—in their official capacities—reasonably should have known that their actions in enforcing the NOVs would cause Four Corners to suffer a deprivation of their property rights. Gutierrez-Rodriguez, 882 F.2d at 561. For these reasons, there is a genuine issue of material fact in relation to proving a direct causal link between the Town's policymaking or custom and Four Corners' deprivation of their due process rights. Therefore, summary judgment with respect to proving this element of the § 1983 claim is denied.

c

The Town's "Deliberate Indifference" in Enforcing the NOVs

The last element needed to prove a § 1983 claim against the Town is whether "the municipality possessed the requisite level of fault, which is generally labeled in these sorts of cases as 'deliberate indifference.'" Young, 404 F.3d at 26 (citing Bd. of Cnty. Comm'rs of Bryan Cnty., 520 U.S. at 404). "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Bd. of Cnty. Comm'rs of Bryan Cnty., 520 U.S. at 410 (emphasis added). "Such knowledge can be imputed to a municipality through a pattern of prior constitutional violations." Young, 404 F.2d at 28. However, in the absence of a pattern of constitutional violations, there must be either an egregious single incident or a single incident and some additional evidence suggesting deliberate indifference. See Bd. of Cnty. Comm'rs of Bryan Cnty., 520 U.S. at 409 (noting a single incident might suffice in a narrow range of circumstances where the failure to train police officers to handle recurring situations would lead to a highly predictable chance that a constitutional violation would occur).

As determined above, there is a genuine dispute as to whether the Town has engaged in a "persistent and widespread" course of conduct to constitutionally deprive Four Corners. Monell, 436 U.S. at 691. Likewise, there is also a genuine dispute as to whether there has been a pattern of widespread constitutional violations committed by the Town, for Four Corners has failed to prove that no genuine issue with respect to this material fact exists. Thus, the only way Four Corners could prevail on summary judgment with respect to this element is if there is either an egregious single incident or a single incident and some additional evidence suggesting deliberate indifference. See Bd. of Cnty. Comm'rs of Bryan Cnty., 520 U.S. at 409. Four Corners has also

failed to prove there is no genuine dispute here either. Although there were three NOVs issued against Four Corners, there was not enough evidence presented for this Court, as a matter of law, to determine that this amounted to a single egregious incident, or at the very least, a single incident with additional evidence suggesting deliberate indifference. Although the September 23, 2015 NOV should have been withdrawn at the time the Town was notified that the puncture in the septic system was remediated, besides these facts, there is insufficient evidence presented to this Court at this moment indicating that the Defendants had "disregarded a known or obvious consequence of [their] action[s]." Bd. of Cnty. Comm'rs of Bryan Cnty., 520 U.S. at 410. Furthermore, although this Court has already determined these two NOVs to be void based on the authority granted to RIDEM, there were no arguments presented indicating that the Defendants were at least constructively aware that RIDEM had the appropriate authority to investigate the situation, and not the Town. Therefore, these facts are still in dispute and summary judgment with respect to the § 1983 claim based on municipal liability is denied.

D

Tortious Interference

Lastly, Four Corners argues that it is entitled to judgment as a matter of law as it pertains to liability for tortious interference with existing and prospective economic damages. Four Corners maintains that Defendants' continuing conduct, since 2009, has intentionally and improperly interfered with Four Corners' efforts to operate a profitable business on the Premises via the issuance of numerous cease and desist orders and NOVs and the refusal to issue permits. Four Corners contends that Defendants had either actual or constructive knowledge of Four Corners' existing and prospective economic expectancies regarding its business operations, that such interference was neither contractually nor statutorily justified, and that such interference has

resulted in substantial economic damages. Moreover, Four Corners argues that Defendants' interference constitutes willful and reckless misconduct giving rise to damages in Rhode Island.

To recover on a claim of tortious interference with prospective economic advantage, a plaintiff must demonstrate the basic elements of the tort: "(1) the existence of a business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an intentional [and improper] act of interference, (4) proof that the interference caused the harm sustained, and (5) damages to the plaintiff." Beauregard, 66 A.3d at 496 (citing Avilla v. Newport Grand Jai Alai LLC, 935 A.2d 91, 98 (R.I. 2007)).

> "'One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.'" Avilla, 935 A.2d at 98 (quoting Federal Auto Body Works, Inc. v. Aetna Cas. & Sur. Co., 447 A.2d 377, 380 n.4 (R.I. 1982)).

In a case for tortious interference with prospective economic advantage, a defendant's knowledge—i.e., intent—is not required in relation to an actual contract; rather, it must relate to a business relationship or expectancy. Mesolella v. City of Providence, 508 A.2d 661, 669-70 (R.I. 1986). In determining whether a defendant engaged in improper interference, the court may consider several factors, such as:

> "'(1) the nature of the actor's conduct; (2) the actor's motive; (3) the contractual interest with which the conduct interferes; (4) the interests sought to be advanced by the actor; (5) the balance of the social interests in protecting freedom of action of the actor and the contractual freedom of the putative plaintiff; (6) the proximity of the actor's conduct to the interference complained of; and (7) the parties' relationship.'" Avilla, 935 A.2d at 98 (quoting Belliveau Building Corp. v. O'Coin, 763 A.2d 622, 628 n.3 (2000)).

"Determining 'improper' conduct 'depends upon the judgment and choice of values in each situation,' therefore, 'the factors listed above are not exhaustive for making such a determination.'" Avilla, 935 A.2d at 98 (quoting Belliveau, 763 A.2d at 628 n.3).

Furthermore, "[p]roof of causation in this tort requires proof 'either that but for the interference there would have been a relationship or that it is reasonably probable that but for the interference the relationship would have been established.'" Burke v. Gregg, 55 A.3d 212, 222 (R.I. 2012) (quoting L.A. Ray Realty, 698 A.2d at 207). Moreover, "damages for interference with prospective contractual relations include '(1) the pecuniary loss of the benefits of the prospective relation and (2) consequential losses for which the interference is a legal cause.'" L.A. Ray Realty, 698 A.2d at 207 (quoting Mesolella, 508 A.2d at 671).

In this case, the Court is satisfied that Four Corners has demonstrated the first element of the tort of intentional interference with prospective advantage. Four Corners submitted an affidavit into evidence that it had booked several events at the Meeting House beyond the date of the revised RIDEM Certificate of Conformance. See Rosalind Weir Aff. ¶¶ 5-7. In addition, Four Corners has presented sufficient evidence to demonstrate that the Town had knowledge of these business expectancies, as the March 29, 2011 and January 13, 2016 NOVs specifically cite to Four Corners' commercial use of the Meeting House. See Notice of Violation, Jan. 13, 2016; Notice of Violation, Mar. 29, 2011.

However, there are genuine issues of material fact with respect to whether the Town's actions in issuing the NOVs were intentional and improper. In other words, the evidence is not sufficient for this Court to determine, as a matter of law, whether Four Corners has satisfied one of the several factors listed in Avilla proving that the Town's actions were intentional and improper. See 935 A.2d at 98. Likewise, the evidence presented on the last two elements,

causation and damages, is also insufficient for this Court to rule as a matter of law at this time. For these reasons, this Court shall grant in part and deny in part Four Corners' summary judgment motion with respect to the claim for tortious interference.

IV

Conclusion

For the reasons set forth in this Decision, this Court grants in part and denies in part Plaintiff's motion for summary judgment. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Four Corners Properties, LLC v. Town of Tiverton, et al.
CASE NO:	NC 2016-0239
COURT:	Newport County Superior Court
DATE DECISION FILED:	November 8, 2017
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	William M. Dolan III, Esq.; Nicholas L. Nybo, Esq.
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