STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[Filed: April 5, 2018]

MIDDLE CREEK FARM, LLC and MIDDLECREEK, LLC, DOUGLAS W. POLITI & CATHERINE M. POLITI	:	
VS.	:	**C.A. No. NC-2016-0231**
PORTSMOUTH WATER & FIRE DISTRICT & THE CITY OF NEWPORT, by and through Its City Manager, Joseph Nicholson, Jr. & Laura Sitrin, Director of Finance & Support Services of	:	

DECISION

VAN COUYGHEN, J. The matter before the Court is Plaintiff Middle Creek Farm, LLC's (Middle Creek) Motion for Summary Judgment and Defendant Portsmouth Water & Fire District's (PWFD) Motion to Dismiss for Failure to Join Indispensable Parties. For the reasons stated herein, the Court grants Middle Creek's Motion for Summary Judgment in part and denies PWFD's Motion to Dismiss. Jurisdiction is pursuant to Super. R. Civ. P. 12(b)(6), Super. R. Civ. P. 56(c), and G.L. 1956 § 9-30-11.

I

Facts and Travel

The within matter concerns an eleven-lot subdivision that straddles the border between Portsmouth and Middletown. Seven lots have home sites located in Portsmouth, Rhode Island and four lots have home sites located in Middletown, Rhode Island. Three of the four lots (sub-lots 1, 2, and 4) that have home sites in Middletown contain a portion of land located in Portsmouth. One of the four lots (sub-lot 3) has no land in Portsmouth and is entirely in Middletown. *See* App. A. The subdivision was approved by both the Middletown and

Portsmouth planning boards. As part of that approval, Middle Creek was required by the Portsmouth Planning Board to install a water main in the new road of the subdivision. PWFD has refused to permit Middle Creek to connect the four sub-lots that have houses located in Middletown to the water main, and, as stated above, three of those lots contain property in Portsmouth.[1]

The parties have agreed to stipulated facts. Although PWFD agrees to the stipulated facts, PWFD asserts that the stipulated facts are insufficient for this Court to base its decision, and alleges that there are facts in addition to those agreed upon which must be developed in order for the Court to properly render its decision.[2] The stipulated facts are as follows:

> (1) [Paragraph one essentially provides a description of the Middle Creek subdivision.] That the certain plat entitled, "MIDDLE CREEK FARM SUBDIVISION A.P. 128 Lot 73 (Middletown) A.P. 68 Lot 71 (Portsmouth) Cornelius Drive Portsmouth, RI 02871 Northeast Engineers & Consultants, Inc. Project Number: 13172.1 Scale: 1"=80' Subdivision Plan Date: 27 Sept 16" and recorded as Index No. 1649 in the Portsmouth Land Evidence Records and recorded as Plat No. 2017-5 in the Middletown Land Evidence Records attached hereto as Exhibit 1 is the Subdivision plan recorded in the Portsmouth Land Evidence Records. [*See* App. A].
> (2) That the Subdivision contains 11 Sub Lots
> (3) That Sub Lots 1-4 will not have home sites located in Portsmouth, RI.
> (4) That Sub Lots 5-11 will have home sites located in Portsmouth, RI.
> (5) That Sub Lots 5-11, as customers of PWFD within PWFD's district, will be allowed to access PWFD water through the installed main.
> (6) That a portion of Sub Lots 1, 2 and 4 have land in Portsmouth, RI.
> (7) That Sub Lots 1, 2 and 4 will be responsible for paying PWFD taxes but have not yet been charged any such taxes.
> (8) That Sub Lot 3 has no land in Portsmouth, RI.

[1] Since the commencement of this litigation, Middlecreek, LLC has purchased Lots 2 and 3, and Douglas and Catherine Politi have purchased Lot 4. These parties have been joined and are parties to the instant litigation.
[2] *See* n.4, *infra*.

> (9) That Sub Lot 3 will not pay PWFD taxes.
> (10) That the water main required by the Portsmouth Planning Board was installed on the road/right of way in the location as identified on the plan entitled "AS BUILT WATER MAIN" Cornelius Drive, Scale 1" = 40' dated January, 2017 attached hereto as Exhibit 2. [*See* App. B].
> (11) That Newport [Water Division] does not oppose all 11 Sub Lots receiving water through PWFD's water main. (Stipulated Facts, Sept. 8, 2017) (emphasis in original omitted).

Middle Creek argues that it is entitled to summary judgment based on two theories. First, that the undisputed facts support this Court's granting summary judgment based on equitable principles. After review of the documents filed, the arguments of counsel and the appropriate law, the Court finds that there are genuine issues of material fact regarding Middle Creek's claim for equitable relief, and thus, summary judgment is inappropriate in that regard. Therefore, summary judgment is denied on that basis.

Middle Creek also seeks summary judgment based upon the language of PWFD's Charter (the Charter) and G.L. 1956 § 46-15-2. Middle Creek contends that the matter before the Court is essentially a matter of statutory construction and that the undisputed facts, when applied to the language of the Charter, require that all of the lots that have a portion of property in Portsmouth be entitled to connect to the PWFD water system. Middle Creek further argues that pursuant to § 46-15-2, PWFD may "extend its supply and distribution mains" and "supply water" outside its district because it has legally supplied water to a location in Middletown in the past.

PWFD objects, alleging that the use of the word "inhabitants" as used in Section 5 of the Charter requires that the actual residence be located within Portsmouth in order to be eligible for water service and that § 46-15-2 prohibits water service beyond the boundaries of the PWFD, at least until various state agencies give their approval. The Court will address each argument in turn.

II

Middle Creek's Motion for Summary Judgment

A

Standard of Review

Superior Court Rule of Civil Procedure 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." *O'Connor v. McKanna*, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976) (citation omitted). 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)) (emphasis in original). An issue is "genuine" if the pertinent evidence is such that a rational factfinder could resolve the issue in favor of either

party, and a fact is "material" if it has the capacity to sway the outcome of the litigation under the applicable law. *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995).

B

Analysis

1

Statutory Interpretation

This Court reviews issues of statutory interpretation as a matter of law. *See Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 711 (R.I. 2000). "It is well settled that when the language of a statute [or, in this case, charter[3]] is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Accent Store Design*, 674 A.2d at 1226 (citations omitted). Moreover, when the Court examines an unambiguous statute, "there is no room for statutory construction and [it] must apply the statute as written." *In re Denisewich*, 643 A.2d 1194, 1197 (R.I. 1994) (citation omitted).

Of course, it is equally well established that when confronted with statutory provisions that are unclear or ambiguous, this Court, as arbiter of questions of statutory construction, will examine statutes in their entirety, and will "glean the intent and purpose of the Legislature 'from a consideration of the entire statute, keeping in mind [the] nature, object, language and arrangement' of the provisions to be construed." *In re: Advisory to the Governor*, 668 A.2d 1246, 1248 (R.I. 1996) (quoting *Algiere v. Fox*, 122 R.I. 55, 58, 404 A.2d 72, 74 (1979)). '"[I]f a mechanical application of a statutory definition produces an absurd result or defeats legislative intent, this [C]ourt will look beyond mere semantics and give effect to the purpose of the act."' *Commercial Union Ins. Co. v. Pelchat*, 727 A.2d 676, 681 (R.I. 1999) (quoting *In re Falstaff*

[3] This Court construes the provisions of a municipal charter in accordance with the customary rules of statutory construction. *See Felkner v. Chariho Reg'l Sch. Comm.*, 968 A.2d 865, 870 (R.I. 2009).

Brewing Corp. Re: Narragansett Brewery Fire, 637 A.2d 1047, 1050 (R.I. 1994)). "Under no circumstances will this Court construe a statute to reach an absurd result." *Smiler v. Napolitano*, 911 A.2d 1035, 1041 (R.I. 2006) (citation omitted).

The use of the word "inhabitants" as used in Section 5 of the Charter is at the center of this dispute. PWFD argues that the owners of sub-lots 1, 2, 3 and 4 are not inhabitants because the houses on those lots are on the portion of the property that is in Middletown and not in Portsmouth. PWFD further argues that it is irrelevant that a portion of sub-lots 1, 2 and 4 contain land located in Portsmouth.

At issue is whether the Legislature's intent was to apply the literal meaning of the word "inhabitant" when applying the language of the Charter. Section 5 of the Charter reads as follows:

> Section 5. The district is hereby authorized to obtain and maintain for the district a supply of water for the extinguishing of fire, and for distribution to the inhabitants of the district, for domestic use *and for other purposes*, and may obtain such water by the establishment of its own works, or by contracting therefor as provided below, or in such other manner as to the district may seem necessary and proper and is not inconsistent with law. The district may also furnish water to the inhabitants of the town of Portsmouth outside of the boundaries of the district.[4] If the district shall undertake to distribute the water so obtained, it shall have the exclusive right thereto and may maintain an action against any person for using the same without the consent of the district, and may regulate the distribution and use of said water within and without said district, and from time to time fix water rates and charges for the water and water facilities furnished by the district, which may be based on the quantity of water used or the number and kind of water connections made or the number and kind of plumbing fixtures installed on the estate or upon the number or average number of persons residing *or working in or otherwise connected therewith* or upon any other factor affecting the use of or the value or cost of the water and water facilities furnished or upon any combination of such factors, and the owner of any *house,*

[4] Section 1 of the Charter excludes portions of Portsmouth, such as the Islands of Narragansett Bay and the U.S. naval base, which are not relevant here.

> *building, tenement or estate* shall be liable for the payment of the water rates, and charges fixed by the district; and such water rates, and charges shall be a lien upon such *house, building, tenement, and estate* in the same way and manner as taxes assessed on real estate are liens, and if not paid as required by the district, shall be collected by said district in the same manner that taxes assessed on real estate are by law collected. *Charter Sec.* 5, 1952 R.I. Acts & Resolves 583-96 (R.I. 1952) (emphasis added); H 840 A, 79th Gen. Assemb., Jan. Sess. (R.I. 1952).

Black's Law Dictionary defines "inhabit" as "To dwell in; to occupy permanently or habitually as a residence." Black's Law Dictionary (10th ed. 2014). It is clear to this Court that the use of the word "inhabitants" as it relates to providing water within the PWFD has a far more expansive meaning than the literal definition referenced above and as urged by PWFD. *See Chang v. Univ. of Rhode Island,* 118 R.I. 631, 643, 375 A.2d 925, 931 (1977) (explaining that the court is not required to have tunnel vision when interpreting a statute; in fact, "every word, clause and sentence of a statute must be given effect if possible").

For example, when referring to charges associated with water use, Section 5 states that the board may consider "the number of persons residing or working in or otherwise connected therewith." The use of the word "working" obviously contemplates a business, which would not fit within the literal definition of "inhabitant." It also references that the "owner[s] of any house, building, tenement or estate shall be liable for the payment of the water rates . . . ." The use of the word "house" implies a residence, but Section 5 also references "building, tenement or estate," which all have a much broader meaning than inhabitants of a home. "Tenement" is defined as "Property held by freehold; an estate or holding of land." Black's Law Dictionary (10th ed. 2014). "Freehold" is defined as "An estate in land held in fee simple, in fee tail, or for term of life; any real-property interest that is or may become possessory." Black's Law Dictionary (10th ed. 2014). Also, Black's Law Dictionary defines "estate" as "The amount, degree, nature, and quality of a person's interest in land or other property; especially, a real-

estate interest that may become possessory." Black's Law Dictionary (10th ed. 2014). This language clearly supports a much boarder approach than the literal definition of "inhabitant." *See Sugarman v. Lewis*, 488 A.2d 709, 711 (R.I. 1985) ("A statute should not be interpreted literally, however, even though clear and unambiguous, when such a construction will lead to a result at odds with the legislative intent."). Reading Section 5 in its entirety, this Court finds that the use of the word "inhabitants" within Section 5 is not intended to be applied based upon the literal definition urged by PWFD. Therefore, this Court finds that a broader interpretation of the term "inhabitants" is necessary to carry out the intent of the Charter.

This conclusion is also consistent when reviewing other sections of the Charter. For example, Section 5(A) is entitled "Mandatory Connection" and provides that, "[t]he administrative board may by resolution order the owner of *any estate* abutting any portion of any street or highway in which any main constituting part of the district's water system is situated to connect the water-using facilities on said estate with such main." (Emphasis added). It is incongruent to hold that PWFD is only required to provide water based upon the literal definition of inhabitant, yet has the power and authority to mandate that "any estate" connect to an abutting main. In this Court's opinion, such an interpretation would be clearly contrary to the purpose of the Charter. *See State v. Hazard*, 68 A.3d 479, 485 (R.I. 2013) ("Therefore, [the Court] must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.") (Internal quotation marks omitted).

Furthermore, Section 10, which is entitled "Authority To Tax," gives the district the power to order, assess and collect taxes on ratable real estate for purposes of maintaining a supply of water and paying its expenses. Again, it does not make sense that the district can tax all real estate but only be required to provide water to people who actually "inhabit" the district.

See Grasso v. Raimondo, 177 A.3d 482, 490 (R.I. 2018) ("Wherever possible, a statute is to be construed in a way which will render it reasonable, fair and harmonious with its manifest purpose, and which will conform with the spirit of the act.") (Citation omitted). If the Court were to adopt PWFD's position, it would mean that the district would not have to provide water to businesses or farmland that have no residential component, but could tax both. To this Court, that appears to be an absurd result.

Also, PWFD's position that the Court should consider a host of other factors as listed in its supplemental brief would also create an absurd result.[5] It would require a case by case analysis which would make a consistent and workable application of PWFD's policy impossible.

Rather, this Court finds that the Charter clearly establishes an inextricable link between taxation and services. The Charter only makes sense if the power to tax is linked to the right to receive services. The power to tax as found in Section 10 is broad and has no limitation as to the type of ratable real property that is subject to taxation. Therefore, based upon the facts of this case concerning the subdivision at issue, which was approved by the Middletown and Portsmouth planning boards, this Court concludes that sub-lots 1, 2 and 4, based upon the Charter, are entitled to connect to the water main because each lot has taxable property within the confines of the district. As sub-lot 3 does not have land within the confines of Portsmouth, it is not entitled to connect to the water main based upon the language of the Charter.

[5] Such factors include which town the residents of the disputed sub-lots will be eligible to vote in, which school system the residents will attend, which town the residents will pay real estate taxes to, and which town will render municipal services to the disputed sub-lots (*i.e.*, sanitation, fire department and snow removal).

2

Section 46-15-2

PWFD next argues that pursuant to § 46-15-2, it is prohibited from providing water service beyond the boundaries of its water district without approval from various state agencies. Section 46-15-2 provides in pertinent part:

> (a) No municipal water department or agency, public water system, including special water districts or private water company, engaged in the distribution of water for potable purposes shall have any power:
>
> . . .
>
> (3) To extend its supply or distribution mains into a municipality or special water district wherein it has not heretofore legally supplied water;
>
> . . .
>
> (5) To extend the boundaries of a special water district; or
>
> (6) To supply water in or for use in any other municipality or civil division of the state which owns and operates a water supply system therein, or in any duly organized special water district supplied with water by another municipal water department or agency, special water district, or private water company, until the municipal water department or agency, special water district, or private water company has first submitted the maps and plans therefor to the director of the department of health, the state planning council and the board, as hereinafter provided, and until the water resources board, after receiving the recommendations of the director of the department of health and the division of statewide planning, shall have approved the recommendations or approved the recommendation with modifications as it may determine to be necessary; provided, however, this subsection shall not apply to any area presently served by any municipal water department or agency, or special water district. Secs. 46-15-2(a)(3), (a)(5), and (a)(6).

Middle Creek argues that the provisions of § 46-15-2 do not preclude PWFD from supplying water to the lots at issue in this case because PWFD already serves properties located in Middletown pursuant to a stipulation entered in the case of *Brennan v. Esposito*, C.A. No. NC-

1985-0264.[6] PWFD claims that Middle Creek's position is incorrect because of the details of the relationship between itself and the Newport Water Division (NWD).[7] However, regardless of the parties' arguments concerning the proper application of § 46-15-2, this Court has already determined that, based upon the language of the Charter, PWFD will not be wrongfully supplying water to sub-lots 1, 2 and 4 because each sub-lot contains taxable property within the confines of the district. Any further determination regarding the application of § 46-15-2 is appropriately left to the Rhode Island Water Resources Board (the Board). Specifically, subsection (c) of this provision provides that the Board "shall enforce the provisions of [§ 46-15-2]," and thus explicitly vests jurisdiction in the Board to make such a determination as is disputed by the parties.[8]

Furthermore, Chapter 46-15, Water Resources Management, establishes an administrative process as a precursor to judicial review that is to be used to address territorial issues regarding the appropriate provision of water. Specifically, § 46-15-4 sets forth a clear process where a petitioner can seek approval from the Board under various circumstances and § 46-15-8 allows the Board to promulgate rules and regulations as may be required for the enforcement of chapter 15. In addition, because the Board is the state agency created to ensure the proper development, protection, conservation and use of the state's water resources, the Administrative Procedures Act provides a formal method whereby a party aggrieved by a final

[6] The *Brennan* Stipulation was entered on August 2, 1985. Subsequently, § 46-15-2 was enacted in 1990 and was later supplemented in 1995. *See* P.L. 1990, ch. 461, § 4; P.L. 1995, ch. 370, art. 30, § 2; *Brennan v. Esposito*, C.A. No. NC-1985-0264.

[7] As stated in the stipulated facts, *infra*, Newport Water Division, which provides water service to Middletown, has no objection to PWFD servicing all eleven Middle Creek lots.

[8] Section 46-15-2(c) reads "The water resources board shall enforce the provisions of this section, and the superior court by injunction may, upon application of the water resources board, prevent any action to be taken by any municipal water agency or department, special district, or private water company without the approval of the water resources board as required by this section."

order in a contested case can seek judicial review and appeal to the Superior Court. *See* § 46-15.1-1 ("The water resources board . . . constitutes a body politic . . . and a public instrumentality of the state"); §42-35-1(1) ("a state agency . . . is authorized by law of [Rhode Island] to make rules or to determine contested cases"); §§ 42-35-15 and 42-35-15.1. Therefore, if PWFD has any concerns regarding the application of § 46-15-2, it should first address them with the Board.[9] *See Heritage Healthcare Servs., Inc. v. Marques*, 14 A.3d 932, 934 (R.I. 2011) (explaining that the Superior Court's role is essentially that of judicial review in which deference should be accorded to agency decision-making in the area of the agency's special knowledge and expertise). This Court will not usurp the power and authority of the Board by allowing the parties to ignore the appropriate administrative procedures. Finally, if the Board does assume jurisdiction, it may provide approval which would resolve the within controversy.

Therefore, the Court reiterates that based upon the language of the Charter, PWFD will not be wrongfully supplying water to sub-lots 1, 2 and 4 because each sub-lot contains taxable property within the confines of the district, and this Court makes no determination as to whether § 46-15-2 applies, or does not apply, to PWFD regarding the provision of water service to the disputed sub-lots.

III

PWFD's Motion to Dismiss for Failure to Join Indispensable Parties

PWFD's motion argues that this case should be dismissed pursuant to Rule 12(b)(7) for failure to join indispensable parties. Specifically, PWFD maintains that approximately fifty-three properties that straddle the Portsmouth/Middletown line have an interest in the outcome of this litigation because it may affect their ability to request water services from PWFD in the

[9] This Court notes that the parties have not sought a determination from the Board regarding the applicability of § 46-15-2 and/or the appropriateness of PWFD providing water to the Middle Creek lots.

future.[10] PWFD uses the standards for joinder under § 9-30-11, the Uniform Declaratory Judgments Act (UDJA), and Super. R. Civ. P. 19 interchangeably, although both are distinct. The Court will, therefore, proceed with its analysis under both standards and address the distinctions between the two as needed.

A

UDJA

Middle Creek's complaint for declaratory and injunctive relief was brought under the provisions of the UDJA. The UDJA is broad in scope and is to be liberally construed and administered to provide a simple and effective means by which parties may secure a binding judicial determination of their "rights, status [or] . . . relations." *See Arnold v. Lebel*, 941 A.2d 813, 817 (R.I. 2007). Section 9–30–11 provides, in pertinent part, that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." This requirement furthers the purpose of the UDJA, which is '"to facilitate the termination of controversies."' *Abbatematteo v. State*, 694 A.2d 738, 740 (R.I. 1997) (quoting *Thompson v. Town Council of Westerly*, 487 A.2d 498, 499 (R.I. 1985)). Our Supreme Court has held that the above-cited provision in § 9–30–11 is mandatory. *Thompson*, 487 A.2d at 499; *In re City of Warwick*, 97 R.I. 294, 296, 197 A.2d 287, 288 (1964). Therefore, "[o]rdinarily[,] 'failure to join all persons who have an interest that would be affected by the declaration' is fatal." *Abbatematteo*, 694 A.2d at 740 (quoting *Thompson*, 487 A.2d at 499).

"[W]hen a [declaratory] judgment is not binding on all persons who have a direct interest in the dispute, the Superior Court should not assert jurisdiction." *Id.* at 740. In making the

[10] Originally, PWFD moved to dismiss Middle Creek's verified complaint for failure to join a third-party purchaser of sub-lots 2 and 3; however, Middle Creek has since joined all third-party purchasers.

determination whether a party should be joined in a case under § 9-30-11, the Superior Court must consider whether the binding effect of the declaration sought would truly "facilitate the termination of controversies." *See* § 9-30-11; *Burns v. Moorland Farm Condo. Ass'n*, 86 A.3d 354, 359 (R.I. 2014). For example, "[i]n *Burns*, the plaintiff condominium owners had sued the condominium association, but not the owners of the other condominium units whose property had been improved, even though the complaint sought and the judgment specifically decreed that costs would be allocated to those owners." *Town of Warren v. Bristol Warren Reg'l Sch. Dist.*, 159 A.3d 1029, 1037 (R.I. 2017) (citing *Burns*, 86 A.3d at 359). The Supreme Court vacated the judgment, explaining "the fact that these unit owners [we]re being ordered to bear an additional burden even though they were not part of the case undermine[d] the purpose of declaratory-judgment actions." *Burns*, 86 A.3d at 359. Again, "[i]n *Abbatematteo*, the plaintiffs sought to enjoin the defendants from paying retirement benefits to certain individuals entitled to benefits if those individuals received disproportionately generous benefits in comparison with the plaintiff members of the retirement system. *Town of Warren*, 159 A.3d at 1037 (citing *Abbatematteo*, 694 A.2d at 740). The Supreme Court explained "[d]isposition of the action in plaintiffs' favor, therefore, would reduce or eliminate pension benefits for these 'favored' members of the retirement system" and held that "the trial justice correctly ruled that these members were indispensable parties [in the context of a declaratory judgment action] that should have been joined . . . ." *Abbatematteo*, 694 A.2d at 740. In both *Burns* and *Abbatematteo*, the parties who were not joined would have been directly affected by the judgment sought. *See Sullivan v. Chafee*, 703 A.2d 748, 754 (R.I. 1997) (failure to join all members of the nine-person Warwick City Council was fatal); *In re City of Warwick*, 97 R.I. at 296–97, 197 A.2d at 288 (failure to join all members of three local boards meant that any declaratory judgment issued by the court would have no binding effect on the absent board members).

In the case before the Court, none of the other fifty-three properties have a direct claim upon the subject of the action such that joinder of that party will cause it to lose anything by operation of the judgment rendered. PWFD has failed to demonstrate how any of the other fifty-three property owners, whose land straddles the Portsmouth/Middletown line, satisfy the § 9-30-11 criteria. PWFD has failed to establish that any of the properties have "an actual, present, adverse, and antagonistic interest" in the judgment. *See Town of Warren*, 159 A.3d at 1037 (quoting 22A Am. Jur. 2d *Declaratory Judgments* § 204 at 859 (2013)). Specifically, Middle Creek prays for a declaratory judgment that PWFD be required to provide water services to all eleven lots located in the subdivision, which include the four lots at issue in this litigation. PWFD, however, has not presented a scintilla of evidence demonstrating how the Court's declaration in the instant matter would negatively affect the other fifty-three properties. Nor has PWFD made an assertion that a subdivision or major/minor land development application has been filed by any of the other fifty-three property owners that would require PWFD to provide water services to future sub-lots.

Instead, PWFD argues that *it* will have to litigate the underlying issue—whether or not PWFD is required to provide water services to the properties—every time a property straddling the Portsmouth/Middletown line files an application for water service because the other fifty-three properties "*may contain, either now or in the future*, single family homes, multi-family dwellings, or condominiums." (Def.'s Suppl. Mem. in Opp'n to Pls.' Mot. for Summ. J. 16) (emphasis added). This argument is purely "speculative." *See Bacardi Int'l Ltd. v. V. Suarez & Co., Inc.*, 719 F.3d 1, 13 (1st Cir. 2013), *cert. denied*, 134 S. Ct. 640 (2013). The inquiry is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk is insufficient and will not satisfy the § 9-30-11 criteria. *See id.* As such, PWFD has failed to establish that the owners of the fifty-three properties should be joined under § 9-30-

11 because no demonstration has been made that the parties "claim any interest which would be affected by the [Court's] declaration," or that the Court's declaration will "prejudice the rights of [the fifty-three property owners] not parties to the proceeding." *See* § 9-30-11.

B

Rule 19

As for joinder of an indispensable party under Super. R. Civ. P. 19, the Court's analysis is much narrower. "[An indispensable] party is a person, natural or artificial, who has a legal or beneficial *material interest* in the subject matter or event of the litigation" that is likely to be defeated or diminished by the litigation. *See Grubb v. Grubb*, 630 S.E.2d 746 (Va. 2006) (emphasis added). A person is indispensable to an action when the person "is so vitally interested in the controversy [involved in the action] that a valid judgment cannot be rendered in the action completely and finally determining the controversy without [that person's] presence" as a party. *See Karner v. Roy White Flowers, Inc.*, 527 S.E.2d 40 (N.C. 2000). Rule 19(a) of the Superior Court Rules of Civil Procedure "is abundantly clear in its requirements for joining indispensable parties." The purpose is to ensure the proper resolution of any issues before the Court. *Rosano v. Mortg. Elec. Registration Sys., Inc.*, 91 A.3d 336, 340 (R.I. 2014). Specifically, Rule 19(a) provides:

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

Our "[Supreme] Court has defined an indispensable party as one 'whose interests could not be excluded from the terms or consequences of the judgment . . . as where the interests of the absent party are inextricably tied in to the cause . . . or where the relief really is sought against the absent party alone."' *Rosano*, 91 A.3d at 340 (quoting *Root v. Providence Water Supply Bd.*, 850 A.2d 94, 100 (R.I. 2004)).

Rule 19(a) "recognizes the difference between persons whose joinder in an action is absolutely essential if the action is to proceed at all and those who ought to be joined but in whose absence the action can, nevertheless, continue." *Doreck v. Roderiques*, 120 R.I. 175, 179, 385 A.2d 1062, 1064 (1978). Under Rule 19, "[t]he first class of such persons is referred to as 'indispensable' and the latter group as 'necessary.'" *Id.* "Rule 19(b) provides that the court may, in its discretion, proceed with the action as to those present unless the absentee is an 'indispensable' party.'" *See* Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure* § 19:2 at 203 (2017-2018 ed.). A party who is "merely necessary" does not have an actual and essential interest in the litigation that would be affected by the declaration and thus is not "indispensable." *Stevens v. Loomis*, 334 F.2d 775, 777 (1st Cir. 1964); *see Meyer v. City of Newport*, 844 A.2d 148, 152 (R.I. 2004). Furthermore, "[t]he burden is on the party raising the defense to show that the person who was not joined is needed for a just adjudication." 7 Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 3d § 1609 at 129 (2001).

"[A] court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." *Doreck*, 120 R.I. at 180, 385 A.2d at 1064-65. "The most important factor in determining whether a party is indispensable is 'whether a judgment entered in the case may have separable affirmative consequences with respect to parties before the court.'" *Retirement Bd. Of Emps.' Ret. Sys. of State v. DiPrete*, 845 A.2d 270, 285 (R.I. 2004) (quoting *Doreck*, 120 R.I. at 180, 385 A.2d at

1065). A court must therefore look to whether complete relief can be afforded without joining the parties and whether any of the current litigants will face multiple or inconsistent results for claims that should be resolved together. *Desjarlais v. USAA Ins. Co.*, 824 A.2d 1272, 1274 (R.I. 2003).

Here, PWFD has failed to establish that the issue before the Court applies to any of the other fifty-three properties whose land straddles the Portsmouth/Middletown line or that the Court's judgment would have "separable affirmative consequences" on the other fifty-three property owners. Importantly, PWFD has provided no evidence that the parties have an interest in the provision of water to the four Middle Creek sub-lots in dispute or that disposition of this case would adversely affect any of the other fifty-three properties. *See Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 16 (1st Cir. 2008) (explaining that joinder is necessary where a judgment in the case would *weaken* the absent party's bargaining position for settlement purposes) (emphasis added)*; In re Wilson's Estate*, 315 P.2d 287 (Wash. 1957) (explaining that persons who may be involved in the subject matter of the action are not necessary parties if no recovery is sought against them and they would not be prejudiced by the judgment.); *see also* 22A Am. Jur. 2d § 204 at 859. "[T]rue indispensable parties are only those whose interests could not be excluded from the terms or consequences of the judgment and leave anything, or appreciably anything, for the judgment effectively to operate upon, as where the interests of the absent party are inextricably tied in to the cause . . . or where the relief really is sought against the absent party alone." *DiPrete*, 845 A.2d at 285. Here, PWFD has provided no evidence that any of the parties not joined have interests that "are inextricably tied to the cause" or that the relief sought by Middle Creek is in actuality "sought against the absent parties alone." *See id.* Thus, PWFD has failed to establish that joinder is required under Rule 19.

C

"Limiting Principles"

Even if this Court were to find that the owners of the fifty-three properties should be joined, joinder in the instant case would warrant the application of "limiting principles" where courts are encouraged to make practical considerations when a § 9-30-11 and/or Rule 19 inquiry is at issue. *See City of Philadelphia v. Commonwealth*, 838 A.2d 566, 566 (Pa. 2003). The application of limiting principles requires the "trial court to make pragmatic [common sense] judgments and to decide whether considerations of efficiency and fairness, growing out of the particular circumstances of the case, [would] require [or prohibit] that a particular person be joined [or not joined] as a party." *Picciotto*, 512 F.3d at 14-15 (footnote and quotation omitted). The Rhode Island Supreme Court has not formally adopted the "limiting principles" approach; however, the Court has acknowledged that "impracticability [of joinder] may exist when the members of the class whose rights are to be affected are so numerous or service upon them would entail such difficulties as would impose an unreasonable burden on the moving party."[11] *In re City of Warwick*, 97 R.I. at 297, 197 A.2d at 289. Other jurisdictions have formally acknowledged the "limiting principles" approach and provide helpful insight. For example, in *City of Philadelphia*, the Supreme Court of Pennsylvania considered the question of indispensability in the context of a constitutional challenge, applying a substantially identical provision to § 9-30-11.[12] 838 A.2d at 566. The defendants therein argued that anyone who may

[11] In *R.I. Pub. Emps.' Retiree Coalition v. Chafee*, No. PC 123166, 2014 WL 3685916, at *5 (R.I. Super. July 17, 2014), the Rhode Island Superior Court addressed this issue in the context of constitutional challenges; however, this Court remains mindful that this is non-binding precedent.

[12] In addition to cases involving constitutional challenges, other jurisdictions have applied limiting principles to cases involving claims for breach of contract and statutory interpretation. *See, e.g.*, *Mid-Ctr. Cty. Auth. v. Twp. of Boggs*, 384 A.2d 1008 (Pa. 1978); *Town of Blooming*

be affected by any aspect of the challenged legislation must be formally joined for jurisdiction to lie. *Id.* at 566-67. The Court acknowledged that while the "joinder provision is mandatory . . . it is subject to limiting principles." *Id.* at 582. In particular, the Court construed the UDJA as

> subject to reasonable limitations: if that provision were applied in an overly literal manner in the context of constitutional challenges to legislative enactments containing a wide range of topics that potentially affect many classes of citizens, institutions, organizations, and corporations, such lawsuits could sweep in hundreds of parties and render the litigation unmanageable. It is true that all such parties would be affected, at least incidentally, by a declaration that the statute in question is unconstitutional . . . . However, requiring the joinder of all such parties would undermine the litigation process. *Id.* at 582-83.

The Court explained that requiring all parties who have an interest that could potentially be affected if the Court were to invalidate the statute would be "impractical." *Id.* at 583. Further, "such an interpretation would result in an unwieldy judicial resolution process [and thus] . . . run contrary to the Legislature's direction . . . to settle, and afford relief from, uncertainty relative to rights, status, and other legal relations." *Id.* at 583.

Even if the owners of the fifty-three other properties did satisfy the § 9-30-11 and/or Rule 19 criteria, the present case warrants the application of reasonable limits upon the application of the joinder provisions. PWFD cites fifty-three properties whose land straddles the Portsmouth/Middletown line; however, based upon the property record cards submitted with PWFD's exhibits, the number of parties subject to service of process has the potential to far exceed this number due to the fact that several of the properties include multi-family homes, condominium associations, properties owned by multiple individuals and entities, and government housing. *See* Def.'s Suppl. Mem. Ex. C. The identification of and service upon such a large number of individual persons and entities, many of which may not have any interest

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Grove v. City of Madison, 81 N.W.2d 713 (Wis. 1957); *White House Milk Co. v. Thomson*, 81 N.W.2d 725 (Wis. 1957).

in this issue, is highly conjectural and constitutes a "circumstance [ ] where it is impractical to require the joinder of all [property owners]" because those owners whose rights *may* "be affected are so numerous or service upon them would entail such difficulties as would impose an unreasonable burden." *In re City of Warwick*, 97 R.I. at 297, 197 A.2d at 289; *see Philadelphia*, 838 A.2d at 568. Not to mention how joinder of the fifty-three plus parties would cripple the litigation, making it impossible to come to a final resolution. Finally, PWFD has failed to demonstrate that any of the fifty-three properties it seeks to join to the instant litigation would suffer negative ramifications as a result of this Court's decision. Instead, PWFD argues that it would be inconvenienced if it had to litigate the instant matter every time a property straddling the Portsmouth/Middletown line files an application for water service. The analysis, however, is whether this Court's declaration will prejudice the rights of persons not parties to the proceeding and *not* whether the parties to the instant case will be inconvenienced in the future by the Court's declaration. *See* § 9-30-11.

Accordingly, because the fifty-three other property owners do not have an interest that is adversely affected or "inextricably tied to the cause" and because the possibility of being subject to multiple obligations is too speculative, PWFD's Motion to Dismiss for Failure to Join Indispensable Parties is denied. *See DiPrete*, 845 A.2d at 285 (citation omitted). Furthermore, the prospect of joining the owners of the fifty-three properties would paralyze the litigation and is also denied on that basis.

IV

Conclusion

Based on the reasons articulated more fully above, Middle Creek's Motion for Summary Judgment based upon equity is denied as there are genuine issues of material fact. Middle Creek's Motion for Summary Judgment regarding sub-lots 1, 2, and 4, all of which have a portion of land located in Portsmouth, is granted and sub-lots 1, 2, and 4 shall have the right to connect to the PWFD water system pursuant to the Charter. Middle Creek's Motion for Summary Judgment regarding sub-lot 3, which has no land located in Portsmouth, is denied and sub-lot 3 has no right to connect to the PWFD water system pursuant to the Charter, because it contains no land in Portsmouth.

Finally, PWFD's Motion to Dismiss for Failure to Join Indispensable Parties is denied because the fifty-three other property owners do not have an interest that is adversely affected or "inextricably tied to the cause" and because the possibility of being subject to multiple obligations is too speculative. Further, PWFD has failed to demonstrate how this decision would negatively affect the straddling landowners' rights.

Counsel shall confer and present the appropriate form of order.

APPENDIX A

OLD MILL LANE

PEQUOT LANE

CORNELIUS DRIVE

MIDDLE CREEK FARM SUBDIVISION

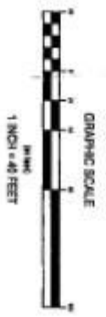
13172.1

SUBDIVISION PLAN

C-5

SHEET 5 of 18

APPENDIX B



NORTHEAST ENGINEERS & CONSULTANTS, INC.

AS-BUILT WATER MAIN

CORNELIUS DRIVE

26-3

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Middle Creek Farm, LLC, et al. v. Portsmouth Water & Fire District, et al.
CASE NO:	NC-2016-0231
COURT:	Newport County Superior Court
DATE DECISION FILED:	April 5, 2018
JUSTICE/MAGISTRATE:	Van Couyghen, J.

ATTORNEYS:

For Plaintiff:	Neil P. Galvin, Esq.; James A. Hall, Esq.
For Defendant:	Adam Ramos, Esq.; Joseph A. Keough, Jr., Esq.