

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(FILED: January 8, 2020)

FRANCIS DIGREGORIO,

Plaintiff,

v.

C.A. Nos. WC-2018-0407
WC-2018-0590

MARIA LAWLER,
IN HER CAPACITY AS THE
TREASURER OF THE TOWN OF
EXETER

and

KEVIN P. MCGOVERN, DANIEL W.
PATTERSON, RAYMOND A.
MORRISSEY, JR., CALVIN A. ELLIS,
AND FRANCIS T. MAHER, JR., IN
THEIR CAPACITIES AS MEMBERS
OF THE EXETER TOWN COUNCIL

Defendants,

v.

GREEN DEVELOPMENT, LLC
A/K/A WIND ENERGY, LLC

Intervenor.

DECISION

LANPHEAR, J. Plaintiff Francis DiGregorio (Mr. DiGregorio) appeals the passage of an amendment to Exeter’s Zoning Ordinance (the Amendment) contending that it is inconsistent with

the specific provisions and goals of Exeter's Comprehensive Plan and therefore invalid. The Amendment restricts certain solar power projects. Defendant Town of Exeter (the Town) agrees that the Amendment is not consistent with the Comprehensive Plan. Interpleader Green Development, LLC (Green) denies that the Amendment is invalid; Green asserts that the Amendment is, in fact, consistent with the Comprehensive Plan. Both the Town and Mr. DiGregorio have moved for summary judgment. This Court has jurisdiction pursuant to G.L. 1956 § 45-24-71.

I

Facts and Travel

Green is in the business of developing commercial-scale renewable energy projects, including those that involve solar power. By 2016, Green was working toward installing large solar energy fields in Exeter. *Green Development, LLC v. Town of Exeter*, WC-2018-0636, 2019 WL 1348609 at *1 (R.I. Super. Mar. 21, 2019).

On January 2, 2018, Green submitted a Petition to the Town seeking to amend the Zoning Ordinance. The Petition sought to allow the development of utility-scale, ground-mounted solar photovoltaic facilities (Solar Projects) by right in certain areas. Green was the largest owner and operator of renewable projects in Rhode Island and had already filed applications to develop Solar Projects in Exeter at the time the Amendment was submitted. Def.'s Mot. Summ. J. Ex. B-6.

The Amendment was referred to the Planning Board for study and recommendation. The Planning Board held a hearing at which both Mr. DiGregorio and a representative for Green were present and had an opportunity to speak. Def.'s Mot. Summ. J. Ex. B-2. On May 29, 2018, the Planning Board provided its findings and recommendations to the Town Council. In its

recommendation, the Planning Board found the Amendment did not comport with the Comprehensive Plan.

The Town Council held a public hearing on the Amendment on April 2, 2018. The hearing was continued to July 9, 2018. On July 16, 2018, the Town passed the Amendment by a vote of 3-2.¹ The Amendment changed the zoning designation of fifteen lots to permit-by-right development of Solar Projects; in other words, the applicant would not need to obtain permission from the Zoning Board or Planning Board to develop Solar Projects. These lots were all located in RU-3 and RU-4 Zoning Districts.

Under the Zoning Ordinance, an RU-3 designation “provide[s] adequate land suitable for low density residential rural development blended with forestry, farming and recreational activities.” An RU-4 designation “protect[s] land now used for forestry, farming and related activities and the natural habitat and wildlife and to preserve the area’s rural character. This zone provides land suitable for low density residential development and reserves land for future farming, forestry, conservation practices and recreational uses.” The Comprehensive Plan designates these lots as either “Low Density/Environmental,” “Medium Low Density,” or “Open Space.”²

¹ This vote was later rescinded, which is the subject of *DiGregorio v. Lawler*, C.A. No. WC-2018-0590.

² The Comprehensive Plan describes for these “Low Density/Environmental” type areas.

“This four-acre minimum lot size category dominates the eastern half of the town that is home to an extensive Aquifer Recharge area associated with the Queens River, as well as having numerous tributary brooks and their associated hydric soils. In general, soil constraints and the presence of this extensive recharge area associated with this regional water supply demand that development be limited and responsive to the potential impacts it may have on these high quality resources. As a result all areas within the recharge

Green now proposes to develop approximately sixty-five megawatts of utility-scale solar photovoltaic facilities on four lots included in the Amendment. It promptly submitted four applications to the Town seeking approvals for the Solar Projects on lots that were rezoned under the Amendment.

In November 2018, several Town Council members were replaced in the local election, including two of the three individuals who had supported the Amendment. *Green Development*, 2019 WL 1348609 at *3. On February 4, 2019, the Town Council amended the Zoning Ordinance and replaced the Amendment with a version it deemed to be in compliance with the Town’s Comprehensive Plan. The new amendment stopped allowing Solar Projects to be developed by right in the areas at issue here.

areas are now indicated for low-density residential use.” Def.’s Mot. Summ. J. Ex. B-11 at 5.2-20-21.

As to the “Medium Low Density” areas, the Comprehensive Plan explains that “[t]his district is found in those areas of reduced environmental constraints to the east of the New London Turnpike. These areas lie outside of the aquifer and its recharge areas dominating that area adjacent to the ... Towns of East Greenwich and North Kingstown.” *Id.* at 5.2-21.

Lastly, as to the “Open Space” areas, the Comprehensive Plan states that

“identif[ying] state lands and other lands held for recreation and conservation purposes, such as those owned by the Audubon Society. The purpose of this designation is to protect against the conversion of these lands to another use inconsistent with that now in existence. Other lands that are purchased or controlled by the town or others (i.e., Land Trust or other conservation group) can be added to this category over time. The town should continue to identify important lands for acquisition in the future that result in the protection of valuable natural resources, the preservation of prime farmlands, provide public access or support the creation of a town-wide open space system. Mechanisms available include Fee Simple Purchase, the acquisition of easements, outright donation, preferred taxing, or the Transfer or Purchase of Development Rights.” *Id.* at 5.2-22-23.

These cases, WC-2018-0407 and WC-2018-0590 have been consolidated by the Court. Mr. DiGregorio appeals the enactment of the original Amendment pursuant to §§ 45-24-71, 45-24-51, 45-24-52, 45-24-53, and 45-23-61. Relevant to this motion, in his Complaint, Mr. DiGregorio also seeks a declaratory judgment that the Amendment violates the Zoning Enabling Act and injunctive relief enjoining the Town from enforcing the Amendment.

II

Issue Presented

At this juncture, the moving parties bear significant burdens. Mr. DiGregorio and the Town are pressing separate motions for summary judgment. Through its motion, the Town claims that the Amendment is inconsistent with the Town's Comprehensive Plan and therefore invalid. Mr. DiGregorio raises the same issue in a motion for summary judgment. The Town argues that Mr. DiGregorio—in his Complaint and the attached twenty-page opinion of the Exeter Planning Department—specified the inconsistencies with the Comprehensive Plan with “extremely detailed particularity.” Def.’s Mem. in Further Supp. of Obj. to Mot. for Summ. J. 2.

III

Analysis

When this Court reviews an amendment to a zoning ordinance, § 45-24-71(c) provides:

“The court shall first consider whether the enactment or amendment of the zoning ordinance is in conformance with the comprehensive plan. If the enactment or amendment is not in conformance with the comprehensive plan, then the court shall invalidate the enactment or the amendment, or those parts of the enactment or amendment which are not in conformance with the comprehensive plan. The court shall not revise the ordinance to conform with the comprehensive plan, but may suggest appropriate language as part of the court decision.”

The rules of statutory construction apply to the construction of a zoning ordinance. *West v. McDonald*, 18 A.3d 526, 532 (R.I. 2011). When the language is clear and unambiguous, the Court will give the words “their plain and ordinary meaning.” *Id.* (internal citations omitted). “Additionally, ‘when the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency, or board, charged *with its enforcement* is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized.’” *Id.* (quoting *Pawtucket Transfer Operations v. City of Pawtucket*, 944 A.2d 855, 859-60 (R.I. 2008)) (emphasis added). At the summary judgment stage, it is the obligation of the parties to point “to the specific portions of the discovery materials upon which such part[ies] rel[y]” and not the obligation of this Court to sift through hundreds of pages of documents *sua sponte*. See *Nedder v. Rhode Island Hospital Trust National Bank*, 459 A.2d 960, 962 (R.I. 1983).

Although the statute directs the Court to first consider compliance with the Comprehensive Plan, it sets a heavy burden to strike down such a statute. “As a general principle, amendments to zoning ordinances are presumed valid. If the amendment ‘reasonably relates to the public health, safety or welfare, then the comprehensive plan remains intact and the amendment is valid.’” *Skelley v. Zoning Board of Review of Town of South Kingstown*, 569 A.2d 1054, 1058 (R.I. 1990) (quoting *Mesolella v. City of Providence*, 439 A.2d 1370, 1374 (R.I. 1982)); see *Barber v. Town of North Kingstown*, 118 R.I. 169, 176, 372 A.2d 1269, 1273 (1977) (“A court may strike down an amendment only if the amendment bears no reasonable relationship to the public health, safety or welfare.”) (quoting *Sweetman v. Town of Cumberland*, 117 R.I. 134, 144, 364 A.2d 1277, 1285 (1976))).

“[T]he party challenging a zoning amendment has the burden of proving that the so-called comprehensive plan has not been followed.” *Mesolella*, 439 A.2d at 1374 (citing *Willey v. Town*

Council of Barrington, 106 R.I. 544, 560, 261 A.2d 627, 635 (1970)); see *Colbea Enterprises, L.L.C. v. City of Warwick*, KC-2008-0074, 2009 WL 3328537 at *3 (R.I. Super. Jan. 21, 2009) (noting in the Superior Court that the plaintiff “bears the heavy burden of proving that the amendment is inconsistent with the Comprehensive Plan”). “Furthermore, an amendment is presumed to be valid and the plaintiff must demonstrate that no such reasonable relationship exists.” *Barber*, 118 R.I. at 176, 372 A.2d at 1273 (quoting *Sweetman*, 117 R.I. at 146, 364 A.2d at 1286).

However, when “there has been special and limited treatment of a small area inconsistent with the treatment accorded to the surrounding property[.]” the presumption of comprehensiveness will not apply. *D’Angelo v. Knights of Columbus Building Association of Bristol, R.I., Inc.*, 89 R.I. 76, 83, 151 A.2d 495, 499 (1959). “[I]n order to justify the rezoning of a limited area, there must have been either a substantial change of conditions in the area since the original comprehensive ordinance or a mistake in the original ordinance.” *Id.* at 84, 151 A.2d at 499 (considering a single lot rezoned by amendment).

The “presumption of legality can be overcome only by competent evidence.” *Verdecchia v. Johnston Town Council*, 589 A.2d 830, 832 (R.I. 1991). This evidence can range from policy considerations in the comprehensive plan to testimony provided by the parties. See *Oury v. Greany*, 107 R.I. 427, 431, 267 A.2d 700, 702 (1970).

While the intention of the legislature in requiring this Court to first search for inconsistencies is evident and well-intentioned, comparing a planning document to an ordinance is not readily accomplished. Comprehensive plans are written “to provide a basis for rational decision making regarding the long-term physical development of the municipality.” Section 45-22.2-5(a). The Exeter Comprehensive Plan, last rewritten in 2004, does not appear to reference

solar power. Plans speak of accomplishing goals for future land use. The Exeter Comprehensive Plan is crafted differently than ordinances and statutes which carve strict limitations and rules for present application.

The requirement that the Court review the compliance with the Comprehensive Plan under § 45-24-71(c) is part of a statutory scheme. Specifically, § 45-24-71(b) requires that the “complaint shall state with specificity the area or areas in which the enactment or amendment does not conform with the comprehensive plan...” In the Complaint, paragraphs 12-16, Mr. DiGregorio notes that the proposals are for RU-3 and RU-4 zones, that those zones have four-acre minimum lot size and are intended for low-density residential and rural development including forestry and farming. However, there is no showing that the proposals are inconsistent with those uses. The Build-Out Analysis (Comprehensive Plan, 5.2-14 through 5.2-20) discusses general goals, trends, findings, issues, goals and policies, but the policies do not clearly limit such a solar power installation, as a matter of law.

Mr. DiGregorio and the Town submitted the extensive Comprehensive Plan and provided general statements concerning the Amendment’s alleged inconsistencies. However, no inconsistency is conspicuous. Instead, the movants make general statements concerning the inconsistencies and urge the Court to extrapolate from the goals of the Comprehensive Plan. Impeding their quest is the language of the Comprehensive Plan itself. While it bears legal significance, it is written as a planning document: speaking of goals, resources, and what the Town wants for its future. It discusses roads, highways, economic growth, present uses, housing needs,

and the like. While the Court has reviewed the extensive document,³ no inconsistency is plain and clear.

The Town, in its memorandum of April 29, 2019, raises no direct inconsistencies between the Amendment and the Comprehensive Plan but incorporates the memorandum of the Planning Board (Exhibit B-4 to the motion). The Planning Board memorandum of May 29, 2018, reviewing the proposed amendment, states:

“The Planning Board is concerned that their ability to determine consistency with the Comprehensive Plan is severely hindered by the fact that, although now the scope of this has been narrowed to fifteen (15) parcels, they are unable to truly determine consistency because this site specific zoning amendment has not presented the applications for each of the proposed projects before the Planning Board for master plan approvals. . . . Below the Planning Board is commenting on the general concept of providing a special exception to the zoning ordinance requirements for fifteen (15) selected lots and the proposed amendments to the solar ordinance that are now part of this proposal.” Mem. of Planning Board 3.

The Planning Board clearly found that the Amendment is contradictory to *general* language about stewardship, vision, economic development, etc. but did not highlight specific language in the

³ While the trial court reviewed the lengthy Comprehensive Plan, the parties have included few citations to the Comprehensive Plan to illustrate direct inconsistencies. The Court scoured the parties’ memoranda to find clear inconsistencies without success. By example, paragraph 15 of Mr. DiGregorio’s Complaint states, “The Future Land Use Map, incorporated in the Exeter Comprehensive Plan, designates the Affected Lots, along with adjacent properties, as intended for either ‘Low Density/Environmental,’ ‘Medium Low Density,’ or ‘Open Space.’” If the Amendment allowed development of land in an area which the Comprehensive Plan designated as future open space, that may be an inconsistency. Open space is to be used for recreation and conservation. Comprehensive Plan § 4.8. The Court, on its own, attempted to compare the map of Future Land Use, in the Comprehensive Plan at Map 5.2.A with Appendix A to the Planning Board Memorandum of May 29, 2018. [This map is located in Exhibit B-11, immediately following page 5.2-19.] That appendix is a map which shows “parcels affected by Green proposal[s].” Simply put, none of the proposed solar fields appear to be in land which the Town has planned to be Open Space in the future.

Comprehensive Plan with which the Amendment was in direct contradiction with.⁴ Mem. of Planning Board 3-4. On the other hand, Green’s memorandum shows consistencies with the Comprehensive Plan.⁵ However, this Court must determine whether there are any inconsistencies, and again, no clear inconsistency is conspicuous or clearly referenced by the parties.

⁴ The Planning Board believed that the Amendment was inconsistent with certain portions of the Comprehensive Plan. The Planning Board first pointed to a portion of the Introduction (“Comprehensive Plan calls for retaining as much as possible of Exeter’s sense of place, which is the town’s most valuable asset.”). Mem. of Planning Board 3.

The Planning Board also looked to Sections 2.1, 2.2, and 4.1.1 of the Plan Summary section of the Comprehensive Plan (“the Town... [is the] stewardship for... the town’s rural character, which provide a quality of life different from what is experienced in the city or suburbs;” “The Comprehensive Plan provides the Town of Exeter with a vision that allows the community to continue to be a rural community with a unique identity and sense of place, retain its historic hamlets, scenic centers, agriculture and business, while simultaneously absorbing new growth and development in the future;” “Exeter must manage growth and accommodate change pro-actively. This entails actively pursuing economic development opportunities that will enhance the natural and built assets of the town, build upon the rural resources that set Exeter apart, and use Exeter’s rural character to the town’s advantage;” the Town “recognizing the community’s responsibility, as a steward, to maintain the unique rural identity of the town, its assets and resources;” and, “The Town of Exeter shall try to manage current and future growth and development in a manner that does not adversely affect or detract from Exeter’s unique natural, environmental and economical resources, or the general character of the Town. These assets enhance the quality of life for town residents and are vitally important to the social, economic and environmental well being of the town.”). *Id.* at 3-5.

The Planning Board then discussed Comments 12 and 15 to Section 5.2.6b of the Comprehensive Plan Issues of Land Use element (“Commercial and industrial development that is sensitive to the rural character of Exeter and sensitive to the natural environment can be positive for the community.” and “The Town has continued to explore ways to promote conservation of open space and natural resources, and to preserve its rural character.”). *Id.* at 6. Lastly, the Planning Board looked to Comment 8 to Section 5.5.7a of the Comprehensive Plan Natural & Cultural Resources element (“As new residential subdivisions continue to be built, land will become increasingly scarce and expensive. This will result in loss of open space and rural character. If development continues to occur predominantly in the form of conventional subdivisions or frontage lots on existing roads, the perception of the Town as a rural community will gradually shift to that of a suburban community.”). *Id.*

⁵ For example, Green noted that the Amendment was consistent with the stated goal in the Comprehensive Plan of promoting economic diversification. Among other examples, Green also believes that the Amendment allows for development that is consistent with the natural restraints of the land and preserves and maintains farmland.

The burden is on Mr. DiGregorio and the Town to establish noncompliance with the Comprehensive Plan. *See Mesolella*, 439 A.2d at 1374. It is difficult to do so when the Comprehensive Plan is based on future wants and needs and speaks of planning goals. Still, the proposal carries a presumption of legality. *See Skelley*, 569 A.2d at 1058. Deference is given to town councils and legislatures to enact new ordinances. To invalidate such an amendment, the moving party must demonstrate that the amendment is contrary to the public interest or does not comply with a specific part of the comprehensive plan. *See Barber*, 118 R.I. at 176, 372 A.2d at 1273.

The moving parties note that the Court should first determine whether the Zoning Ordinance is consistent with the Comprehensive Plan. *See* § 45-24-71(c). Armed with the Comprehensive Plan and counsel's memoranda, the Court has considered whether the Zoning Ordinance is in conformity and is unable to do so via the pending motions. Fact finding may be necessary. The Court therefore denies the motions for summary judgment without prejudice.

IV

Conclusion

After review of the record, this Court finds that there are still genuine issues of material fact regarding the Amendment's consistency with the Comprehensive Plan. Therefore, the motions for summary judgment are denied without prejudice.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Francis DiGregorio v. Maria Lawler, et al. v. Green Development, LLC a/k/a Wind Energy, LLC

CASE NOS: WC-2018-0407 and WC-2018-0590

COURT: Washington County Superior Court

DATE DECISION FILED: January 8, 2020

JUSTICE/MAGISTRATE: Lanphear, J.

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