STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 24, 2020)

ALEXANDRA DURYEA; CARMEN BOYAN, A MINOR CHILD BY NEXT BEST FRIEND JUSTIN BOYAN; NEELAM AHMED; STEPHAN FOLLETT; VICTORIA HUERTAS, A MINOR CHILD BY NEXT BEST FRIEND MONICA HUERTAS; JEREMI HUERTAS, BY NEXT BEST FRIEND MONICA HUERTAS; MEGHAN JANICKI, A MINOR CHILD BY NEXT BEST FRIEND SCOTT JANICKI; EVE KELLEY; CHLOE MOERS, A MINOR CHILD BY BEST FRIEND EWA ROSELLI; GREG (CHIP) SLAYBAUGH; PHILIP TIERNEY, A MINOR CHILD BY NEXT BEST FRIEND JENN TIERNEY; CATHERINE SCOTT; JAMIEL CONLON; NATURE'S TRUST RHODE ISLAND; SISTERS OF MERCY ECOLOGY; AND MERCY ECOLOGY, INC.	:	
v.	:	
RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; JANET COIT, IN HER CAPACITY AS DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	:	**C.A. No. PC-2018-7920**

DECISION

M. DARIGAN, J. Before this Court is the Rhode Island Department of Environmental Management and Director Janet Coit's (Defendants) motion to dismiss Plaintiffs' amended Complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. For the reasons that follow, Defendants' motion is granted.

I

Facts and Travel

The facts pertinent to the motion to dismiss are brief. On September 5, 2018, a group of Rhode Island residents, as well as several non-profit organizations (Plaintiffs), filed a petition with the Department of Environmental Management (DEM) proposing the enactment of certain rules "to address urgent problems posed by climate change to the health of Petitioners." (Pls.' Am. Compl., at 20-21.) Plaintiffs brought this petition to DEM pursuant to G.L. 1956 § 42-35-6 of the Administrative Procedures Act (APA or Rhode Island APA), which provides that "[a]ny person may petition an agency to promulgate a rule." In support of the petition, Plaintiffs submitted materials containing "extensive evidence of the best available science demonstrating both the urgent need for action and Defendant's authority to do so." (Pls.' Am. Compl., at 22.)[1]

Defendants responded to Plaintiffs' petition by letter dated October 5, 2018, denying the petition in full. (Pls.' Am. Compl., at 24.) The response was timely pursuant to the APA and detailed the reasons for declining to enact Plaintiffs' proposed rules, indicating that the timeframe and other parameters suggested by Plaintiffs were logistically unattainable and unprecedented and that Defendants were already implementing measures to address Plaintiffs' concerns regarding climate change.[2]

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[1] The petition and its supporting materials are appended to Plaintiffs' amended Complaint and Defendants' motion to dismiss.

[2] Defendants' response is attached as an exhibit to Defendants' motion to dismiss. It is not attached to Plaintiffs' amended Complaint but is reviewable at this stage pursuant to *Chase v. Nationwide Mutual Fire Insurance Company*, 160 A.3d 970, 973 (R.I. 2017) and *Mokwenyei v. Rhode Island Hospital*, 198 A.3d 17, 22 (R.I. 2018). The Court notes that Defendants' response was reviewed in connection with the motion to dismiss for context and completeness. However, the response and its adequacy or inadequacy is not central to consideration of Defendants' motion to dismiss, and the content of the response plays no role in this Court's determination that dismissal of the amended Complaint is proper.

On November 2, 2018, Plaintiffs filed a Complaint in this Court seeking judicial review of Defendants' refusal to enact their proposed rules and requesting a declaration as to the proposed rulemaking and Plaintiffs' rights. Plaintiffs amended their Complaint on November 15, 2018.[3] The amended Complaint, the operative pleading for purposes of Defendants' motion, makes the following claims: Count I purports to be an APA appeal pursuant to § 42-35-15 in which Plaintiffs ask this Court to reverse DEM's determination set out in its October 5, 2018 response; Count II requests a declaration under the APA's § 42-35-7, as well as under the Uniform Declaratory Judgment Act, G.L. 1956 § 9-30-1 (UDJA), that DEM's response is invalid and harmful to Plaintiffs. Both counts of the amended Complaint request that this Court remand Plaintiffs' petition to DEM and order DEM to undertake rulemaking consistent with the Plaintiffs' petition.

On December 11, 2019, Defendants moved to dismiss the amended Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Plaintiffs objected on January 13, 2020 and Defendants replied on January 31, 2020. The Covid-19 pandemic disrupted plans for oral argument on the motion and objection. Pursuant to Superior Court Administrative Order 2020-05 and the Superior Court's Protocol for Requesting a Remote Hearing/Conference, the parties, through their counsel, agreed that the motion to dismiss may be decided upon review of the parties' memoranda without oral argument.

[3] The second Complaint, filed on November 15, is not titled "amended Complaint"—it is simply labeled "Complaint." Despite this, it is clearly an "amended Complaint" and is referred to as such in this Decision.

II

Standard of Review

A

Rule 12(b)(1)

"A motion under Rule 12(b)(1) questions a court's authority to adjudicate a particular controversy before it." *Boyer v. Bedrosian*, 57 A.3d 259, 270 (R.I. 2012). "'[I]n ruling on a Rule 12(b)(1) motion, a court is not limited to the face of the pleadings.'" *Id.* (quoting *Morey v. State of Rhode Island*, 359 F. Supp. 2d 71, 74 (D.R.I. 2005)). "'A court may consider any evidence it deems necessary to settle the jurisdictional question.'" *Id.* (quoting *Morey*, 359 F. Supp. 2d at 74). "Because subject-matter jurisdiction is 'an indispensable ingredient of any judicial proceeding,' it can be raised *sua sponte* by the court." *Rogers v. Rogers*, 18 A.3d 491, 493 (R.I. 2011) (quoting *Paolino v. Paolino*, 420 A.2d 830, 833 (R.I. 1980)). "Accordingly, subject-matter jurisdiction cannot be 'waived nor conferred by consent of the parties.'" *Id.* (quoting *Paolino*, 420 A.2d at 833). Importantly, "[i]f the court lacks jurisdiction over the class of cases to which the particular action belongs, it must dismiss the action." Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure*, § 12:5.

B

Rule 12(b)(6)

"'The sole function of a motion to dismiss is to test the sufficiency of the complaint.'" *Pontarelli v. Rhode Island Department of Elementary and Secondary Education*, 176 A.3d 472, 476 (R.I. 2018) (brackets omitted) (quoting *Narragansett Electric Co. v. Minardi*, 21 A.3d 274, 277 (R.I. 2011)). In making its Rule 12(b)(6) determination, a court "'assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to

the plaintiffs.'" *Giuliano v. Pastina*, 793 A.2d 1035, 1036-37 (R.I. 2002) (quoting *Martin v. Howard*, 784 A.2d 291, 297-98 (R.I. 2001)). "[A] Rule 12(b)(6) motion to dismiss is appropriate 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" *Barrette v. Yakavonis*, 966 A.2d 1231, 1234 (R.I. 2009) (quoting *Palazzo v. Alves*, 944 A.2d 144, 149-50 (R.I. 2008)).

III

Analysis

A

APA Appeal under § 42-35-15—Count I

Defendants argue that Plaintiffs' agency appeal should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). (Defs.' Mem. in Supp. of its Mot. to Dismiss, at 4.) Specifically, Defendants argue that § 42-35-15 of the APA only provides for an appeal of an agency decision by a person who has been "aggrieved by a final order in a contested case" and the denial of Plaintiffs' proposed rules is not a "contested case" within the meaning of the statute. *Id.* at 5-9.

Plaintiffs respond that jurisdiction over their agency appeal is obtained by adopting standards of federal law supporting review of administrative matters wherever possible. (Pls.' Obj. to Defs.' Mot. to Dismiss, at 4, 5, 15.) First, Plaintiffs argue that turning to federal law is appropriate because the Rhode Island APA shares a drafting history with its federal counterpart. *Id.* at 5-6. Second, Plaintiffs suggest that the Rhode Island Supreme Court in at least one case has turned to federal law to adjudicate cases brought under the Rhode Island APA. *See Sakonnet Rogers, Inc. v. Coastal Resources Management Council*, 536 A.2d 893, 896 (R.I. 1988)

(referencing federal standards of reviewability in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)). (Pls.' Obj. to Defs.' Mot. to Dismiss, at 5-6.) Third, Plaintiffs submit that a United States Supreme Court case, *Massachusetts v. EPA*, 549 U.S. 497 (2007), stands for the proposition that an agency's denial of rulemaking—in contrast with a decision not to initiate an enforcement action—renders a case more appropriate for judicial review, thus further evidencing that reliance on federal law is warranted. (Pls.' Obj. to Defs.' Mot. to Dismiss, at 6-7.)

Furthermore, Plaintiffs argue that the United States Supreme Court has developed a "presumption of reviewability" over administrative matters that is incumbent on Rhode Island Courts to follow. *Id.* at 10-15. For this proposition, Plaintiffs point to *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), where the Supreme Court stated that judicial review of an administrative matter is presumed "so long as no statute precludes such relief or the action is not one committed by law to agency discretion." *Id.* at 140. (Pls.' Obj. to Defs.' Mot. to Dismiss, at 11-12.) Plaintiffs additionally maintain that federal courts have reviewed an agency's rejection of a proposed rule where circumstances have significantly changed. They argue that recent scientific understanding demonstrates that the speed and severity of climate change has grown, thus constituting a significant change in circumstances that would permit this Court to hear their appeal. (Pls.' Obj. to Defs.' Mot. to Dismiss, at 7-8.)

None of these arguments are availing given clear-cut and long-standing Rhode Island law governing APA appeals. Section 42-35-15(a) of the Rhode Island APA governing appeals from administrative agencies states in relevant part:

> "Any person, including any small business, who has exhausted all administrative remedies available to him or her within the agency, *and who is aggrieved by a final order in a contested case* is entitled to judicial review under this chapter." (Emphasis added.)

The term "contested case" is defined in § 42-35-1(5) as:

> "a proceeding, including but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency *after an opportunity for hearing*." (Emphasis added.)

Our Supreme Court has interpreted this statutory definition to mean that "a hearing must be required by law in order for an administrative matter to constitute a contested case." *Property Advisory Group, Inc. v. Rylant*, 636 A.2d 317, 318 (R.I. 1994). The Supreme Court has additionally held that whether an opportunity for a hearing is required rests in the particular statutory language at issue in an agency's decision. *See Mosby v. Devine*, 851 A.2d 1031, 1049 (R.I. 2004) (discussing that "a failure to expressly provide for a hearing by statute renders a case 'uncontested' for purposes of the APA"); *see also Bradford Associates v. Rhode Island Division of Purchases*, 772 A.2d 485, 489 (R.I. 2001).

Here, it is abundantly clear that Plaintiffs have not been aggrieved by a final order in a contested case within the meaning of § 42-35-15, and, therefore, this Court lacks subject matter jurisdiction over Count I of their amended Complaint. The statute under which Plaintiffs proposed the climate change rules to Defendants—§ 42-35-6, "Petition for promulgation of rules"—states:

> "Any person may petition an agency to promulgate a rule. An agency shall prescribe, by rule, the form of the petition and the procedure for its submission, consideration, and disposition. Not later than thirty (30) days after submission of a petition, the agency shall:
>
> "(1) Deny the petition in a record and state its reasons for the denial; or
> "(2) Initiate rulemaking."

The statute expressly does not provide for a hearing. Therefore, a rulemaking petition under § 42-35-6 and an agency's response to the petition is not a "contested case" that may be appealed pursuant to the APA, and Plaintiffs are not entitled to judicial review of Defendants' denial of their proposed rules. *See Mosby*, 851 A.2d at 1049; *see also Bradford Associates*, 772 A.2d at 489.

Plaintiffs' direction of this Court to another body of law does not avert this result. The notion that the Rhode Island APA may be comparable in some respects to its federal counterpart does not impose a duty upon this Court to abandon long-standing state law precedent for federal law, which of course deals with the interpretation of federal administrative matters. As discussed above, § 42-35-15 of the APA clearly delineates when judicial review of an administrative matter is obtainable, and the Supreme Court repeatedly has held that judicial review in administrative matters is unavailable unless expressly provided for by statute.

Additionally, Plaintiffs' reference to our Supreme Court's citation of federal law in *Sakonnet Rogers* provides no assistance. There, the Supreme Court turned to federal law only to highlight the standard of review through which to analyze the case, not to determine whether it possessed subject matter jurisdiction over the case. *See Sakonnet Rogers*, 536 A.2d at 896. Plaintiffs' reliance on the "presumption of reviewability" discussed in *Abbott Laboratories* and on the heightened susceptibility of judicial review discussed in *Massachusetts v. EPA* is similarly unavailing. Rhode Island law—which governs here—makes clear that review of an administrative matter is confined to contested cases and what constitutes a contested case is firmly established. *See Mosby*, 851 A.2d at 1049; *Property Advisory Group*, 636 A.2d at 318 (holding that "a hearing must be required by law in order for an administrative matter to constitute a contested case"). *Compare with Abbott Laboratories*, 387 U.S. at 140 (holding that judicial review of an administrative matter is presumed "so long as no statute precludes such relief or the action is not one committed by law to agency discretion").

This Court will not turn to federal law, as urged by Plaintiffs, and will instead follow the precedent of our Supreme Court discussed above. In the instant matter, Defendants' denial of Plaintiffs' proposed rulemaking affords no opportunity for judicial review on appeal. Having no

jurisdiction to entertain Plaintiffs' claimed APA appeal, Count I of the amended Complaint is dismissed.

B

Declaratory Judgment Pursuant to § 42-35-7 of the APA—Count II

Defendants contend that dismissal of Plaintiffs' requests for declaratory judgment is proper under Rule 12(b)(6). First, they argue that Plaintiffs are not entitled to declaratory relief under the APA's § 42-35-7—"Declaratory judgment on validity or applicability of rules"—because the statute only contemplates relief with respect to agency rules that are already in existence, not those that have only been proposed. (Defs.' Mem. in Supp. of its Mot. to Dismiss, at 10.) Since Count II of the amended Complaint seeks a declaration on Defendants' response to Plaintiffs' rulemaking petition, and not rules that have been enacted, Defendants contend that Plaintiffs have failed to state a claim upon which relief can be granted. *Id.* at 11. Plaintiffs do not respond to this argument in their objection.

Upon review, it is evident that Defendants are correct that no claim for declaratory relief may be maintained in this case under § 42-35-7. Section 42-35-7 states:

> "*The validity or applicability of any rule may be determined in an action for declaratory judgment* in the superior court of Providence County, when it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question." (Emphasis added.)

A plain reading of the statute reveals that declaratory relief is only available with regard to the validity of a rule that already exists within an agency. Section 42-35-7 does not contemplate declaratory relief for an agency's denial of a proposed rule. Because Plaintiffs have not sought

declaratory relief with regard to a rule already in existence, but have instead done so with respect to a proposed rule that was not enacted, it is clear beyond a reasonable doubt that Plaintiffs would not be entitled to relief under § 42-35-7. Accordingly, dismissal pursuant to Rule 12(b)(6) is warranted with respect to Plaintiffs' request in Count II for declaratory relief under the APA.

C

Declaratory Judgment Pursuant to § 9-30-1 of the UDJA—Count II

Defendants also move for dismissal of Plaintiffs' additional request for declaratory relief set forth in Count II, made under § 9-30-1. They argue that the discretionary nature of the UDJA permits this Court to deny Plaintiffs' request for a declaration and that no justiciable controversy as required by the UDJA exists. (Defs.' Mem. in Supp. of its Mot. to Dismiss, at 14-16.) Defendants do not elaborate on Plaintiffs' inadequate standing[4] with regard to the UDJA's justiciability requirement in their briefs. However, this Court believes—and the law establishes—that whether Plaintiffs have demonstrated they have standing under the UDJA is a paramount consideration when adjudicating a request for declaratory relief pursuant to the UDJA. Thus, this issue will be discussed in this Decision as a key determination regarding Plaintiffs' ability to receive declaratory relief under the UDJA.

Plaintiffs assert that they are entitled to declaratory judgment under the UDJA because they, along with future generations, have and will suffer immediate harm due to the "current climate emergency," thus sufficiently giving rise to standing under the UDJA's justiciability requirement. (Pls.' Obj. to Defs.' Mot. to Dismiss, at 23.) This Court finds nonetheless that Plaintiffs do not have standing under the UDJA to maintain a request for declaratory relief.

[4] "Standing" means a claimant must have alleged a sufficient legal interest and injury to "stand" before the Court as a plaintiff in a lawsuit.

The UDJA "is a vehicle by which parties can obtain relief for actual or imminent harm." *McKenna v. Williams*, 874 A.2d 217, 227 (R.I. 2005). Importantly, the UDJA is "not intended to serve as a forum for the determination of abstract questions or the rendering of advisory opinions." *Id.* (internal quotation omitted). Instead, "to be entitled to a declaratory judgment, a plaintiff must both demonstrate a personal stake in the outcome of the controversy and advance allegations claiming an entitlement to actual and articulable relief." *Id.*

"The most fundamental characteristic of standing is that it focuses on the party seeking to have a claim entertained and not on the issues he [or she] wishes to have adjudicated." *Id*. at 225 (internal quotation omitted). "Thus, when standing is at issue, the focal point shifts to the claimant, not the claim, and a court must determine if the plaintiff whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable or, indeed, whether or not it should be litigated." *Id*. at 226 (internal quotation omitted). "The result is that courts must sometimes forego deciding issues of public import." *Id*. (internal citations omitted).

To demonstrate an "injury in fact" to satisfy the requirement of standing, "[t]he plaintiff must allege to the court's satisfaction that the challenged action has caused him injury in fact, economic or otherwise." *Id*. (internal quotation omitted). "This often has been characterized as a legally cognizable and protected interest that is concrete and particularized * * * and * * * actual or imminent, not conjectural or hypothetical." *Id*. (internal quotation omitted). And, in the case of a representative bringing suit on behalf of a larger, purportedly aggrieved class, "the representative must still allege his personal stake in the controversy—his own injury in fact—before he will have standing to assert the broader claims of the public at large." *Rhode Island Ophthalmological Society. v. Cannon*, 113 R.I. 16, 26-27, 317 A.2d 124, 130 (1974).

In the instant matter, Plaintiffs have not met these standing requirements. First, Plaintiffs have not demonstrated an "injury in fact." Instead, Plaintiffs set forth data and studies in their original proposal to Defendants, as well as a general contention throughout their subsequent papers, that indicate the effects of climate change are worsening and will be detrimental to global society. (Pls.' Obj. to Defs.' Mot. to Dismiss, at 23) (discussing that "Plaintiffs here have alleged immediate harm due to the current climate emergency to themselves and future generations"). While this Court should have no reason to dispute the presented findings and issues, and, frankly, shares in Plaintiffs' concerns for the environmental impacts of human activity, Plaintiffs have nonetheless failed to demonstrate a specific, tangible, and concrete injury suffered as a result of Defendants' rejection of the proposed rules. While climate change is concerning, in the case presently at bar, this Court cannot be used as a "forum [to determine] abstract questions," even if the questions Plaintiffs raise are grounded in science. *See McKenna*, 874 A.2d at 227. As they presently stand, Plaintiffs' concerns appear better directed to a forum different from this Court.

Second, and similarly, Plaintiffs have not alleged a "personal stake in the controversy," but instead allege only "broader claims of the public at large" in setting forth their concerns about environmental impacts. *See Ophthalmological Society*, 113 R.I. at 26-27, 317 A.2d at 130. Plaintiffs have not demonstrated how Defendants' rejection of the proposed rules has harmed them specifically, or how receiving declaratory relief, ostensibly by way of Defendants enacting the proposed rules, will address or alleviate their harm. Instead, again, Plaintiffs set forth environmental concerns of the public at large, which is insufficient to give rise to standing. Admittedly, Plaintiffs do provide a link in their papers to a website which discusses how several members of the Plaintiffs' class are affected by climate change. (Pls.' Obj. to Defs.' Mot. to

Dismiss, at 23 n.29).[5] However, after reviewing this link, it is evident that the members discussed either broad concepts regarding climate change, or, in the event specific injuries were discussed, they were not tied to any of Defendants' actions or inaction regarding the case at bar.

Put simply, "[P]laintiffs do not measure up to the requirements of our law—they have neither a stake in the outcome of this controversy nor an entitlement to real and articulable relief." *McKenna*, 874 A.2d at 227 (holding that "[n]either party [a lawyer and a law firm challenging the position of a former Rhode Island Supreme Court Chief Justice] has alleged an imminent injury in fact; nor have plaintiffs articulated a stake in the outcome of this controversy that is distinguishable from that of other members of the bar or the public"); *see also Lamb v. Perry*, 101 R.I. 538, 543, 225 A.2d 521, 524 (1967) (rejecting a declaratory judgment action challenging a city ordinance brought by twelve residents, concluding that "as taxpayers and residents, [the plaintiffs had] no right, status or other legal relations affected by the amended ordinance, except that which they share[d] in common with all other taxpayers and residents of the city"). Because Plaintiffs do not have standing as required by the UDJA, there is no set of facts that could be proven in support of

[5] In reviewing a motion to dismiss, this Court must "look no further than the complaint." *Mokwenyei*, 198 A.3d at 21 (internal quotation omitted). However, the Court is mindful of the Supreme Court's adoption of the First Circuit Court of Appeals' "narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *See Chase*, *supra* at n.2. (internal quotation omitted). Further, if "'a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), [then] that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).'" *Mokwenyei*, 198 A.3d at 22 (quoting *Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir. 2005) (citation omitted)). In the instant matter, Plaintiffs' amended Complaint is expressly linked to attached data, studies, and other material which detail the science forming the basis for their legal claim.

their claim for declaratory relief. Count II of the amended Complaint seeking declaratory relief under the UDJA is therefore dismissed.

IV

Conclusion

For the foregoing reasons, this Court grants Defendants' motion to dismiss and dismisses Plaintiffs' amended Complaint in its entirety.[6] Counsel for Defendants shall prepare an appropriate order and judgment for entry.

[6] Defendants also sought to have Plaintiffs' amended Complaint dismissed for improper consolidation of claims and insufficient service of process. Because the motion to dismiss is decided on other grounds, these issues need not be reached.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Alexandra Duryea, et al. v. Rhode Island Department of Environmental Management, et al.**
CASE NO:	**PC-2018-7920**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 24, 2020**
JUSTICE/MAGISTRATE:	**M. Darigan, J.**
ATTORNEYS:	
For Plaintiff:	**Allyson M. Quay, Esq.**
For Defendant:	**Susan Forcier, Esq.**