STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 13, 2020)

PETER SCOTTI & ASSOCIATES, INC.; BUILDING BRIDGES PROVIDENCE; FRANK MUHLY; and ANDREW MEYER	:	
v.	:	**C.A. No. PC-2019-0283**
SETH YURDIN, HELEN ANTHONY, NIRVA LaFORTUNE, NICHOLAS J. NARDUCCI, JR., JO-ANN RYAN, MICHAEL CORREIA, JOHN J. IGLIOZZI, JAMES TAYLOR, CARMEN CASTILLO, LUIS A. APONTE, MARY KAY HARRIS, KATHERINE KERWIN, RACHEL MILLER, DAVID A. SALVATORE, and SABINA MATOS, in their official capacity as Members of the City Council of the CITY OF PROVIDENCE; THE I-195 REDEVELOPMENT DISTRICT; and JASON FANE	:	

DECISION

STERN, J. In this challenge to an Amendment of the Zoning Ordinance of the City of Providence (Ordinance) implemented by the City Council of the City of Providence (City Council), Plaintiffs Peter Scotti & Associates, Inc. and Building Bridges Providence (Plaintiffs) have filed a Motion for Judgment upon Stipulated Facts.[1] In response, Defendant Jason Fane (Mr. Fane) has filed a

[1] Also before the Court is Plaintiffs' Motion to Strike two Affidavits submitted by Defendants. As the Court does not rely upon said Affidavits in this Decision, the Court need not address that motion.

Cross-Motion for Judgment (or Summary Judgment) on Stipulated Facts. The City Council filed a similar motion and also joined in Mr. Fane's arguments. Jurisdiction is pursuant to G.L. 1956 §§ 45-24-71 and 9-30-1, *et seq*.

I

Facts and Travel

In 2011, the General Assembly declared that the surplus, state-owned land that became available following the relocation of Interstate Route I-195 would be transferred to the I-195 Redevelopment District, so-called, which is a legislatively-created district designed to put such land to beneficial use. *See* P.L. 2011, ch. 245, § 3, and P.L. 2011, ch. 267, § 3.[2] To achieve this objective, the General Assembly enacted G.L. 1956 §§ 42-64.14-1, *et seq*., entitled The I-195 Redevelopment Act of 2011, and created the I-195 Redevelopment District Commission (Commission) to "carry out and effectuate" the Act. Sections 42-64.14-1; 42-64.14-6; and 42-64.14-7. The I-195 Redevelopment District also is a Defendant in the instant matter.

The following facts mostly are gleaned from the Stipulated Facts submitted by the parties:[3]

The I-195 Redevelopment District owns property in Providence located at Assessor's Plat 20, Lot 397, also known as Parcel 42, and an adjacent property located at Assessor's Plat 20, Lot 399, also known at Parcel P4. (Stip. Facts ¶ 5.) Parcel P4 is situated along the westerly side of the Providence River. *Id.* ¶ 6. The Commission has the authority to adjust the boundaries of Parcel

[2] Both of those enactments were identical. *See* G.L. 1956 § 42-64.14-1, Compiler's Notes.

[3] Although the parties submitted a document entitled Stipulated Facts, attached to that document were multiple exhibits. In the preamble to the Stipulated Facts, the parties stated that they

> "reserve the right to supplement these facts and documents as necessary in connection with their further briefing and to present additional facts and documents as would be presented in a Motion for Summary Judgment. All parties further reserve the right to argue or contest the relevance of any documents or facts referenced herein." (Stip. Facts at 1-2.)

P4, provided that the property retains 186,186 square feet for a park or park supporting activity. *Id.* ¶¶ 6 and 8; Section 42-64.14-5(a).

The Fane Organization submitted a proposal to purchase Parcel 42 and a portion of Parcel P4 for purposes of developing a high-rise residential building not to exceed six hundred feet in height and to be named "Hope Point" a/k/a "Fane Tower." (Stip. Facts ¶ 7.) At the time, both parcels were in a D-1-100 zone, which meant that the maximum permissible height of a building was one hundred feet (with additional height to the extent bonuses were earned). *Id.* ¶ 11.

The Commission agreed to adjust the boundaries of Parcel P4 and to subdivide Parcel 42 into two parcels separated by a pedestrian walkway and bicycle path. *Id.* ¶ 9. The northerly parcel would be combined with a portion of Parcel P4 and would contain the proposed Fane Tower (Subject Property). *Id.* The remainder of Parcel P4 would continue to be designated as park space. *Id.* ¶ 10.

Considering that the proposed building exceeded the maximum allowable height, on April 18, 2018, the Fane Organization, Mr. Fane, and the I-195 Redevelopment District jointly petitioned the City Council for an Amendment of the Ordinance to add a height sub-district to the existing seven height sub-districts in the area. *Id.* ¶ 16 and Ex. E. at 3. The Petition consisted of the proposed Amendment and an attached map. (Ex. E.) The proposed Amendment would permit a maximum building height of six hundred feet and only would apply to the Subject Property. (Ex. E. at 4.) The Amendment also would permit the Downtown Design Review Committee to waive height, massing, and transition lines for buildings. *Id.* at 3-4.

On April 25 and May 15, 2018, the City Plan Commission (CPC) conducted public hearings on the Petition. (Stip. Facts ¶ 18.)[4] The CPC also received a report from the City of Providence Planning Department (Planning Department) recommending approval of the Amendment as being consistent with the City's Comprehensive Plan and with the City's zoning goals. (Stip. Facts ¶ 19; Ex. G.) The CPC disagreed with the Planning Board's recommendation; instead, it found that the proposed Amendment was inconsistent with certain provisions of the Comprehensive Plan and recommended that the City Council deny the application. (Stip. Facts ¶ 20; Ex. H.) In doing so, it impliedly rejected the Planning Department's recommendation. *Id.*

On July 18, 2018, the City Council's Ordinance Committee conducted a public hearing to consider the Amendment. (Stip. Facts ¶ 21; Ex. I.) At the conclusion of the hearing, the Ordinance Committee voted to recommend that the City Council deny the Amendment. *Id.* When the matter came before the City Council, the City Council referred the matter back to the Ordinance Committee. (Stip. Facts ¶ 25; Ex. J.)

On September 26, 2018, the Ordinance Committee voted to conduct a public hearing on the Amendment. *Id.* ¶ 23. Thereafter, it conducted the hearing on October 22, 2018. *Id.* ¶ 24, Ex. L. The hearing included a presentation from the Fane Organization and public comment. *Id.* As part of its presentation, the Fane Organization submitted its preliminary design concept accompanied by various illustrations. (Stip. Facts ¶ 25; Ex. M.)

[4] The Court observes that the exhibits attached to the Stipulated Facts do not provide transcripts or audio recordings of any of the proceedings; rather, the Stipulated Facts simply state that "[a]udio recordings of the above-referenced meetings [are] available on the City of Providence Open Meetings Portal . . . ." (Stip. Facts ¶ 32.)

At a second public hearing on November 8, 2018, the petitioners submitted an amended Petition, entitled Substitute A, which added proposed findings of fact to the original Petition regarding the Amendment's consistency with the Comprehensive Plan. (Stip. Facts ¶ 26; Ex. N.) Thereafter, a member of the Ordinance Committee made "a motion to attach substitution A to the ordinance." (Stip. Facts ¶ 26; Ex. O; Meeting Minutes, at 1.) The Vice-Chairman expressed concern about its admission, to which the Chairman stated: "It is explanatory and does not change the structure of the actual ordinance." Ex. O; Meeting Minutes, at 2. The Vice-Chairman then observed that the public had not been given an opportunity to comment on the document. *Id.* The Chairman responded: "If there are questions that have to be addressed[,] that can be done before the process is complete." *Id.*

The Vice-Chairman then stated:

> "So, if I heard correctly, the proposal goes along with the comprehensive plan or meets the needs of the comprehensive plan? Isn't that the core of the issue here, if the project is consistent with the comprehensive plan or not? Zoning says it's not and that there is a height restriction of 100 feet in that area. What we are considering tonight is 600 feet, which by definition is inconsistent with zoning, and zoning comes from the comprehensive plan. I do not understand how we can pass something that is not consistent with the comprehensive plan? I do not see how we can make a conclusion that this proposal is consistent with the comprehensive plan, when it's obviously not." *Id.* at 3.

In response, a Councilwoman stated:

> "The document before us makes a number of points consistent with the comprehensive plan. It is not referencing the height. This came out of the public hearing. If I recall, the City Planning staff recommended that the matter was consistent with the comprehensive plan to the CPC and recommended approval, and that is how this matter

> started. Our job is to make sure that this is consistent with the comprehensive plan. The petition before us today expresses that. I make a motion to approve." *Id.* at 3.

Thereafter, the Ordinance Committee voted to approve the attachment of Substitute A. The minutes then concluded with the following statement: "Further discussion was held relative to the foregoing matter." *Id.* at 4. The Ordinance Committee voted to recommend that the City Council approve the Petition, as amended. *Id.*; Stip. Facts ¶ 27.

On November 15, 2018, the City Council voted to approve the zoning Amendment at the first reading by a vote of eight to five, with two abstentions. (Stip. Facts ¶ 28; Exs. P and O.) At a special meeting on November 20, 2018, the City Council conducted a second reading and then voted to approve the Amendment by a vote of nine to five, with one abstention. (Stip. Facts ¶ 29; Exs. R and S.) On November 30, 2018, the Mayor for the City of Providence vetoed the Amendment. (Stip. Facts ¶ 30.) Thereafter, on December 13, 2018, the City Council voted to override the Mayor's veto and approved the Amendment by a vote of ten to three, with one abstention. (Stip. Facts ¶ 31; Exs. T and U.)

Pursuant to § 45-24-71, Plaintiffs timely filed a Complaint in this Court on January 11, 2019, asserting that the Amendment did not conform to the City's Comprehensive Plan and that it constituted illegal spot zoning. (Compl.)[5] In addition, Plaintiffs seek declaratory relief under § 9-30, entitled the Uniform Declaratory Judgments Act. *Id.* They filed an Amended Complaint on January 25, 2019.

On September 6, 2019, Plaintiffs filed a Motion for Judgment upon Stipulated Facts. Thereafter, on October 9, 2019, they filed a Second Amended Complaint to add two residents and owners

[5] The operative document for purposes of this Decision is Plaintiffs' Second Amended Complaint. *See Hall v. Insurance Co. of North America,* 666 A.2d 805, 806 (R.I. 1995) (holding that "the filing of an amended complaint supersedes for many purposes the original complaint").

of property in Providence. Meanwhile, on October 23, 2019, Mr. Fane filed a Cross-Motion for Judgment (or Summary Judgment) on Stipulated Facts (and in Objection and Opposition to Plaintiffs' Motion for Judgment on Stipulated Facts). Defendant I-195 Redevelopment District joined in and adopted Mr. Fane's motion, and the City Council filed a memorandum in support of Mr. Fane's motion.

II

Standard of Review

Before the Court essentially is a Motion for Summary Judgment and a Cross-Motion for Summary Judgment. Our Supreme Court has declared that '"[s]ummary judgment is 'a drastic remedy,' and a motion for summary judgment should be dealt with cautiously.'" *Jackson v. Quincy Mutual Fire Insurance Co.*, 159 A.3d 610, 612 (R.I. 2017) (quoting *Estate of Giuliano v. Giuliano*, 949 A.2d 386, 390 (R.I. 2008)). Before deciding any such motion, "[i]t is important to bear in mind that the 'purpose of the summary judgment procedure is issue finding, not issue determination.'" *Jackson*, 159 A.3d at 612-13 (quoting *Estate of Giuliano*, 949 A.2d at 391) (internal quotation omitted); see also *O'Connor v. McKanna*, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976) ("[I]n passing on a motion for summary judgment, the question for the trial justice is whether there is a genuine issue as to any material fact and not how that issue should be determined.").

It is well settled that '"[i]n passing on a motion for summary judgment, the trial justice must determine whether there is a genuine issue of material fact, and if not, the trial justice must determine whether the moving party is entitled to judgment as a matter of law.'" *Correia v. Bettencourt*, 162 A.3d 630, 634–35 (R.I. 2017) (quoting *Ferreira v. Strack*, 652 A.2d 965, 969 (R.I. 1995)). Furthermore, "[a]lthough the moving party bears the initial burden of establishing that no genuine issue of material fact exists for a finder of fact to resolve, . . . it can carry this

burden successfully by submitting evidentiary materials, such as interrogatory answers, deposition testimony, admissions, or other specific documents, and/or pointing to the absence of such items in the evidence adduced by the parties." *Doe v. Gelineau*, 732 A.2d 43, 48 (R.I. 1999) (citing *Superior Boiler Works, Inc. v. R.J. Sanders, Inc.*, 711 A.2d 628, 631-32 (R.I. 1998)).

Once the party seeking summary judgment satisfies this burden, then "the burden shifts to the opponent of the motion to respond with specific facts that would constitute a genuine issue for trial. Such party may not rest upon the mere allegations or denials set forth in his pleadings." *Nedder v. Rhode Island Hospital Trust National Bank*, 459 A.2d 960, 962 (R.I. 1983). In doing so, "the nonmoving party . . . must identify any evidentiary materials already before the court and/or present its own competent evidence demonstrating that material facts remain in genuine dispute." *Gelineau*, 732 A.2d at 48.

III

Analysis

The Plaintiffs contend that the Amendment manifestly violates the Comprehensive Plan's one-hundred-foot height restriction for the area—as depicted in a certain land use map—by creating a new district on a single lot for the sole purpose of building a massive high-rise building. They further maintain that the Amendment violates the Comprehensive Plan because it is inconsistent with many of its Plan's objectives such as uniformity in regulation of development, as well as proportionality and integration of design and development. In addition, they assert that the Amendment violated the Downtown and Knowledge District Plan, so-called, and that the City Council should have amended said plan, as well as the Comprehensive Plan, before voting on the Amendment.

In response, all of the Defendants contend that deference should be afforded the City Council's legislative actions and that land use maps have nothing to do with designating sub-district height or any other dimensional regulation considerations. They further contend that the Downtown and Knowledge District Plan simply was a recommendation by an *ad hoc* group of citizens, and that as such, it was not binding on the City Council. The Defendants also maintain that the Special Economic Development District Enabling Act specifically and intentionally superseded the Comprehensive Plan.

A

Standard of Review under § 45-24-71

The Plaintiffs contend that this Court should review the City Council's actions in passing the Amendment on a *de novo* basis. Conversely, Defendants maintain that the proper standard for reviewing legislative action by the City Council is one of deference.

Section 45-24-71 provides in pertinent part:

> "(a) An appeal of an enactment of or an amendment to a zoning ordinance may be taken to the superior court for the county in which the municipality is situated by filing a complaint within thirty (30) days after the enactment or amendment has become effective. . . .
>
> "(b) The complaint shall state with specificity the area or areas in which the enactment or amendment does not conform with the comprehensive plan and/or the manner in which it constitutes a taking of private property without just compensation.
>
> "(c) The review shall be conducted by the court without a jury. 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." Section 45-24-71.

Our Supreme Court has declared that "[i]t is well settled that legislation, including amendments to zoning and minimum-housing ordinances, enjoy a presumption of validity." *Johnson & Wales College v. DiPrete*, 448 A.2d 1271, 1279 (R.I. 1982) (citing *Carpionato v. Town Council of North Providence*, 104 R.I. 490, 244 A.2d 861 (1968)). However, "[i]t is equally well settled that the authority of a legislative body to enact laws and amendments thereto is limited by the requirement that that body act only in the proper exercise of the police power. A city or town council, whose responsibility it is to enact local ordinances, is not immune from this restriction." *Johnson & Wales College*, 448 A.2d at 1279. Pursuant to § 45–24–29(b)(2), the General Assembly "specifically direct[ed] the state zoning enabling authority to require 'each city and town to conform its zoning ordinance and zoning map to be consistent with its comprehensive plan' developed under the Comprehensive Planning and Land Use Regulation Act." *Town of East Greenwich v. Narragansett Electric Co.*, 651 A.2d 725, 728 (R.I. 1994) (quoting § 45–24–29(b)(2)).

Section 45-24-71 requires the Court to determine whether an "amendment of the zoning ordinance is in conformance with the comprehensive plan." Section 45-24-71(c). Interpreting § 45-24-71's predecessor statute—§ 45-24-3—our Supreme Court opined "that the requirement set out in § 45–24–3 that the zoning regulations conform to a comprehensive plan is mandatory and that strict compliance therewith is required of a local legislature when it enacts a zoning ordinance." *Cianciarulo v. Tarro*, 92 R.I. 352, 358, 168 A.2d 719, 722 (1961).[6] The purpose behind

[6] Our Supreme Court observed that "[t]he provisions of § 45–24–3 in substance provide that the regulations 'shall be made in accordance with a comprehensive plan' and that they shall be designed to promote the accomplishment of the objectives enumerated therein, all of which relate generally to the public safety, health, and welfare." *Cianciarulo*, 92 R.I. at 358, 168 A.2d at 722 (quoting § 45–24–3).

this requirement "is to avoid an arbitrary, unreasonable or capricious exercise of the zoning power, resulting in haphazard or piecemeal zoning." *Id.* at 358-59, 168 A.2d at 722-23 (internal quotation omitted). Thus, the purpose of such provision is "to reduce the impact of zoning restrictions on the right of an owner to make a free use of his land by barring any radical or impulsive exercise of the power conferred, . . . and that end will be attained only when the local legislature is held to strict compliance with the pertinent statutory provision." *Id.* at 359, 168 A.2d at 723. Accordingly, "[a]ny amendment which does not . . . conform to a comprehensive plan is illegal." *Barber v. Town of North Kingstown*, 118 R.I. 169, 176, 372 A.2d 1269, 1273 (1977).

Although amendments passed by a council "enjoy a presumption of validity[,]" *Johnson & Wales College*, 448 A.2d at 1279, such presumption is not absolute. *See City of Mobile v. Madison*, 122 So.2d 540, 541 (Ala. Ct. App. 1960) (stating that the presumption of validity given to a municipality in promulgating ordinances under its police power is not absolute and it "must be reasonably related to the object sought to be accomplished"). A plaintiff has the burden of demonstrating that an amendment is invalid. *See Barber*, 118 R.I. at 176, 372 A.2d at 1273 (interpreting predecessor statute). Furthermore, "[w]hen the evidence is fairly debatable the issues should be resolved in favor of upholding the zoning regulations." *City of Phoenix v. Collins*, 524 P.2d 1318, 1320 (1974). However, "[t]he legal presumption favoring validity of a zoning ordinance and the fairly debatable doctrine are not absolutes. The presumption can be rebutted[,] for otherwise the zoning authority could operate with total power and without restraints or guidelines." *Id.*

Applying the foregoing principles, it appears that the Amendment at issue enjoys a presumption of validity in that the Amendment is presumed to be in conformance with the Comprehensive Plan. However, that presumption is not absolute, and Plaintiffs may rebut this presumption by demonstrating that the Amendment is not in conformance with the Comprehensive Plan.

Accordingly, the Court must examine the facts to determine if Plaintiffs sustained their burden. *See, e.g., id.* at 1321 ("In the final analysis [the Court][7] must examine the facts in each individual case to determine if the zoning as applied to the property in dispute is reasonable and serves a beneficial public purpose.").

B

The Amendment

As previously stated, Plaintiffs contend that the Amendment manifestly violates the Comprehensive Plan's one-hundred-foot height restriction for the area, as depicted in the plan's Future Land Use Map. They further contend that the Amendment is inconsistent with the objectives of the Comprehensive Plan and the Downtown and Knowledge District Plan. The Defendants contend that land use maps have nothing to do with designating sub-district height or other dimensional regulation considerations, and that, nevertheless, Plaintiffs have cited the wrong map to support their arguments. They further maintain that the City Council's legislative actions enjoy a presumption of validity.

Section 45-22.2-6 sets forth the required content of a comprehensive plan. It states that a "comprehensive plan must be internally consistent in its policies, forecasts, and standards, and shall include the content described within this section." Section 45-22.2-6(b). Thus, "[t]he plan must identify the goals and policies of the municipality for its future growth and development and for the conservation of its natural and cultural resources." Section 45-22.2-6(b)(1). The plan also must contain the following maps: (1) a map illustrating "[e]xisting conditions[,]" such as land use, zoning, key infrastructure, service areas for public water and sewer, historical and cultural resource

[7] In view of the Court's conclusions, *infra*, the Court need not address the applicability, if any, of the Downtown and Knowledge District Plan.

areas and sites, public and private open space and conservation areas, and natural resources (Section 45-22.2-6(b)(2)(i)); (2) a map of "[f]uture land use illustrating the desired patterns of development, density, and conservation as defined by the comprehensive plan" (Section 45-22.2-6(b)(2)(ii)); and (3) a map that identifies "discrepancies between future land uses and existing zoning use categories." Section 45-22.2-6(b)(2)(iii).

In accordance with these provisions, the Providence Comprehensive Plan contains three maps denominated as Map 11.1, Map 11.2, and Map 11.3. (Stip. Facts, Ex. B., Comp. Plan at 107, 112-13. Map 11.1 is entitled Areas of Stability and Change; Map 11.2 is entitled Future Land Use; and Map 11.3 is entitled Future Zoning Change Areas Map. *Id.* These maps track the requirements of § 45-22.2-6(b)(2)(ii). According to the Comprehensive Plan, Map 11.1 aims to direct growth in a controlled fashion in areas of anticipated and appropriate growth. *Id.* at 105. Map 11.2 is described as "the official Land Use Map of the city and provides the basis for the Zoning Ordinance." *Id.* Map 11.3 identifies the "inconsistencies between the City's existing zoning ordinance and the proposed future land use." *Id.* at 110. The Comprehensive Plan states that "[t]hese maps are not fixed in time; it is expected that they will be refined and fine-tuned during the neighborhood planning process and periodically in the future." *Id.* at 105.

Map 11.2 indicates that the Subject Property is within the Downtown/Mixed Use area of the city. *Id.* at 112. Map 11.3 indicates that the "Base Zoning" for the Downtown/Mixed Use District is D-1. *Id.* at 113. Although Plaintiffs contend that Map 11.3 places the Subject Property within a D-1-100 District, based upon the size of the map submitted by the parties, the Court is unable to discern any specific height restrictions or sub-districts within the Downtown/Mixed Use District; rather, that particular map appears to simply denote the whole area as D-1. *See id.* at 112. Consequently, even if Map 11.3 constitutes the Future Land Use Map, as Plaintiffs contend, such

designation does not appear to support Plaintiffs' argument that Map 11.3 of the Comprehensive Plan places the Subject Property within a D-1-100 District. The Court observes, however, that Map A.18 of the Comprehensive Plan shows that the Existing Zoning Map placed the Subject Property in a D-1-100 zone, meaning that according to the Existing Zoning Map, the maximum height of a building in that particular D-1 sub-district was one hundred feet. *Id.* at 266; *see also* Stip. Facts, Ex. C at 24.

The Zoning Enabling Act defines a zoning-use district as "[t]he basic unit in zoning, either mapped or unmapped, to which a uniform set of regulations applies . . . Zoning-use districts include, but are not limited to: agricultural, commercial, industrial, institutional, open space, and residential. *Each district may include sub-districts . . . .*" Section 45-24-31(73) (emphasis added). As previously stated, it is undisputed that the Subject Property is located in the Downtown/Mixed Use District of Providence. It equally is undisputed that the Subject Property simultaneously is located in the I-195 Redevelopment District. Table 11.2 of the Comprehensive Plan "contains descriptions of each land use designation . . . ." (Stip. Facts, Ex. B, Comp. Plan at 116.) The Downtown/Mixed Use area where the Subject Property is located is described as an area that

> "is intended to revitalize and restore the historic core business area and to accommodate appropriate expansion of the downtown area. It is characterized by a variety of business, financial, institutional, public, quasi-public, cultural, residential, appropriate light manufacturing, and other related uses. To preserve and foster the economic vitality of downtown, a mix of compatible uses is encouraged to promote commercial and other business activity at the street level and residential, office, and commercial uses on the upper floors. In order to promote economic development while maintaining compatibility between uses, *sub-districts may be established to address building height*, entertainment and light industrial uses." *Id.* at 118 (emphasis added).[8]

[8] Article 6 of the Ordinance governs the regulations for the Downtown District. Its stated purpose

Section 11.2.2 discusses the goals for mixed-use areas. (Stip. Facts, Ex. B, Comp. Plan at 123.) It states in pertinent part:

> "While most areas in the city have more than one single use, the truly mixed-use areas are the city's downtown, commercial corridors, former manufacturing areas and parts of the City's waterfront. Urban life and vitality are the heart of these areas, with residential, retail, office, industrial, civic, institutional, and entertainment uses jumbled together. Mixed-use takes many forms, such as small commercial blocks, commercial areas along main corridors, shopping areas and plazas, office buildings with retail uses on the ground floor, stores with apartments on upper floors, or former mill buildings with a mix of industrial, office and residential uses.
>
> "Mixing uses creates desirable places to live by improving the balance of jobs to housing and creating healthy neighborhoods where residents can walk to shops and services. *It is in these mixed-use areas that nodes of concentrated development could be established to link future development to transit hubs. In these nodes, greater residential density and buildings* [*sic*] *heights could be accommodated to create a more efficient pattern of development and protect the character of the residential neighborhoods*.
>
> "Building form is important in mixed-use areas. The urban fabric of our city, with buildings set to the street edge, *pedestrian amenities and human-scaled building massing and design must be preserved and must guide the character of future developments*. When many

---

> "is to encourage and direct development in the downtown to ensure that: new development is compatible with the existing historic building fabric and the historic character of downtown; historic structures are preserved and design alterations of existing buildings are in keeping with historic character; development encourages day and night time activities that relate to the pedestrian and promote the arts, entertainment and housing; greenways and open spaces are incorporated into the downtown; and the goals of the Comprehensive Plan are achieved. The design of the exterior of all buildings, open spaces and all exterior physical improvements in the D-1 District shall be regulated and approved through development plan review in accordance with the provisions of this Section." Art. 6, Section A. of the Ordinance.

> uses co-exist, it is the built environment of those areas that establish the character. Establishing a cohesive form allows for uses to change over time without significantly changing the character of the area." *Id.* (emphases added).

Objective LU9 of the Comprehensive Plan, entitled Built Environment, lists among its strategies the identification of "the best locations for nodes of concentrated development and increased density . . . [,] [as well as] *areas that could support taller buildings and amend land use regulations to allow for greater height in those areas*." *Id.* at 130, Objective LU9 A and B (emphasis added). It also recommends the amendment of "regulations as needed to establish incentives for *greater height and density* in exchange for affordable units, public space investment, support for neighborhood amenities, sustainable design, etc." *Id.* at LU9 D (emphasis added).

Objective BE3 of the Comprehensive Plan, entitled Compact Urban Development, outlines numerous strategies to reach its goal of achieving "a higher concentration and greater mix of housing, employment and transit options in identified areas of the city." *Id.* at 43. Such strategies include identifying and evaluating areas "where *increased building height and density can be accommodated, allowing for compatible transition to surrounding areas*[,]" as well as developing "regulations and incentives that encourage high-quality, mixed-use development at *heights and densities* that support the city's diverse housing needs and transit alternatives." *Id.* (emphases added). Another of those strategies is to "[e]valuate and *identify areas where increased height limits may be appropriate*." *Id.* (emphasis added).

It is clear from the foregoing that the Comprehensive Plan contemplates increases in building heights and densities. It also permits the establishment of sub-districts to address building height. *See id.* at 118; Section 45-24-31(73). The issue before the Court is whether Plaintiffs

successfully rebutted the presumption that the City Council's Amendment that created a sub-district to increase the building height for that district was in conformance with the Comprehensive Plan.

Map 11.3 places the Subject Property in a D-1 zone. Prior to the Amendment, Article 6 of the Ordinance listed seven height sub-districts in the city's Downtown District. *See* Stip. Facts, Ex. C, Article 6, Section 602B of the Ordinance. It stated that

> "[t]he maximum building height within each of the D-1 District height sub-districts is as follows:
> "1. D-1-45 equals a maximum building height of 45 feet
> "2. D-1-75 equals a maximum building height of 75 feet
> "3. D-1-100 equals a maximum building height of 100 feet
> "4. D-1-120 equals a maximum building height of 120 feet
> "5. D-1-150 equals a maximum building height of 150 feet
> "6. D-1-200 equals a maximum building height of 200 feet
> "7. D-1-300 equals a maximum building height of 300 feet" Id.

The Amendment added an eighth sub-district to the D-1 zone; namely, a D-1-600 sub-district which, according to the accompanying map, applies only to the Subject Property. *See* Stip. Facts, Ex. A, Amendment at 3 and 4. In doing so, the Amendment adds the following language: "8. D-1-600 equals a maximum building height of 600 feet." *Id.* at 3. The Amendment also changed the text of Article 6, Section 606A.2 and 606D.2 of the Ordinance to allow the Downtown Design Review Committee to waive building height and massing requirements, and transition line requirements that relate to adjoining and adjacent structures. *Id.* In view of the fact that the Comprehensive Plan allows for increases in building height and density in the Downtown/Mixed Use area, the Court finds that the addition of sub-districts to the D-1 zone would be in conformance with the Comprehensive Plan.

Furthermore, in the Amendment, the City Council made multiple legislative findings. It observed that the Planning Department's favorable advisory recommendation concluded that the

Petition is consistent with the Comprehensive Plan and the purposes of zoning because the Comprehensive Plan "supports dense residential development [and] . . . tall buildings in Downtown, leaving the decisions on the location and regulations of height districts to future planning processes and the discretion of the City Council . . . ." *Id.* at 1. The City Council also found, consistent with said advisory recommendation, that the Petition was "consistent with Objectives BE3 ('Compact Urban Development'), LU2 ('Direct Growth'), and LU9 ('Built Environment') of the Comprehensive Plan and their corresponding strategies." *Id.* The City Council further determined that the Petition was consistent with the Comprehensive Plan's strategy of identifying areas that could support taller buildings where increased height limits might be appropriate. *Id.* at 2.

The City Council also found that the Subject Parcel is located in a node of concentrated development where '"greater residential density and building heights could be accommodated to create a more efficient pattern of development and protect the character of residential neighborhoods.'" *Id.* (quoting Stip. Facts, Ex. B, Comp. Plan at 123). With respect to consistency with other strategies and objectives of the Comprehensive Plan, the City Council found that the Petition, (a) promotes the development of a mixture of uses with different levels of intensity; (b) promotes the integration of transit services and housing; (c) promotes the encouragement of pedestrian related day and nighttime activities; (d) observes existing view corridors. (Stip. Facts, Ex. A, Amendment at 2.)

With respect to view corridors, the City Council found that:

> "[B]ecause the Subject Parcel is uniquely situated in a former highway right of way, the impacts of a taller building are moderated by the absence of immediate proximity to historic places or structures, an aspiration of the Zoning Ordinance . . . Similarly, the Proposed Zoning Ordinance change [*i.e.*, the Amendment] will preserve the view corridors established by the Zoning Ordinance for the D-1 District[.]" *Id.*

The City Council specifically stated that the "Petition does not resolve or determine issues relating to the specific design of the building. That will occur as part of the continuing approval process under the I-195 Redevelopment Act in which the Downtown Design Review Committee will further participate." *Id.*

After thoroughly reviewing all the materials submitted by the parties, the Court finds that there are insufficient facts contained therein for this Court to determine whether Plaintiffs satisfied their burden of rebutting the presumption that the Amendment was in conformance with the Comprehensive Plan. Said materials do not include transcripts of the proceedings before any of the hearings; consequently, the Court is unable to review the specific evidence or documents, if any, that Plaintiffs submitted in objection to the proposed Amendment. Indeed, with respect to the materials that the parties did provide, they specifically reserved the right to supplement those materials and the right to dispute the relevance of the facts contained in those materials. (Stip. Facts at 1-2.)[9] Thus, although the Comprehensive Plan permits increases in building height within the Downtown/Mixed Use District, without the full record the Court is unable to conclude that Plaintiffs failed to demonstrate that a doubling of the previous height limitation of three hundred feet in the D-1 zone is not in conformance with the Comprehensive Plan.

Furthermore, there appear to be genuine issues of material fact between the Planning Department's recommendation that the Petition was consistent with the Comprehensive Plan and the

[9] The Court observes that Defendants supplemented the materials submitted to this Court with an October 23, 2019 opinion letter from the Historical Preservation & Heritage Commission. (Defs.' Ex. 11.) Said opinion letter concluded that in the Area of Potential Effect, the proposed construction would have no adverse effect on any properties listed in the National Register of Historic Places. *Id.* at 13-14. Given that this opinion letter was written after passage of the Amendment, it is not clear whether the City Council had this information before it when it considered the Amendment.

CPC's finding to the contrary. Without a complete record, the Court cannot determine what criteria these entities considered in support of their recommendations.

IV

Conclusion

In view of the foregoing, the Court concludes that there is insufficient evidence before it to rule on the Cross-Motions for Summary Judgment. Although there appear to be genuine issues of material fact as to whether Plaintiffs can demonstrate that Amendment is not in conformance with the Comprehensive Plan, this lack of evidence before the Court precludes it from making such a finding. Consequently, the Cross-Motions for Summary Judgment are denied.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Peter Scotti & Associates, Inc., et al. v. Seth Yurdin, et al.**
CASE NO:	**PC-2019-0283**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 13, 2020**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Armando E. Batastini, Esq.; William Wynne IV, Esq.**
For Defendant:	**William Landry, Esq.; Patrick J. McBurney, Esq.; William E. O'Gara, Esq.; Mark W. Freel, Esq.; Samantha M. Vasques, Esq.**