STATE OF RHODE ISLAND

NEWPORT, SC. **SUPERIOR COURT**

(FILED: May 18, 2022)

DENISE WILKEY, MARK WILKEY, JAYME SOUZA, DAVID SOUZA, DONNA OLSZEWSKI, ANTHONY OLSZEWSKI, DAVID SCHULLER, AND MARK JONES	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. NC-2021-0352**
	:	
WED PORTSMOUTH ONE, LLC AND THE TOWN OF PORTSMOUTH, RHODE ISLAND, by and through Lisa Lasky its Treasurer her title being Director of Finance	:	
***Defendants*.**	:	

DECISION

I

Facts & Travel

LICHT, J. In 2016, WED Portsmouth One, LLC (WED), pursuant to an agreement with the Town of Portsmouth (Town), installed a wind turbine at Portsmouth High School in Portsmouth, Rhode Island which replaced a smaller turbine that had been there between 2009 and 2012. Plaintiffs claim this new turbine is more troublesome than the prior one because it allegedly generates more noise and produces shadow flickers across nearby property. Each Plaintiff in this case lives between 740 and 1155 feet from the wind turbine.

Plaintiffs' Complaint advances four causes of action: (1) private nuisance; (2) public nuisance; (3) breach of contract; and (4) injunctive relief. In response, Defendants filed a motion to dismiss Count II, public nuisance; Count III, breach of contract claims; and Count IV, injunctive relief.

This Court previously held a two-day hearing on March 2 and March 11, 2022 on the Plaintiffs' motion for a preliminary injunction in which certain Plaintiffs were cross-examined regarding their affidavits. In addition, Dr. Harold Vincent, an acoustics engineer, testified about noise levels, and three Portsmouth police officers testified about noise complaints filed by various Plaintiffs. After listening to testimony and examining the evidence presented, this Court denied Plaintiffs' motion for a preliminary injunction because none of the elements for an injunction—i.e., irreparable harm, likelihood of success on the merits, balance of the equities, and preserving the status quo—were met.

II

Standard of Review

Pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure, the function of a motion to dismiss is to test the sufficiency of the complaint. *Palazzo v. Alves*, 944 A.2d 144, 149 (R.I. 2008). In determining a Rule 12(b) dismissal, this Court "examines the allegations contained in the plaintiff's complaint, assumes them to be true, and views them in the light most favorable to the plaintiff." *Id.* (citing *Ellis v. Rhode Island Public Transit Authority*, 586 A.2d 1055, 1057 (R.I. 1991). A motion to dismiss may be granted only "if it appears beyond a reasonable doubt that a plaintiff would not be entitled to relief under any conceivable set of facts[.]" *Narragansett Electric Co. v. Minardi*, 21 A.3d 274, 278 (R.I. 2011) (internal quotation omitted).

In ruling on a motion to dismiss, "a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." *Chase v. Nationwide Mutual Fire Insurance Co.*, 160 A.3d 970, 973 (R.I. 2017) (internal quotation omitted). There is, however, a narrow exception "for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Watterson v. Page*,

987 F.2d 1, 3 (1st Cir. 1993). While, as mentioned above, the Court held a two-day preliminary injunction hearing in this matter, it cannot and will not consider any evidence introduced at that hearing. It will confine its decision to the Complaint and any documents referred to therein.

III

Analysis

A. Count II - Public Nuisance

The Rhode Island Supreme Court articulated the elements of a public nuisance as "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred." *State v. Lead Industries Association, Inc.*, 951 A.2d 428, 446-47 (R.I. 2008). The Restatement (Second) makes clear that a public right is more than an aggregate of private rights by a large number of injured people. *See* Restatement (Second) *Torts* § 821B, cmt. g at 92; *see also City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 131 (Ill. App. 2005) (a public right is not "an assortment of claimed private individual rights"). Rather, a public right is the right to a public good, such as "an indivisible resource shared by the public at large, like air, water, or public rights-of-way." *Id.*

In paragraph 17 of their Amended Complaint, Plaintiffs allege that "[t]he operation of the wind turbine at Portsmouth High School . . . is an 'unreasonable interference with a right common to the general public' to be free of annoyance, flicker, vibrations and flicker."[1] Based on the above guidance by our Supreme Court regarding what indivisible resources can constitute a public right, the Court cannot construe freedom from "annoyance, flicker, [and] vibrations" as a public right.

[1] The Court views the repetition of the word "flicker" as a drafting error, rather than a conscious emphasis by Plaintiffs on the extent to which they are *really* bothered by these shadow flickers.

Compl. ¶ 17. *See also Lead Industries Association, Inc.*, 951 A.2d at 453. It is not "indivisible," nor is it "affirmative," like, for example, clean air, fresh water, or unobstructed public waterways. *See American Cyanamid Co.*, 823 N.E.2d at 131 (defining a "public right" as a "right to" an affirmative, "indivisible" public good).

There is nothing in Plaintiffs' Complaint that alleges any effect on the quality of air or water. Arguably, shadow flicker could constitute interference of "light flow." *Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980). However, such a challenge would fail as the "right" to unobstructed flow of light is not recognized in the common law jurisprudence of this state or the nation more generally. *See Piccirilli v. Groccia*, 114 R.I. 36, 40, 327 A.2d 834, 837 (1974) (Plaintiffs were not entitled to recover damages on theory that presence of six-foot high fence on defendant's abutting property denied them their rights to light and air, in light of the fact that such damage is not recognized in state.); *Fontainebleau H. Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357, 359 (Fla. Dist. Ct. App. 1959) ("[T]he English doctrine of 'ancient lights' has been unanimously repudiated in this country.").

In paragraph 16 of Count II, Plaintiffs incorporate the allegations in Count I, which in paragraphs 12 and 13 complain about the noise emanating from the turbine. The Court is not aware of any case anywhere that declares there is a public right to silence. Noise can and is regulated under the police power by municipalities. Enforcement of noise ordinances is left to the authorities. Alternatively, excessive noise can constitute a private nuisance. However, it does not violate any public right.

Plaintiffs here seek to be unmolested on their property by occasional, periodic, and/or seasonal shadow flickers, and excessive noise and vibrations. While they may have a private nuisance claim, they are not protecting any indivisible rights of the public.

In addition, even if this Court did find that freedom from flicker—or some derivative obstruction involving air or light—as a public right, the Plaintiffs have failed to define or establish any "special" damages. To successfully argue a public nuisance claim as private individuals, those individuals must "suffer special damage, distinct from that common to the [general] public." *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 957 (R.I. 1994) (internal quotation omitted). Moreover, an individual '"must have suffered harm *of a kind different* from that suffered by other members of the public exercising the right common to the general public[.]" *Id*. at 958 (emphasis added) (quoting 4 Restatement (Second) *Torts* § 821C(1) (1979)).

Here, Plaintiffs make a conclusory allegation that they suffered special damages distinct from their fellow Portsmouth residents, but have neglected to articulate how those harms were incurred during Plaintiffs' "exercise of a public right[,]" not just their "exercise of [their] private-property right[.]" *Hydro-Manufacturing, Inc.*, 640 A.2d at 958; *see also Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 316 (3d Cir. 1985). Plaintiffs argue special damages such as vibration and "flicker" to meet this requirement, but those damages are no different than damages that could be suffered by any of the homeowners in the general vicinity of the wind turbine. Thus, because Plaintiffs' harm was not suffered in the exercise of a right common to the general public, they cannot pursue a public nuisance action.

Based on the failure to allege a public right and special damages, Count I is dismissed.

B. Count III - Breach of Contract

Plaintiffs argue that they are third-party beneficiaries to the Wind Energy Lease and Purchase Power and Project Agreements between the Town and WED. Although not exhibits to the Complaint, these agreements are sufficiently referenced and, as such, the Court can review them in deciding this issue. *See* Am. Compl. ¶¶ 7, 21-22.

The law in Rhode Island is well settled that "only intended, and not incidental, third party beneficiaries can maintain an action for damages resulting from a breach of a contract between two other contracting parties." *Forcier v. Cardello,* 173 B.R. 973, 984 (D.R.I. 1994); *Davis v. New England Pest Control Co.,* 576 A.2d 1240, 1242 (R.I. 1990); *Finch v. R.I. Grocers Association,* 93 R.I. 323, 329-30, 175 A.2d 177, 184 (1961). *See also State of R.I. Department of Corrections v. ADP Marshall, Inc.*, No. Civ. A PB99-4704, 2004 WL 877560, at *7 (R.I. Super. Mar. 29, 2004). Rhode Island Courts follow the Restatement (Second) of Contracts to distinguish between "intended" and "incidental" beneficiaries. Section 302 of the Restatement provides:

> "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . .
>
> ". . .
>
> > "b. the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> "(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary." Restatement (Second) *Contracts* § 302 (1981)).

Based on the standard above as articulated, the Court cannot reach the same conclusion as Plaintiffs. First, the Wind Energy Lease Agreement itself cannot be clearer that it did not intend to have *any* third-party beneficiaries to the contract. Section 28 of the Wind Energy Lease states that "[e]xcept as expressly provided in this Lease, there are no third-party beneficiaries of this Lease." Plaintiffs contend that since Section 5.2(b) refers to surrounding properties, they are expressly provided for. However, Plaintiffs lose sight of the rest of the section, particularly, the language following the "surrounding properties" sentence which reads as follows: "In relation thereto, Lessee shall prepare and implement an operations and maintenance plan including an impact management practices plan (fully addressing, at a minimum, noise, flicker, and structural

integrity), enforceable by Lessor …"[2] WED and the Town expressly agreed that any failure by WED to comply with its operations and maintenance plan, including addressing noise, flicker, and structural integrity would be enforceable solely by the Town, *not the Plaintiffs as neighboring property owners.*

Secondly, Plaintiffs argue that the intent was to benefit the Plaintiffs as surrounding property owners (i.e., as a class), but where is the cut off line of who is a "surrounding property owner" for the purposes of being a third-party beneficiary to this Lease? The Plaintiffs all live between 740 and 1155 feet from the wind turbine. Does this mean that the Lease Agreement intended to encompass the whole neighborhood and, if so, how would that be defined? The entire Town of Portsmouth? Moreover, the phrase "no greater impact" on the residents does not give rise

[2] The entire Section 5(2)(b) reads as follows: "Lessee shall commit to operating and maintaining the Wind Turbine in such a manner as shall have no greater impact on the surrounding properties, in the aggregate, than did the Existing Turbine when it was in operation to the extent reasonably practicable. In relation thereto, Lessee shall prepare and implement an operations and maintenance plan including an impact management practices plan (fully addressing, at a minimum, noise, flicker, and structural integrity), enforceable by Lessor, a copy of which, as the same may be amended by Lessee from time to time, shall be provided to Lessor. At the expiration of the Term of the Lease, Lessee will decommission the Wind Turbine to One (1) foot below grade. Subject to Lessee's compliance with this *Section 5.2*, at no time during the Term of the Lease, as extended, Shall Lessor take or cause to be taken any action that will result in the Wind Turbine not operating or being operational, or otherwise interfere with Lessee's operation of the Wind Turbine, the Parties agreeing that a specific condition precedent to the Payment Obligation (as defined in the Project Agreement) is the continued operation of the Wind Turbine by Lessee throughout the Term of the Lease, as extended."

to the Plaintiffs' claim that Defendants intended to "benefit" them with this new wind turbine, especially because the Lease clearly stated that there are no third-party beneficiaries.[3]

The Plaintiffs argue that they should be allowed discovery to determine what the parties meant by these terms. The Court feels otherwise. This turbine was expressly intended to benefit the entire Town of Portsmouth, which is why the Lease articulated that any disputes about breach or default could be brought by the Town—not the neighboring townspeople. Further, the exacting standard of the Restatement test requires that "*the parties directly and unequivocally intend to benefit a third party* in order for that third party to be considered an intended beneficiary." *ADP Marshall, Inc.*, 2004 WL 877560, at *7 (emphasis added) (internal quotation omitted). "Surrounding properties" is anything but unequivocal. "Moreover, when a third party [is seeking] enforcement of a contract made between other parties, the contract must be [read and understood] strictly against the party seeking enforcement." *ADP Marshall, Inc*., 2004 WL 877560, at *7 (internal quotation omitted).

Finally, Plaintiffs repeatedly rely on *Iggy's Doughboys, Inc. v. Giroux, et al.*, 729 A.2d 701 (R.I. 1999) to aver that they are third-party beneficiaries. In that matter, Iggy's Doughboys restaurant, a well-known chowder and clam cakes take-out establishment, was next door to Rocky Point Chowder House (RPCH). While Iggy's Doughboys and RPCH both had the same landlord, there was an explicit prohibition in the RPCH lease on window take-out service. The Court found Iggy's Doughboys to be the third-party beneficiary of that clause. Plaintiffs' reliance on this case is misplaced. In *Iggy's Doughboys,* the landlord was the same individual for both restaurants. Furthermore, the landlord assured the owners of Iggy's Doughboys, prior to entering a twenty-

[3] Indeed, the phrase "no greater impact" connotes the mitigation of a harm rather than the conferral of a benefit!

seven-year lease, that take-out service would not be allowed next door. The Supreme Court of Rhode Island concluded that "[i]n any event, by the time Mako's had authorized its sub-lessee, RPCH, Inc., to operate the RPCH restaurant on the premises, it was clear that, as a practical matter, Iggy's was the de facto beneficiary of the lease restriction in question." *Iggy's Doughboys, Inc.*, 729 A.2d at 706.

In the present case, the Plaintiffs were not a party to *any* contract with *any* defendant and no facts have been presented that Plaintiffs were aware of the details of the Lease when the Town and WED entered into it. Additionally, the provision banning take-out service in *Iggy's Doughboys* was clearly intended to benefit Iggy's Doughboys; whereas, in the present case, the Lease between the Town and WED was not intended to benefit the specific Plaintiffs in this case but, rather, the Town as a whole. Finally, *Iggy's Doughboys* was decided on a preliminary injunction hearing, and the Court in that hearing specified that "plaintiffs' request for permanent injunctive relief will require greater scrutiny and attention to whether such a remedy is justified, and if so, to whether the court should permit any reasonable exemptions and modifications…" *Id.*

Based on the foregoing, the Court dismisses Count III.

C. Count IV - Injunctive Relief

In Rhode Island, an injunction is a remedy, not a cause of action. *See Long v. Dell, Inc.*, 93 A.3d 988, 1004 (R.I. 2014). This Court grants the Defendants' Motion to Dismiss Count IV for Injunctive Relief. The Court will permit Plaintiffs to amend their Complaint to request injunctive relief in addition to damages in Count I.

IV

Conclusion

For the reasons set forth herein, this Court **GRANTS** Defendants' Motion to Dismiss Counts II, III, and IV of the Amended Complaint. Counsel shall prepare and present an appropriate order.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Denise Wilkey, et al. v. WED Portsmouth One, LLC and the Town of Portsmouth, Rhode Island, et al.**
CASE NO:	**NC-2021-0352**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**May 18, 2022**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Joseph F. Hook, Esq.**
For Defendant:	**John A. Tarantino, Esq.; Nicole J. Benjamin, Esq.; Erin A. Hockensmith, Esq.; Kevin P. Gavin, Esq.; Michael DeSisto, Esq.**