STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

[Filed: November 9, 2022]

NARRAGANSETT 2100,	:	
Plaintiff,	:	
v.	:	**C.A. No. WC-2021-0448**
THE TOWN OF NARRAGANSETT; CHRISTINE SPAGNOLI, in her capacity as Narragansett Finance Director, JESSE PUGH, in his capacity as a President of the Narragansett Town Council; SUSAN P. CICILLINE BUONANNO, in her capacity as a Member of the Narragansett Town Council, EWA DZWIERZYNSKI, in her official capacity as Town Council Member, DEBORAH KOPECH, in her official capacity as Town Council Member, and PATRICK MURRAY, in his official capacity as Town Council Member,	:	
Defendants.	:	

DECISION

TAFT-CARTER, J. Before this Court for decision are Plaintiff's, Narragansett 2100, Motion for Summary Judgment with respect to Counts I and II of Plaintiff's Complaint and Defendants'—Town of Narragansett (the Town), Christine Spagnoli, in her capacity as Narragansett Finance Director, Jesse Pugh, in his capacity as a President of the Narragansett Town Council, Susan P. Cicilline Buonanno, in her capacity as a Member of the Narragansett Town Council, Ewa Dzwierzynski, in her official capacity as Town Council Member, Deborah Kopech, in her official capacity as Town Council Member, and Patrick Murray, in his official capacity as Town Council Member—Cross Motion for Summary Judgment as to Counts I and II. Jurisdiction is pursuant to

G.L. 1956 §§ 9-30-1, 45-24-71 and Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure.

I

Facts and Travel

On June 15, 2020, the Narragansett Town Council (hereinafter the Council) instructed the Town solicitor to prepare an ordinance to govern student and other short-term rentals in single-family neighborhoods. (Compl. ¶ 15; Answer ¶ 15.) The proposed ordinance (hereinafter the 2020 Three-Student Ordinance) provided that no more than three college students shall occupy a dwelling or dwelling unit unless the building is owner occupied. (Compl. ¶ 18; Answer ¶ 18.) The Council unanimously voted to refer the 2020 Three-Student Ordinance to the Narragansett Planning Board (hereinafter the Board) on June 29, 2020. (Compl. ¶ 16; Answer ¶ 16.)

After reviewing the 2020 Three-Student Ordinance, the Board submitted its findings and recommendations to the Council on August 11, 2020. (Pl.'s Mot. Summ. J. (Pl.'s Mot.) Ex. D, at 1.) The Board found that the 2020 Three-Student Ordinance may be consistent with three of the purposes of zoning. *Id.* at 7. Specifically, the Board determined that the ordinance may be consistent with: (1) promoting public health, safety and general welfare; (2) providing for a range of uses and intensities appropriate to the character of the Town and reflecting current and future needs; and (3) providing for the control of noise pollution. *See id.* at 6. However, the Board also found that the ordinance was inconsistent with the 2017 Narragansett Comprehensive Plan. *Id.* at 9. The Board therefore unanimously voted to disapprove of the 2020 Three-Student Ordinance. (Compl. ¶ 21; Answer ¶ 21.)

The Council conducted a remote hearing on August 17, 2020 using the video conferencing service Zoom. (Compl. ¶ 19; Answer ¶ 19.) Plaintiff, a group of concerned landlords,[1] submitted letters in opposition to the ordinance. (Compl. ¶ 23; Answer ¶ 23.) At the hearing, many members of the public voiced opposition to the ordinance. (Compl. ¶¶ 24-26; Answer ¶¶ 24-26.) The public was instructed to raise their hands to indicate their desire to speak, but the meeting was closed before everyone was afforded the chance to be heard. *Id.* Despite this, the Council adopted the 2020 Three-Student Ordinance on August 24, 2020. (Compl. ¶ 30; Answer ¶ 30.)

Plaintiff, along with other interested parties, subsequently filed suit challenging the ordinance. *See Narragansett 2100, Inc. v. The Town of Narragansett*, No. WC-2020-0353, 2021 WL 2327266, at *1 (R.I. Super. June 1, 2021). On June 1, 2021, this Court declared that the 2020 Three-Student Ordinance was void *ab initio* and *ultra vires* for failing to comply with § 45-24-53. *See id.* at *6. This Court found that the Council did not give all members of the public who wished to speak the opportunity to do so. *See id.*

Two weeks later, the Council voted to schedule a public hearing on an *identical* ordinance, the 2021 Three-Student Ordinance. (Compl. ¶¶ 32, 40, Ex. A; Answer ¶ 32.) The 2021 Three-Student Ordinance was not referred to the Board for findings and recommendation. (Compl. ¶¶ 33-34; Answer ¶¶ 33-34; Pl.'s Mot., Ex. H.) Therefore, there were no findings and recommendations made regarding the 2021 Three-Student Ordinance. (Compl. ¶ 35; Answer ¶ 35.) Prior to the public hearing, Plaintiff sent its opposition to the 2021 Three-Student Ordinance to the

[1] Defendants admitted in their Answer that Plaintiff was an entity located in Rhode Island. *See* Answer ¶ 1 n.1. However, Defendants denied that Plaintiff was a group of landowners in Narraganset Rhode Island. Plaintiffs nevertheless have submitted evidence that they presented themselves at the Council meeting as a corporation of landlords in the community. (Pl.'s Mot., Ex. H.) As Defendants have not contested this evidence, they cannot rest on their flat denial in the pleadings. *See Loffredo v. Shapiro*, 274 A.3d 782, 790 (R.I. 2022).

Council. (Compl. ¶ 36; Answer ¶ 36.) The Council conducted a public hearing on August 18, 2021 to discuss the ordinance. (Compl. ¶ 37; Answer 37.) On that day, the Council voted in favor of the first passage of the 2021 Three-Student Ordinance by a vote of 3-2. (Compl. ¶ 38; Answer ¶ 38.) The Council then voted in favor of the second passage of the ordinance by a vote of 3-2 on September 7, 2021. (Compl. ¶ 39; Answer ¶ 39.)

Plaintiff initiated this lawsuit on October 5, 2021, asserting two counts—Count I is an appeal pursuant to § 45-24-71, and Count II is a request for a Declaratory Judgment pursuant to the Uniform Declaratory Judgments Act. (Compl. ¶¶ 41-53.) Plaintiff subsequently filed a motion for summary judgment requesting that this Court enter an order in its favor or alternatively enter a declaratory judgment as to Counts I and II of their Complaint.[2] (Pl.'s Mot. 1.) Defendants filed a cross-motion for summary judgment on August 3, 2022. (Defs.' Cross Mot. 1.) This Court now renders its Decision as to both motions.

II

Standard of Review

The Rhode Island Supreme Court has cautioned that, "[s]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *DeMaio v. Ciccone*, 59 A.3d 125, 129 (R.I. 2013). The Court examines the factual evidence contained in "the pleadings, depositions, documents, electronically stored information, answers to interrogatories, and admissions on file, together with the affidavits," Super. R. Civ. P. 56(c), but the parties may

[2] Plaintiff also asked this Court to grant it summary judgment on the issue of standing by dismissing Defendants' affirmative defense. (Pl.'s Mot. 32.) However, Defendants failed to raise the issue of standing in their Opposition Memorandum, their Cross Motion for Summary Judgment, and their Supplemental Memorandum. *See generally* Defs.' Opp'n Mem.; Defs.' Cross Mot. 3; Defs.' Suppl. Mem. Therefore, this Court concludes that Defendants are not contesting the issue of standing and will proceed to the merits.

not rest on mere allegations or denials contained in the pleadings. *See Loffredo*, 274 A.3d at 790. Once the movant has alleged the absence of material factual issues, the opposing party has an affirmative duty to provide evidence of the existence of material factual disputes. *Id.* A court will only grant a motion for summary judgment when the competent evidence, viewed in the light most favorable to the non-moving party, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law." Super. R. Civ. P. 56(c); *see also Andrade v. Westlo Management LLC*, 276 A.3d 393, 399-400 (R.I. 2022).

III

Analysis

A

Count II: Declaratory Relief

The Zoning Enabling Act (the Enabling Act) sets forth the procedure for the adoption of zoning ordinances. *See* § 45-24-51. Section 45-24-51 of the statute provides:

> "The city or town shall designate the officer or agency to receive a proposal for adoption . . . of a zoning ordinance . . . . Immediately upon receipt of the proposal, the officer or agency *shall* refer the proposal to the city or town council, *and to* the planning board . . . for study and recommendation . . . . Where a proposal for adoption . . . of a zoning ordinance . . . is made by the city or town planning board . . . the *requirements* for study by the board may be waived; provided, that the proposal by the planning board includes its findings and recommendations pursuant to § 45-24-52." *Id.* (emphasis added).

Upon receipt of the proposal, the planning board must report their findings and recommendations to the town council within forty-five days. *Id.* These findings must include: (1) a statement of the general consistency of the proposal with the comprehensive plan; and (2) "a demonstration of recognition and consideration of each of the applicable purposes of zoning, as presented in § 45-

24-30." Section 45-24-52. The town council must then hold a public hearing and, within forty-five days, render a decision. Section 45-24-51.

Plaintiff is seeking a declaration that the 2021 Three-Student Ordinance is void *ab initio* and *ultra vires* because Defendants failed to comply with the procedural requirements of the Enabling Act. (Pl.'s Mot. 11-13; Compl. 9.) Plaintiff contends that by failing to refer the 2021 Three-Student Ordinance to the Board for study and recommendation, the Council violated the mandatory provisions of § 45-24-51 which requires zoning ordinance proposals to be immediately referred to the Board. *Id.* at 11-13.[3] Defendants argue that the procedural failure to refer the 2021 Three-Student Ordinance to the Board should not automatically render the resulting ordinance void. (Defs.' Opp'n Mem. 14.) Defendants contend that the referral requirement is directory, rather than mandatory. (Defs.' Opp'n Mem. 18.) Consequently, Defendants urge the Court to uphold the ordinance because the Town substantially complied with the requirements of § 45-24-52 by referring an identical ordinance to the Board for study and recommendation the year prior. (Defs.' Suppl. Mem. 5.)

[3] At all times, Plaintiff refers to the *Council's* failure to refer the 2021 Three-Student Ordinance to the Board. *See generally* Pl.'s Mot. 11-13; Pl.'s Obj. 2-9. However, it should be noted that § 45-24-51 does not direct the town *council* to refer proposals for the adoption, amendment, or repeal of the zoning ordinance to the planning board; rather, it is the designated officer or agency who must refer such proposals to the town council and the planning board. Section 45-24-52. The Town of Narragansett has designated the planning division of the department of community development to serve that function. *See* Narragansett Code of Ordinances, Suppl. No. 13, App. A, § 20 (Sept. 18, 2019). It appears that it is the Council's practice to directly refer such proposals to the Board. *See* Compl. ¶ 16; Answer ¶ 16; *see also* Pl.'s Mot., Ex. L (noting the Council referred a new ordinance proposal to the Board for review and recommendation). Nevertheless, this apparent procedural error is of no consequence to the immediate action since neither entity referred the 2021 Three-Student Ordinance to the Board for findings and recommendations. This Court will thus proceed with its analysis, but it will refer to the *Town's* failure to refer the ordinance to the Board, rather than the Council's failure.

1

Section 45-24-51, Directory or Mandatory

Defendants first contend that the referral provision is directory, rather than mandatory because it does not provide a sanction for non-compliance citing to *Michael West & Michael West Builders, Inc. v McDonald*, No. 06-6625, 2008 WL 4176767 (R.I. Super. Aug. 7, 2008), *aff'd West v. McDonald*, 18 A.3d 526 (R.I. 2011). (Defs.' Opp'n Mem. 18.) Contrary to Defendants' argument, the *Michael West Builders, Inc.* court did not find the statute at-issue was directory solely because it lacked a sanction. *See* 2008 WL 4176767. Instead, the court determined that the 18-month deadline was directory because the time restriction was subsidiary to the essence of the statute. *Id.* Therefore, *Michael West Builders, Inc.* does not support a finding that § 45-24-51 is directory simply because it lacks a sanction for non-compliance. *See id.*

It is clear that directory and mandatory statutes are intended to be complied with. *Rosa v. PJC of Rhode Island, Inc.*, 270 A.3d 37, 41 (R.I. 2022). However, "[w]hile a violation 'of a mandatory statute either invalidates the transaction or subjects the noncomplier to the consequences stated in the statute,' failure to comply with a directory statute does not have such consequences 'since there is a permissive element.'" *Id.* The distinction between a discretionary and mandatory statute hinges on the legislative intent. *See Town of Tiverton v. Fraternal Order of Police, Lodge #23*, 118 R.I. 160, 165, 372 A.2d 1273, 1276 (1977). "If the legislature considers the provisions sufficiently important that exact compliance is required, then the provision is mandatory." 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 25:3 at 584 (7th ed. 2021). Therefore, "statutory requirements comprising the essence of a statute are mandatory." *Town of Tiverton*, 372 A.2d at 1275. In contrast, statutes that are simply "a guide

for the conduct of business and for orderly procedure, rather than a limitation of power," are directory. *Begg v. Alexander-Scott,* 242 A.3d 23, 30 (R.I. 2020).

The best indication of legislative intent is a statute's plain language. *See* 3 Shambie Singer, *Sutherland Statutory Construction* § 57:2 at 16 (8th ed. 2020). Therefore, if a statute's clear and unambiguous language is mandatory, "then there is no room for statutory construction and [the Court] must apply the statute as written." *GSM Industrial, Inc. v. Grinnell Fire Protection Systems Co., Inc.,* 47 A.3d 264, 270 (R.I. 2012). However, a statute couched in mandatory terms may still be deemed directory if the statute is directed at public officers or where there is no sanction for noncompliance. *Rosa,* 270 A.3d at 41. In such a case, "the provision will not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized." *Begg,* 242 A.3d at 29.

Here, the plain language of the statute indicates that the referral requirement is mandatory. The statute states that the designated officer or agency "s*hall* refer the proposal to the city or town council, *and* to the planning board . . . ." Section 45-24-51 (emphasis added). The use of "shall" is generally understood to be mandatory unless context indicates otherwise. *Shine v. Moreau,* 119 A.3d 1, 13 (R.I. 2015); *see also* 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 25:4 at 589 (7th ed. 2009). In addition, the statute describes the referral provision as a "requirement." *See* § 45-24-51. "Requirement" is not defined by the statute, but its common meaning can be gleaned from a recognized dictionary. *See Planned Environments Management Corp. v. Robert,* 966 A.2d 117, 123 (R.I. 2009). Merriam-Webster's Dictionary defines requirement as "something essential to the existence or occurrence of something else." *Requirement,* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/requirement

(last visited Sept. 27, 2022). Therefore, § 45-24-51's plain and ordinary meaning indicates that referral to the planning board is mandatory, rather than directory.

This finding would ordinarily end the Court's inquiry. *See GSM Industrial, Inc.*, 47 A.3d at 271. However, the referral requirement in § 45-24-51 lacks a sanction and is directed at a public officer. *See* § 45-24-51. Consequently, this Court must consider whether the Town substantially complied with the statute's purpose. *See Begg*, 242 A.3d at 29.[4] Defendants argue that the Town substantially complied with the statute's purpose because they referred an identical ordinance to the Board, the year prior. (Defs.' Suppl. Mem. 5). Defendants contend that the legislature did not intend to require the "Planning Board to review the proposal for a second time – as long as it already made findings and recommendations pursuant to § 45-24-52." *Id.*

Contrary to Defendants' argument, "the raison d'être of the . . . Zoning Enabling Act is to promote the intelligent development of land." *West*, 18 A.3d at 535. To that end, § 45-24-51 requires referral to the Board, so that they may aid the Council's decision-making process by advising them on a proposed ordinance's consistency with the comprehensive plan and the purposes of zoning. *See* § 45-24-51; *see also Maynard v. Beck*, 741 A.2d 866, 871-72 (R.I. 1999). Therefore, unlike time restrictions which are designed to secure order and dispatch, *see West*, 18 A.3d at 534, the referral requirement comprises the essence of the statute because it is "an integral part of the legislative process in the context of a municipality enacting appropriate zoning ordinances." *Maynard*, 741 A.2d at 872. Furthermore, the statute provides a clear timeline for ordinance proposals. *See* § 45-24-51 (requiring that after receiving a new proposal, the Board give its findings and recommendations within 45 days, the Council hold a public hearing within 65

[4] Whether the non-compliance prejudiced either party is also ordinarily considered; however, as neither party argued that they were prejudiced by Defendants' noncompliance, the Court will not consider it here.

days, and the Council render a decision within 45 days after the public hearing). Therefore, the statute cannot be read as only intending the Board to make findings regarding an ordinance once, regardless of how much time passes between the Board's original report and the ordinance's adoption.

Accordingly, even though § 45-24-51 lacks a sanction and is directed at a public officer, the referral requirement is mandatory because it is written with mandatory language and is an essential component of achieving the essence of the Enabling Act: promoting the intelligent development of land.

2

Substantial Compliance

Defendants nevertheless argue the ordinance should not be declared void because the Town substantially complied with the statute and strict compliance would merely be technical, citing to several non-binding cases to support this proposition. *See* Defs.' Opp'n Mem. 14-17 (citing *McFarland v. City of Cranston*, No. C.A. WC 01-4938, 2003 WL 21688261 (R.I. Super. July 15, 2003); *Lischio v. Town of North Kingstown*, No. Civ.A. WC 00-0372, 2003 WL 21018092 (R.I. Super. Apr. 25, 2003)); Defs.' Suppl. Mem. 5-7 (citing *Abel v. Board of Works of City of Elizabeth*, 164 A.2d 764 (N.J. Super. Ct. App. Div. 1960)). The Rhode Island Supreme Court has dealt with a similar argument in *Johnson & Wales College v. DiPrete*, 448 A.2d 1271 (R.I. 1982). There the defendant argued that they substantially complied with a notice provision because they gave proper notice before the first public hearing, even though they failed to provide proper notice for the second hearing. *Id.* at 1275. This argument was rejected because substantial compliance with a mandatory Enabling Act requirement is not sufficient. *See id.* at 1278-79. The court may "not ignore procedural irregularity or treat it as inconsequential." *Id.* at 1278. Similarly, the Defendants

argue here that the Town's former compliance with the referral requirement is sufficient. Given the clear, mandatory language of § 45-24-51, however, this Court cannot conclude that the Town's procedural error was inconsequential. *See id.*

Defendants rely on a New Jersey case to support their argument that the Court may ignore mandatory statutory language if the Town committed a technical statutory violation. *See* Defs.' Suppl. Mem. 5-6 (citing *Abel*, 164 A.2d at 771). Defendants' reliance on *Abel*, however, does not support a similar result here. In *Abel*, the Planning Board violated a mandatory statutory requirement by recommending a zoning ordinance to the Board of Public Works without first seeing the text of the proposed ordinance. 164 A.2d at 767-68. Nevertheless, the *Abel* court found that the violation did not invalidate the ordinance because the Planning Board did see a *map* of the proposed ordinance. *Id.* at 771. Therefore, the statutory violation was merely technical because, "the Planning Board got precisely the kind of information which the Legislature wanted it to get in reviewing a proposed zoning change, and it exercised its expert judgment on the basis of that information." *Id.* Unlike in *Abel*, the Council did not receive the kind of information that the Legislature intended when adopting the 2021 Three-Student Ordinance.

Defendants ask this Court to accept that the Board's findings and recommendations would have been identical in 2021 because the corresponding Board as well as the text of the Comprehensive Plan are unchanged. This argument fails because the Board is charged, not only with determining the consistency of the ordinance with the Comprehensive Plan, but also with evaluating the consistency of the ordinance with the purposes of zoning. *See* § 45-24-52. The Board in 2020 found that the Three-Student Ordinance "may be consistent with the purposes of zoning," including providing for a range of uses and intensities that are appropriate to the character of the Town, reflecting current and future needs. (Pl.'s Mot. Ex. D, at 6.) While the Comprehensive

Plan remained untouched, the needs of a town constantly change. Therefore, even if this Court were to adopt the *Abel* court's reasoning in regard to technical violations of mandatory statutes, this Court would still conclude that the 2021 Three-Student Ordinance was invalid because the Town's violation of the referral requirement was not merely technical.

Defendants' reliance on two Superior Court cases also does not persuade the Court that substantial compliance with a mandatory statute is sufficient. Defendants first argue that under *McFarland*, the Court should only invalidate an ordinance for failure to follow procedural rules if the violation of procedure was intentional. (Defs.' Opp'n Mem. 15, 17). *McFarland* is unavailing because the applicable statute specifically provided that procedural defects would only render subsequent ordinances invalid if the defect was intentional. *See* 2003 WL 21688261, at *4. Section 45-24-51 does not contain a similar provision. *See* § 45-24-51. Furthermore, Defendants' reliance on *Lischio* is also unpersuasive because the *Lischio* court did not decide that failure to refer an ordinance to the planning board was unnecessary. 2003 WL 21018092, at *10. Rather, the *Lischio* court found that there was insufficient evidence on the record to show a lack of compliance with the referral requirement. *See id.* at *10.[5]

For the above reasons, the Town's substantial compliance with the referral requirement cannot validate their illegal adoption of the 2021 Three-Student Ordinance. The Town violated a

[5] For similar reasons, Defendants' other cited cases are also unhelpful. *See* Defs.' Opp'n Mem. 14-17 (citing *Little Mack Entertainment II, Inc. v. Township of Marengo*, 625 F. Supp. 2d 570 (W.D. Mich. 2008)); Defs.' Suppl. Mem. 5-7 (citing *Wilhelm v. Morgan*, 157 S.E.2d 920 (Va. 1967)). In *Little Mack Entertainment II, Inc.*, the court found that the failure to refer an ordinance to the planning commission did not invalidate the ordinance only because the planning commission did not exist. 624 F. Supp. 2d at 575. Additionally, the *Wilhelm* court did not require the defendant to refer an ordinance to the planning commission a second time only because the applicable statute explicitly permitted such an exception to the referral requirement. 157 S.E.2d at 921.

mandatory statutory provision. Therefore, the resulting ordinance is void. *See Rosa*, 270 A.3d at 41; *DiPrete*, 448 A.2d at 1278-79.

B

Appeal Pursuant to R.I.G.L. § 45-24-71

Because this Court finds that Plaintiff's motion for summary judgment should be granted as to Count II, this Court need not proceed to Count I to determine whether the now invalid 2021 Three-Student Ordinance is consistent with the Comprehensive Plan.

IV

Conclusion

For the reasons stated above, Plaintiffs' Motion for Summary Judgment is granted with respect to Count II. Accordingly, Defendants' Cross-Motion for Summary Judgment is denied with respect to Count II.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Narragansett 2100 v. The Town of Narragansett, et al.**
CASE NO:	**WC-2021-0448**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**November 9, 2022**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**Joelle C. Rocha, Esq.**
For Defendants:	**James M. Callaghan, Esq.**