STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: December 12, 2022)

THE PRESERVE AT BOULDER HILLS, LLC; THE PRESERVE AT BOULDER HILLS II, LLC; THE PRESERVE AT BOULDER HILLS III, LLC; THE PRESERVE AT BOULDER HILLS IV, LLC; M.T.M. INVESTMENT GROUP L.P.; AND CASTLE RESIDENCES, LLC,	:	
Plaintiffs,	:	
v.	:	
	:	**C.A. No. WC-2021-0568**
LAURA KENYON, in her capacity as Finance Director of THE TOWN OF RICHMOND; NELL CARPENTER, in her capacity as President of the RICHMOND TOWN COUNCIL; and JAMES PALMISCIANO, LAUREN CACCIOLA, RICH NASSANEY AND RONALD NEWMAN, in their Capacities as members of the RICHMOND TOWN COUNCIL,	:	
Defendants.	:	

DECISION

LICHT, J. This case concerns a major land development project known as the Preserve,[1] located in the Town of Richmond and developed by the Preserve at Boulder Hills, LLC; the Preserve at Boulder Hills II, LLC; the Preserve at Boulder Hills III, LLC; the Preserve at Boulder Hills IV,

[1] Plaintiffs chose not to provide a description of the Preserve or to identify which individual Plaintiff owns which portion of the development. Even though Plaintiffs promote their development in print, broadcast media, and the internet, in deciding this motion, the Court need not and will not look beyond the Amended Complaint and those items which the Court may look at pursuant to Rule 12(c) of the Superior Court Rules of Civil Procedure.

LLC; M.T.M. Investment Group, L.P.; and Castle Residences, LLC[2] (collectively referred to as the Plaintiffs). The Preserve comprises at least 756.53 acres, on which there is "a clubhouse with a restaurant and banquet facility, golf course, tennis facility, trails and fishing ponds," and perhaps an indoor and outdoor shooting range and a hotel.[3] (Am. Compl. ¶¶ 1-7, 20, 30.)

The Defendants are Laura Kenyon, in her capacity as Finance Director for the Town of Richmond; Nell Carpenter, in her capacity as President of the Richmond Town Council; as well as James Palmisciano, Lauren Cacciola, Rich Nassaney, and Ronald Newman, in their capacities as members of the Richmond Town Council (collectively referred to as the Defendants).

Defendants filed a Motion to Dismiss and for Judgment on the Pleadings Pursuant to Rule 12(c) [of the Superior Court Rules of Civil Procedure], or in the Alternative, for Summary Judgment Pursuant to Rule 56 [of the Superior Court Rules of Civil Procedure] (Defs.' 12(c) Motion). Plaintiffs object to Defendants' 12(c) Motion. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts & Travel

In or about 2011, Plaintiffs entered into a Purchase and Sale Agreement (the Agreement) for a 178-acre parcel of land known as Assessor's Plat 6B, Lot 4 (the Initial Property) which, at the time, was zoned as "Planned Development." (Am. Compl. ¶ 17.) Prior to closing on the Initial

[2] Each named Plaintiff owns a different tax assessor lot as identified in paragraphs 1 through 6 of the Amended Complaint. However, Plaintiffs failed to identify on which lots the various portions of the development are located. For the purposes of this opinion, the Court will refer to the development as "the Preserve" as the Court believes it provides more clarity, even though the term "the Preserve" is used to refer to all six Plaintiffs in the Amended Complaint and subsequent memorandum of law.

[3] The Amended Complaint speaks repeatedly of Plaintiffs' intent to have these features in their development but never affirmatively indicates that they were built.

Property, Plaintiffs informed Defendants that they intended to seek a permit for an outdoor shooting range and gun club, which Plaintiffs claim was then a permitted use in a Planned Development zone.[4] *Id.* ¶ 18. At public hearings, both Defendants and the Planning Board informed Plaintiffs that "an indoor range would be an even more acceptable use." *Id.* In reliance on such statements, Plaintiffs allege that they closed on the Initial Property and began plans for development, which included initiating a marketing campaign that highlighted activities like an indoor and outdoor shooting range and selling memberships for the upcoming facility. *Id.* ¶ 19.

Three years later, in or about early 2014, Plaintiffs met with the then Town Planner to discuss the submission of their plans for an indoor and outdoor shooting range. *Id.* ¶ 20. At that time, Plaintiffs were informed of a recent amendment to the zoning ordinance which prohibited indoor and outdoor shooting ranges, as well as most of Plaintiffs' other planned outdoor recreational activities, in Planned Development zones. *Id.* Plaintiffs aver that they were not given notice of either the proposed amendment or the approval despite Defendants' knowledge and endorsement of Plaintiffs' planned activities. *Id.* ¶¶ 20-21. Thus, Plaintiffs contend that as a result of the zoning amendment, they were "forced to make business decisions relative to the memberships it had already sold…at great expense." *Id.* ¶ 22. However, two years later, in or about late 2016, the "Preserve Resorts District" was created which permitted recreational activities such as indoor and outdoor shooting ranges. *Id.* ¶ 23. The Initial Property was later rezoned from Planned Development to Preserve Resorts District. *Id.*

Although Plaintiffs did not have the appropriate zoning to fully develop the indoor and outdoor shooting ranges, Plaintiffs remained able to develop other features of the Preserve. As

[4] As will be discussed below, the Town's Zoning Ordinance required a special use permit for a gun club.

such, by November 2015, Phase 1 of the Preserve, which included "a clubhouse with a restaurant and banquet facility, golf course, tennis facility, trails and fishing ponds" was nearly complete. *Id.* ¶ 30. However, Plaintiffs sought to further develop the Preserve and proposed an expansion (the Hotel Expansion) to the Richmond Planning Board for "a Master Plan Major Land Development for a project that include[ed] a 150 room hotel, conference center, and other related structures…" *Id.* ¶ 32.

In furtherance of the Hotel Expansion, Plaintiffs allege that they were required to pay: (1) a $500 pre-application fee; (2) $15,050 for a Master Plan Major Land Development Application; and (3) $8,500 for a traffic study performed by Beta and Associates in support of the application. *Id.* ¶¶ 31, 33-34. Plaintiffs further contend that Defendants "insisted on…outside peer review of" the Hotel Expansion proposal, resulting in Plaintiffs paying an additional $13,691 in peer review fees. *Id.* ¶ 35.

In May 2016, Plaintiffs received Master Plan Approval for the Hotel Expansion. *Id.* ¶ 37. Plaintiffs then submitted their preliminary application package to Defendants in which Plaintiffs allege they were required to pay another application fee of $15,050. *Id.* ¶ 38. Furthermore, Plaintiffs assert that upon submission of their preliminary application package to Defendants, Plaintiffs informed Defendants that they had obtained financing for the Hotel Expansion which was set to expire in July 2016. *Id.* ¶ 43. Plaintiffs contend, however, that the Planning Board did not initiate public hearings on the Hotel Expansion until August 2016, at which time the Planning Board further delayed the hearings until September 2016. *Id.* ¶¶ 44-45. On October 11, 2016, approximately five months after Plaintiffs submitted their preliminary application package, the Planning Board issued a decision approving Plaintiffs' preliminary plan to which the Town's Administrative Officer gave final approval on or about February 8, 2017. *Id.* ¶¶ 44, 47-48.

On December 16, 2021, Plaintiffs filed a five count Complaint against Defendants alleging a continuous deprivation of rights which "has caused and continues to cause" substantial harm and damages. *Id*. ¶ 14. Specifically, Plaintiffs' Complaint advances claims for (Count I) Substantive Due Process Under the Rhode Island Constitution; (Count II) Tortious Interference with Contract; (Count III) Tortious Interference with Prospective Business Advantages; (Count IV) Civil Liability for Crimes and Offenses; and (Count V) Civil Racketeer Influenced and Corrupt Organizations (RICO) Act, Violation of R.I. Gen. Laws § 7-15-1 *et seq*. *Id.* ¶¶ 67-89.

On April 7, 2022, Defendants filed their Rule 12(c) Motion. In addition to Defendants' substantive arguments in response to each of Plaintiffs' claims, Defendants also raise numerous defenses in support of their 12(c) Motion which will be discussed below. Plaintiffs filed an Objection and Supporting Memorandum (Pls.' Objection) on May 27, 2022 with their arguments refuting Defendants' defenses. Defendants filed their Reply Memorandum (Defs.' Reply) on June 24, 2022.[5] The Court heard oral arguments on November 1, 2022.

II

Standard of Review

Before addressing the parties' arguments, this Court must determine whether the instant motion for judgment on the pleadings should be converted to a motion for summary judgment pursuant to the language of Rule 12(c). Super. R. Civ. P. 12(c). "Ordinarily, when ruling on a motion to dismiss brought under Rule 12(b)(6) or Rule 12(c), 'a court may not consider any

[5] This Court also previously entered an Order dated October 5, 2022 granting Plaintiffs' Motion for Leave to Amend Complaint to include forms of injunctive relief as additional remedies for Defendants' alleged civil RICO violations. The Amended Complaint was filed on October 6, 2022 and is the operative complaint in this matter. On October 7, 2022, Defendants filed a Supplemental Memorandum in Further Support of their 12(c) Motion which merely reincorporated Defendants' arguments from their September 8, 2022 memorandum of law in opposition to Plaintiffs' Motion for Leave to Amend Complaint.

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 Company*, 160 A.3d 970, 973 (R.I. 2017) (quoting *Alternative Energy, Inc. v. St. Paul Fire & Marine Insurance Co.*, 267 F.3d 30, 33 (1st Cir. 2001)).

If a trial justice considers extraneous material as part of a motion for judgment on the pleadings under Rule 12(c), the motion will be automatically converted to one for summary judgment under Rule 56. *See Salvadore v. Major Electric & Supply, Inc.*, 469 A.2d 353, 356 (R.I. 1983); Ewing *v. Frank*, 103 R.I. 96, 98, 234 A.2d 840, 841 (1967). Rule 12(c) of the Superior Court Rules of Civil Procedure provides:

> "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Super. R. Civ. P. 12(c).

The court is then to give the parties notice of the conversion and a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Id*.

However, "[t]he *submission* of additional materials does not automatically result in conversion of a motion for judgment on the pleadings into a motion for summary judgment." *Payette v. Mortgage Electronic Registration Systems*, No. PC-2009-5875, 2011 WL 3794701, at *2 (R.I. Super. Aug. 22, 2011) (emphasis added). "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Super. R. Civ. P. 10(c). There is also "a 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.'" *Chase*, 160 A.3d at 973 (quoting *Alternative Energy, Inc.*, 267 F.3d

at 33); *see also* Robert B. Kent, et al., *Rhode Island Civil and Appellate Procedure with Commentaries*, § 10:3 at 115-16 (2021-2021 ed.) (hereinafter *Kent*). When the exhibits associated with a motion for judgment on the pleadings were included with or incorporated into the pleadings, the proper standard of review remains that for judgment on the pleadings. Super. R. Civ. P. 10(c); *see also Kent* §§ 10:3, 12:13.

Both Defendants and Plaintiffs have attached exhibits to their filings and cite to evidence that can only be found within these extraneous filings to support arguments made in their respective memoranda. Specifically, Defendants included fifteen exhibits[6] with their Rule 12(c) Motion and subsequently attached another eight exhibits to their Reply.[7] Similarly, Plaintiffs

[6] Defendants' 12(c) Motion contains the following exhibits:

1. Complaint Filed on December 16, 2021 (Ex. 1).
2. Defendants' Answers and Defenses dated February 4, 2022 (Ex. 2).
3. Notice of Claim and Demand by The Preserve, LLC dated March 30, 2021 (Ex. 3).
4. G.L. 1956 § 45-15-5 (Ex. 4).
5. Secretary of State Search Record for The Preserve, LLC (Ex. 5).
6. Entity Summary for The Preserve at Boulder Hills, LLC (Ex. 6).
7. Entity Summary for The Preserve at Boulder Hills II, LLC (Ex. 7).
8. Entity Summary for The Preserve at Boulder Hills III, LLC (Ex. 8).
9. Entity Summary for The Preserve at Boulder Hills IV, LLC (Ex. 9).
10. Entity Summary for M.T.M. Investment Group, L.P. (Ex. 10).
11. Entity Summary for Castle Residences, LLC (Ex. 11).
12. Secretary of State Preserve/The Preserve Entity Summary (Ex. 12).
13. Chapter 18.26 Planned Development Resort District Ordinance (Ex. 13).
14. Richmond, R.I. Land Development and Subdivision Regulations, Article 11, as amended 10/12/2010 (Ex. 14).
15. Richmond, R.I. Land Development and Subdivision Regulations, Article 11, as amended 4/25/2017 (Ex. 15).

[7] Defendants' Reply contains the following exhibits:

1. *State v. Town of Cumberland*, 6 R.I. 496 (R.I. 1860) (Ex. A).
2. Title IV, Chapters 43-44 (Ex. B).
3. Title XXX, Chapters 210-219 (Ex. C).
4. G.L. 1956 §§ 45-24-71, 45-24-63, 45-24-66, 45-24-69, and Chapter 18.52 Zoning Board of Review (Ex. D).
5. Richmond, R.I. Land Development and Subdivision Regulations, Article 11, as amended 4/25/2017 (Ex. E).

included three exhibits with their Objection.[8] The decision to include or exclude proffered materials in connection with a Rule 12(c) motion is entrusted to the sound discretion of the court. *Gulf Coast Bank & Trust Co. v. Reder*, 355 F.3d 35, 38 (1st Cir. 2004). Thus, this Court finds that the exhibits included by both parties, except for Exhibit H attached to Defendants' Reply, may be considered without converting Defendants' 12(c) Motion to one for summary judgment as the exhibits are either pleadings themselves, "sufficiently referred to in the complaint," or are "official public records." *Chase*, 160 A.3d at 973.

As this Court will not convert Defendants' Rule 12(c) Motion to a Rule 56 Motion for Summary Judgment, Plaintiffs' request for discovery pursuant to Rule 56(f) need not be addressed. (Pls.' Mem. of Law in Opp'n to Defs.' Rule 12(c) Mot. (Pls.' Opp'n) at 11-14.) The Court will now decide Defendants' 12(c) Motion as a Motion for Judgment on the Pleadings.

A Rule 12(c) motion for judgment on the pleadings provides a trial court with the ability to dispose of a case early in the litigation process "when the material facts are not in dispute after the pleadings have been closed and only questions of law remain to be decided." *Haley v. Town of Lincoln*, 611 A.2d 845, 847 (R.I. 1992) (citation omitted). When filed by the defendant, a motion for judgment on the pleadings pursuant to Rule 12(c) is essentially a motion to dismiss, and the Court reviews it as so. *Kent* § 12:13; *see Chariho Regional School District v. Gist*, 91 A.3d 783, 787 (R.I. 2014) (citation omitted). Thus, a Rule 12(c) motion "is appropriate 'when it

6. Richmond, R.I. Land Development and Subdivision Regulations, Article 12, as amended 4/25/2017 (Ex. F).
7. G.L. 1956 §§ 45-23-57, 45-23-51, 45-23-58, 45-23-66, 45-23-67, 45-23-70, 45-23-71, 45-23-72 (Ex. G).
8. Descriptions of the Preserve at Boulder Hills from various websites (Ex. H).

[8] Plaintiffs' Objection contains the following exhibits:

1. Notice of Claim and Demand by The Preserve, LLC dated March 30, 2021 (Ex. A).
2. Affidavit of Erin Hockensmith (Ex. B).
3. Copy of April 20, 2021 Town Council Meeting Agenda (Ex. C).

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) (internal quotation omitted). Moreover, although the Court is restricted to a review of the pled facts in a manner most favorable to the nonmoving party, "allegations that are more in the nature of *legal* conclusions rather than factual assertions are not necessarily assumed to be true." *DiLibero v. Mortgage Electronic Registration Systems, Inc.*, 108 A.3d 1013, 1016 (R.I. 2015) (internal quotation omitted).

III

Analysis

A

Affirmative Defenses

Defendants have raised six affirmative defenses in support of their 12(c) Motion: (1) inadequate notice; (2) statute of limitations; (3) legislative immunity; (4) the public-duty doctrine; (5) the voluntary payment doctrine; and (6) failure to exhaust administrative remedies. Defendants bear "the burden of proof to introduce sufficient evidence" in support of each affirmative defense. *Oden v. Schwartz*, 71 A.3d 438, 450 (R.I. 2013) (citing *Estate of Fontes v. Salomone*, 824 A.2d 433, 438 (R.I. 2003)). The Court will now address the merit of each affirmative defense raised by Defendants below.

i

Notice of Claim Pursuant to G.L. 1956 § 45-15-5

Defendants' first challenge to Plaintiffs' claims for relief is that Plaintiffs failed to meet the statutory requirements pursuant to G.L. 1956 § 45-15-5. (Defs.' 12(c) Mot. at 8-11.) Under Rhode Island law, "monetary claims against municipalities" are "strictly governed by the

presentment and notice provisions set forth in § 45-15-5." *United Lending Corp. v. City of Providence*, 827 A.2d 626, 632 (R.I. 2003). Specifically, § 45-15-5 provides:

> "*Every person* who has any money *due him or her from any town or city*, or any claim or demand against any town or city, for any matter, cause, or thing whatsoever, shall take the following method to obtain what is due: *The person shall present to the town council of the town*, or to the city council of the city, *a particular account of that person's claim, debt, damages, or demand, and how incurred or contracted*; which being done, in case just and due satisfaction is not made to him or her by the town or city treasurer of the town or city *within forty (40) days after the presentment of the claim, debt, damages, or demand, the person may commence his or her action* against the treasurer for the recovery of the complaint." Section 45-15-5 (emphasis added).

Our Supreme Court has recognized that the purpose of treating the notice requirement under § 45-15-5 as a prerequisite to filing a suit against a municipality is to "enable the town council to investigate the claim, and to afford them an opportunity to settle it without subjecting the town to the expense of a suit." *Burdick v. Richmond*, 16 R.I. 502, 17 A. 917, 918 (1889); *cf. Provost v. Finlay*, 768 A.2d 1256, 1257 (R.I. 2001) (explaining that the notice requirement in G.L. 1956 § 45-19-9(a) "is to give the municipality an opportunity to investigate claims and, if appropriate, to settle them without litigation) (citing *Tessier v. Ann & Hope Factory Outlet, Inc.*, 114 R.I. 315, 318, 332 A.2d 781, 782 (1975). As such, "compliance with the statute's notice requirements and the forty-day waiting period are conditions precedent to filing suit and may be grounds to challenge the appropriateness of a court's exercise of power." *United Lending Corp.*, 827 A.2d at 632 (citing *Mesolella v. City of Providence*, 508 A.2d 661, 666 (R.I. 1986)).

In *Burdick*, the Court was tasked with determining the sufficiency of the plaintiff's written notice under a substantively identical statute to the one at bar. *Burdick*, 16 R.I. at 502, 17 A. at 917. The defendant argued that because the notice contained "no statement of the amount of the

plaintiff's claim for damages," the notice was insufficient under the statute. *Id.* at 502, 17 A. at 918. The Court reasoned, however, that "[i]f…, the facts upon which the claim arises are set forth in the notice with sufficient fullness and particularity to enable the [defendant] to make such [an] investigation, the purpose of the statute is answered." *Id.* at 502, 17 A. at 918. Thus, the Court concluded that the defendant, "being possessed of a knowledge of the facts, can form a judgment as to the amount of the damages as well as the claimant, and can then either pay or tender to him that amount within the 40 days after the presentment of the claim specified in the statute before suit can be brought." *Id.*

Although dealing with a different statutory provision than the matter before this Court, *Ahearn v. City of Providence*, 181 A.3d 495 (R.I. 2018) provides additional insight as to the General Assembly's intention behind the inclusion of a notice requirement. In *Ahearn*, the plaintiff tripped and fell while walking near or around Charles Street in Providence, Rhode Island. *Ahearn*, 181 A.3d at 496. In accordance with § 45-15-9(a),[9] the plaintiff filed a notice of claim with the Providence City Council; however, the plaintiff failed to properly identify the location in her notice, instead identifying a location that did not exist. *Id.* The plaintiff later filed suit in Superior Court, and the City of Providence moved for summary judgment arguing that the plaintiff's claim should be dismissed based on insufficient notice. *Id.* Our Supreme Court explained that "[t]his Court has consistently held 'that the requirements of § 45-15-9 must be strictly obeyed and that

[9] G.L. 1956 § 45-15-9(a) provides:

> "A person so injured or damaged shall, within sixty (60) days, give to the town by law obliged to keep the highway, causeway, or bridge in repair, notice of the time, place, and cause of the injury or damage; and if the town does not make just and due satisfaction, within the time prescribed by § 45-15-5, the person shall, within three (3) years after the date of the injury or damage, commence his or her action against the town treasurer for the recovery of damages, and not thereafter."

the notice requirement is a condition precedent to the plaintiff's right of actions,… and may not be waived.'" *Id.* at 498 (internal quotation omitted). The Court further clarified that "[a]lthough a notice 'need not 'fix the exact location of the defect,' it must describe the setting in a 'reasonably sufficient manner.'" *Id.* (internal quotations omitted). Thus, because the plaintiff's notice directed the City of Providence to a non-existent location, "the statutory requirements necessary to maintain the action" were not met, and the claim must fail. *Id.*

Plaintiffs submitted the Notice to the Town Solicitor, Karen R. Ellsworth, on March 30, 2021. (Defs.' 12(c) Mot. Ex. 3; Pls.' Opp'n Ex. A.) The Notice describes, in detail, the alleged conduct giving rise to Plaintiffs' claims and provides an estimated damage of at least $100,000,000 as a result of Defendants' alleged conduct. *Id.* Specifically, the Notice asserts, in part:

> "By way of example, to provide notice to the Town, as a result of the Town's wrongful, tortious and illegal actions and omissions, The Preserve lost a real, viable and timely opportunity to build a substantial hotel on the premises through the Town's start-and-stop approvals, delays and changes, ostensibly approving the project and then delaying it to the point that financing opportunities were lost; for years The Preserve has repeatedly lost the opportunity to attract purchasers and have them sign contracts to purchase properties and homes at The Preserve; and is presently in the process of continuing to lose purchasers because of the Town's conduct. The Preserve has also lost sales of commodities and goods, including guns, ammunition and related items." *Id.*

Defendants argue that Plaintiffs have failed to present a proper notice of claim under § 45-15-5 because the Notice fails to accurately identify the parties. (Defs.' 12(c) Mot. at 9.) The Notice references "The Preserve, LLC and all of its affiliated entities," thus, Defendants allege that because "The Preserve, LLC" does not exist and because none of the "alleged affiliates" mentioned in the Notice were identified, the statutory prerequisites were not fulfilled. *Id.* at 10; (Defs.' 12(c) Mot. Ex. 3, Pls.' Opp'n Ex. A.) Conversely, Plaintiffs argue that Defendants' position is baseless as a reference to "The Preserve, LLC" as opposed to "The Preserve at Boulder

Hills, LLC *et al.*" in no way impeded Defendants' ability to identify Plaintiffs as the complaining party. (Pls.' Opp'n at 48-49.)

In support of Plaintiffs' position, Plaintiffs refer to the "New Business" section of the Richmond Town Council's April 20, 2021 Meeting Agenda (the Agenda) as further evidence of Defendants' express recognition of The Preserve at Boulder Hills as the complaining party that submitted the Notice. *Id.* at 49; (Pls.' Opp'n Ex. C at Section K, Item 2). Defendants disagree with Plaintiffs' assertion and instead argue that "The Preserve at Boulder Hills" is the name of the development; thus, the description on the Agenda simply reflects the name used to describe the development. (Defs.' Reply at 18.)

While the Notice does fail to identify the named Plaintiffs in the case at bar; instead generally referring to Plaintiffs as "The Preserve, LLC and all of its affiliated entities," the Court finds that such an error does not amount to a failure to meet the notice requirement of § 45-15-5. As our Supreme Court has recognized, the purpose of the notice requirement in § 45-15-5 is to provide the town with "sufficient fullness and particularity to enable the town council to make such [an] investigation[.]" *Burdick*, 16 R.I. at 502, 17 A. at 918. Based on the content of the Notice, the Court is satisfied that Plaintiffs have set forth facts that would enable Defendants to ascertain the identity of Plaintiffs and investigate their claims.

Defendants also take issue with the asserted claim for damages in the amount of $100,000,000. (Defs.' 12(c) Mot. at 10.) Defendants argue that the Notice is "hopelessly vague and deficient" as it neither identifies whether the claim is a "conglomerated account of the claims of an unspecified group calling themselves collectively 'The Preserve'" nor does "a particular claimant state its individual claim or any facts upon which such an individual claimant asserts its specific interest." *Id.* However, for the reasons stated above, the Court is not convinced that a

breakdown of what party is claiming what damages is necessary in order to meet the notice requirement under § 45-15-5. Notably, the *Burdick* Court found sufficient notice even when the notice of claim itself lacked any statement as to a claim for damages. *Burdick*, 16 R.I. at 502, 17 A. at 918. Although it would have been helpful, Plaintiffs' intention to supplement the Notice with a chart of damages is not required under the statute and thus has no bearing on whether proper notice of claim was given.

To that end, Plaintiffs submitted the Notice on March 30, 2021 and did not commence suit until December 16, 2021, which is well beyond the forty-day waiting period. Thus, the affirmative defense of insufficient notice does not apply, and Plaintiffs are entitled to bring this suit. *See* § 45-15-5, *see also United Lending Corp.*, 827 A.2d at 632.

ii

Statute of Limitations

The second ground upon which Defendants press their 12(c) Motion is that Plaintiffs' claims are barred by the applicable statute of limitations. (Defs.' 12(c) Mot. at 11-14.)

The General Assembly has enacted statutes of limitations in which a plaintiff must comply with to bring a particular action. "When a statute creates a civil remedy for its violation but is silent regarding the applicable limitations period" the court often has to decide "between one of two residual statutes of limitations provided in chapter 1 of title 9: either the three years provided in § 9-1-14(b) or the ten years provided in § 9-1-13(a)." *Goddard v. APG Security-RI, LLC*, 134 A.3d 173, 176 (R.I. 2016).

General Laws 1956 § 9-1-13(a) provides a catch-all statute of limitations for civil cases in which there is no explicit period of limitation provided. Specifically, § 9-1-13(a) states: "[e]xcept as otherwise specially provided, all civil actions shall be commenced within ten (10) years next

after the cause of action shall accrue, and not after." Section 9-1-13(a). Thus, Plaintiffs argue that in the absence of an express statute of limitations provision, the general ten-year statute of limitations applies. (Pls.' Opp'n at 14.)

Conversely, Defendants contend that Plaintiffs' claims are barred under §§ 9-1-14(b) and 9-1-25, both of which provide a three-year statute of limitations period.[10] (Defs.' 12(c) Mot. at 11-13.) Section 9-1-14(b) states, in part, "[a]ctions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue, and not after…" Section 9-1-14(b). Similarly, § 9-1-25(a) provides that the applicable statute of limitations for suits against any municipality arising out of tort is three years. Section 9-1-25(a). Specifically, § 9-1-25(a) provides, in part:

> "[I]n cases involving actions or claims in tort against the state or any political subdivision thereof or any city or town, the action shall be instituted within three (3) years from the effective date of the special act, or within three (3) years of the accrual of any claim of tort. Failure to institute suit within the three-year (3) period shall constitute a bar to the bringing of the legal action." Section 9-1-25(a).

Plaintiffs' Amended Complaint advances claims for (Count I) Substantive Due Process Under the Rhode Island Constitution; (Count II) Tortious Interference with Contract; (Count III) Tortious Interference with Prospective Business Advantages; (Count IV) Civil Liability for Crimes and Offenses; and (Count V) Civil RICO, Violation of R.I. Gen. Laws § 7-15-1 *et seq*. (Am. Compl. ¶¶ 67-89.) Thus, before addressing the substantive questions of law asserted by the parties, this Court must first determine the applicable statutes of limitations for each count in Plaintiffs' Amended Complaint.

[10] Defendants also assert the possibility of a four-year statute of limitation for Count V, which will be discussed below.

a.

Count I – Substantive Due Process Under the Rhode Island Constitution

"Constitutional claims against the State are governed by the three-year limit set forth in § 9-1-14." *Shire Corp., Inc. v. Rhode Island Department of Transportation.*, No. PB 09-5686, 2012 WL 756991 at *10 (R.I. Super. Mar. 2, 2012) (quoting *Pearman v.* Walker, 512 F. Supp. 228, 230 (D.R.I. 1981)).

In *Shire Corp. Inc.*, the plaintiff, Shire, was "a family-owned and -operated highway and bridge contractor" which focused on "highway, bridge, and other construction projects administered by the Rhode Island Department of Transportation (RIDOT) through contracts with the Rhode Island Department of Administration[.]" *Id.* at *1. Shire filed a complaint against the State advancing claims for, *inter alia*, a violation of article 1, section 2 of the Rhode Island Constitution, as well as tortious interference with contractual relations, and tortious interference with business relations. *Id.* at *5-6. The defendant argued, in part, that Shire's claims were subject to a three-year statute of limitations, whereas Shire argued that the claims were subject to the continuing tort doctrine and, therefore, the statute of limitations was tolled "until the date of its last injury." *Id.* at *10-11.

With respect to the constitutional claim, Judge Silverstein explained that based on the meaning of "injury" within § 9-1-14(b) provided by our Supreme Court, "[e]qual protection and due process claims fall within the purview of personal injuries under § 9-1-14(b)." *Id.* at *10. In reaching his conclusion, Judge Silverstein relied on *Commerce Oil Refining Corp. v. Miner*, 98 R.I. 14, 199 A.2d 606 (1964) wherein our Supreme Court stated that the meaning of the term "injury" within § 9-1-14(b) is:

> "to include within that period of limitation actions brought for injuries resulting from invasions of rights that inhere in man as a

> rational being, that is, *rights to which one is entitled by reason of being a person in the eyes of the law*. Such rights, of course, are to be distinguished from those which accrue to an individual *by reason of some peculiar status or by virtue of an interest created by contract or property*." *Id.* at 20-21, 199 A.2d at 610 (emphasis added).

In Count I of the Amended Complaint, Plaintiffs allege that "[t]he Due Process Clause of the Rhode Island Constitution, Article I, Section 2, guards against arbitrary and capricious government action and provides that entities such as [Plaintiffs] are entitled to such protections." (Am. Compl. ¶ 68.) As such, Plaintiffs allege that Defendants' "actions and omissions have deprived and continue to deprive [Plaintiffs] of a property interest protected by the Due Process Clause of the Rhode Island Constitution." *Id.* ¶ 70. Thus, this Court finds that Count I of Plaintiffs' Amended Complaint is subject to a three-year statute of limitations, unless the continuing tort doctrine, which will be discussed below, applies.

b.

Count II – Tortious Interference with Contract &
Count III – Tortious Interference with Prospective Business Advantages

Count II and Count III of Plaintiffs' Amended Complaint assert claims for tortious interference with contract and tortious interference with prospective business advantages, respectively. *See* Am. Compl. ¶¶ 71-78. "Tortious interference with contractual relations and tortious interference with prospective business relations are, by definition, torts." *Shire Corp., Inc.*, 2012 WL 756991, at *10 (citing *Mesolella*, 508 A.2d at 669-70). According to our Supreme Court, a ten-year statute of limitations applies to claims of tortious interference with contractual relations under § 9-1-13(a). *See McBurney v. Roszkowski*, 687 A.2d 447, 448 (R.I. 1997).

However, in *Shire Corp. Inc.*, Justice Silverstein did not apply the ten-year statute of limitations as our Supreme Court held in *McBurney*. *Shire Corp., Inc.* 2012 WL 756991, at *10.

Unlike *McBurney*, where the defendant was a private individual, the plaintiff in *Shire Corp. Inc.* sued the State, thus invoking the specific statute of limitations for suits against the State and municipalities for claims in tort pursuant to § 9-1-25 as opposed to § 9-1-13(a). *Id.* Thus, Justice Silverstein held that "[a] more specific statute of limitations, such as that provided by § 9-1-25 for tort actions against the State, trumps the general, catch-all provision of § 9-1-13(a)." *Id*.

Plaintiffs assert their claims for tortious interference of contractual relations and tortious interference of prospective business advantages against a municipality, and, therefore, this Court finds that § 9-1-25, and not the catch-all statute of limitations found in § 9-1-13(a), applies in this case. Therefore, absent any applicable tolling statute, Count II and Count III of Plaintiffs' Amended Complaint for tortious interference of contractual relations and tortious interference of prospective business advantages are subject to a three-year statute of limitations period.

c.

Count IV – Civil Liability for Crimes and Offenses

Count IV of the Amended Complaint alleges that Defendants collected substantial fees and assessments from Plaintiffs under false pretenses in violation of § 9-1-2. (Am. Compl. ¶¶ 80-81.) Specifically, Plaintiffs assert that Defendants charged various application and peer review fees that Defendants claimed were necessary when, in reality, the charges were imposed to frustrate Plaintiffs' development of the Preserve. *Id.*

In *Commerce Park Realty, LLC v. HR2-A Corp.*, 253 A.3d 868 (R.I. 2021), the plaintiff filed a complaint seeking to recover, *inter alia*, damages pursuant to § 9-1-2 for violation of the criminal usury statute. *Commerce Park Realty*, 253 A.3d at 877. The defendants moved for summary judgment on the ground that the plaintiff's claim was time-barred under a ten-year statute of limitation period. *Id.* The trial justice agreed with the defendants, holding that the time for the

plaintiff to file its claim had expired. *Id.* at 879. The Rhode Island Supreme Court later affirmed the decision explaining:

> "The provision setting forth the statute of limitations for civil actions, including those brought pursuant to § 9-1-2, plainly states, '[e]xcept as otherwise specially provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after.' Section 9-1-13(a)." *Id.*

For the forgoing reasons, the Court finds that Count IV of Plaintiffs' Amended Complaint is subject to a ten-year statute of limitations.

d.

Count V – Civil RICO, Violation of R.I.G.L. § 7-15-1 *et seq.*

Like its federal counterpart, the Rhode Island RICO statutory scheme under G.L. 1956 § 7-15-1 does not include a statute of limitations. Defendants raise two applicable statutes of limitations: (1) three years under § 9-1-14(b) or (2) four years pursuant to the Supreme Court of the United States' decision in *Agency Holding Corp. v. Malley-Duff Associates, Inc.*, 483 U.S. 143 (1987). As stated above, Plaintiffs maintain that a ten-year statute of limitations applies.

Although not binding on this Court, the United States District Court for the District of Rhode Island's decision in *Martin v. Fleet National Bank*, 676 F. Supp. 423, 431 (D.R.I. 1987) is persuasive. In *Martin*, the plaintiffs filed a complaint alleging three counts under the federal RICO statute. *Id.* at 429. The court explained that based on the factors outlined in *Commerce Oil*, "pecuniary loss resulting from reliance on fraudulent or negligent misrepresentation is not 'an injury to the person' under sec. 9-1-14(b)." *Id.* at 431 (quoting § 9-1-14(b)). Thus, the Court held that a three-year statute of limitations did not apply.

This Court concurs that a three-year statute of limitation does not apply to a Rhode Island RICO claim. However, Defendants also advance a theory of a four-year statute of limitations

based on *Agency Holding Corp.* In *Agency Holding Corp.*, the Supreme Court of the United States identified a four-year statute of limitations period for federal RICO claims. *Agency Holding Corp.*, 483 U.S. at 150. Defendants also argue that the Rhode Island antitrust statute includes a four-year statute of limitations period and, therefore, both should be persuasive for this Court to decide that a four-year statute applies for RICO actions. (Defs.' 12(c) Mot. at 14.)

This Court declines to adopt the *Agency Holding Corp.* decision for one simple reason: unlike Rhode Island, no federal catch-all statute of limitations is applicable to the Federal RICO statute. 28 U.S.C.A. § 1658 provides a four-year statute of limitation for "a civil action arising under an Act of Congress enacted after the date of the enactment of this section," but the Federal RICO statute was enacted prior to § 1658.[11] Had there been a federal catch-all provision, perhaps the Supreme Court would have deferred to that, but this Court will not impute a statute of limitations when the General Assembly did not. As such, the catch-all ten-year statute of limitations applies to Plaintiffs' RICO claim.

e.

Continuing Tort Doctrine

Having found that Counts I, II, and III are subject to three-year statutes of limitations, this Court will now address whether the Court may still consider the claims "because of the continuing nature of the torts." (Pls.' Opp'n at 16.) Plaintiffs argue that the continuing tort doctrine tolls the running of any applicable statute of limitations "because the claims allege frequent, repetitive, and continuous conduct that all concern the same subject matter," namely, Defendants' continued

[11] 28 U.S.C.A. § 1658 was originally enacted in December 1990 but was subsequently amended in 2002 to include the relevant language provided for in subsection (a). The Federal RICO statute codified in 18 U.S.C. § 1962 was originally enacted in October 1970 and was subsequently amended in November 1988.

frustration of Plaintiffs' efforts to develop the Preserve. *Id.* at 17. Defendants, on the other hand, contend that despite the outcome of *Shire Corp, Inc.,* the continuing tort doctrine does not apply under the present facts as the zoning ordinance amendment and payment of peer review fees are distinct triggering events. (Defs.' 12(c) Mot. at 10.) (Defs.' Reply at 9-10.)

The continuing tort "doctrine applies 'when no single incident in a chain of tortuous activity can fairly or realistically be identified as the cause of the significant harm.'" *Shire Corp. Inc.*, at *21 (quoting 54 C.J.S. *Limitation of Actions* § 223 (2011)). In *O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001), the United States Court of Appeals for the First Circuit set forth a three-part test to determine if there was a continuing violation sufficient to trigger the continuing tort doctrine: (1) whether the subject matter of the discriminatory act is sufficiently similar that there is a substantial relationship between the otherwise untimely acts and the timely acts; (2) whether the acts were isolated or discrete or occurred frequently, repetitively, or continuously; and (3) whether the acts were of sufficient permanency that they would trigger an awareness of the need to assert rights. *O'Rourke*, 235 F.3d at 730-31.

Plaintiffs look to *Shire Corp, Inc.* in support of their position that the continuing tort doctrine applies. However, in that case, Shire had a relationship with the State on many contracts. *Shire Corp. Inc.*, at *23. When Shire raised an issue about retainage, change orders, or the fact that it was a purported low bidder, Shire was promised that it would receive other contracts or other disputes would be settled. *Id.* Thus, Justice Silverstein concluded that "[t]here is not one event here to which either party [could] point and label as a singular act causing the continued consequences." *Id.* at *11.

In their Amended Complaint, Plaintiffs allege various actions taken by Defendants which interfered with Plaintiffs' property interests and contractual relations. Specifically, Plaintiffs

allege that Defendants (1) amended the Town's zoning ordinance as to shooting ranges; (2) imposed substantial application and peer review fees; (3) retained the application and peer review fees under false pretenses; (4) delayed public hearings for the Hotel Expansion; (5) impeded Plaintiffs' access to their property; (6) imposed buffer restrictions; (7) interfered with the acquisition of another property; and (8) "waffl[ed] on [certain] approvals."[12] (Am. Compl. ¶¶ 25, 28, 39-40, 43, 48, 51-54, 57-60, 62-64.)

This Court finds that each of these acts are separate and distinct from one another and were not repeated. For each of these acts, Plaintiffs were aware of their injury and were, or should have been, aware of the need to assert their rights. Plaintiffs also incurred discrete damages and had a discrete remedy for each of these acts. Moreover, unlike in *Shire Corp., Inc.*, where the "bad actor" was the same; namely, the Department of Administration, in this case, each alleged wrongful act was done by a different person or entity within the Town of Richmond. Specifically, the amended zoning ordinance, which prohibited a shooting range, was an act of the Town Council, and Plaintiffs concede that the damage was done between 2014, when they found out about the zoning change, and 2016, when the zoning ordinance was amended to allow indoor and outdoor shooting. (Am. Compl. ¶ 25.) (Pls.' Opp'n at 4-5.) Similarly, with respect to items (2) to (4), the alleged damage was done by the Planning Department and/or the Planning Board and as soon as Plaintiffs lost their financing in July 2016, Plaintiffs knew they were damaged. (Am. Compl. ¶¶ 30-50.) As to blocking access to Plaintiffs' property, Plaintiffs were aware of this when it occurred and could identify, and do identify, their damages as increased construction costs. *Id.* ¶¶ 51-55.

[12] For purposes of deciding the statute of limitations issue, the Court will assume that each of these alleged actions states a cause of action for which relief can be granted. Whether they do will be discussed below.

Plaintiffs further indicate that there were buffer restrictions affecting certain portions of their property. *Id*. ¶¶ 26-29. However, the Amended Complaint does not assert that these buffers were added to the zoning ordinance before or after Plaintiffs acquired the property which makes up the Preserve. The Amended Complaint does, however, identify the damage incurred from these buffers; namely, that Plaintiffs were prohibited from operating recreational vehicles in the buffer area, resulting in loss of revenue. *Id.* ¶ 27.

Moreover, while the Amended Complaint alleges that the Conservation Commission (the Commission) thwarted Plaintiffs' efforts to buy certain property, the Amended Complaint is devoid of any facts as to the time or manner of how this was done. *Id*. ¶¶ 56-57. In any event, this is a distinct and separate act and, once committed by the Commission, Plaintiffs were aware of their injury and could have asserted their rights as soon as they were prevented from purchasing the property.

Lastly, Plaintiffs assert that Defendants "waffl[ed]" on granting approvals. *Id.* ¶¶ 61-64. While the Amended Complaint is somewhat vague on what those approvals were, Plaintiffs had to have been aware of what approvals they were seeking. Each application is separate and distinct, and Plaintiffs had a remedy if they were dissatisfied with any action, or lack thereof, by a Town employee or official. Certainly, if any of the foregoing actions constituted a violation of Plaintiffs' constitutional rights or tortious interference with their contracts or prospective business advantages, they could have pursued their remedy within three years of the alleged wrongdoing.

Based on Plaintiffs' allegations, the Court does not find that the facts of this case support a finding that Defendants' conduct constitutes an ongoing, continuous tort. As such, this Court holds that the continuing tort doctrine does not apply to Plaintiffs' claims for substantive due process, tortious interference with contract, and tortious interference with business advantages.

Thus, because Plaintiffs filed their initial Complaint on December 16, 2021, and the applicable three-year statutes of limitations are not equitably tolled, Plaintiffs' claims regarding the zoning amendments and the Hotel Expansion, including the request for peer review fees, are outside the statute of limitations and, therefore, barred from relief. As to the other alleged wrongdoings, since there are no facts pled that indicate when these matters occurred, the Court cannot conclude whether they would be barred by the statute of limitations. Notwithstanding the foregoing, the Court will proceed below to determine if, substantively, the Amended Complaint states any claims where relief can be granted.

iii

Legislative Immunity

The Court must now address whether Defendants enjoy legislative immunity with respect to their actions. Defendants contend that, with the exception of the Town Treasurer, all of the named defendants in this action are legislators and, therefore, any and all actions taken with respect to the Preserve are protected under the doctrine of legislative immunity.[13] (Defs.' 12(c) Mot. at 15.) Plaintiffs, on the other hand, argue that Defendants' conduct was administrative rather than legislative and, therefore, no immunity applies. (Pls.' Opp'n at 20.)

As stated above, Plaintiffs identify eight occasions as the grounds for their alleged damages: (1) the zoning ordinance amendment; (2) the imposition of substantial application and peer review fees; (3) the retention of such fees under false pretenses; (4) the delay of public hearings for the Hotel Expansion; (5) the prevention of Plaintiffs' access to their property; (6) the

[13] Defendants also allege that the Town Planning and individual Planning Board members, though not named parties, are also immune from the present action. (Defs.' 12(c) Mot. at 17.) As these individuals are not parties to this action, this Court will not address if the legislative immunity doctrine would extend to them.

imposition of buffer restrictions; (7) the interference with the acquisition of another property; and (8) "waffl[ing] on [certain] approvals." (Am. Compl. ¶¶ 25, 28, 39-40, 43, 48, 51-54, 57-60, 62-64.) Therefore, a threshold issue this Court must answer is whether each alleged conduct is administrative or legislative.

It is well established that the amendment of a zoning ordinance by a town is a legislative act.[14] *See Mesolella v. City of Providence*, 439 A.2d 1370, 1373 n.1 (R.I. 1982); *see also L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202, 208 (R.I. 1997) (explaining that "the adoption and application of a zoning ordinance is a governmental function"). Therefore, this Court finds that with respect to the changing of the zoning ordinance, Defendants are protected by legislative immunity.

As for the remaining allegations made by Plaintiffs, this Court is not convinced that Defendants enjoy any legislative immunity for the alleged conduct. The United States Court of Appeals for the First Circuit has set out a two-prong test to determine whether acts are administrative or legislative:

> "First, if the facts underlying the decision are 'generalizations concerning a policy or state of affairs,' the decision is legislative. If the decision stems from specific facts relating to particular individuals or situations, the act is administrative. Second, the court must consider the 'particularity of the impact of the state of action.' 'If the action involves establishment of a general policy, it is legislative;' if it 'single[s] out specifiable individuals and affect[s] them differently from others,' it is administrative." *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 9 (1st Cir. 2000) (internal citations omitted).

Other jurisdictions have also identified similar standards for determining whether an action was administrative or legislative in character. *See Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996)

[14] Although removed in 2019, this Court recognizes that the buffer restrictions alleged by Plaintiffs were in the zoning ordinance and, therefore, is a legislative act.

("To be legislative, the act must be (1) substantively legislative, such as 'policy-making of a general purpose' or 'line-drawing'; and (2) procedurally legislative, such that it is 'passed by means of established legislative procedures.'") (internal citations omitted).

In *Acevedo-Garcia*, the First Circuit was tasked with determining whether the defendants acted in a legislative manner when state workers were replaced with those from the defendants' own political party or the work environments of state workers who belonged to a competing political party were altered. *Acevedo-Garcia*, 204 F.3d at 4. The court determined that the defendants' conduct was not legislative, explaining that "[b]ecause the defendants' decisions stemmed from specific facts about the party affiliation of individuals and affected particular individuals different from others, these actions were administrative rather than legislative." *Id.* at 9.

Plaintiffs contend that this case is similar to *Acevedo-Garcia* in that Plaintiffs have "been a perennial and particularized target of" Defendants. (Pls.' Opp'n at 21.) This Court concurs that, with respect to all the alleged conduct except for the zoning amendment and the buffer zones, Defendants do not enjoy legislative immunity.

First, this Court finds that the present facts of this case are distinguishable from *Acevedo-Garcia* in that the alleged damage, with respect to the Hotel Expansion, was made by the Planning Board as opposed to a legislative body, to wit, the town council. Notably, a town planning board is not a legislative body. This Court recognizes that legislative immunity is not strictly reserved for legislative people and/or bodies. *See Maynard v. Beck*, 741 A.2d 866, 870 (R.I. 1999). ("[T]he doctrine of legislative immunity is not reserved solely for legislators, and that 'officials outside the legislative branch are entitled to legislative immunity when they perform legislative

functions.'") (internal quotations omitted). However, this Court also does not find that the actions taken by either the Planning Board and/or Planning Department are legislative.

In this case, the Planning Board was tasked with granting Plaintiffs' preliminary plan approval for the Hotel Expansion. However, the Amended Complaint does not allege any facts regarding the Hotel Expansion that "concern[s] a policy or state of affairs," and, therefore, this Court does not find it qualifies as legislative conduct. *Acevedo-Garcia*, 204 F.3d at 9. Rather, all of the fees associated with the Hotel Expansion deal with specific facts relating to Plaintiffs or the Preserve. *Id.* Therefore, this Court concludes that, at least with respect to the Hotel Expansion, all actions were administrative and therefore are not protected by legislative immunity.

Moreover, for the reasons explained above, this Court further finds that with respect to the impediment of Plaintiffs' access to their property and the Commission, such acts are not legislative. Notably, such actions do not further any "policy or state of affairs" but rather relate to Plaintiffs' specific interests in the Preserve and/or future business opportunities. *See id.*

Thus, this Court finds that, except as noted above, Defendants' challenged actions were not "an integral part of the legislative process in the context of a municipality enacting appropriate zoning ordinances" and, therefore, legislative immunity for these actions does not apply. *Maynard*, 741 A.2d at 872.

iv

Public Duty Doctrine

Should this Court find that the doctrine of legislative immunity does not apply, Defendants assert that they are nevertheless shielded from liability under the public duty doctrine. (Defs.' 12(c) Mot. at 19.) Plaintiffs argue that the public duty doctrine does not afford any protection to

Defendants because (1) G.L. 1956 § 9-31-1 eliminates absolute sovereign immunity for the torts of political subdivision and (2) the alleged conduct was egregious. (Pls.' Opp'n at 22.)

Section 9-31-1 states, in pertinent part, "all cities and towns, shall, subject to the period of limitations set forth in § 9-1-25, hereby be liable in all actions of tort in the same manner as a private individual or corporation[.]" Section 9-31-1(a). Thus, "[w]hen the state engages in an activity typically performed by a private individual, 'the state owes the public a duty of reasonable care and will be liable for a breach of that duty to the same extent a private individual would be in the same circumstances.'" *Haley*, 611 A.2d at 848-49 (quoting *Longtin v. D'Ambra Construction Co.*, 588 A.2d 1044, 1045 (R.I. 1991)). "'The public duty doctrine shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions that by their nature are not ordinarily performed by private persons.'" *Boland v. Town of Tiverton*, 670 A.2d 1245, 1248 (R.I. 1996) (quoting *Haley*, 611 A.2d at 849). Therefore, "when the state has engaged in an activity that could not ordinarily be performed by a private person that consideration of the public duty doctrine and its exceptions become relevant." *Haley*, 611 A.2d at 849

The public duty doctrine seeks "to encourage the effective administration of governmental operations by removing the threat of potential litigation." *Catone v. Medberry*, 555 A.2d 328, 333 (R.I. 1989). However, such protection under the public duty doctrine is not absolute and liability may still attach under certain circumstances. *See Toegemann v. City of Providence*, 21 A.3d 384, 388 (R.I. 2011).

When the alleged conduct is "'normally performed by private citizens,'" the public duty doctrine does not apply. *Id.* (quoting *DeFusco v. Todesca Forte, Inc.*, 683 A.2d 363, 365 (R.I. 1996)). In this case, all the alleged conduct revolves around the administration of zoning, planning,

and other land use ordinances and regulations, all of which are governmental and discretionary in nature and cannot be performed by private individuals.

When there is a "special duty" owed by the state or political subdivision to the plaintiff, the courts have found an exception to the public duty doctrine. *See Boland*, 670 A.2d at 1248. Plaintiffs do not address this "special duty" exception in their supporting memorandum of law. Thus, this Court need not address the applicability.

The public duty doctrine also does not apply when the alleged conduct is egregious, which occurs when "'the state has knowledge that it has created a circumstance that forces an individual into a position of peril and subsequently chooses not to remedy the situation[.]'" *Id.* (quoting *Houle v. Galloway School Lines, Inc.*, 643 A.2d 822, 826 (R.I. 1994)). As this Court will discuss below, Defendants' alleged conduct, when assumed to be true, is not egregious, and, therefore, the third exception does not apply. Thus, this Court finds that the public duty doctrine does apply but a question arises as to whether it would apply to all counts in the Amended Complaint. This Court does not believe the doctrine was ever intended to protect a municipality from constitutional or criminal violations as caselaw suggests that the doctrine is solely to "shield a government entity from tort liability." *Gray v. Derderian*, 400 F. Supp. 2d 415, 427 (D.R.I. 2005); *see Haley*, 611 A.2d at 849.[15] Therefore, the public duty doctrine, in this case, can only protect the Town from liability with respect to Counts II and III.

[15] "The public duty doctrine is a rule grounded in common-law negligence and provides that when a governmental entity owes a duty to the general public, particularly a statutory duty, individual plaintiffs may not enforce the duty in tort." 27 N.C. Index 4th State § 40.

v

The Voluntary Payment Doctrine

Defendants contend that because the Amended Complaint fails to allege that the fee payments were "made under a mistake or in ignorance of the law" or any fraud on the part of Defendants, such payments cannot be recovered under the voluntary payment doctrine. (Defs.' 12(c) Mot. at 26.) Conversely, Plaintiffs contend that because they paid the fees before knowing that the public hearing would be delayed, the voluntary payment doctrine does not apply because Plaintiffs made the payments without full knowledge of the facts. (Pls.' Opp'n at 50, 52.)

Under the doctrine of voluntary payment, "'a voluntary payment made under a mistake or in ignorance of the law, but with full knowledge of all the facts, and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered back.'" *Roadepot, LLC v. Home Depot, U.S.A., Inc.*, 163 A.3d 513, 524 (R.I. 2017) (quoting *Nelson v.* Swenson, 46 R.I. 26, 28, 124 A. 468, 468-69 (1924)). "'[T]he purpose of the voluntary payment doctrine is to promote stability in transactions and to 'allow[] entities that receive payment … to rely upon these funds and to use them unfettered in future activities' without fear of a claim for reimbursement by the payor.'" *Id.* at 523 (quoting *Putnam v. Time Warner Cable of Southeastern Wisconsin, Limited Partnership*, 649 N.W.2d 626, 633 (2002)).

Plaintiffs rely on *Hannibal-Fisher v. Grand Canyon University*, 523 F. Supp. 3d 1087 (D. Ariz. 2021) in support of their argument. (Pls.' Opp'n at 51.) In that case, the plaintiff had previously paid all expenses related to tuition for his spring 2020 term. *Id.* at 1091. As a result of the COVID-19 pandemic, the defendant university instructed its students to evacuate the campus and switch to online learning. *Id.* Plaintiff subsequently filed a suit seeking reimbursement for all tuition and fees previously paid. *Id.* at 1092. The court agreed, finding that "taking the []

allegations as true, Plaintiffs did not pay with full knowledge of the facts. They paid GCU before knowing that GCU would instruct students to return home and move classes online." *Id.* at 1099.

Plaintiffs contend that because they paid the fees before knowing that Defendants would delay the public hearing until the financing deadline for the project had expired, they cannot be barred by the voluntary payment doctrine. (Pls.' Opp'n at 52.) This Court disagrees with Plaintiffs' assertion and finds that the voluntary payment doctrine does apply. Based on the allegations in the Amended Complaint, Plaintiffs paid Defendants a total of $38,137 in application fees and $22,191 in peer review fees in pursuing the application for the Hotel Expansion. (Am. Compl. ¶ 39.) This Court has a difficult time finding similarities between the facts set forth in *Hannibal-Fisher* and the facts of this case. Notably, *Hannibal-Fisher* dealt with an unforeseeable world pandemic whereas here, the application fees and peer review costs "are a familiar aspect of the land use permitting process and…were made pursuant to duly-enacted regulations and ordinances." (Defs.' 12(c) Mot. at 26; Defs.' Ex. 13 at 9-10; Defs.' Exs. 14, 15.) Thus, it is difficult to find that Plaintiffs were not aware of all the facts. Furthermore, this Court is hesitant to allow a claim based on the defense of not knowing a public hearing would be delayed. As this Court will explain in more detail below, a town cannot be subject to a developer's, as opposed to a statutory, timeline.

vi

Failure to Exhaust Administrative Remedies

Defendants assert that Plaintiffs did not exhaust all available administrative remedies, and therefore, their claims should be dismissed. (Defs.' 12(c) Mot. at 24.) Plaintiffs argue that there is no available administrative remedy. (Pls.' Opp'n at 53.)

"[T]he exhaustion of administrative remedies (1) 'aids judicial review by allowing the parties and the agency to develop the facts of the case, and (2) it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, perhaps avoiding the necessity of any judicial involvement.'" *Almeida v. Plasters' & Cement Masons' Local 40 Pension Fund,* 722 A.2d 257, 259 (R.I. 1998) (quoting *Burns v. Sundlun,* 617 A.2d 114, 117 (R.I. 1992)). "Exhaustion of administrative remedies, however, is not always required." *Doe ex rel. His Parents & Natural Guardians v. East Greenwich School Department*, 899 A.2d 1258, 1266 (R.I. 2006) (citing *Honig v. Doe*, 484 U.S. 305, 308 (1988)). For instance, a party may not be required to exhaust their administrative remedies where "(1) the administrative process would be 'futile or inadequate;' (2) the administrative process would 'waste resources, and work severe or irreparable harm on the litigant;' (3) the issues raised 'involve purely legal questions;' or (4) the agency prevents 'the litigant from pursuing [his or] her claim at the administration level.'" *Id.* (quoting *Pihl v. Massachusetts Department of Education*, 9 F.3d 184, 190-91 (1st Cir. 1993)).

Plaintiffs primarily contend that they could not achieve any remedy from an administrative appeal as they are not challenging any individual decision of the Town Council, the Zoning Board, or the Planning Board. (Pls.' Opp'n at 54.) Rather, Plaintiffs' claims are grounded in the "wrongful and tortious conduct … rooted in a series of purposeful and discriminatory actions that 'consistent[ly] and repeated[ly]' victimized [Plaintiffs] for the better part of a decade." *Id.* (quoting Am. Compl. ¶ 14.) This Court concurs with Plaintiffs' assertion, as Plaintiffs have not raised a cause of action that has an administrative remedy; therefore, the defense of exhaustion is inapplicable.

B

Substantive Law

Despite this Court's finding that Counts I (Substantive Due Process Under the Rhode Island Constitution), II (Tortious Interference with Contract), and III (Tortious Interference with Prospective Business Advantages) are barred by the statute of limitations and/or other affirmative defenses, this Court will nonetheless analyze Plaintiffs' claims asserted in their Amended Complaint to determine if any or all of them state a claim upon which relief could be granted if such affirmative defenses did not exist.

i

Count I – Substantive Due Process Under the Rhode Island Constitution

Plaintiffs claim that Defendants' "actions and omissions have deprived and continue to deprive [Plaintiffs] of a property interest protected by the Due Process Clause of the Rhode Island Constitution." (Am. Compl. ¶ 70.) Defendants, on the other hand, contend that Plaintiffs have failed to allege facts that either "implicate any concerns of a constitutional magnitude" or "implicate any 'fundamental right.'" (Defs.' 12(c) Mot. at 27, 32.)

Article I, section 2 of the Rhode Island Constitution provides, in pertinent part, that "[n]o person shall be deprived of life, liberty or property without due process of law[.]" R.I. Const. art. I, § 2. As courts have recognized that due process claims under the Rhode Island Constitution mirror those asserted under the United States Constitution, this Court will also look to federal courts for guidance on this constitutional guarantee. *See Pelland v. State of Rhode Island*, 317 F. Supp. 2d 86, 97 (D.R.I. 2004) (explaining that the analysis of claims for due process, equal protection, and ex post facto violations under the Rhode Island Constitution are identical to those asserted under the United States Constitution).

Unlike procedural due process, substantive due process "addresses the 'essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible." *L.A. Ray Realty*, 698 A.2d at 211 (quoting *Jolicoeur Furniture Co., Inc. v. Baldelli*, 653 A.2d 740, 751 (R.I. 1995)). Therefore, the purpose of substantive due process, as noted by the United States Court of Appeals for the First Circuit, is not to:

> "protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991) (internal citations omitted).

To prevail on a substantive due process claim, a plaintiff must demonstrate that the state acted in a manner that is "'egregiously unacceptable, outrageous, or conscience-shocking.'" *Jolicoeur Furniture Co.*, 653 A.2d at 725 (quoting *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990)). The conduct must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *State v. Germane*, 971 A.2d 555, 584 (R.I. 2009) (internal quotation omitted).

This Court will look first at the alleged conduct of Defendants to see whether their actions were indeed "conscience-shocking." *See Harron v. Town of Franklin*, 660 F.3d 531, 536 (1st Cir. 2011) ("We have not adopted a rigid two-step analysis in which one showing necessarily must precede the other, but we typically have looked first to whether the acts alleged were conscience-shocking.") (internal citations omitted).

"'There is no scientifically precise formula for determining whether executive action is – or is not – sufficiently shocking to trigger the protections of the substantive due process branch…'"

Id. (quoting *Pagán v. Calderon*, 448 F.3d 16, 32) (1st Cir. 2006)). However, caselaw on the matter indicates that conduct must be "'truly outrageous, uncivilized, and intolerable.'" *Id.* (quoting *Hasenfus v. LaJeunesse*, 175 F.3d 68, 72 (1st Cir. 1999)). For instance, where there is:

> "'an extreme lack of proportionality, as the test is primarily concerned with violations of personal rights so severe[,] so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.* (quoting *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 881 (1st Cir. 2010) (internal quotation marks and ellipses omitted)).

Based on the foregoing, taking the facts alleged in the Amended Complaint as true, this Court is convinced beyond a reasonable doubt that Plaintiffs have failed to allege any conduct on behalf of Defendants that meet the high standard for a substantive due process claim. *See Barrette*, 966 A.2d at 1234.

In *L.A. Ray Realty*, the Rhode Island Supreme Court found a due process violation under 42 U.S.C. § 1983 by the town officials who denied the plaintiffs' request for subdivision approval. *L.A. Ray Realty*, 698 A.2d at 213. In that case, the plaintiffs submitted to the planning board a subdivision proposal for its land with lot sizes less than two acres. There was a desire by some in the town to require two-acre minimum zoning in certain districts, which included L.A. Ray Realty's property. *Id.* at 205. The Town Council defeated the amendment, so an initiative petition was placed on the ballot. In a letter to the Secretary of State requesting that the question be placed on the ballot, the town solicitor stated that section 2 of the ballot question would grandfather "all subdivisions filed with the planning board as of September 28, 1987." *Id*. at 205-06. L.A. Ray Realty had filed its subdivision plan prior to that date. The referendum passed and the Town Council amended the zoning ordinance accordingly effective as of the date the voters approved the referendum. *Id*. at 206. The planning board denied L.A. Ray Realty's subdivision on the sole

grounds that it did not have two-acre minimum lot sizes. Otherwise, the proposed subdivision satisfied all other requirements. *Id.* L.A. Ray Realty sued, and the Supreme Court invalidated the referendum-initiated ordinance.

L.A. Ray Realty brought a second suit against the town seeking damages under several theories, one being a denial of substantive due process. Our Supreme Court identified three specific instances in which the town's actions were "egregiously unacceptable" and "outrageous." *Id.* at 211. First, the town officials distributed a falsified ordinance to the planning and zoning boards, which did not include the grandfathered rights provision. Moreover, the mayor and the town solicitor met with the planning director and "informed him that there were no grandfathered rights under the referendum." *Id.* Second, the Court explained that in denying the plaintiffs' applications, the mayor and the town solicitor defied an order from the Superior Court which stated that if the plaintiffs could prove that they detrimentally relied on the pre-referendum regulations, the applications must be considered under those regulations. *Id.* at 212. Lastly, the Court noted that three other applicants, who were similarly positioned as the plaintiffs, were granted final approval of their subdivision after the planning board found evidence of detrimental reliance. *Id.* Thus, the Court concluded that "[t]he totality of this evidence exemplifies the animus directed by town officials uniquely toward plaintiffs" and, therefore, supports a finding of due process violations. *Id.*

Shortly thereafter, the Court was again tasked with addressing an alleged constitutional violation in *Pitocco v. Harrington*, 707 A.2d 692 (R.I. 1998). In *Pitocco*, the plaintiffs' home was destroyed by fire. Plaintiffs then purchased and stored various construction equipment on their property which was to be used to rebuild their home. *Id.* at 693-94. When the plaintiffs applied for a building permit, the local building official denied the plaintiffs' application on the ground

that the zoning ordinance prohibited heavy construction equipment on residential property and, therefore, because the plaintiffs were in violation of a zoning ordinance, they could not be granted a permit. *Id.* at 694. The building official further charged a $100 fine for each day the equipment remained on the plaintiffs' property and recorded liens for the unpaid fines against the property. *Id.*

The Court explained that the role of the building official, as a municipal administrative officer, was to "follow the zoning ordinance and applicable statutory provisions pursuant to which he or she is authorized to act." *Id*. at 696. Therefore, "[i]f a building permit application shows that the proposed construction conforms to the building code and to other applicable laws, the applicant is entitled to the permit." *Id.* The Court reasoned that by "(1) adjudg[ing] plaintiffs to be zoning violators, (2) assess[ing] thousands of dollars in fines against [the plaintiffs] without a hearing or other court proceedings, (3) plac[ing] a purported lien against the record title to [the plaintiffs'] property, and (4) arbitrarily refus[ing] to issue them a building permit…based solely on his improper adjudication of them as zoning violators," the building official exceeded the scope of his statutory authority and thereby deprived the plaintiffs of their property in violation of due process. *Id.* at 697.

Even taking the factual allegations of the Complaint to be true, this Court has a difficult time reconciling the conduct of Defendants with the conduct of the defendants in both *L.A. Ray Realty* and *Pitocco*. In fact, this Court has difficulty even discerning what specific conduct alleged by Plaintiffs gives rise to a constitutional deprivation. In their supporting memorandum of law, Plaintiffs assert that they have set forth "well-pled allegations" in their Complaint which assert "colorable claims" of Defendants' mistreatment that is sufficient to "shock the conscience." (Pls.' Opp'n at 37-40.) However, this Court finds that Plaintiffs' allegations in the Complaint are no

more than generalized allegations or legal conclusions that do not rise to the level of egregious or conscience-shocking that would entitle Plaintiffs to relief.

While it is true that a plaintiff need only (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he or she deems himself entitled, this Court is convinced that Plaintiffs have failed to meet this requirement through the allegations in the Complaint. *See* Super. R. Civ. P. 8(a). To survive a Rule 12(b)(6) or 12(c) motion, Plaintiffs still must allege facts that, when taken as true, demonstrate "beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant[.]" *Barrette*, 966 A.2d at 1234 (internal quotation omitted).

Based on the allegations in the Amended Complaint, this Court infers that Plaintiffs base their substantive due process claim on (1) the original zoning amendment and (2) the delay and fees associated with the Hotel Expansion. (Am. Compl. ¶¶ 18-22, 30-50.)

Plaintiffs assert that in 2011 they entered into the Agreement and, prior to closing, they informed Defendants that they intended to seek permitting for an outdoor shooting range and gun club which was "then a permitted use in the Planned Development zone." (Am. Compl. ¶¶ 17-18.) During public hearings, both the Planning Board and the Town Council informed Plaintiffs that "an indoor range would be an even more acceptable use." *Id*. ¶ 18. Plaintiffs go on to allege that "[i]n reasonable reliance on its communications with [Defendants] … [Plaintiffs] closed on the property[.]" *Id.* ¶ 19. Plaintiffs then, in 2014, met with the Town Planner and found out that a recent amendment eliminated indoor and outdoor shooting ranges and other outdoor recreational activities from the Planned Development zone. *Id.* ¶ 20. Plaintiffs complain that they were never notified about this change in zoning and that they were damaged because they sold memberships. *Id*. ¶ 21.

While no specific dates are provided in the Amended Complaint, it appears from Town records that the zoning amendment was passed on November 19, 2013. Moreover, contrary to what Plaintiffs assert in their Amended Complaint, prior to the amendment, an examination of the zoning ordinance[16] in effect at the time demonstrates that gun clubs were, in fact, not permitted as of right but rather only by special use permit. *See* 2010 Town of Richmond Zoning Ordinance, Chapter 18.16 Use Table, Use Code No. 837.

Taking these allegations as true, the Court finds no fundamental right of which Plaintiffs have been deprived. No one has a vested right in a zoning ordinance until a substantially complete application is submitted. *See* G.L. 1956 § 45-24-44(a) ("A zoning ordinance provides protection for the consideration of applications for development that are substantially complete and have been submitted for approval to the appropriate review agency in the city or town prior to enactment of the new zoning ordinance or amendment.") As such, anytime between 2011, when Plaintiffs entered into the Agreement,[17] and the enactment of the zoning amendment on November 19, 2013, Plaintiffs could have applied for a special use permit for a gun club and their rights would have been vested. Instead, Plaintiffs apparently chose to sell memberships without having secured the zoning permit and now want to hold Defendants responsible for their failure.

Plaintiffs also claim that they received no notice of this zoning amendment. (Am. Compl. ¶ 21.) Sections 45-24-51 and 45-24-53 set forth the procedures a municipality must follow to adopt and amend its zoning ordinance. As Plaintiffs do not allege that Defendants did not follow the appropriate procedures, the Court can infer that Defendants complied with the applicable

[16] Although not submitted with the pleadings, a trial justice, in deciding a Rule 12(b)(6) or 12(c) motion, may review a municipality ordinance just as he or she may review a statute.
[17] It is not unusual for a prospective buyer of real estate, under a purchase and sales agreement, to apply for zoning or planning relief as long as the seller co-signs the application.

statutes. Thus, even if Plaintiffs had some fundamental right of which the Court is not aware, Defendants cannot have behaved egregiously if it followed a state statute for amending its zoning ordinance. Also, unlike *L.A. Ray Realty* and *Pitocco*, where the applicants were denied their relief, in this case, Defendants, in 2016, amended the zoning ordinance to allow indoor and outdoor gun ranges.

Furthermore, regarding the delay and fees associated with the Hotel Expansion, this Court finds nothing egregious about Defendants' conduct. Plaintiffs allege that to obtain Master Plan Approval and Preliminary Approval for the Hotel Expansion, they had to spend thousands of dollars in application and peer review fees. *Id*. ¶¶ 31-39. In support of their position, Plaintiffs contend that a nearby municipality only charged $7,500 for a total application fee and that Defendants previously granted waivers to developers. *Id.* ¶¶ 40-41. Moreover, Plaintiffs claim that upon submission of their preliminary application package, Defendants were informed of a financing opportunity for the Hotel Expansion that was set to expire in July 2016. *Id.* ¶ 43. Although Defendants were aware of the pressing deadline imposed by the financing, Plaintiffs aver that Defendants delayed public hearings on the Hotel Expansion until after the expiration date. *Id.* ¶ 44. Consequently, Plaintiffs allege that such acts are arbitrary and capricious; however, that is not the standard. Plaintiffs do not allege that Defendants' conduct was intolerable, uncivilized or egregious, or that they shocked the conscience, nor could Plaintiffs do so in good faith.

Defendants acted pursuant to statutory authority and the local municipal regulations in the charging and collection of the application and peer review fees. Specifically, G.L. 1956 § 45-23-58 provides that "[l]ocal regulations adopted pursuant to this chapter may provide for reasonable fees, in an amount not to exceed actual costs incurred, to be paid by the applicant for

the adequate review and hearing of applications, issuance of permits and recordings of subsequent decisions." To that end, Table 11.1 of Article 11 of the Richmond Land Development and Subdivision Regulation provides a breakdown of the fees for the type of application and the stage of the application. (Defs.' 12(c) Mot. Ex. 14 at 3.) Imposing fees and requiring peer review pursuant to state statute and local regulations in the amounts alleged in the Amended Complaint does not shock the conscience and is not egregious. Moreover, Plaintiffs neither allege that the peer review fees exceeded the town's actual cost nor that they ever objected to the fees or the requirement for peer review or asked them to be waived or reduced.

Plaintiffs further complain that they lost their hotel financing because of the Planning Board's failure to grant preliminary approval by their July financing deadline. (Am. Compl. ¶¶ 44-50.) However, Plaintiffs do not allege which official knew or whether Defendants promised to meet that deadline, nor do they allege that Defendants were required to meet such a deadline. Moreover, this Court does not believe that any Town official would have the authority to bind the Planning Board to a developer's timetable.

The General Assembly has imposed deadlines for planning boards to act upon major land development applications. Sections 45-23-40 to 45-23-43. Specifically, for preliminary plan approval, in 2016, the application had to have been certified as complete or incomplete within sixty days of submission. Failure to so certify means the application is complete. Section 45-23-41(b). Thereafter, the planning board had to approve or deny the application within 120 days of such certification. Failure to render a decision constitutes approval. Sections 45-23-41(f)-(g). In this case, Plaintiffs received preliminary plan approval within the statutory timelines. Therefore, Plaintiffs are asking this Court to require local officials to meet a developer's deadlines, and that

is the province of the General Assembly not the Superior Court.[18] To allow Plaintiffs to succeed on this claim would essentially be putting all municipalities at the mercy of developers who come with their own deadlines. Are local planning officials now to be required to peruse finance commitment letters to determine when they must act? What of the purchaser whose purchase is conditioned on some zoning relief or other permit? Should the town officials have to march to the timetable established by a buyer and seller? This Court does not think so.

Plaintiffs were aware of the statutory deadlines that the Planning Board had to meet, the expenses that they would have to incur in pursuing their application, and obtaining financing was their responsibility not that of the Planning Board.

Based on the foregoing, this Court finds that the conduct courts have found that rises to the level of egregious to warrant a violation of substantive due process goes far beyond the factual allegations by Plaintiffs. The delay and fees associated with the review and approval process of Plaintiffs' Hotel Expansion do not rise to the level of shocking one's conscience. Notably, unlike *L.A. Ray Realty* and *Pitocco,* where the submitted applications met the required criteria but were rejected, Plaintiffs indeed received the approvals they sought and, moreover, such approvals were provided in the time allotted under the statute. (*See* Defs.' 12(c) Mot. Exs. 14-15.)

All of the actions taken by Defendants were permissible under the applicable regulations and statutes and, therefore, this Court sees no meaningful constitutional violation under the present facts, even assuming such facts to be true. Thus, this Court finds beyond a reasonable doubt that Plaintiffs would not be entitled to relief from Defendants under any set of facts that could be proven

[18] The Court points out that the General Assembly reduced the timelines referenced above to twenty-five and ninety days, respectively. P.L. 2017, ch.109, § 1.

in support of the Plaintiffs' claim in Count I of Plaintiffs' Amended Complaint and it is therefore dismissed. *See Barrette*, 966 A.2d at 1234.

ii

Count II – Tortious Interference with Contract and
Count III – Tortious Interference with Business Advantages

While the Court believes these counts are barred by the affirmative defenses discussed above, it will nevertheless address whether, notwithstanding those defenses, the Amended Complaint states a cause of action for tortious interference with contract and tortious interference with prospective business advantages. Defendants argue that these claims must fail because Plaintiffs fail to identify adequately the conduct that constitutes the tortious interference. (Defs.' 12(c) Mot. at 39-40.) Conversely, Plaintiffs contend that they have met the pleading requirements for Count II and Count III and, therefore, the claims should not be dismissed. (Pls.' Opp'n at 44-45.)

To establish a prima facie case of tortious interference with contractual relations, the aggrieved party must show "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his [or her] intentional interference; and (4) damages resulting therefrom." *Smith Development Corp. v. Bilow Enterprises, Inc.*, 112 R.I. 203, 211, 308 A.2d 477, 482 (1973). To establish intentional interference with contract, "'malice, in the sense of spite or ill will, is not required; rather legal malice—an intent to do harm without justification—will suffice.'" *Jolicoeur Furniture Co.*, 653 A.2d at 753 (R.I. 1995) (quoting *Mesolella*, 508 A.2d at 669-70).

Similarly, to establish a claim for interference with prospective business advantages, the plaintiff must prove "(1) the existence of a business relationship or expectancy, (2) knowledge by the interferor of the relationship or expectancy, (3) an intentional act of interference, (4) proof that the interference caused the harm sustained, and (5) damages to the plaintiff." *Mesolella*, 508 A.2d

at 669. As stated above, to meet the requirement of an "intentional interference," only evidence of "legal malice" is required. *See Jolicoeur Furniture Co.*, 653 A.2d at 753.

Plaintiffs identify three instances in which Defendants allegedly interfered with either Plaintiffs' existing contractual relations or prospective business advantages. First, Plaintiffs maintain that Defendants' actions in amending the zoning ordinance, which prohibited the indoor and outdoor shooting ranges from being constructed, constitutes Defendants' intentional interfering with Plaintiffs' contracts. (Am. Compl. ¶¶ 18-21.) Plaintiffs allege that Defendants knew from public hearings that Plaintiffs would be selling memberships to its shooting ranges. Consequently, Plaintiffs aver that they suffered substantial damages in having to make subsequent and alternative business decisions that complied with the newly amended zoning ordinance. *Id.* ¶¶ 18, 19, 21-22.

The second occasion of alleged interference alleged by Plaintiffs is that prior to any planning board hearings, Plaintiffs assert they told Defendants that they had secured financing for the Hotel Expansion and that such financing would expire in July 2016. *Id.* ¶¶ 43-44. Although Plaintiffs were granted a hearing, the public hearings did not commence until after the financing had expired. *Id.* ¶¶ 44-47. Accordingly, Plaintiffs argue that Defendants intentionally interfered with Plaintiffs' prospective business advantages by delaying the public hearings, knowing that such delay would cause the Hotel Expansion's financing to expire. As a result of Defendants' actions, Plaintiffs assert that they not only lost the value of the financing but also the substantial revenue it would have had from rentals. *Id.* ¶ 50.

This Court finds that Plaintiffs have pled *some* of the elements required for claims for intentional interference with contract and intentional interference with prospective business advantages; namely, the existence of a business relationship or expectancy; knowledge of the

relationship or expectancy; proof that the interference caused the harm sustained; and damages to the plaintiff. *See Mesolella*, 508 A.2d at 669. For purposes of this motion, the Court accepts these facts as true. However, this Court finds that Plaintiffs have failed to assert sufficient facts to support their argument that Defendants engaged in any improper interference.

When determining if conduct qualifies as an improper interference, a court may consider "'(1) the nature of the actor's conduct; (2) the actor's motive; (3) the contractual interest with which the conduct interferes; (4) the interests sought to be advanced by the actor; (5) the balance of the social interests in protecting freedom of action of the actor and the contractual freedom of the putative plaintiff; (6) the proximity of the actor's conduct to the interference complained of; and (7) the parties' relationship.'" *Avilla v. Newport Grand Jai Alai LLC*, 935 A.2d 91, 98 (R.I. 2007) (quoting *Belliveau Building Corp. v. O'Coin*, 763 A.2d 622, 628 n.3 (R.I. 2000)). Such a determination is case-specific and, therefore, "'the factors listed above are not exhaustive.'" *Id.* (quoting *Belliveau*, 763 A.2d at 628 n.3).

This Court further finds that all of the factors discussed in *Avilla* weigh heavily in Defendants' favor. As to the first four *Avilla* facts, Defendants were, and are, permitted by law to change a zoning ordinance. As explained in Section (B)(i) of this Decision above, the right to be protected under a previous zoning ordinance does not vest until a complete application is submitted. *See* § 45-24-44(a). Despite Plaintiffs' opportunity to file an application over the course of more than two years—where Plaintiffs could have filed as early as when Plaintiffs first told Defendants of their intent to build the shooting range to the time Defendants amended the zoning ordinances—Plaintiffs never submitted an application to the planning board. Moreover, as discussed previously, the only limitation imposed on Defendants in regard to when a public hearing for preliminary plan approval may be held is that they must comply with the deadlines set by the

General Assembly for major land development applications.

Under *Avilla's* last three factors, if this Court were to find that Defendants improperly interfered with Plaintiffs' contracts and/or prospective business advantages by changing a zoning ordinance or by delaying public hearings, such a determination would undermine the statutory scheme of land use planning by providing an alternative remedy to disappointed applicants. Instead of an applicant seeking further remedy by way of filing an administrative appeal, a disappointed applicant could alternatively file a complaint for tortious interference, thus bypassing the statutory scheme.

For their third instance of tortious interference, Plaintiffs aver that they had negotiated a purchase and sales agreement for the Saila Family Preserve property and that Defendants, "through its Conservation Commission, intentionally interfered with, frustrated and ultimately thwarted" the purchase of the property. (Am. Compl. ¶¶ 56-57.) However, these are mere generalizations and in the nature of legal conclusions and Plaintiffs have failed to allege any additional facts to support their claim for intentional tortious interference regarding the Saila Family Preserve property.

While the Court acknowledges that Plaintiffs need only plead a short plain statement of their claim, this bald assertion about the Commission is woefully inadequate. "Rhode Island takes a 'liberal approach' to pleadings." *Oliveira v. Rhode Island Lottery*, No. PC-2021-03645, 2022 WL 8345018, at *9 (R.I. Super. Oct. 5, 2022) (citing *Oliver v. Narragansett Bay Insurance Co.*, 205 A.3d 445, 451 (R.I. 2019)). As such, "[a] plaintiff is not required to plead 'the ultimate facts that must be proven,' nor is he required 'to set out the precise legal theory upon which his or her claim is based.'" *Id.* (quoting *Haley*, 611 A.2d at 848). Rather, "a plaintiff must only provide 'fair and adequate notice of the type of claim being asserted.'" *Id.* (quoting *Haley*, 611 A.2d at

848); *see* Super. R. Civ. P. 8(a).

"Rhode Island's notice pleading standard has its limits, however, and claims that are severely lacking in detail or are ambiguous will not be heard." *Id.* at *10; *see Konar v. PFL Life Insurance Co.*, 840 A.2d 1115, 1119 (R.I. 2004) (explaining that "[b]y generally mentioning the word 'negligence' in a complaint, without alleging breach of a particular duty, it is not clear whether a defendant must defend a general negligence claim, a premises liability claim, or a claim for negligent supervision or hiring"). In *Oliveira*, the trial justice found that the plaintiff could not proceed on his claim where he simply alleged that the defendant committed a "tort." *Oliveira*, 2022 WL 8345018, at *10. Relying on our Supreme Court's decision in *Konar*, the trial justice explained that the claim was "simply too broad for the Court to consider it 'fair and adequate notice' under Rule 8(a)" as merely pleading a tort "opens the door for *any legal theory in all of tort law*." *Id.*

Plaintiffs' Amended Complaint provides a vague allegation that the Commission "intentionally interfered with, frustrated and ultimately thwarted" the purchase of the Saila Family Preserve property. (Am. Compl. ¶¶ 56-57.) However, the Amended Complaint fails to articulate why Plaintiffs were before the Commission. The Court is left to wonder what relief or what permit Plaintiffs sought from the Commission. The Court is also without an answer as to whether Plaintiffs submitted an application to the Commission or whether the Commission took some action on its own initiative. Accordingly, this Court finds that Plaintiffs have not alleged any facts that could either provide Defendants a "fair and adequate notice" to support a finding of the "legal malice" necessary to establish a claim for intentional interference. *See Jolicoeur Furniture Co.*, 653 A.2d at 753.

For these reasons, this Court finds beyond a reasonable doubt that Plaintiffs have failed to

allege sufficient facts which, if proven, could establish that Defendants improperly interfered with Plaintiffs' contractual relations or prospective business advantages. *See Barrette*, 966 A.2d at 1234. Accordingly, even if Count II and Count III were not subject to the affirmative defenses, they would be dismissed.

iii

Count IV – Civil Liability for Crimes and Offenses

The Plaintiffs allege: "The Town collected substantial fees and assessments from The Preserve under false pretenses, ostensibly claiming that such fees and expenses were necessary and would be used to evaluate and assess the Preserve's projects and developments but, in reality, the Town acted on pretext and had as its purpose the frustration of The Preserve's project and developments."[19] (Am. Comp. ¶ 80.) Conversely, Defendants argue that this claim must be dismissed because municipalities cannot be found to have the requisite intent to establish a claim for false pretenses. (Defs.' 12(c) Mot. at 20.)

Pursuant to § 9-1-2, which states, in part, that "[w]henever any person shall suffer any injury to his or her person, reputation, or estate by reason of the commission of any crime or offense, he or she may recover his or her damages for the injury in a civil action against the offender[.]" Section 9-1-2.

[19] In paragraph 40 of the Amended Complaint, Plaintiffs contend that two neighboring towns only charged $7,500 for Master Plan Approval on a 100-acre parcel without peer review fees. The Court finds this fact of no relevance whatsoever. Each town has the authority to set its own fees. Richmond's application fees are based on acreage. Although the Amended Complaint fails to state which lots were the subject of the application, paragraphs 1-6 indicate that the total acreage for the Preserve comprises at least 756.3 acres, which is significantly larger than the East Greenwich-North Kingstown parcel. Moreover, there is no description of what that project was, making any comparison, even if relevant, impossible.

Moreover, G.L. 1956 § 11-41-4 outlines the elements that comprise the crime of obtaining property by false pretenses which includes, in pertinent part: "Every person who shall obtain from another designedly, by any false pretense or pretenses, any money, goods, wares, or other property, *with intent to cheat or defraud*…shall be deemed guilty of larceny." Section 11-41-4 (emphasis added). As such, Defendants assert that proof of intent or scienter is required for a conviction of false pretenses. (Defs.' 12(c) Mot. at 20.) Plaintiffs, on the other hand, assert that Defendants can form the requisite *mens rea* to be held liable under § 9-1-2. (Pls.' Opp'n at 30-32.)

As explained above in Section (III)(B)(i), Defendants acted pursuant to statutory authority and the local municipal regulations when they charged and collected the application and peer review fees in connection with their master plan and preliminary plan applications. *See* § 45-23-58; *see also* Defs.' 12(c) Motion Ex. 14 at 3. The peer review fees totaled $22,191 (Am. Compl. ¶ 39) and "caused [Plaintiffs] the time and expense of its own consultants to respond to and counter those submissions and to justify [Plaintiffs'] proposals." (Am. Compl. ¶ 36.) Plaintiffs knew, or should have known, that any application for a major land development project would be subject to various fees and to peer review pursuant to both state statutes and municipal regulations. The General Assembly authorized peer review precisely to afford Planning and Zoning Boards to have the ability to properly analyze expert submittals by applicants.

Both applications of Plaintiffs were approved within the statutory timeframes. Therefore, to contend that they were "cheated or defrauded" or that these charges frustrated the project stretches this Court's credulity. Moreover, since any fees regarding the Hotel Expansion were authorized by law, the Court need not address the parties' arguments regarding whether a municipality can form the requisite intent to be liable for false pretenses as the issue of false pretenses is not implicated. For the foregoing reasons, this Court finds beyond a reasonable doubt

that Plaintiffs have failed to allege sufficient facts which, if proven, could establish that Defendants obtained money under false pretenses. *See Barrette*, 966 A.2d at 1234. Therefore, Count IV of the Amended Complaint is therefore dismissed.

iv

Count V – Violation of Rhode Island State RICO Act

Count V of Plaintiffs' Amended Complaint alleges a violation of the Rhode Island RICO Act enumerated in § 7-15-1. (Am. Compl. ¶¶ 83-89.) Specifically, Plaintiffs assert that Defendants "established an enterprise consisting of certain purported consultants and third-party contractors retained by [Defendants] (the Enterprise)." *Id.* ¶ 84. Plaintiffs further allege that the Enterprise, "by and through the direction, assistance, encouragement and implementation of various Town employees," permitted Defendants to "knowingly receive[] income from [Plaintiffs] by way of fees and other costs and expenses for purported… services and assessments." *Id.* As such, Plaintiffs contend that the collection of "substantial sums of money through permitting, consulting, peer review and other fees" from Plaintiffs qualifies as "racketeering activity, to wit obtaining money" as it is defined in § 7-15-1. *Id.* ¶¶ 85-86.

Plaintiffs mainly argue whether a municipality is a "person" under the statute. (Pls.' Opp'n at 25.) Defendants, on the other hand, argue that the issue is whether a municipality, as an enterprise, can form the requisite mental state for activities listed as offenses pursuant to § 7-15-1(c). (Defs.' 12(c) Mot. at 22-23.) However, this Court finds that it need not address either of the arguments presented by the parties because, as this Court will explain below, no racketeering activity has been committed.

After an examination of the prohibited activities under § 7-15-2,[20] the only activity that could possibly apply in this case is "receiv[ing] any income derived directly . . . from a racketeering activity. . . ." Section 7-15-2(a). Section 7-15-1(c) provides the following definition of a "racketeering activity":

> "'Racketeering activity' means any act or threat involving murder, kidnapping, gambling, arson in the first, second, or third degree, robbery, bribery, extortion, larceny or prostitution, or any dealing in narcotic or dangerous drugs that is chargeable as a crime under state law and punishable by imprisonment for more than one year, or child exploitations for commercial or immoral purposes in violation of § 11-9-1(b) or (c) or § 11-9-1.1." Section 7-15-1(c).

[20] Pursuant to § 7-15-2, the following activities are prohibited under the Rhode Island RICO Act:

> "(a) It is unlawful for any *person* who has knowingly received any income derived directly or indirectly from a *racketeering activity* or through collection of an *unlawful debt*, to directly or indirectly use or invest any part of that income, or the proceeds of that income in the acquisition of an interest in, or the establishment or operation of any *enterprise*."
>
> "(b) It is unlawful for any *person* through a *racketeering activity* or through collection of an *unlawful debt* to directly or indirectly acquire or maintain any interest in or control of any *enterprise*."
>
> "(d) It is unlawful for any *person* employed by or associated with any *enterprise* to conduct or participate in the conduct of the affairs of the *enterprise* through *racketeering activity* or collection of an *unlawful debt*."
>
> "(e) Provided, that a purchase of securities on the open market for purposes of investment and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, is not unlawful under this section if the securities of the issuer held by the purchaser, the members of his immediate family, and his or her or their accomplices in a racketeering activity or the collection of an unlawful debt after the purchase do not amount in the aggregate to one percent (1%) of the outstanding securities of any one class, and do not, either in law or in fact, confer the power to elect one or more directors of the issuer." Section 7-15-2 (emphasis added).

Plaintiffs explicitly identify "obtaining money under false pretenses" as the underlying conduct giving rise to their allegation for violation of the Rhode Island RICO Act. (Am. Compl. ¶¶ 84-86.) Rhode Island does recognize the act of obtaining money under false pretenses as "larceny." *See* § 11-41-4; *see also* Am. Compl. ¶ 85. However, this Court, in the previous section, found that there are no allegations to support a finding that such funds were received under false pretenses. Thus, there can be no RICO violation. For these reasons, this Court finds beyond a reasonable doubt that Plaintiffs have failed to allege sufficient facts which, if proven, could establish that Defendants committed any RICO violation. *See Barrette*, 966 A.2d at 1234. Accordingly, Count V of Plaintiffs' Amended Complaint is dismissed.

IV

Conclusion

For the above reasons, Defendants' Motion to Dismiss and for Judgment on the Pleadings Pursuant to Rule 12(c) is GRANTED. Counsel shall confer and submit an order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**The Preserve at Boulder Hills, LLC v. The Town of Richmond, et al.**
CASE NO:	**WC-2021-0568**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**December 12, 2022**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Erin A. Hockensmith, Esq.** **John A. Tarantino, Esq.** **Nicole Benjamin, Esq.**
For Defendant:	**Stephen J. Sypole, Esq.** **James P. Marusak, Esq.** **Per C. Vaage, Esq.**