STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: March 7, 2023)

RICKEY THOMPSON	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. WC-2021-0308**
	:	
TOWN OF NORTH KINGSTOWN ZONING BOARD OF APPEALS, RANDY WEITMAN, JOHN V. GIBBONS, JR., ROBERT O'NEILL, CYNTHIA WARREN, and CHRISTOPHER ZENGARI, in their capacities as members of the Zoning Board of Appeals, and TOWN OF NORTH KINGSTOWN PLANNING COMMISSION, and JAMES GRUNDY, ERIC WISHART, PATRICK ROACH, PAUL DION, TRACEY MCCUE and BOB JACKSON, in their capacities as members of the Planning Commission, and JAMM GOLF, LLC, MARK L. HAWKINS, JOSHUA L. HAWKINS, M L HAWK REAL ESTATE LLC	:	
	:	
Defendants.	:	

DECISION

TAFT-CARTER, J. Before the Court for decision is Defendants' Motion for Summary Judgment relating to Count I of the Plaintiff's Complaint and the Plaintiff's Objection thereto. Jurisdiction is pursuant to G.L. 1956 § 45-23-71 and Rule 56 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

This is a zoning appeal pursuant to § 45-23-71. (Compl. ¶ 1.) Plaintiff is appealing a decision of the Town of North Kingstown Zoning Board of Appeals (hereinafter "Board of

Appeals") which affirmed the Town of North Kingstown Planning Commission's (hereinafter "Planning Commission") final plan approval for a major land development project (hereinafter "the Project"). *Id.* The Project was challenged in this Court at the preliminary plan stage by the same Plaintiff. *See* Mem. Supp. Defs.' Mot. Summ. J. (Defs.' Mem.) Ex. C (Board of Appeals Final Plan Decision), at 2; Defs.' Mem. Ex. A (Superior Ct. Prelim. Plan Decision), at 1-2. This Court rendered its decision regarding Plaintiff's preliminary plan appeal on August 29, 2022. *See Thompson v. Town of North Kingstown Zoning Board of Appeals*, No. WC-2020-0268, 2022 WL 4017120 (R.I. Super. Aug. 29, 2022); *see also* Defs.' Mem. Ex. A (Superior Ct. Prelim. Plan Decision). This Court incorporates by reference its recounting of the facts from its previous decision and will supplement with additional facts as needed.

During the preliminary plan stage of the Project, the Planning Commission considered Defendants M L Hawk Real Estate LLC, Mark L. Hawkins, Joshua L. Hawkins, and JAMM Golf, LLC's (collectively the Applicant Defendants) preliminary plan application and approved it on April 9, 2020. (Compl. ¶¶ 30, 33.) Plaintiff appealed the preliminary plan decision to the Board of Appeals advancing six primary arguments. (Superior Ct. Prelim. Plan Decision 9-10.) Specifically, the Plaintiff appealed the decision to the Board of Appeals arguing:

> "[1] that the Planning Commission could not make the required finding that 'the proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance' because the Project does not comply with Ordinance 17-16 . . .
> "[2] the Planning Commission erred by disregarding Ferrari's expert testimony and ignoring the negative environmental impacts that the Project would have on the Town . . .
> "[3] that the Town Council impermissibly acted as a Planning Commission by purporting to approve the Applicants' preliminary plan through the Consent Judgment, thereby violating the Development Review Act . . .
> "[4] that the Planning Commission erred by not considering the Project's proposed golf clubhouse as a nonresidential use when

> calculating the ratio of residential to nonresidential uses under the CVD Ordinance . . .
> "[5] that the golf course, as a commercial use of the Property, could not be considered one of the 'open, available spaces throughout the development' required by the CVD Ordinance . . .
> "[6] that the Project did not conform with the CVD Ordinance's requirement that vehicular, bicycle, and pedestrian traffic be interconnected within the CVD District." *Id.*

The Board of Appeals rejected each of Plaintiff's arguments and affirmed the Planning Commission's Preliminary Plan Decision. *Id.* at 13. Plaintiff then appealed the decision of the Board of Appeals to this Court. *Id.* at 13-14. This Court affirmed the decision of the Board of Appeals in a decision dated August 29, 2022. *See generally*, *id.*; *Thompson,* 2022 WL 4017120.

Nevertheless, while the appeal of the preliminary plan was pending, the Planning Commission considered and approved the Project's final plan in a decision dated March 22, 2021. (Defs.' Mem. Ex. B (Planning Commission Final Plan Decision), at 1, 7-8.) Plaintiff appealed this decision to the Board of Appeals asserting virtually the same six arguments that he asserted in his appeal of the preliminary plan approval. *Compare* Board of Appeals Final Plan Decision 3, *with* Superior Ct. Prelim. Plan Decision 9-10. Specifically, Plaintiff appealed the final plan decision by arguing that:

> "[1] The Planning Commission could not make the required finding that 'the proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance.
> "[2] The Planning Commission could not make the required finding that 'there will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval.'
> "[3] The Consent Judgment purports to approve the Rolling Greens development in violation of the Development Review Act.
> "[4] The proposed golf clubhouse is a 'nonresidential' use and must be included in the nonresidential square footage.
> "[5] The proposed golf course is not in conformance with Section 21-95(16) of the North Kingstown Zoning Ordinance, which requires 'a system of open, available spaces throughout the development.'

> "[6] The proposed development is not in conformance with Section 21-95(8) of the Zoning Ordinance that requires that 'vehicular, bicycle and pedestrian traffic shall be interconnected within the CVD District, and shall connect to adjacent lots containing land zoned for business purposes.'" (Board of Appeals Final Plan Decision 3.)

The Board of Appeals found that the appeal should be dismissed because § 45-23-66 "limits appeals of any final plan approval to only issues that were not addressed in the preliminary plan review, or that deviate from the preliminary plan." *Id.* at 4. Consequently, the Board of Appeals reviewed the preliminary and final plans, along with the Planning Commission's approval of those plans, and concluded that there were no material differences between the preliminary plan approval and the final plan approval such that dismissal of the appeal under § 45-23-66 was appropriate. *Id.*

Alternatively, the Board of Appeals concluded that if the Planning Commission's Final Plan Decision was properly appealable, Plaintiff's six grounds for appeal were virtually identical to his grounds for appealing the Preliminary Plan Decision. *Id.* Therefore, seeing no basis to reach a different conclusion than it reached at the Preliminary Plan stage, the Board of Appeals rejected each of Plaintiff's six arguments by incorporating "by reference its decision rejecting the Preliminary Plan Appeal, and its discussion of each of those grounds, as set forth in the decision of [the] board recorded in the land evidence records on June 18, 2020." *Id.*

On July 14, 2021, Plaintiff filed the present suit appealing the Board of Appeals Final Plan Decision pursuant to § 45-23-71. (Compl. ¶ 1.) The Complaint asserts a single-count—the appeal of the Final Plan Approval. On August 30, 2021, Defendants, the Board of Appeals, Randy Weitman, John V. Gibbons, Jr., Robert O'Neill, Cynthia Warren, and Christopher Zengari, in their capacities as members of the Board of Appeals, and the Planning Commission, James Grundy, Eric Wishart, Patrick Roach, Paul Dion, Tracy McCue, and Bob Jackson, in their capacities as

members of the Planning Commission (hereinafter Town Defendants), filed their Answer. *See* Docket. The Applicant Defendants subsequently filed their Answer on September 16, 2021. *See id.* On October 7, 2022, the Applicant Defendants and the Town Defendants collectively filed a Motion for Summary Judgment on Count I. (Defs.' Mem. 1.) Plaintiff objected on January 20, 2023, and the Defendants filed their reply on January 26, 2023. *See* Docket. On February 20, 2023, the Court conducted a hearing on Defendants' Motion for Summary Judgment and reserved its judgment. *See id.* Accordingly, Defendants' Motion for Summary Judgment is now before this Court for decision.

II

Standard of Review

Under Rule 56 of the Superior Court Rules of Civil Procedure, a court should only grant a motion for summary judgment when the competent evidence, viewed in the light most favorable to the nonmoving party, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Super. R. Civ. P. 56(c); *see also Andrade v. Westlo Management LLC*, 276 A.3d 393, 399-400 (R.I. 2022). The court should examine the factual evidence contained in "the pleadings, depositions, documents, electronically stored information, answers to interrogatories, and admissions of file, together with the affidavits . . . ." Super. R. Civ. P. 56(c). Once the movant has alleged the absence of material factual issues, the opposing party has an affirmative duty to provide evidence of the existence of material factual disputes. *See Loffredo v. Shapiro*, 274 A.3d 782, 790 (R.I. 2022).

III

Analysis

A

Propriety of Summary Judgment

As an initial matter, Plaintiff argues that summary judgment is not appropriate in this matter because zoning appeals are not civil actions, but instead appellate proceedings. *See* Pl.'s Mem. Supp. Obj. to Defs.' Mot. Summ. J. (Pl.'s Obj.) 2. Contrary to Plaintiff's argument, although zoning appeals are not civil actions, they are governed by the rules of civil procedure "insofar as applicable." *Carbone v. Planning Board of Appeal of Town of South Kingstown*, 702 A.2d 386, 388-89 (R.I. 1997). Therefore, the rules of civil procedure apply to a zoning appeal if the rule in question "is consistent with the nature of an appellate proceeding and may be applied to further the goal of securing the just, speedy, and inexpensive determination of every action." Roland F. Chase, *Rhode Island Zoning Handbook* § 234, at 224 (3d ed. 2016); *see also Carbone*, 702 A.2d at 389.

Here, the Court can appropriately consider Defendants' Motion for Summary Judgment because the issue before the Court is whether Plaintiff is collaterally estopped from bringing this appeal. *See* Defs.' Mem. 6-7. Therefore, considering the instant motion will not conflict with the Court's limited scope of review on appeal because collateral estoppel is an issue of law which can be resolved without dissecting the evidence presented by the zoning appeal. *See Casco Indemnity Co. v. O'Connor*, 755 A.2d 779, 782 (R.I. 2000) (collateral estoppel is an issue of law); *Lincoln Comprehensive Plan Defense Committee v. Depault*, No. P.C. 01-5509, 2003 WL 22048723, at *1 (R.I. Super. July 30, 2003) (finding summary judgment appropriate in a zoning appeal where the issues could be settled as a matter of law and there was "virtually no evidence to dissect").

Moreover, summary judgment will further the just, speedy, and inexpensive resolution of the case because it will obviate the need for unnecessary further briefing if the case can be resolved based on collateral estoppel. *See Carbone*, 702 A.2d at 389; *Depault*, 2003 WL 22048723, at *1. Accordingly, the Court can appropriately consider Defendants' Motion for Summary Judgment in this case.

B

Collateral Estoppel

Defendants argue that Plaintiff is estopped from repeating the same arguments that he made at the Preliminary Plan stage because he appealed the Planning Commission's Final Plan Decision to the Board of Appeals on the same six grounds that he appealed the Planning Commission's Preliminary Plan Decision. (Defs.' Mem. 6-7.) Defendants contend that Plaintiff should not receive a "second bite of the apple" because those six grounds for appeal were already rejected by this Court in its Preliminary Plan Decision, *Thompson*, 2022 WL 4017120. *See* Defs.' Mem. 6-7.

Under the doctrine of collateral estoppel "an issue of ultimate fact that has been actually litigated and determined cannot be re-litigated between the same parties or their privies in future proceedings." *Commercial Union Insurance Co. v. Pelchat*, 727 A.2d 676, 680 (R.I. 1999). The application of collateral estoppel requires: "(1) an identity of issues; (2) a final judgment on the merits; and (3) an establishment that the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior action." *Providence Teachers Union, Local 958, American Federation of Teachers, AFL-CIO v. McGovern*, 113 R.I. 169, 172, 319 A.2d 358, 361 (1974). For the following reasons, each of those requirements has been met in this case.

1

Identity of Issues

The identity of issues requirement is subdivided "into three factors: (1) the issue sought to be precluded must be identical to the issue determined in the earlier proceeding, (2) the issue must actually have been litigated in the prior proceeding, and (3) the issue must necessarily have been decided." *E.W. Audet & Sons, Inc. v. Fireman's Fund Insurance Co. of Newark, New Jersey*, 635 A.2d 1181, 1186 (R.I. 1994).

The issue presently before this Court is whether the Board of Appeals prejudiced the substantial rights of the Plaintiff in its Final Plan Decision. *See* Compl. ¶¶ 37-44; § 45-23-71; Board of Appeals Final Plan Decision 3-4. This issue is identical to the one previously considered by this Court because: (1) Plaintiff appealed the Planning Commission's Final Plan Decision for the same six reasons that he appealed the Planning Commission's Preliminary Plan Decision; and (2) the Board of Appeals rejected Plaintiff's six grounds for appeal using the exact same reasoning that it rejected Plaintiff's preliminary plan appeal. *Compare* Board of Appeals Final Plan Decision 3-4, *with* Superior Ct. Prelim. Plan Decision 9-10; *see also* Board of Appeals Final Plan Decision 4 (incorporating by reference the Board of Appeals Preliminary Plan Decision). Therefore, the issue of whether the Board of Appeals prejudiced the substantial rights of the Plaintiff in its Final Plan Decision is identical to the issue of whether the Board of Appeals prejudiced the substantial rights of the Plaintiff in its Preliminary Plan Decision. *See* Compl. ¶¶ 37-44; § 45-23-71; *compare* Board of Appeals Final Plan Decision 3-4, *with* Superior Ct. Prelim. Plan Decision 9-10.

Next, the issue was actually litigated in the prior proceeding because this Court considered the Board of Appeals' rejection of each of Plaintiff's six grounds for appeal but ultimately upheld the Board of Appeals decision. *See* Superior Ct. Prelim. Decision 16-41; *see also* Restatement

(Second) *Judgments* § 27 (1982); *Ferguson v. Marshall Contractors, Inc.*, 745 A.2d 147, 156 (R.I. 2000) (looking to the Restatement (Second) *Judgments* for guidance in determining the application of collateral estoppel). An issue is actually litigated when it is properly raised, submitted for determination, and actually determined. *See* Restatement (Second) *Judgments* § 27 (1982); *Ferguson*, 745 A.2d at 156.

In the prior proceeding, the Plaintiff raised and submitted his six grounds for appeal because he argued before this Court that: (1) the Planning Commission erred in finding the Project in Compliance with the CVD Ordinance; (2) the Planning Commission erred in finding there were no significant environmental impacts from the Project; (3) the Consent Judgment effectively amended the Town's Zoning Ordinance with respect to the property; (4) the Planning Commission erred in omitting the golf clubhouse from its calculation of nonresidential square footage; (5) the ratio of residential to non-residential square footage was not in conformity with the applicable zoning ordinances; and (6) the Planning Commission erred in finding that the Project conformed with the CVD Ordinance. *See* Superior Ct. Prelim. Decision 16-41. This Court considered each of these arguments, but ultimately determined that each was without merit and that the Board of Appeals Decision should be affirmed. *See id.* at 16-42. Accordingly, the issues presented by the present appeal were actually litigated in the prior preceding. *See id.*; Restatement (Second) *Judgments* § 27 (1982); *Ferguson*, 745 A.2d at 156.

Finally, the issue was necessarily decided in the first proceeding because concluding that the Board of Appeals had not substantially prejudiced the rights of the Plaintiff in its Preliminary Plan Decision was essential to affirming the Board of Appeals Preliminary Plan Decision, rather than mere dicta. *See* Restatement (Second) *Judgments* § 27 (1982) (noting that issues were not essential to the judgment if the judgment was not dependent on them, such as if the issues were

resolved in dicta); *see also Ferguson*, 745 A.2d at 156 (looking to the Restatement (Second) *Judgments* for guidance in determining the application of collateral estoppel). Given the foregoing, there is an identity of issues between the present appeal and the issues previously decided by this Court in its Preliminary Plan Decision.

2

Final Judgment on the Merits

A judgment may be given *res judicata* effect even though the judgment is subject to an appeal because the underlying basis for *res judicata*, and its subsidiary doctrine of collateral estoppel, is that an issue need only be judicially determined once. *Silva v. Silva*, 122 R.I. 178, 183, 404 A.2d 829, 832 (1979); *see also Mulholland Construction Co. v. Lee Pare & Associates, Inc.*, 576 A.2d 1236, 1238 (R.I. 1990) (collateral estoppel is a subsidiary doctrine of *res judicata*). Therefore, the trial court has discretion to determine whether a "final judgment on the second suit should be delayed until the pending appeal has been decided." *Perez v. Pawtucket Redevelopment Agency*, 111 R.I. 327, 338, 302 A.2d 785, 792 (1973).

Here, this Court's Preliminary Plan Decision is presently on appeal before the Rhode Island Supreme Court. *See* Defs.' Mem. 7. Nevertheless, this Court will exercise its discretion to give preclusive effect to the Preliminary Plan Decision notwithstanding the pending appeal because this Court is satisfied that Plaintiff should not be permitted to take "a proverbial second bite" of the apple. *See Silva*, 122 R.I. at 183, 404 A.2d at 832; *Perez*, 111 R.I. at 338, 302 A.2d at 792.

3

Party Against Whom Collateral Estoppel is Used

Collateral estoppel may be asserted against parties to the original proceeding or parties in privity with the original parties. *McGovern*, 113 R.I. at 172, 319 A.2d at 361.

Here, although some of the Defendant members of the Board of Appeals and Planning Commission, named in their official capacity, were not named in the original action, it is the Defendants who are seeking to assert collateral estoppel against the Plaintiff. *See* Defs.' Mem. 6-7. Rhode Island law only requires that the party against whom collateral estoppel is sought be a party to the original proceeding. *See, e.g.*, *McGovern*, 113 R.I. at 172, 319 A.2d at 361; *Retirement Board of Employees' Retirement System of State v. DiPrete*, 845 A.2d 270, 282 (R.I. 2004). Therefore, because Plaintiff, Rickey Thompson, was a party to the original proceeding, collateral estoppel may be properly asserted against him. *See* Superior Ct. Prelim. Plan Decision 1; *see also Pelchat*, 727 A.2d at 680.

Accordingly, all three requirements for collateral estoppel have been met, and Plaintiff is precluded from relitigating the issue of whether the Board of Appeals substantially prejudiced his rights by rejecting his six grounds for appeal which was previously litigated in the Preliminary Plan Decision.

IV

Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment on Count I is **GRANTED**. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Thompson v. Town of North Kingstown Zoning Board of Appeals, et al.**
CASE NO:	**WC-2021-0308**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**March 7, 2023**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**Christopher A. D'Ovidio, Esq.**
For Defendant:	**Mark W. Freel, Esq.** **Alexandra G. Lancey, Esq.** **Nicholas J. Hemond, Esq.**