

**STATE OF RHODE ISLAND
NEWPORT, SC**

SUPERIOR COURT

RHODE ISLAND NURSERIES, INC.,
Plaintiff,

v.

TOWN OF PORTSMOUTH, *et al.*,
Defendants.

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C.A. No.: NM-2011-0515

AMENDED COMPLAINT

This is a petition for an assessment of damages in connection with the abandonment of a public highway pursuant to the provisions of R.I. General Laws § 24-6-4, as well as a claim for damages and counsel fees for the taking and/or impairment of a property interest without just compensation and without due process as provided under Title 42 of the United States Code, the Constitution of the United States, and the Constitution of the State of Rhode Island.

Parties and Jurisdiction

1. Plaintiff, Rhode Island Nurseries, Inc. ("RIN") is a Rhode Island corporation having a principal place of business in the Town of Middletown, Rhode Island.
2. Defendant, Town of Portsmouth ("Town"), is a municipal corporation chartered under the laws of the State of Rhode Island.
3. Defendant, Town Council of the Town of Portsmouth ("Town") is the Town Council established by the Town of Portsmouth.
4. Defendant David P. Faucher is made a defendant herein in his capacity as Finance Director for the Town of Portsmouth.
5. Defendant Joseph W. Robicheau is made a defendant herein in his capacity as a Member and President of the Town Council of the Town of Portsmouth.

6. Defendant Judi J. Staven is made a defendant herein in her capacity as a Member and Vice President of the Town Council of the Town of Portsmouth.

7. Defendant Keith E. Hamilton is made a defendant herein in his capacity as a Member of the Town Council of the Town of Portsmouth.

8. Defendant Elizabeth A. Pedro is made a defendant herein in her capacity as a Member of the Town Council of the Town of Portsmouth.

9. Defendant Michael A. Buddemeyer is made a defendant herein in his capacity as a Member of the Town Council of the Town of Portsmouth.

10. Defendant Paul F. Kesson is made a defendant herein in his capacity as a Member of the Town Council of the Town of Portsmouth.

11. Defendant James A. Seveney is made a defendant herein in his capacity as a Member of the Town Council of the Town of Portsmouth.

12. This action is brought pursuant to the provisions of R.I. General Laws § 24-6-4, and under Section 1983, 1985, and 1988 of Title 42 of the United States Code; the Fifth Amendment to the Constitution of the United States as made applicable to the States through the Fourteenth Amendment; and Article I, Section 2 and Article I, Section 16 of the Constitution of the State of Rhode Island. Defendants have, acting under purported color of law, deprived R.I. Nurseries of property rights and interests and/or impaired said rights and interests for purported public purposes without compensation and in violation of its substantive and procedural due process rights.

The Relevant Facts

13. R.I. Nurseries is the owner of an approximately 76.5 acre tract of land in the Town of Portsmouth, Rhode Island, more particularly described as Lot 5 on Town of Portsmouth Tax Assessor's Plat 59 ("The R.I. Nurseries Property").

14. The R.I. Nurseries Property, at all relevant times prior to the highway abandonment that is the subject of this action, directly abutted (to the north) a portion of public highway known as Heidi Drive, and enjoyed the right of legal access along Heidi Drive and then westerly along Glen Road out to East Main Road, R.I. Route 138.

15. In 1987 and 1988, the Town of Portsmouth Planning Board ("Planning Board") considered, and approved the Stanton Farm Subdivision on what is now Glen Ridge Farm. In its approval, the Board approved (and required) the extension of Heidi Drive (Heidi Drive Extension") and expressed that the north-south extension of Heidi Drive was to be for the Town's future planning. Specifically, the minutes provide that:

The Board requested that the drawing show Water Board easement on the property and reconfigure the subdivision to show the **town's proposed N-S road tying into Heidi Drive**.

Importantly, the Planning Board approved the Heidi Drive Extension at this time, in lieu of an extension of Frank Coelho Drive.

16. The November 18, 1987 Minutes of the Planning Board are attached hereto as **Exhibit A**.

17. Page 1 of the February 17, 1988 Minutes of the Planning Board are attached hereto as **Exhibit B**.

18. Heidi Drive Extension was platted and shown on Town plans after the approval of the Stanton Farm Subdivision.

19. A Road Bond was set by the Town of Portsmouth and submitted by the developer for Stanton Farm Subdivision in the amount of \$135,000.00 ("Road Bond"). The Road Bond was secured by a mortgage deed ("Mortgage") given to the Town of Portsmouth, recorded in the Land Evidence Records of the Town of Portsmouth at Book 255, Page 254. The Road Bond was provided to the Town for the purpose of guaranteeing construction of the roads, including the Heidi Drive Extension. The mortgage and road bond was only to be released upon completion of the improvements and installation of the roads shown on the Stanton Farm Plat as approved by the Planning Board.

20. The Road Bond is attached hereto as **Exhibit C**.

21. The Mortgage is attached hereto as **Exhibit D**.

22. At the October 15, 1997 Planning Board meeting, the Planning Board released a portion of the Road Bond. Importantly, the portion of the Road Bond covering the construction of the Heidi Drive Extension remained in place.

23. The October 15, 1997 Planning Board meeting minutes are attached hereto as **Exhibit E**.

24. On December 29, 1997, Kevin Tarsagian ("Tarsagian") purchased the property of the Stanton Farm Subdivision, subject to the Road Bond and Mortgage securing the Road Bond. Tarsagian applied to abandon the Heidi Drive Extension in 1997, but subsequently withdrew this request.

25. On January 7, 1998, the Town Council was advised by the Executive Secretary of the Planning Board that:

At a regular meeting of the Portsmouth Planning Board on December 17, 1997, it was voted to recommend partial release (25%) of the 135,000 road bond on the Stanton Farm Subdivision.

Stanton Drive is complete and acceptable **while the extension of Heidi Drive, part of this bond, has not yet been undertaken.**

The Director of Public Works has inspected the site and concurs in the recommendation.

26. The January 7, 1998 letter from the Executive Secretary of the Planning Board to the Town Council is attached hereto as **Exhibit F.**

27. On or about March, 2009, Rhode Island Nurseries applied for master plan approval of a proposed residential subdivision of a portion of its property located at Assessor's Plat 59, Lot 5. The Executive Secretary of the Planning Board's summary of the March 18, 2009 agenda of the Planning Board specifically describes the application of RIN:

. . . subdivide (14 lots) the eastern strip of farmland located along the Sakonnet River in between Sea Berry Farm to the north and Stanton Farm to the south. The concept plan presented indicates a road connection between the southern terminus of Vanderbilt Lane of Sea Berry Farm and the northern terminus of the plotted, but as yet un-built extension of Heidi Drive in the Stanton Farm subdivision. There is presently an outstanding road bond guaranteeing the completion of the Heidi Drive extension. This road bond is secured by one of the lots of the Stanton Farm subdivision.

28. The March 12, 2009 summary of the March 18, 2009 Planning Board Agenda items is attached hereto as **Exhibit G.**

29. At the time of submission, the Town of Portsmouth Land Development and Subdivision Regulations required two means of egress to the subdivision.

30. To meet the requirement for two means of egress, RIN proposed that access to the south be by way of the Heidi Drive Extension, a platted, but unimproved public road, which connected to its Property.

31. The Planning Board reviewed the subdivision plan as a concept on March 18, 2009, when the issue of the status of the Heidi Drive Extension arose. Kevin Tarsagian, owner of Glen Farm (formerly Stanton Subdivision land) appeared and objected to RIN's Application, asserting that the Heidi Drive Extension would have a negative impact on his alpaca farm and the road would bisect his property, now known as Glen Ridge Farm. At the March 18, 2009 meeting the Town Solicitor advised the Planning Board that the paper road "is technically Town property." The matter was continued until April, so that the Town Solicitor could review the issue and report back to the Board.

32. The March 18, 2009 Planning Board meeting minutes are attached hereto as **Exhibit H.**

33. At the April 15, 2009 Planning Board meeting, the Town Solicitor advised the Planning Board that "Heidi Drive Extension had been accepted by the planning board as public road when it approved the Stanton Farm Subdivision on September 26, 1990."

34. The April 15, 2009 Planning Board meeting minutes are attached hereto as **Exhibit I.**

35. The Application was certified complete on May 5, 2009.

36. The matter was heard at the June 17, 2009 hearing. At that hearing, the Town Solicitor again advised that the Heidi Drive Extension was a public way. RIN's engineer testified that if they utilized Frank Coelho Drive as a second means of access instead of the Heidi Drive Extension, RIN Nurseries would lose 6-7 acres of farmland.

37. The June 17, 2009 Planning Board meeting minutes are attached hereto as **Exhibit J.**

38. The matter was next heard at the September 16, 2009 hearing. The matter was continued to the next hearing.

39. The September 16, 2009 Planning Board meeting minutes are attached hereto as **Exhibit K**.

40. By letter dated September 21, 2009, the Town Solicitor advised the Planning Board on two legal issues, including his opinion that the board is legally required to connect cul de sacs from one subdivision to the next.

41. The September 21, 2009 Letter from the Town Solicitor to the Planning Board is attached hereto as **Exhibit L**.

42. At the October 21, 2009 Planning Board hearing, the Town Solicitor advised the Board, in accordance with his September 21, 2009 letter, that Town Regulations required RIN to connect subdivisions which contained cul-de-sacs, so as to provide through-road. This regulation prompted the need for the use of the Heidi Drive Extension.

43. The October 21, 2009 Planning Board meeting minutes are attached hereto as **Exhibit M**.

44. On November 3, 2009, Tarsagian, through his counsel, wrote to the Town Council to “renew his request to abandon Heidi Drive Extension.”

45. The November 3, 2009 Letter from Mark E. Liberati, Esq. to the Town Council is attached hereto as **Exhibit N**.

46. On November 4, 2009, a workshop was held on the Application, with Planning Board members, a representative of the Town Water and Fire District and the Deputy Chief of the Portsmouth Fire Department. The purpose of the workshop was “to verify the requirements for both a secondary access to the proposed subdivision for purposes of safety and the looping of

water mains with existing; to establish whether the actual location of the two requirements could be coincidental; to determine the construction standards; and to determine the location, both preferred and alternate.” As a result of the meeting, two possible routes were discussed for secondary access: 1) through the Heidi Drive extension; and 2) to connect the subdivision with the northern end of Frank Coelho Drive. Both the Town Water and Fire District and the Fire Department expressed that they preferred the Heidi Drive Extension for secondary access.

47. The November 4, 2009 Planning Board workshop meeting minutes are attached hereto as **Exhibit O**.

48. On November 18, 2009, the Board finished taking evidence and counsel for RI Nurseries and counsel for Tarsagian (in opposition) made closing arguments with respect to the application of RIN. Member Lopes made a motion to approve the RIN Application with the condition that the Heidi Drive Extension be constructed as a gravel roadway, along the area earmarked as the so called paper route, be gated at either end, and be used for emergency vehicles only and not for pedestrian or public vehicular access. . .” Member Russell seconded the motion.

49. The November 18, 2009 Planning Board meeting minutes are attached hereto as **Exhibit P**.

50. The RIN Application was heard by the Board for further findings of fact with respect to the denial, on January 20, 2010.

51. Also before the Planning Board on January 20, 2010 was the Petition of Kevin Tarsagian to abandon Heidi Drive Extension. The matter was before the Board to issue a recommendation to the Town Council with respect to the Petition. Member Russell made a motion to send a favorable recommendation to the Town Council with conditions, and Member

Wimpress seconded that motion. The Town Solicitor advised the Board that they should include a condition that the Town require the petitioner to indemnify the Town against all losses the Town may suffer if a neighboring property owner challenges the abandonment or is damaged by the same. Members Bissonnette and Lopes opposed the Motion given the legal advice by the Solicitor and their opinion that the application from RIN was not yet closed. **Id.** Members Wimpress and Quigley voted in opposition to the motion based on the advice of the Solicitor and potential liability to the Town. All members opposed the Motion.

52. The January 20, 2010 Agenda Summary and Minutes of that Planning Board meeting are attached hereto as **Exhibit Q.**

53. The Planning Board, sent correspondence to the Town Council dated January 22, 2010, in which it unanimously recommended that the road not be abandoned.

54. The January 22, 2010 Letter from the Administrative Officer/Executive Secretary for the Planning Board to the Town Council is attached hereto as **Exhibit R.**

55. On February 18, 2010, the Planning Board formally denied RIN's application for master plan approval.

56. The February 18, 2010 Decision of the Planning Board is attached hereto as **Exhibit S.**

57. The decision was appealed by RIN, and the Board of Appeals had a hearing on the same on April 29, 2010. The Board of Appeals found that the planning board had not referred to the evidence on which it relied to reach its decision and it remanded the matter to the Planning Board to make findings of fact based on the evidence. Additionally, the Planning Board of Appeals found that:

In reaching this decision, the board of appeals noted with particularity that the planning board completely ignored the fact that Heidi Drive belongs to the town and not to Glen Ridge Farm.

58. The Decision of the Planning Board of Appeals with respect to the Appeal of Rhode Island Nurseries, Inc., dated May 27, 2010 and recorded on June 1, 2010, at Book 1427, Page 296 of the Town of Portsmouth Land Evidence Records is attached hereto as **Exhibit T**.

59. On June 21, 2010, the Planning Board met to make findings of fact and render a decision based on these findings. At this hearing, one member:

Moved that the board approve Rhode Island Nurseries, Inc.'s major subdivision master plan and, based on the testimony of the Portsmouth fire chief and the Portsmouth Water and Fire District, as a condition of approval, the Applicant construct Heidi Drive extension as a gravel roadway along the area identified as to so-called paper road, with gates at each end for emergency vehicles only and not for pedestrian or vehicular access at this time . . .

The motion was seconded by another member, and a vote was postponed until findings of fact were made and the Board could vote on them. A member then moved to accept the findings of fact proposed by the Applicant's Attorney, which motion was seconded. Four members voted in favor, approving the Application, and three against. *See* Minutes of June 21, 2010 Planning Board meeting, attached hereto as **Exhibit U**. A copy of the findings proposed by the Applicant and adopted by the Board was appended to the written decision.

60. The Decision of the Planning Board on the Application of Rhode Island Nurseries, Inc., dated July 22, 2010 and recorded on August 3, 2010, in the Town of Portsmouth Land Evidence Records at Book 1437, Page 127 is attached hereto as **Exhibit V**.

61. On June 24, 2010, RIN, through its counsel, contacted the Town to seek permission to access Heidi Drive Extension for the purpose of completing engineering work RIN

needed for the submission of its preliminary plan application. On July 7, 2010, the Town

Solicitor advised the Town Administrator that:

. . . It is my opinion and advice that the representatives of Rhode Island Nurseries have the right to go upon Heidi Drive Extension for the purposes described in Vernon's letter.

I have advised the planning board that Heidi Drive Extension is a public way. Any member of the public has the right to use it for purposes of travel. I have also advised the planning board that it had a right to direct Rhode Island Nurseries to improve the right of way as part of the development of its own property.

If the representatives of Rhode Island Nurseries who are charged with doing survey work on Heidi Drive Extension are interfered with, it would be appropriate for the police to intervene so that the work necessitated by the recent planning board decision can be accomplished.

62. The July 7, 2010 Letter from the Town Solicitor to the Town Administrator regarding Heidi Drive Extension is attached hereto as **Exhibit W**.

63. Tarsagian took an appeal of that approval to the Zoning Board sitting as the Planning Board of Appeals. The Planning Board of Appeals denied Mr. Tarsagian's appeal.

64. On August 23, 2010, the Town Council met and considered, among other things, a request to advertise for the abandonment of Heidi Drive Extension from Attorney Mark Liberati, attorney for Tarsagian, the Petitioner. At that meeting, the Town Solicitor warned the Council of taking action to abandon Heidi Drive Extension giving the Planning Board approval of RIN's Subdivision:

Town Solicitor D'Andrea stated that the Planning Board, in approving a subdivision plan, has incorporated Heidi Drive for use of emergency vehicles. That decision is presently on appeal from the Planning Board to the Planning Board of Appeals which is the Zoning Board of Review. What is being appealed is the approval of the subdivision plan which includes the use of the road for

emergency access. If the Council were to hold a hearing, and upon hearing decide to abandon Heidi Drive Extension, then it would have implications for that Board.

If you hold a hearing and if you desire to abandon the road, before you actually enter a decree abandoning the road, you will have to determine whether Rhode Island Nurseries, the one abutter other than Mr. Liberati's client, would suffer damages and if so you would have to set an amount of damages to be paid to Rhode Island Nurseries.

After receiving this advice, the Town Council, by a vote of 4 to 3, voted to set the hearing regarding the abandonment down for October 7, 2010.

65. The August 23, 2010 Planning Board meeting minutes are attached hereto as **Exhibit X**.

66. On September 30, 2010, counsel for RIN, sent a detailed letter to the Town Council regarding the upcoming hearing on the petition to abandon the Heidi Drive Extension. Counsel for RIN, through this letter, specifically advised the Town Council of the history of the Heidi Drive Extension and the approval of the Heidi Drive Extension as a means of access for the RIN Subdivision. Counsel for RIN advised the Town Council that RIN would suffer significant damages should the Town Council vote to abandon Heidi Drive Extension, including out of pocket expenses with respect to the subdivision which was incurred in reliance on Town regulations and conditions of approval.

67. The September 30, 2010 Letter from Vernon L. Gorton, Jr. to the Portsmouth Town Council regarding the Petition for the Abandonment of Heidi Drive is attached hereto as **Exhibit Y**.

68. On October 6, 2010, the Town Planner wrote to the Planning Board, to opine on the "highway classification" of Heidi Drive, at the request of the co-applicant to the Petition to

Abandon, Ann Fiore. The Town Planner opined that Heidi Drive falls into the category of “Local Street” as defined in the Comprehensive Plan for the Town of Portsmouth. The October 6, 2010 Memorandum by the Town Planner to the Planning Board regarding the Highway Classification of Heidi Drive is attached hereto as **Exhibit Z**.

69. On October 7, 2010, the Town Council held a hearing on Tarsagian’s petition to abandon, specifically described on its Agenda and Minutes as:

APPLICANT: Kevin Tarsagian requests that the Town grant his petition for the abandonment of a highway, alleging that it has ceased to exist to be useful to the public, said highway being described as “Heidi Drive” and abutting Tax Assessor’s Plat 59, Lots 13, 49, 50, 52, and 53. The said portion of Heidi Drive also abuts Lot 5 at its northerly terminus.

There was an error with the legal advertisement for the hearing and therefore the hearing on the abandonment was continued until October 27, 2010.

70. The October 7, 2010 Town Council meeting minutes are attached hereto as **Exhibit AA**.

71. At the December 13, 2010 Town Council meeting, Member Seveney recused himself from the matter due to a possible conflict of interest, and the matter was continued to January 27, 2011.

72. The December 13, 2010 Town Council meeting minutes are attached hereto as **Exhibit BB**.

73. Witnesses testified at the January 27, 2011 Town Council meeting and the matter was continued until January 31, 2011. Despite a motion on the floor to approve the abandonment, a motion to recess and take up the matter at a later date was made and passed.

74. The January 27, 2011 Town Council meeting minutes are attached hereto as **Exhibit CC**.

75. On January 31, 2011, the Town Council continued the matter, including the determination of whether to award damages until February 7, 2011.

76. The Town Council continued to hear the abandonment on February 7, 2011. At the February 7, 2011 hearing, counsel for RIN presented expert testimony of an appraiser. The appraiser testified that the difference in the value of the subdivision as approved by the Planning Board and the subdivision which now had to be re-engineered for a different second access point because of the abandonment of Heidi Drive Extension was \$1,030,000.00. RIN also presented the testimony of their engineer. Tarsagian, through counsel, presented testimony of an appraiser and of an engineer. Members of the public spoke in favor of and in opposition to the abandonment and the award of damages. A motion was made and seconded by a member of the Council not to award damages. A motion was then made and seconded to hold off until making a decision about damages until the Council could obtain an independent appraisal of the damages to RIN. That motion failed, 2 votes to 3. The motion not to award damages was voted on and passed, 3 votes to 2. The Council also voted to abandon the Heidi Drive Extension by a vote of 3-2.

77. The February 7, 2011 Town Council meeting minutes are attached hereto as **Exhibit DD.**

78. The Planning Board heard the RIN Application for Preliminary Plan approval on February 9, 2011. RIN looked for direction from the Planning Board at this meeting, because substantial engineering had to be done, given the Town Council's decision to abandon the Heidi Drive Extension.

79. The February 9, 2011 Planning Board meeting minutes are attached hereto as **Exhibit EE.**

80. The Planning Board heard the Preliminary Plan application on the revised plans on April 13, 2011. The revised proposal presented a new secondary means of access—the construction of a private road from Frank Coelho Drive to the property line. The new road would be private but require paving due to steep grades. The road would also be gated at both ends and a buffer planted to screen neighbors from the road. The Planning Board also set the road bond at \$425 per foot or \$446,250, with an additional \$75,000.00 for the cost of the gates at each end of the private road, for a total bond of \$521,250.00. All members voted in favor of approving Preliminary Plan with conditions and for the road bond.

81. The April 13, 2011 Planning Board meeting minutes are attached hereto as **Exhibit FF**.

82. On April 15, 2011, the Executive Secretary of the Planning Board wrote to the Finance Director that the Road Bond for the RIN Subdivision was set at \$521,250.00, with an inspection fee of \$10,425.00. *See* Letter attached hereto as **Exhibit GG**.

83. The Planning Board approved the Preliminary Plan Application, and a Decision dated June 10, 2011 was recorded on June 13, 2011 in the Land Evidence Records of the Town of Portsmouth, Rhode Island, at Book 1486, Page 192. *See* **Exhibit HH**.

84. On or about May 31, 2011, defendant Town Council of the Town of Portsmouth entered a Decree of Abandonment for the Heidi Drive Extension, which was described in said Decree as, "...that portion of Heidi Drive in [the] Town of Portsmouth, which abuts Lots 13,49,50,51(*sic.*), and 53 on Tax Assessor's Plat 59, with its northerly terminus abutting on Lot 5 on said Plat...". *See* Decree of Abandonment, attached hereto as **Exhibit II**.

85. R.I. Nurseries is aggrieved by the Decree of Abandonment.

86. The Decree of Abandonment awarded no damages to R.I. Nurseries or any other abutter to the abandoned portion of Heidi Drive.

87. R.I. Nurseries' ability to legally and physically gain access to and utilize the Heidi Drive Extension for its Subdivision was destroyed by the Town Council's abandonment of the Heidi Drive Extension as aforesaid in a manner that substantially and permanently diminished the market value of the R.I. Nurseries Property in several ways.

88. Physical access to Heidi Drive (and then Glen Road) had been an overwhelmingly important planning component and a condition of the vested master plan approval for RIN's Subdivision. The abandonment of the Heidi Drive Extension along all of R.I. Nurseries' frontage precluded this feature and impaired the value of The R.I. Nurseries Property by (a) requiring design changes that diminish subdivision potential and profitability; (b) significantly increasing development and construction costs, engineering costs, legal costs, permitting costs, and delay costs associated with the RIN Subdivision; and (c) requiring portions of the RIN Property not otherwise designated or required for that purpose to be utilized in connection with a substitute access to the Subdivision.

89. Defendants acted as they did in connection with the abandonment of the aforesaid Heidi Drive Extension with full knowledge that RIN's rights and property interests would be adversely affected and damaged, and yet awarded no damages. They acted in concert in a way that permanently and substantially impaired the value of the RIN Property without awarding any compensation, all at the behest of a private landowner whose personal agenda they preferred.

90. RIN has previously provided defendants with notice of this claim pursuant to R.I. General Laws § 45-15-5, but has been afforded no relief.

Count I
(Assessment of Damages Pursuant to R.I. General Laws §24-6-4)

91. RIN repeats and incorporates herein by reference the allegations set forth in Paragraphs 1 through 90 of this Complaint.

92. On June 21, 2010, The Planning Board voted to approve RIN's subdivision and, as a condition of approval required that:

the Applicant construct Heidi Drive extension as a gravel roadway along the area identified as to so-called paper road, with gates at each end for emergency vehicles only and not for pedestrian or vehicular access at this time . . .

Exhibit U.

93. On August 23, 2010, the Town Solicitor warned the Council of taking action to abandon Heidi Drive Extension giving the Planning Board approval of RIN's Subdivision:

Town Solicitor D'Andrea stated that the Planning Board, in approving a subdivision plan, has incorporated Heidi Drive for use of emergency vehicles. That decision is presently on appeal from the Planning Board to the Planning Board of Appeals which is the Zoning Board of Review. What is being appealed is the approval of the subdivision plan which includes the use of the road for emergency access. If the Council were to hold a hearing, and upon hearing decide to abandon Heidi Drive Extension, then it would have implications for that Board.

If you hold a hearing and if you desire to abandon the road, before you actually enter a decree abandoning the road, you will have to determine whether Rhode Island Nurseries, the one abutter other than Mr. Liberati's client, would suffer damages and if so you would have to set an amount of damages to be paid to Rhode Island Nurseries.

See **Exhibit X.**

94. On September 30, 2010, counsel for RIN, sent a detailed letter to the Town Council regarding the upcoming hearing on the petition to abandon the Heidi Drive Extension. Counsel for RIN, through this letter, specifically advised the Town Council of the history of the

Heidi Drive Extension and the approval of the Heidi Drive Extension as a means of access for the RIN Subdivision. Counsel for RIN advised the Town Council that RIN would suffer significant damages should the Town Council vote to abandon Heidi Drive Extension, including out of pocket expenses with respect to the subdivision which was incurred in reliance on Town regulations and conditions of approval. See Exhibit Y.

95. On January 27, 2011, the Town Solicitor advised the Town of the process under R.I. Gen. Laws §24-6-1 *et seq.*:

First, I'll give a very short overview of the procedural questions involved in this matter and then give some advice as to what I think should be done first and third give you a copy of the Tax Assessor's map so that the Town Council can see not only the portion of Heidi Drive involved but also see some of the neighboring land particularly two lots that are owned by people who have an interest in the outcome of this matter.

In order to have the authority to abandon a public road the Town must first determine if it has ceased to be useful to the public and if the Town Council so decides then the Town Council must determine what damages, if any, an abutter to the road would suffer if the road were abandoned, and, if it is determined it has ceased to be useful to the public, it doesn't mean you are required to abandon it – it means you are authorized to abandon the road. If you determine it is still useful to the public you may not abandon the road – if you determine that it is not useful to the public you may abandon or not abandon it as you wish.

Exhibit CC.

96. At the February 7, 2011 hearing, counsel for RIN presented expert testimony of an appraiser. The appraiser testified that the difference in the value of the subdivision as approved by the Planning Board and the subdivision which now had to be re-engineered for a different second access point because of the abandonment of Heidi Drive Extension was \$1,030,000.00. RIN also presented the testimony of their engineer. Tarsagian, through counsel, presented testimony of an appraiser and of an engineer. Members of the public spoke in favor of and in opposition to the abandonment and the award of damages. A motion was made and seconded by a member of the Council not to award damages. A motion was then made and seconded to hold off until making a decision about damages until the Council could obtain an independent appraisal of the damages to RIN. That motion failed, 2 votes to 3. The motion not

to award damages was voted on and passed, 3 votes to 2. The Council also voted to abandon the Heidi Drive Extension by a vote of 3-2. *See **Exhibit DD***.

97. On February 7, 2011, the Town Council voted to abandon the Heidi Drive Extension and not to award damages to any abutters. *See **Exhibit DD***.

98. On or about May 31, 2011, defendant Town Council of the Town of Portsmouth entered a Decree of Abandonment for the Heidi Drive Extension. *See **Exhibit II***.

99. RIN seeks an assessment of damages with respect to the aforesaid abandonment in accordance with the provisions of R.I. General Laws § 24-6-4.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court award it damages for the abandonment in accordance with R.I. Gen. Laws §24-6-4, as well as interest, costs and attorneys' fees.

Count II

(Alternative Count: Declaratory Judgment that the abandonment of Heidi Drive Extension by the Town was ultra vires, void ab initio, and a violation of Plaintiff's due process)

100. RIN repeats and incorporates herein by reference the allegations set forth in Paragraphs 1 through 99 of this Complaint.

101. Defendants, in a submission to this Honorable Court on January 5, 2016, have now taken the position that the abandonment of the Heidi Drive Extension was not performed under R.I. Gen. Laws §24-6-1 *et seq.*

102. There is no other statutory authority by which a Town can abandon a roadway.

103. The actions of the Town in abandoning the Heidi Drive Extension were therefore ultra vires, as it had no authority to do so.

104. RIN is damaged by the Town's ultra vires actions.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court:

- a. Declare that the actions of the Town in abandoning the Heidi Drive Extension were ultra vires and therefore void;
- b. Declare that the Heidi Drive Extension is still a public road; and
- c. Award Plaintiff compensatory and punitive damages, interest, costs and attorneys' fees which have resulted from the illegal actions of the Town.

COUNT III
(Taking Without Just Compensation)

105. RIN repeats and incorporates herein by reference the allegations set forth in Paragraphs 1 through 104 of this Complaint.

106. Prior to the abandonment of Heidi Drive Extension Plaintiff had rights to use the Heidi Drive Extension.

107. Prior to the abandonment of the Heidi Drive Extension, Plaintiff was required, by the Town, to utilize the Heidi Drive Extension as a condition of the approval of its Subdivision.

108. The Town's abandonment of the Heidi Drive Extension, and the decision not to award damages to Plaintiffs was in violation of Plaintiff's rights to just compensation, as guaranteed by the Constitution.

109. Defendants have, as aforesaid, acting under purported color of state law, and acting arbitrarily and in bad faith, and in derogation of information of record, deprived R.I. Nurseries of due process rights and protections and the right not to have property interests taken without just compensation, all in violation of the Fifth Amendment to the Constitution of the United States as made applicable to the States through the Fourteenth Amendment, as well as 42 U.S.C. §1983 and 42 U.S.C. §1985.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court award it just compensation for the taking of the Heidi Drive Extension, interest, and expert costs and attorneys' fees pursuant to 42 U.S.C. §§ 1983, 1985, and 1988.

COUNT IV
(Interference with Prospective Business Relations)

110. RIN repeats and incorporates herein by reference the allegations set forth in Paragraphs 1 through 109 of this Complaint.

111. On June 21, 2010, the Town approved the subdivision application of RIN on the condition that the Heidi Drive Extension be used as the mandated second means of access to the Subdivision for emergency access. See **Exhibits U** and **W**.

112. Subsequent to the approval, Plaintiff expended costs in an effort to comply with that condition, and accessed the Heidi Drive Extension for that reason. See Exhibit W.

113. On January 20, 2010, the Planning Board considered the Petition of Kevin Tarsagian to abandon Heidi Drive Extension. The matter was before the Board to issue a recommendation to the Town Council with respect to the Petition. See **Exhibit Q** at pages 5-8. Member Russell made a motion to send a favorable recommendation to the Town Council with conditions, and Member Wimpres seconded that motion. The Town Solicitor advised the Board that they should include a condition that the Town require the petitioner to indemnify the Town against all losses the Town may suffer if a neighboring property owner challenges the abandonment or is damaged by the same. **Exhibit Q** at page 8. Members Bissonnette and Lopes opposed the Motion given the legal advice by the Solicitor and their opinion that the application from RIN was not yet closed. **Id.** Members Wimpres and Quigley voted in opposition to the motion based on the advice of the Solicitor and potential liability to the Town. **Exhibit Q** at page 8. All members opposed the Motion. See **Exhibit Q** at page 8.

114. On January 22, 2010, the Planning Board informed the Town Council that it recommended against approving the abandonment of the Heidi Drive Extension. See **Exhibit R.**

115. On August 23, 2010, the Town Council met and considered, among other things, a request to advertise for the abandonment of Heidi Drive Extension from Attorney Mark Liberati, attorney for Tarsagian, the Petitioner. At that meeting, the Town Solicitor warned the Council of taking action to abandon Heidi Drive Extension giving the Planning Board approval of RIN's Subdivision:

Town Solicitor D'Andrea stated that the Planning Board, in approving a subdivision plan, has incorporated Heidi Drive for use of emergency vehicles. That decision is presently on appeal from the Planning Board to the Planning Board of Appeals which is the Zoning Board of Review. What is being appealed is the approval of the subdivision plan which includes the use of the road for emergency access. If the Council were to hold a hearing, and upon hearing decide to abandon Heidi Drive Extension, then it would have implications for that Board.

If you hold a hearing and if you desire to abandon the road, before you actually enter a decree abandoning the road, you will have to determine whether Rhode Island Nurseries, the one abutter other than Mr. Liberati's client, would suffer damages and if so you would have to set an amount of damages to be paid to Rhode Island Nurseries.

Minutes of August 23, 2010 Town Council meeting, attached hereto as **Exhibit X.**

116. On September 30, 2010, counsel for RIN, sent a detailed letter to the Town Council regarding the upcoming hearing on the petition to abandon the Heidi Drive Extension. Counsel for RIN, through this letter, specifically advised the Town Council of the history of the Heidi Drive Extension and the approval of the Heidi Drive Extension as a means of access for the RIN Subdivision. Counsel for RIN advised the Town Council that RIN would suffer significant damages should the Town Council vote to abandon Heidi Drive Extension, including

out of pocket expenses with respect to the *subdivision which was incurred in reliance on Town regulations and conditions of approval*. See **Exhibit Y**.

117. At the February 7, 2011. Town Council hearing, counsel for RIN presented expert testimony of an appraiser. The appraiser testified that the difference in the value of the subdivision as approved by the Planning Board and the subdivision which now had to be re-engineered for a different second access point because of the abandonment of Heidi Drive Extension was \$1,030,000.00. RIN also presented the testimony of their engineer. See **Exhibit DD**.

118. Despite being advised that RIN would be damaged if the Heidi Drive Extension was abandoned, the Town Council, and despite knowing the approval for the RIN Subdivision was conditioned on the use of the Heidi Drive Extension, on February 7, 2011, voted to abandon the Heidi Drive Extension and not to award any damages. See **Exhibit DD**.

119. The actions of the Town in abandoning the Heidi Drive Extension interfered with the ability of RIN to develop and sell the property, in accordance with the approvals and realize profits from the same.

WHEREFORE, Plaintiffs' respectfully request that this Honorable Court award Plaintiff damages for Defendants' interference, in an amount to be proven at trial.

COUNT V
Violation of Due Process

120. RIN repeats and incorporates herein by reference the allegations set forth in Paragraphs 1 through 119 of this Complaint.

121. Despite being advised that RIN would be damaged if the Heidi Drive Extension was abandoned, the Town Council, and despite knowing the approval for the RIN Subdivision

was conditioned on the use of the Heidi Drive Extension, on February 7, 2011, voted to abandon the Heidi Drive Extension and not to award any damages.

122. The Town's actions in abandoning the Heidi Drive Extension and not awarding damages to Plaintiff were wrongful and arbitrary.

123. The Town Council's actions in failing to independently assess the damages to be caused by the Heidi Drive Extension is further evidence of the arbitrariness of its decision.

124. At least one Town Council member counselled the applications for the petition to abandon the Heidi Drive Extension on several occasions.

125. Upon information and belief, the applicants for the petition to abandon the Heidi Drive Extension were advised by Council members to withdraw their petition until they had the votes to pass the abandonment.

126. On or about May 5, 2009, the Town Administrator inappropriately informed the Planning Board of his opposition to the RIN Subdivision and use of the Heidi Drive Extension, and, upon information and belief, utilized his influence on the Council as to the abandonment of the Heidi Drive Extension.

127. The Council further attempted to interfere with the Planning Department and Planning Board's review of the RIN's Subdivision and its use of the Heidi Drive Extension.

128. Since the Planning Board did not give in to the Town Council and Administrator's undue influence, the Town Council took matters into their own hands to prevent use of the Heidi Drive Extension and further the goals of the applicants for the abandonment, Kevin Tarsagian and Ann Fiore in preventing lawful use of the Heidi Drive Extension.

129. The Town's actions to abandon the Heidi Drive Extension and not award damages to Plaintiff were egregious and done with animus and bias against the Plaintiff.

130. The Town's actions to not award damages to Plaintiff for the abandonment of the Heidi Drive Extension were without actual or legal basis and deprived Plaintiff of its substantive due process rights.

WHEREFORE, RIN respectfully requests that this Honorable Court award Plaintiff damages, as well as costs and fees pursuant to 42 U.S.C. §§ 1988.

COUNT VI
Promissory Estoppel

131. RIN repeats and incorporates herein by reference the allegations set forth in Paragraphs 1 through 132 of this Complaint.

132. RIN detrimentally relied on the approval of the Town on June 21, 2010, which conditioned its subdivision on the use of the Heidi Drive Extension.

133. RIN expended substantial costs in reliance on the Town's actions.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court award it damages for out of pocket expenses and attorneys' fees incurred in reliance on the Town's actions.

PLAINTIFF DEMANDS TRIAL BY JURY AS TO ALL ISSUES SO TRIABLE

Respectfully submitted,

Plaintiff,

RHODE ISLAND NURSERIES, INC.,

By and through its attorneys:

/s/ Michael A. Kelly, Esq.

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Dated: May 2, 2016

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 2nd day of May, 2016, I filed and served the within document through the electronic filing system on the following:

Marc DeSisto, Esq.

DESISTO LAW

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P.O. Box 2563

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Portsmouth, RI

The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Lynn Daigle

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