**STATE OF RHODE ISLAND**

**NEWPORT, SC.** **SUPERIOR COURT**

**(FILED: March 23, 2022)**

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

**DECISION**

**I**

**Facts & Travel**

**LICHT, J.** In 2016, WED Portsmouth One, LLC (WED), pursuant to an agreement with the Town of Portsmouth (Town), installed a wind turbine at Portsmouth High School in Portsmouth, Rhode Island which replaced a turbine that had been there between 2009 and 2012. The Plaintiffs have filed a Complaint against both WED and the Town alleging that the new turbine constitutes both a public and private nuisance. In addition, they contend that they are third-party beneficiaries of the contract between the Town and WED, and that the contract requires the new turbine to "have no greater adverse impact on the neighboring properties than the previous wind turbine[,]"particularly relating to noise, flicker and structural integrity. Complaint ¶ 22. Each Plaintiff in this case lives between 740 and 1155 feet from the wind turbine and alleges that the new turbine generates more noise and shadow flickers than the prior turbine.

Plaintiffs have petitioned for a preliminary injunction to prevent the Defendants from operating the wind turbine. The Court held a hearing on March 2 and March 11, 2022. Both sides submitted memoranda in support of their position. The following Plaintiffs have submitted affidavits describing how the current wind turbine has impacted their life: Jayme Souza, David Souza, Donna Olszewski, David Schuller, Mark Jones, and Denise Wilkey. The affidavits were admitted into evidence, and each Plaintiff was cross-examined. Plaintiffs presented an acoustics engineer, Harold Vincent, who submitted an expert report regarding the wind turbine, and he was cross-examined. Additionally, three Portsmouth police officers testified about responding to noise complaints at certain of the Plaintiffs' homes.

## II

## Parties' Arguments and Evidence

### A

### Plaintiffs' Evidence

#### 1

#### Affidavits

Jayme Souza, David Souza, Donna Olszewski, David Schuller, Mark Jones, and Denise Wilkey (hereinafter Plaintiffs) submitted individual affidavits arguing that the wind turbine has disrupted their peaceful enjoyment of their homes and lots.

The Plaintiffs' affidavits all similarly allege that the wind turbine is interrupting their use of their home because of the constant noise, shadow flicker, and fear that the wind turbine is going to fall and hit their homes. Plaintiffs aver in their affidavits that the noise prevents them from opening their windows and getting fresh air. Specifically, Donna Olszewski states that she must run her air conditioning and fan year-round because she cannot open her windows due to the noise

generated by the turbine. Ms. Olszewski claims she has such high electric bills that she was forced to take out a loan to install solar panels on her home. Furthermore, Plaintiffs David Souza, Jayme Souza, Donna Olszewski, and Denise Wilkey expressed their need for prescription sleeping pills merely to fall asleep at night due to the constant noise from the wind turbine. Ms. Olszewski further stated that she did not require sleeping pills at all during the three years between the end of the first wind turbine and the installation of the current one. From this she concluded that the wind turbine is interrupting her sleep necessitating the use of sleeping pills.

In addition to the noise of the wind turbine, Plaintiffs maintain that it also creates shadow flicker. A "shadow flicker" is when the blades of the wind turbine interact with the sun creating a strobe light effect. Plaintiffs zealously contend that the shadow flicker impacts the overall enjoyment of their home. Plaintiffs aver the shadow flicker is so pronounced that it infringes on daily life activities, such as watching television, doing the dishes, and even driving around the town. Additionally, certain Plaintiffs claim that the shadow flicker causes migraine headaches, and moreover, the shadow flicker causes some Plaintiffs to leave their home because it is so unbearable and causes dizziness and nausea. Mr. Souza and Ms. Wilkey showed videos of the flicker in their homes and on the street.

**2**

**Police Reports**

Over the years, Ms. Wilkey and Mr. and Mrs. Souza had complained to the police about noise after 10 p.m. These police officers introduced their reports into evidence. Portsmouth Noise Ordinance § 257-7 provides that, in residential areas and open space, acceptable sound levels allowed at or within the real property boundary are 65 dBA between 7 a.m. and 10 p.m. and 55 dBA between 10 p.m. and 7 a.m. In commercial areas, Ordinance § 257-7 provides that the

acceptable sound levels allowed at or within the real property boundary are 75 dBA at all times. At the Souza home, which is in a residential zone, there were fifteen readings ranging from 44.1 dBA to 56.6 dBA over a period of time from October 2017 to September 2018, and only one exceeded 55 dBA. The average noise reading performed by the Portsmouth police was 50.46 dBA. At the Wilkey home, which is in a commercial zone, the readings ranged from 53.7 dBA to 64.1 dBA, averaging 58.2 dBA, but none exceeded 75 dBA.

**3**

**Dr. Vincent**

In addition to what is contained in the Plaintiffs' affidavits, Harold Vincent testified. Dr. Vincent, who holds a Ph.D. in Ocean Engineering from the University of Rhode Island, is an expert in underwater acoustics. He conducted a study of the wind turbine at two different sites in Portsmouth between December 20, 2020 and January 29, 2021. The first location was the Wilkey residence, and the second location was the Souza residence. Dr. Vincent placed condenser microphones at these two locations to measure the differences between noise levels and frequency content. His report is replete with numerous charts depicting his findings.

Dr. Vincent ultimately found that the radiated noise levels at the measurement sites were consistently higher than those obtained in previous noise studies. He reasoned the difference is "due to the improper use of the A-weighting that deliberately reduces the contributions of low frequency noise and suppresses the contributions of any strong tones."[1] (Aff. of Dr. Vincent 45). Dr. Vincent challenged the use of A-weighting and used an unweighted scale in his testing. Furthermore, the exact physical characteristics of the noise such as the very high-pressure levels

[1] Chapter 257, Section 3A of the Portsmouth Noise Ordinance requires that "a sound-level meter shall contain at least an A-weighted scale . . ." Apparently, there are several different scales to measure decibel level.

at low frequency had significant tonal content and amplitude modulation, that in turn cause the most annoyance and disruption. Thus, Dr. Vincent found this wind turbine creates consistently higher noise levels than other previous noise studies, but he could not link this high noise level to any of the Plaintiffs' alleged adverse health effects. In his affidavit he states, "In my opinion the radiated noise levels at the measurement sites were high when the turbine was operational. The noise levels included very high acoustic pressure levels at low frequency, significant tonal content and amplitude modulations. This noise emanating from the turbine is disruptive and disturbing and causes an annoyance to the occupants of the neighboring properties[.]" (Aff. of Dr. Vincent ¶ 4.)

**B**

**Plaintiffs' Argument**

Plaintiffs seek to mitigate this harm until this Court can come to a final decision regarding the wind turbine. In their Complaint, Plaintiffs allege both private and public nuisance because both doctrines relate to the unreasonable interference with the use and enjoyment of land. Under Rhode Island law, a claim for private nuisance "arises from the unreasonable use of one's property that materially interferes with a neighbor's physical comfort or the neighbor's use of his real estate." *Weida v. Ferry*, 493 A.2d 824, 826 (R.I. 1985). The Plaintiffs argue they cannot enjoy their private homes, both indoors and outdoors, because of the constant noise and shadow flicker given off by the wind turbine.

The Plaintiffs contend that "the constant noise, vibrations and flicker that emanates [*sic*] from the turbine prevents them from enjoying their homes, disrupts their sleep, causes headaches, nausea, requires them to close their windows, prevents them from enjoying their outdoor portions of their property and is annoying and aggravating." Pls.' Mem. Supp. Mot. TRO and Prelim. Inj. at 4. Plaintiffs further aver that medical evidence is not essential to a preliminary injunction

decision. The Supreme Court of Rhode Island affirmed the lower court in granting a preliminary injunction without any medical expert opinion proximately relating the plaintiff's respiratory complaints to a specific source. *Harris v. Town of Lincoln,* 668 A.2d 321 (R.I. 1995). Moreover, the Supreme Court of Rhode Island concluded that individuals have the right to an "8-hour period during which they may place their heads on a pillow, hopefully got to sleep, dream perhaps the impossible dream, and then awake renewed and refreshed…" *DeNucci v. Pezza*, 114 R.I. 123, 130, 329 A.2d 807, 811 (1974). Even though the plaintiffs in *DeNucci* did not present any medical evidence linking the trucks hitching and unhitching to loss of sleep, the Court nonetheless still found injunctive relief proper. Thus, Plaintiffs conclude that the wind turbine should constitute both a private and public nuisance and should discontinue operations.

**C**

**Defendants' Argument**

Defendants aver Plaintiffs' motion for preliminary injunction should not be granted because the Plaintiffs failed to meet their burden to show an irreparable harm. The United States District Court for the District of Rhode Island stated that, as a general matter, delay in seeking preliminary injunctive relief cuts against a finding of irreparable injury. *Wine & Spirits Retailers, Inc. v. State of Rhode Island and Providence Plantations*, 364 F. Supp. 2d 172, 182 (D.R.I. 2005); *see also Kohmetscher v. NextEra Energy Resources, LLC*, No. 19-80281-CIV-ALTMAN, 2020 WL 5639950, at *4 (S.D. Fla. Sept. 22, 2020) (holding that since plaintiffs waited two years after wind turbines became operational before seeking injunctive relief, they could not demonstrate irreparable harm because their delay in filing was inexcusable).

In this present matter, Defendants argue that the Plaintiffs waited between five and twelve years to bring this motion. The current wind turbine started supplying power on August 12, 2016,

but its predecessor began operations in March 2009. In the affidavits and testimony, Defendants highlight that some Plaintiffs allege the noise and shadow flicker were a problem with the original wind turbine. Specifically, Ms. Olszewski stated that "[t]he problem that is even worse than the noise is the 'shadow flicker.' This bothers me the most because it came as a complete shock to me and my family the first day it started, *with the first turbine."* (Aff. of Donna Olszewski (emphasis added).) Furthermore, David Souza stated the noise from the wind turbine "has been an ongoing problem for the residents since the installment of [the first] wind turbine at the Portsmouth High School" and it disturbs residents' sleep. *See* Defs.' Obj. to Pls.' Mot. for TRO and Prelim. Inj., Ex. 3, Ltr. from D. Souza to Town Council (Jan. 29, 2018). Moreover, Plaintiffs waited five months after Dr. Vincent released the results of his study to file for injunctive relief.

Second, Defendants argue Plaintiffs have no empirical evidence to support their claims of pain and suffering, aggravation, and emotional distress. In *Kohmetscher,* the plaintiffs submitted affidavits claiming they experienced some physical and mental discomforts, but no medical proof was presented linking their claimed mental and physical injuries to the wind turbine. *Kohmetscher,* 2020 WL 5639950, at *5. The court in *Kohmetscher* reasoned that "if the Plaintiffs' physical and mental injuries were indeed 'irreparable,' the Plaintiffs would have sought some medical or psychological assistance during this two-year period. They might, for instance, have seen a doctor who may have prescribed some medication to remedy the dizziness or the nausea they say they are suffering…This absence of evidence is fatal to their request." *Id.* at *6. Moreover, the court in *Walker v. Kingfisher Wind, LLC*, No. CIV-14-914-D, 2016 WL 5947307, at *7-8 (W.D. Okla. Oct. 13, 2016) found that plaintiff's generalized harms, such as headaches, sleep disturbances, dizziness, and memory loss due to wind turbines, was speculative at best because the plaintiffs there failed to provide any medical evidence. Similarly, in this case, the Plaintiffs merely make

general statements in their affidavits and motion that the wind turbine prevents them from enjoying their home, disrupts their sleep, and causes headaches and nausea. Pls.' Mem. Supp. Mot. TRO and Prelim. Inj. at 4. However, the Plaintiffs fail to submit any evidence of any medical provider that causally links their allegations of harm to the wind turbine. As one example, the Defendants point out that numerous Plaintiffs make claims that they have to take sleeping pills but fail to provide any medical opinion or documentation that the sleep interruption stems from the wind turbine. Thus, as in *Kohmetscher* and *Walker,* the Plaintiffs' vague assertions of injury are insufficient to support the requisite irreparable harm for a writ of preliminary injunction.

Furthermore, Defendants aver that Plaintiffs do not establish, by empirical evidence, that the wind turbine causes an unreasonable amount of noise. Plaintiffs offer Dr. Vincent as an expert on noise, but he holds a degree in neither acoustics nor audiology. Moreover, Defendants claim Dr. Vincent does not use the generally accepted methodology for measuring wind turbine noise. He claims that standard noise level measurements employing A-weighting failed to measure the true sound pressure level present in the environment. A-weighted measurement of wind turbine sound pressure levels is the recognized "gold standard" practice for measuring wind turbine noise. He could not point to one other community in Rhode Island which does not use an A-weighted scale.

Also, while Defendants argue that the Plaintiffs should not surpass the "irreparable harm" element of a preliminary injunction, if they do, however, Plaintiffs still cannot demonstrate a likelihood of success on the merits. First, Plaintiffs have not alleged an interference with a public right; therefore, they cannot prevail on their claim for public nuisance. Second, as a matter of law, Plaintiffs are not third-party beneficiaries, so they cannot prevail on their breach of contract cause of action. Thus, the only cause of action remaining is private nuisance.

Third, Defendants argue the Plaintiffs cannot demonstrate a likelihood of success on the merits of their private nuisance claim. The Supreme Court stated that for a noise to amount to a nuisance the noise must be "unreasonable." *De Nucci*, 114 R.I. at 129, 329 A.2d at 810. In the present matter, however, Defendants contend that Plaintiffs have no evidence to support that the noise or vibrations produced by the wind turbine are/were unreasonable or even exceed the permissible levels as stipulated in the Town's Noise Ordinance.

Plaintiffs' testimony was that the shadow flicker occurs in the fall and spring for approximately eight weeks and lasts for ten minutes to one hour per day. The testimony was that the flicker occurs between thirty and seventy hours per year. Defendants contend this evidence is not strong enough. *See Charette v. Pezza*, No. 09-908, WL 3280058, at *11 (R.I. Super. Aug. 12, 2010) (holding an occasional "once or twice a week" incident does not constitute sufficient impairment of a plaintiff's rights to support a finding of nuisance). Thus, Plaintiffs' claims of occasional shadow flicker do not constitute sufficient impairment of Plaintiffs' rights to support a finding of nuisance, either public or private.

Furthermore, Defendants argue that the balance of equities as well as the public interest require the denial of Plaintiffs' request for a preliminary injunction. Defendants reason that enjoining the operation of the wind turbine would disrupt (i) the status quo and (ii) the generation of clean renewable energy (which is ongoing and used to power municipal buildings). This wind turbine has operated continuously for the last five years, so removing it would *per se* disrupt the status quo. Moreover, voters in the Town approved the construction of the wind turbine by referendum in 2009, which is nothing if not indicative of the public interest. Therefore, the (i) balance of equities, (ii) public interest, and (iii) preserving the status quo all tilt strongly against Plaintiffs' motion.

## III

## Standard of Review

For a preliminary injunction, the moving party must clearly establish that: (1) they will suffer irreparable harm without the requested relief; (2) they have a likelihood of success on the merits of the case; (3) the balance of the equities, including the possible hardships to each party and to the public interest, tip in their favor; and (4) the issuance of a preliminary injunction will preserve the status quo. *See Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517 (R.I. 1997).

## IV

## Analysis

### A

### Irreparable Harm

#### 1

#### Time Passed

Although not binding on this Court, the court in *Kohmetscher* found plaintiffs' delay in seeking a preliminary injunction as mitigating against their claim of irreparable harm. *Kohmetscher*, 2020 WL 5639950, at *4. The plaintiffs in *Kohmetscher* waited only two years, but nonetheless, the court concluded that two years is simply too long to wait since the noise and shadow flicker were present as soon as the windmill in question became operational. *Id.* In the present matter, Plaintiffs brought this action more than five years after the current wind turbine became operational. Additionally, Donna Olszewski affirmed in her affidavit that "[t]he problem that is even worse than the noise is the 'shadow flicker.' This bothers me the most, because it came as a complete shock to me and my family *the first day it started, with the first turbine*." (Aff. of

Donna Olszewski (emphasis added).) The initial wind turbine on the site was constructed and operational in March 2009, so Ms. Olszewski's "harms" began approximately twelve years ago.

Even with access to Dr. Vincent's report about the noise level of the wind turbine, Plaintiffs still delayed filing for this injunction for five additional months. Using the reasoning in *Kohmetscher*, living with the wind turbine for over five years (inclusive of its noise and shadow flicker) is an exceptionally long time to now claim irreparable, immediate harm.

Moreover, the Plaintiffs failed to seek any injunctive relief when they filed their original Complaint on November 4, 2021. Their motion for a restraining order was filed twelve weeks later, on January 26, 2022.

The passage of time undermines Plaintiffs' claim of irreparable harm.

**2**

**Lack of Empirical Evidence**

Plaintiffs presented no empirical (i.e., non-testimonial) evidence linking the wind turbine to any of their alleged harms. While Plaintiffs cite to cases that did not require medical evidence in nuisance cases,[2] this Court finds more persuasive the *Walker* reasoning that, absent some medical evidence to support plaintiffs' claim, the court could not conclude that the wind turbine caused the harm to plaintiffs. Rather concluding otherwise would be speculative at best. *Walker,* 2016 WL 5947307, at *7-8. Defendants correctly articulate that Plaintiffs make general statements such as "constant noise, vibrations and flicker that emanates from the turbine prevents them from enjoying their homes, disrupts their sleep, [and] causes headaches [and] nausea." Pls.' Mem. Supp.

[2] While in *DeNucci v. Pezza*, one of the plaintiffs' sisters was sick and had supersensitivities to the noise emitting from the trucks hitching and unhitching at night. *DeNucci,* 114 R.I. 123, 329 A.2d 807 (1974). However, the Court only restricted the trucks from operating from 11 p.m.- 7 a.m. because the plaintiffs met their burden and also did not wait to file injunctive relief in their complaint.

Mot. TRO and Prelim. Inj. at 4. However, Plaintiffs fail to provide any medical opinion or evidence to support their claims. Additionally, Dr. Vincent, in his report, even stated that "[i]nvestigations are also underway to determine if it is these characteristics that cause adverse health effects in certain individuals." *See* Aff. of Dr. Vincent at 42. Thus, the Plaintiffs' injuries are wholly unsupported and lack any evidence showing this Court a link between their alleged harms and the wind turbine.

Second, Plaintiffs claim the wind turbine has diminished their property value but provide no evidence in support other than some hearsay testimony[3] that a couple of Plaintiffs testified that they consulted a real estate expert who said the turbine would affect their property values. No appraisals were done. Even if the Plaintiffs had presented expert testimony on the effect of property values, it does not establish irreparable harm for two reasons. First, all the Plaintiffs have lived for a long time in these homes, and not one indicated a present intention to sell. Secondly, even if Plaintiffs could establish such loss in value, they could be compensated with money damages.

Lastly, Plaintiffs allege the noise given off by the wind turbine is an irreparable harm but, as with their arguments above, have not presented any evidence in support. Portsmouth Noise Ordinance § 257-7 provides that, in residential areas and open space, acceptable sound levels allowed at or within the real property boundary of receiving land use are 65 dBA between 7 a.m. and 10 p.m. and 55 dBA between 10 p.m. and 7 a.m. In commercial areas, Ordinance § 257-7 provides that the acceptable sound levels allowed at or within the real property boundary of receiving land use are 75 dBA at all times. Likewise, Defendants' Exhibit 22, a study done in February 2019, found that sound levels at Plaintiff Denise Wilkey's residence (*which is commercially zoned*) did not exceed 45 dBA. *See* Defs.' Ex. 22. Conversely, Dr. Vincent does find

[3] In preliminary injunction hearings, the Rules of Evidence do not apply. R.I. R. Evid. 101(b)(3).

this wind turbine creates consistently higher noise levels than other previous noise studies.[4] However, Dr. Vincent deviated from the "gold standard" method when measuring the turbine noise in his study, but Plaintiffs still have not presented evidence that the wind turbine emits noise above the allowed dBA laid out in the Portsmouth Noise Ordinance. Furthermore, numerous studies have found that there is simply no connection between the noise from a wind turbine and adverse effects on human health. *See* Defs.' Exs. 23-25. Thus, Plaintiffs cannot establish noise as an irreparable harm because the noise level has not been shown to exceed the ordinance, and furthermore, Plaintiffs do not introduce any scientific or peer-reviewed literature to advance their claims of adverse health effects due to the wind turbine's noise. This Court cannot find irreparable harm rising to the level needed for a preliminary injunction.

**B**

**Likelihood of Success on the Merits**

First, Plaintiffs make a claim for public nuisance. A plaintiff's burden in a public nuisance claim is by clear and convincing evidence, which is a higher burden than preponderance of the evidence.

The Rhode Island Supreme Court articulated the elements of a public nuisance as "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred." *State of Rhode Island v. Lead Industries Association*, 951 A.2d 428, 446-47 (R.I. 2008). "As the Restatement (Second) makes clear, a public right is more than an aggregate of private rights by a large number of injured people." *See* Restatement (Second) *Torts* § 821B, cmt. g at 92; *see also City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 131 (Ill. App. Ct. 2005) (a

[4] *See* Aff. of Dr. Vincent at 42.

public right is not "an assortment of claimed private individual rights"). "Rather, a public right is the right to a public good, such as 'an indivisible resource shared by the public at large, like air, water, or public rights-of-way.'" *American Cyanamid*, 823 N.E.2d at 131.

In paragraph 17 of their Amended Complaint, Plaintiffs allege "[t]he operation of the wind turbine at Portsmouth High School by the Defendants is an 'unreasonable interference with a right common to the general public' to be free of annoyance, flicker, vibrations and flicker."

It is highly questionable whether being free from flicker is a public right.

Moreover, to successfully argue a public nuisance claim as private individuals, the individual must "suffer special damage, distinct from that common to the public." *Hydro-Manufacturing, Inc v. Kayser-Roth Corp.*, 640 A.2d 950, 957 (R.I. 1994) (internal quotation omitted). An individual "must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public." *Id*. (internal quotation omitted). The special damage requirement is only overcome when a private individual suffers a harm different from the harm suffered by other members of the public while exercising the right common to the public. *Id.* Here, the Plaintiffs represent six homes out of many that live within the vicinity of the wind turbine. The Plaintiffs have not submitted any facts or evidence that show they are suffering a harm while exercising a right common to the public. The Plaintiffs' claims are all related to enjoying their private homes and property, not any public place of accommodation or repose. Furthermore, Plaintiffs' claims of pain and suffering, aggravation, emotional distress, and loss of property value, etc. are not different than any other neighbor's potential claims that live near the wind turbine. Thus, the Plaintiffs cannot establish a special damage that is separate from any other individual's harm in the community, so, by default, they do not have a likelihood to succeed on the merits on a public nuisance claim.

Plaintiffs also have alleged that they are third-party beneficiaries of the Town's contract with WED. However, at this stage of the proceeding, they have neither put forth evidence nor argued that issue.

That leaves the Court to address the cause of action for private nuisance. Under Rhode Island law, a claim for private nuisance "arises from the unreasonable use of one's property that materially interferes with a neighbor's physical comfort or the neighbor's use of his real estate." *Weida,* 493 A.2d at 826. The Rhode Island Supreme Court held that private nuisance of emission of noises, odors, and vibrations by sewer processing facility pumping station onto neighboring residential property warranted injunctive relief. *Harris*, 668 A.2d 321. The Plaintiffs claim the noise, vibration, and shadow flicker from the wind turbine prevent them from enjoying their homes. However, Plaintiffs need to show the noise produced by the wind turbine was "unreasonable." There was scant evidence that the noise at Plaintiffs' homes ever exceeded the Town's noise ordinance. The Plaintiffs seem to rely on Dr. Vincent's report. Because, as stated above, the Rhode Island Rules of Evidence are inapplicable to a preliminary injunction hearing, the Court allowed Dr. Vincent to testify. However, at a trial on the merits, the Court believes it is doubtful he could testify, as his testimony and study could not withstand a *Daubert*[5] challenge. His report would probably be found unreliable as his methodology is not used by anyone else. It has not been peer reviewed. It has chain of custody issues. Moreover, while Dr. Vincent exhibited extensive knowledge of acoustics, his expertise is with underwater acoustics. Dr. Vincent's

[5] The factors to consider are "(1) whether the proffered knowledge has been or can be tested; (2) whether the theory or technique has been the subject of peer review and publication; (3) whether there is a known or potential rate of error; and (4) whether the theory or technique has gained general acceptance in the scientific community." *Owens v. Silvia*, 838 A.2d 881, 891 (R.I. 2003); *see also DiPetrillo v. Dow Chemical Company*, 729 A.2d 677, 689 (R.I. 1999) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993)).

affidavit in paragraph 4 merely said that the noise was "high," but he did not quantify this assertion in relation to anything—"How high?" "High in relation to what?" He did refer to a chart on page 11 of his report. It shows that at certain low levels of Hz the decibel level of unweighted is lower than A-weighted. At least to the Court, he did not satisfactorily explain why this made the A-weighted measurement accepted by the state and all thirty-nine cities and towns unacceptable. Perhaps Dr. Vincent is right, just as Galileo was, but so far, he has failed to convince any authorities that his measurements are a better way to test sound.

As to the shadow flicker, the Plaintiffs fail to show what evidence establishes that thirty to seventy hours of flicker per year is unreasonable. *See accord Citizens for Preservation of Waterman Lake v. Davis,* 420 A.2d 53, 59-60 (R.I. 1980) ("[T]he Citizens group failed to produce any evidence directly bearing on the amount of noise created by trucks under Davis's control. . . Under these circumstances we cannot say that the trial justice clearly erred when he found that the Citizens group had failed to adduce evidence sufficient to show that the noise from the trucks constituted a nuisance.").

The Court accepts the contention that Plaintiffs have been annoyed by the wind turbine, but the legal issue is whether such annoyance is so unreasonable that it constitutes a private nuisance. Plaintiffs have failed to show this Court that they have the evidence to prove that. As such, the Plaintiffs have failed to establish a likelihood on the merits.

**C**

**Balance of the Equities**

In weighing a request for a preliminary injunction, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 547 (1987). Moreover, courts must pay particular regard for the public consequences when granting preliminary injunctive relief. *Id.* The public both in Portsmouth and in Rhode Island are generally in favor of wind energy to help create more green, renewable energy. More specifically, the voters in the Town of Portsmouth approved by referendum the construction of the wind turbine on this exact property in 2009, which is indicative of the public interest.[6] Furthermore, the General Assembly, per G.L. 1956 § 42-6.2-9, has required the state to reduce its statewide greenhouse gas emissions. Thus, weighing the public interest of wind turbines with the Plaintiffs' alleged harm, this Court finds the public interest better served by allowing the wind turbine to continue spinning.

**D**

**Preserve the Status Quo**

The final element of a preliminary injunction is that granting such injunction will preserve the status quo. In a preliminary injunction, the status quo is "the last peaceable status prior to the controversary." *Mesolella v. Phillips*, No. PC-2009-4060, 2010 R.I. Super. LEXIS 55, at *14-15 (R.I. Super. Mar. 12, 2010). This wind turbine has been operating for the last five years and Plaintiffs just recently brought this injunction. Even prior to this current wind turbine, another similar turbine was operating since 2009. Therefore, this area in Portsmouth has had a wind turbine

[6] *See* Defs.' Ex. 2, *Portsmouth Wind Power*, available at http://www.portsmouthriedc.com/windpower.html.

since 2009 and has had this specific turbine since 2016. Using the *Mesolella* court's reasoning, a wind turbine existed, along with its noise and shadow flicker, prior to this controversary, so this Court would affect the status quo if Plaintiffs' injunction were granted.

## V

## Conclusion

For the reasons set forth herein, this Court denies Plaintiffs' motion for a preliminary injunction. Counsel shall present the appropriate order.

**RHODE ISLAND SUPERIOR COURT**
***Decision Addendum Sheet***

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| **TITLE OF CASE:** | **Denise Wilkey, et al. v. WED Portsmouth One, LLC, et al.** |
| **CASE NO:** | **NC-2021-0352** |
| **COURT:** | **Newport County Superior Court** |
| **DATE DECISION FILED:** | **March 23, 2022** |
| **JUSTICE/MAGISTRATE:** | **Licht, J.** |
| **ATTORNEYS:** | |
| **For Plaintiff:** | **Joseph F. Hook, Esq.** |
| **For Defendant:** | **John A. Tarantino, Esq.; Nicole J. Benjamin, Esq.; Erin A. Hockensmith, Esq.; Kevin P. Gavin, Esq., Michael Desisto, Esq.** |