STATE OF MAINE
FRANKLIN, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-21-12

WILSON LAKE MARINA, LLP,

Plaintiff,

v.

TOWN OF WILTON,

Defendant.

POST-TRIAL ORDER

Plaintiff Wilson Lake Marina, LLP ("Wilson") has filed a declaratory judgment action to determine the validity of certain zoning ordinance amendments enacted by Defendant Town of Wilton ("the Town"). For the following reasons, the court determines after trial that Wilson has not met its burden to demonstrate that the amendments are invalid.

PROCEDURAL HISTORY

Wilson filed an eleven-count complaint on June 10, 2021. On March 23, 2022, the court dismissed Counts V through XI by agreement of the parties.[1] On May 30 and 31, 2023, the court conducted a bench trial on the remaining four counts, all of which assert declaratory judgment actions, as follows:

[1] Counts V through XI related to Wilson's claims that the Town of Wilton Planning Board erroneously denied Wilson's site plan application to build a commercial dock and marina on Wilson Lake. Wilson has challenged that decision in a separate complaint filed pursuant to Maine Rule of Civil Procedure Rule 80B. *See Wilson Lake Marina, LLP v. Town of Wilton*, Docket No. FARSC-AP-21-04. That matter has been stayed pending final judgment in the instant matter.

Count	Allegation
Count I	Validity of Amendments to Zoning Ordinance – Public Participation (30-A M.R.S. § 4352(1))
Count II	Validity of Amendments to Zoning Ordinance – Notice
Count III	Validity of Article 5 Amendment to Zoning Ordinance – Town of Wilton Zoning Ordinance Article 1.6(A)
Count IV[2]	Validity of Article 4 Amendment to Zoning Ordinance – Inconsistent with Comprehensive Plan

The court has considered the testimony of the witnesses and the evidence presented at trial. The parties completed post-trial briefing on July 7, 2023, and the court has also reviewed and considered those briefs in reaching its decision.

FINDINGS OF FACT

The Town of Wilton uses what is known as the "town manager plan" form of government, by which local government consists of "a town meeting, an elected select board, an elected school committee, an appointed town manager and any other officials and employees that may be appointed under [the applicable statute], general law or ordinance." *See* 30-A M.R.S. § 2631(2). At the annual event known as the town meeting, Wilton residents cast secret ballots to elect Town officials and perform legislative functions such as approving a budget and adopting ordinances. All business for the town meeting must appear on a document known as a warrant, which is issued by the Town of Wilton Board of Selectpersons ("Select Board"). *See* 30-A M.R.S. § 2521.

The two zoning ordinance amendments at issue in this case are Articles 4 and 5 of the town meeting warrant dated June 14, 2021 (together, the "zoning

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2 The parties have stipulated to the record the court should consider in evaluating Count IV.

amendments"). Article 4 amends the Town of Wilton Zoning Ordinance to define the term "marina," adds the marina use to the Table of Land Uses, and requires a permit from the Town of Wilton Planning Board ("Planning Board") for any marina proposed for the Limited Residential and Recreation ("LR&R") zoning district. Jt. Ex. 2. Article 5 amends the Zoning Ordinance regarding piers, docks, and wharfs to provide that a single lot must contain twice the minimum shore frontage in order for an owner to be permitted to construct a pier, dock, or wharf. Jt. Ex. 3. That amendment makes the Zoning Ordinance consistent with the State of Maine's minimum shoreland zoning guidelines. *Id.*

James Butler and Ashley Rand are partners in both their business and personal lives. They live in Wilton on the shores of Wilson Lake on a property that abuts the Town's public boat launch (the "Property"). The Property is improved with a single-family home and private dock. The Property is primarily located within the LR&R zoning district and partially within the Downtown Village zoning district.

In November 2020, Butler and Rand formed Wilson Lake Marina, LLP with the goal of establishing a commercial marina on the Property. They intended to install a temporary dock on Wilson Lake and lease seasonal boat slips to residents.

Wilson hired Main-Land Development Consultants, Inc. ("Main-Land") to survey the Property and prepare a site plan application for their marina (hereinafter, "Application"). Esther Bizier of Main-Land, who helped to prepare the Application, reviewed the Town's Zoning Ordinance and did not see anything in the Zoning Ordinance that would impede approval of the Application.

On February 18, 2021, Butler, Rand, and Bizier met with Wilton Town Manager Rhonda Irish and Town Code Enforcement Officer ("CEO") Charles Lavin to discuss their project and proposed application. At the meeting, neither Irish nor Lavin expressed concerns about Wilson's plan. Thereafter, Butler and Rand also met with two members of the Friends of Wilson Lake association to alert them to their upcoming site plan application. Butler and Rand put a deposit on a floating dock and invested time and money in obtaining the survey and site plan application. They hoped to install the dock in the summer of 2021.

Wilson submitted its Application to the Planning Board on March 11, 2021. Pl.'s Ex. 30.[3] The Planning Board placed review of the Application on the agenda for its March 18, 2021, meeting.

Butler and Bizier attended the March 18 meeting prepared to discuss the Application but were not invited to speak. The Planning Board did not take up the Application as expected. Instead, the Board voted to table review of the Application and ask the Select Board to hold a special town meeting to discuss "a moratorium on any commercial development in the LR&R zone surrounding Wilson Pond (Lake) for 6 months." Pl.'s Ex. 10 (Town of Wilton Planning Board Minutes, March 18, 2021). The Planning Board felt that the existing Zoning Ordinance was not equipped to deal with a request of the sort presented in the Application: for example, the Ordinance did not define the term "marina."

[3] Wilson submitted an amended application on May 21, 2021. Pl.'s Ex. 31.

At a meeting on April 6, 2021, the Select Board tabled the moratorium proposal. At its next meeting, held on April 20, 2021, the Select Board took no action on the moratorium, effectively killing the Planning Board's request.

Although the moratorium proposal had failed, the Planning Board did not put Wilson's Application back on its agenda for consideration. Instead, beginning at a meeting held on April 15, 2021, the Planning Board discussed drafting amendments to the Zoning Ordinance that would provide for a definition of "marina," as well as address the requirements for installing a marina. The issue had not been included on the Board's agenda prior to the meeting. Around this same time, the CEO also requested that the Planning Board consider amending the Zoning Ordinance to bring it in compliance with State requirements regarding the minimum shore frontage needed for a property owner to construct a pier, wharf, or dock. The Board sought the assistance of the Town's attorney, Sally Daggett, in drafting proposed amendment language that ultimately became the subject of Articles 4 and 5 of the town meeting warrant.

There are multiple ways for a zoning amendment to be added to Wilton's town meeting warrant for consideration. In order for the Zoning Ordinance to be amended by request of the Planning Board, several things must occur: Language must be drafted, the Planning Board must vote on whether to accept the proposed language, the Planning Board must conduct a public hearing, and the Select Board must vote to add the proposed amendment to the town warrant. Wilton Zoning Ordinance, § 1.6 (Jt. Ex. 15). There is no ordinance dictating the order by which

these steps must occur. An amendment does not become effective unless approved by a majority of the voters at the town meeting. *Id.*

On April 22, 2021, the Planning Board held a workshop to discuss the language of the proposed zoning amendments, as well as to discuss two additional Zoning Ordinance amendments, one having to do with signs and one having to do with marijuana businesses. The public is permitted to attend and observe Planning Board workshops but is not typically permitted to comment. Although Butler and Rand were not individually notified of the Planning Board's workshops, the meeting dates and times were public. Butler and Rand attended the workshop but were not invited to speak in front of the Planning Board about the Application or the proposed zoning amendments. Butler felt that the amendments were intended to halt Wilson's proposed project. The Article 4 amendment defining "marina" and requiring Planning Board permits for a marina is retroactive to March 18, 2021, the date Wilson's Application first appeared on the Planning Board's agenda. The only pending application that was impacted by the amendment was Wilson's.

On May 3, 2021, Attorney Daggett sent a final proposed draft of the town meeting warrant to Town Manager Irish for presentation to the Select Board. Daggett also forwarded final language for the amendments referenced in Articles 4 and 5 of the warrant. On May 4, 2021, the Select Board approved the warrant, including Articles 4 and 5. Once the Select Board approved the warrant, it could not be changed. On May 6, 2021, the Planning Board also voted to approve the inclusion

of Articles 4 and 5 (as well as the two other proposed Zoning Ordinance amendments) on the warrant.

At the May 6 meeting, the Planning Board scheduled a public hearing on the four zoning amendments for May 27, 2021. That same day, Irish e-mailed a notice of the public hearing to the administrator of the Town website for posting on the website, as well as to the *Daily Bulldog*, an online news publication, and the *Franklin Journal*, a local weekly print publication. The notice included the date, time, location (the Wilton Town Office), and subject matter of the hearing. It further indicated that "Town Office meeting space is very limited," and provided a phone number and e-mail address for members of the public to contact if they would like a Zoom invitation to the meeting. Jt. Ex. 9.

Also on May 6, Irish sent the approved warrant as well as the four proposed Zoning Ordinance amendments to a Town staff person so that the warrant could be printed in the Town's annual report and the proposed amendments would be available for review by members of the public. At the same time, the Town Clerk prepared the warrant for public posting in locations around town in advance of the town meeting, which was scheduled to occur on June 8 and June 14, 2021. On May 27, 2021, the police chief posted the warrant in six public places in Wilton.

On Friday, May 14, 2021, the *Franklin Journal* published the first notice of the Planning Board public hearing scheduled for May 27, 2021. Jt. Ex. 10. This was 13 days before the hearing. The Town Zoning Ordinance requires that the first notice for a Planning Board public hearing be published in a newspaper at least 14

days in advance of the hearing, (Wilton Zoning Ordinance, § 1.6(B) (Jt. Ex. 15)), whereas State law requires a first notice to be published 12 days before the hearing, 30-A M.R.S. § 4352(9)(B). The second notice was published on Friday, May 21, 2021, 6 days before the public hearing. Jt. Ex. 11. Both the Zoning Ordinance and State law require the second notice to be published at least 7 days before the public hearing. Wilton Zoning Ordinance, § 1.6(B) (Jt. Ex. 15); 30-A M.R.S. § 4352(9)(B).

Town Manager Irish acknowledged in her testimony at trial that the newspaper postings were late. The *Franklin Journal* is only printed on Fridays. Irish chose to publish the notice in the *Franklin Journal* because she believed Town residents were more likely to see the notice in a local newspaper than in a larger daily newspaper printed farther away. She also posted the notice on the Town Facebook page and on a signboard outside the Town Office in an effort to reach as many Wilton residents as possible.

The Town's Zoning Ordinance also requires the notice of public hearing to be posted at the Town Office 14 days ahead of time. Wilton Zoning Ordinance, § 1.6(B) (Jt. Ex. 15). Irish posted the notice on the Town Office bulletin board on May 6, 2021, the same day she e-mailed the notice to the newspapers for inclusion. She also provided the proposed amendment language to town staff so that it was available at the Town Office if anyone wanted to see it. Between May 4 and May 27, 2021, Irish was not made aware of any complaints that the ordinance language was unavailable for viewing. Butler testified that he went to the Town Office on May 17,

2021, and did not see a posted notice of the public hearing. He was able to get a copy of the proposed amendments when he asked.

On May 27, 2021, the Planning Board held a public hearing on the four zoning amendments included in the town warrant. The meeting, which was conducted both in person and by Zoom, was well attended. Butler and Rand attended in person. Printed copies of the proposed amendments were available at the hearing, and members of the public were permitted to comment on the proposals. Moreover, despite some minor technological glitches, those participating remotely could see, hear, and comment, and otherwise fully participate in the public hearing. Butler spoke on Article 4, as did his attorney, Kendall Ricker. Butler also commented on Article 5, as did Esther Bizier. This was the first time Butler was permitted to speak publicly on Articles 4 and 5. The Chair of the Planning Board did not enforce time limits on any speakers at the meeting.

Because the town warrant had already been approved, there would not have been an opportunity to alter the language of Articles 4 and 5 based on comments made at the public hearing. The hearing was not intended as a workshop to discuss language changes. Instead, it was an opportunity for members of the public to share their opinions and ask questions of CEO Lavin and Planning Board members. According to Lavin, there was a "groundswell of public opinion" that was "skeptical" of Wilson's plan to build a marina. The issue "became quite political" in Wilton.

The Town conducted its annual meeting over two days in June. On June 8, 2021, voters cast secret ballots to elect local officials. On June 14, 2021, the public

portion of the town meeting was held outdoors, and the voters considered numerous articles on the warrant, including the four proposed zoning amendments. Printed copies of the amendments were available for review. The town meeting had high turnout as compared to past meetings. While public comment was permitted, there was little if any discussion of Articles 4 and 5. Butler and Rand were present, but they did not make any public comments. The voters overwhelmingly approved Articles 4 and 5.

The Article 4 and Article 5 amendments have been approved by the Maine Department of Environmental Protection as consistent with the *Mandatory Shoreland Zoning Act*, 38 M.R.S. §§ 435-448, and the Department's *Guidelines for Municipal Shoreland Zoning Ordinances*. Jt. Ex. 4; *see* 38 M.R.S. § 438-A(2); 06-096, C.M.R. ch. 1000 (2015).

The Planning Board subsequently reviewed and denied Wilson's Application under the amended provisions of the Zoning Ordinance.[4]

BURDEN OF PROOF

"Judicial review of a zoning ordinance amendment may be obtained by an action seeking a declaratory judgment." *F.S. Plummer Co., Inc. v. Town of Cape Elizabeth*, 612 A.2d 856, 859 (Me. 1992). In such an action, "the allocation of the burden of proof . . . must be determined by reference to the substantive gravamen of the complaint." *Constr. Servs. Workers' Comp. Grp. Self Ins. v. Stevens*, 2010 ME

[4] As noted *supra* n.1, the Planning Board's denial of the Application is under review in Docket No. FARSC-AP-21-04.

108, ¶ 17, 8 A.2d 688 (quoting *Markley v. Semle*, 1998 ME 145, ¶ 5, 713 A.2d 945). "The party who asserts the affirmative of the controlling issues in the case, whether or not he is the nominal plaintiff in the action, bears the risk of non-persuasion." *Hodgdon v. Campbell*, 411 A.2d 667, 670-71 (Me. 1980). Here, Wilson, as the party affirmatively seeking to invalidate the zoning amendments, bears the burden of proof. *See Constr. Servs. Workers' Comp. Grp. Self Ins.*, 2010 ME 108, ¶ 17, 8 A.3d 688.

When reviewing municipal zoning decisions, the court "must respect that zoning is a legislative act and must give deference to the legislative body." *Friends of the Motherhouse v. City of Portland*, 2016 ME 178, ¶ 10, 152 A.3d 159 (quoting *Remmel v. City of Portland*, 2014 ME 114, ¶ 12, 102 A.3d 1168). Judicial review of a zoning amendment is limited "to a determination of whether the ordinance itself is constitutional, . . . whether the [zoning amendment] is in basic harmony with the [t]own's comprehensive plan," and whether the town has complied with statutory mandates governing enactment or amendment. *Bog Lake Co. v. Town of Northfield*, 2008 ME 37, ¶¶ 11-14, 942 A.2d 700.

CONCLUSIONS OF LAW

I. Count I: Public Participation (Articles 4 and 5)

In Count I, Wilson challenges the validity of Articles 4 and 5 by invoking 30-A M.R.S. § 4352(1), which provides: "The public shall be given an adequate opportunity to be heard in the preparation of a zoning ordinance." Wilson alleges that the Town failed to provide the public with an opportunity to participate in the

preparation of the amendments and failed to provide Wilson or its representatives an opportunity to be heard on the amendments. Pl.'s Compl. ¶¶ 58-59. The court concludes that Wilson has not met its burden to demonstrate that it is entitled to declaratory judgment on Count I.

As just noted, municipalities are required by statute to give the public an opportunity to be heard in the preparation of zoning ordinance amendments. 30-A M.R.S. § 4352(1); *F.S. Plummer Co.*, 612 A.2d at 862. This is accomplished by holding a public hearing before a municipal reviewing authority. *See* 30-A M.R.S § 4352(9); *F.S. Plummer Co.*, 612 A.2d at 862. However, the public's right to be heard is not unlimited. *Crispin v. Town of Scarborough*, 1999 ME 112, ¶ 20, 736 A.2d 241. Rather, a municipality must "strike a fair and reasonable balance between its interest in efficiency and the public's right to speak." *Id.*

Here, the evidence shows that the Town struck the proper balance. On May 27, the Town conducted the requisite public hearing, consistent with §§ 4352(1) and (9). The text of Articles 4 and 5 was available to the public both before and at the hearing. The hearing itself was unusually well attended. Despite the large turnout, the Chair of the Planning Board did not enforce time limits on the public comment portion of the hearing. Indeed, Butler was permitted to comment multiple times on both Articles 4 and 5. Kendall Ricker, Wilson's attorney, and Esther Bizier of Main-Land were also allowed to speak on Wilson's behalf. The CEO and Planning Board members were present to provide information about the proposed amendments and answer questions. Further, because Wilton uses the town meeting form of

government, the town meeting provided another opportunity for voters to debate the merits of the Articles 4 and 5 proposals before the vote (representatives of Wilson chose not to avail themselves of this opportunity). The court accordingly finds that the public, including representatives of Wilson, was given an "adequate" opportunity to speak to the legislative body—here, Town voters—before it voted on the proposed amendments. 30-A M.R.S. § 4352(1); *Crispin*, 1999 ME 112, ¶ 21, 736 A.2d 241 (holding that public participation requirement was satisfied where Town Council reviewed "abundant written materials" from landowners and held a public hearing at which landowners were given three minutes to speak and landowners' attorney spoke "essentially without limit"); *F.S. Plummer Co.*, 612 A.2d at 862 (finding that public participation statute was satisfied when Town provided notice of and conducted public hearing).

Wilson asserts that the ability to comment at the public hearing and at the town meeting was insufficient; rather, it contends that the statute requires that the public be permitted to participate in the preparation of the amendments, including by influencing the drafting process.[5] The court is not persuaded. The statute requires only that the public have an "adequate opportunity to be *heard*" in the

[5] For example, Wilson argues that the public was unable to meaningfully participate at the April 6 or April 15 meetings, as well as at the April 22 workshop session, because the Planning Board did not provide public notice that the ordinance amendments would be discussed at those meetings. Pl.'s Br. at 13. Relatedly, Wilson contends that the May 27 public hearing allowed for public participation in name only, because there was no opportunity given the timing of the upcoming town meeting and procedures governing preparation of the warrant to change Articles 4 and 5 in response to the public's input. *Id.* at 13-15.

amendment preparation process. 30-A M.R.S. § 4352(1) (emphasis added); *Crispin*, 1999 ME 112, ¶¶ 19-21, 736 A.2d 241. The plaintiff has not cited, nor is the court aware of, any authority requiring public participation in the exercise of drafting amendments. The Law Court's decision in *Roop v. City of Belfast*, 2007 ME 32, 915 A.2d 966 ("*Roop I*"), upon which Wilson relies, is not to the contrary.

In *Roop I*, the Law Court concluded that plaintiffs who lived adjacent to a district subject to rezoning had standing to challenge the process used to amend the city's comprehensive plan and zoning ordinance where the litigants' claimed injury was a "denial of the right to meaningful participation pursuant to subsection [30-A M.R.S. §] 4324(3)." *Id.* ¶ 10. The plaintiffs had asserted, among other procedural deficiencies, the city's inability to change the amendment language after public hearings on the amendments. *Id.* ¶ 2. Notably, the *Roop I* plaintiffs brought their claim pursuant to a statute that governs the preparation of a town comprehensive plan as opposed to a zoning amendment. *Compare* 30-A M.R.S. § 4324(3) (requiring "citizen participation in the development of a growth management program" and the solicitation and consideration of "a broad range of public review and comment"), *with* 30-A M.R.S. § 4352(1) (providing the public with "an adequate opportunity to be heard in the preparation of a zoning ordinance").

Moreover, even if the Law Court in *Roop I* intended its decision to apply to both comprehensive plan and zoning amendments, as Wilson asserts (Pl.'s Reply Br. at 4-5), the Court did not find that the city *had* violated the governing statutes, only that the plaintiffs had crossed the "minimal" threshold necessary to establish

standing in the "context of disputes involving an abutting landowner." *Roop I*, 2007 ME 32, ¶ 8, 915 A.2d 966.[6] *Roop I* is therefore inapposite.

By contrast, in the *Crispin* case, the Law Court opined directly on the requirements for public participation in the preparation of a zoning ordinance amendment, holding that they were satisfied where the petitioners were "given a substantial opportunity to speak directly to the [Town] Council before its vote on the proposed contract zoning agreement." 1999 ME 112, ¶ 21, 736 A.2d 241. The court finds, therefore, that the Law Court has interpreted the public participation statute in this context to require an adequate opportunity for the public to share its views with the legislative body before that body decides whether to approve a zoning amendment. *See F.S. Plummer Co.*, 612 A.2d at 862 (holding that public participation statute was satisfied when town provided notice of and conducted public hearing). Here, that requirement was satisfied.[7]

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[6] When the case came back to the Law Court a second time after the Superior Court granted summary judgment for the city, the Law Court dismissed the appeal as moot because the city had decided to eliminate the zoning district at the heart of the appeal. *Roop v. City of Belfast*, 2008 ME 103, 953 A.2d 374 ("*Roop II*").

[7] The court also finds unpersuasive Wilson's assertion that the remote participation option for the May 27 hearing was inadequate. *See* Pl.'s Br. at 12, 16. Although the Zoom link was not included on the public hearing notice, the notice provided both an e-mail address and telephone number to contact for the link. *See* P.L. 2020, ch. 617, § G-1 (emergency, effective March 18, 2020 through July 30, 2021) (notice of public meeting during COVID-19 state of emergency must "include[] the method by which the public may attend" through remote means). Further, the trial testimony demonstrated that despite some minor technological glitches, those participating remotely could see, hear, and comment, and were thus able to fully participate in the public hearing. The Town's efforts to enable both remote and in-person participation, at a time when the COVID-19 pandemic posed hurdles for large, in-person gatherings, were more than sufficient. *See In re H.B.*,

II. Count II: Notice (Articles 4 and 5)

In Count II, Wilson alleges that the Town did not provide adequate notice of the proposed zoning amendments and the Planning Board public hearing. The court concludes that Wilson has not met its burden to demonstrate that it is entitled to declaratory judgment on this count.

Wilson's primary argument is that the Town did not provide adequate notice of the May 27 public hearing.[8] It cites to both 30-A M.R.S. § 4352(9) and § 1.6(B) of the Wilton Zoning Ordinance, which provide deadlines by which the Town was required to post and publish notice of the public hearing. *See* 30-A M.R.S. § 3452(9) (requiring notice to be posted in municipal office at least 13 days before public hearing and published in newspaper with "general circulation in the municipality" 12 days and 7 days before the hearing); Wilton Zoning Ordinance, § 1.6(B) (Jt. Ex. 15) (requiring posting in municipal office 14 days before hearing, and publication in newspaper 14 days and 7 days before hearing). As noted above, the Town did not strictly comply with these requirements. The court concludes, however, that Wilson waived its argument of deficient notice by its representatives' presence at the public hearing. *See Crispin*, 1999 ME 112, ¶ 24, 736 A.2d 241 (explaining that parties who

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2022 IL App (2d) 210404, ¶ 58, –N.E. 3d– (concluding that use of hybrid in-person/remote format was consistent with due process); *In re I.L.*, 177 N.E.3d 864, 872 (Ind. Ct. App. 2021) (holding that party's opportunity to be heard was meaningful, notwithstanding minor errors in remote hearing through videoconferencing application).

8 As discussed *supra* n.7, the information contained in the notice, which included contact information to obtain a Zoom link, but not the link itself, was sufficient.

attended town meeting "cannot now complain that they were not given adequate notice of the meeting" and affirming Superior Court's finding that parties waived objection to sufficiency of notice); *Tryba v. Town of Old Orchard Beach*, 1998 ME 10, ¶ 3, 704 A.2d 403 ("By attending the hearing with his counsel, and participating without a timely objection, plaintiff waived any objection he might have had with respect to the adequacy of notice.").

Moreover, even if Wilson had not waived its notice argument, neither 30-A M.R.S. § 4352(9) nor the Zoning Ordinance condition the validity of a zoning amendment on strict compliance with the notice provisions. The court finds that the Town substantially complied with the notice requirements and effectuated notice in a manner designed to ensure that the public had an adequate opportunity to be heard.[9] *See* 30-A M.R.S. § 4352(1); *cf. Crosby v. Inhabitants of Town of Ogunquit*, 468 A.2d 996, 998 (Me. 1983) (explaining that purpose of notice provision in then-existing statute governing ordinance enactment was "to facilitate meaningful debate and informed voting"; substantial compliance with notice provisions was sufficient where statute did not "explicitly condition the validity of an ordinance on precise compliance with the statutory enactment procedure").[10]

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9 Ironically, it was the Town Manager's decision to post the notice in a local weekly publication rather than a daily newspaper printed elsewhere that resulted in the late notice.

10 Wilson also asserts that it was entitled to individual notice of the public hearing pursuant to 30-A M.R.S. § 4352(10). Pl.'s Br. at 10; Pl.'s Reply Br. at 7. Yet that provision applies only "when a municipality has proposed an amendment to an existing zoning ordinance or map that, within a geographically specific portion of the municipality, has the effect of either prohibiting all industrial, commercial or retail uses where any of these uses is permitted or permitting any industrial,

Wilson also relies on a provision of the Freedom of Access Act ("FOAA"), 1 M.R.S. § 406, to assert that the zoning amendments should be invalidated because the Planning Board discussed the amendments at meetings and at a workshop without notifying the public beforehand that it intended to do so. Pl.'s. Br. at 11; Pl.'s Reply Br. at 7. Even assuming that to be the case[11], the FOAA provision cited does not provide Wilson with the relief it seeks. The statute provides:

> Public notice shall be given for all public proceedings as defined in section 402, if these proceedings are a meeting of a body or agency consisting of 3 or more persons. This notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned.

1 M.R.S. § 406. The statute further provides that the court must declare "null and void" any official action taken illegally during an executive session. *Id.* § 409(2). Here, the public did receive notice of the meetings at issue, even if, on at least one occasion, the Planning Board took up an issue that had not been on its agenda. *See Crifasi v. Governing Body of Borough of Oakland*, 383 A.2d 736, 739 (N.J. App. 1978) (holding that public body permissibly considered items omitted from the

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commercial or retail uses where any of these uses is prohibited." 30-A M.R.S. § 4352(10). Neither the Article 4 nor Article 5 zoning amendments has that effect. Further, even if they did, the statute permits a Superior Court to invalidate an ordinance amendment only upon a demonstration by a plaintiff that it "had no knowledge of the proposed amendment to the ordinance or map and . . . was materially prejudiced by that lack of knowledge." *Id.* Wilson has not made such a showing.

11 The evidence shows that the Planning Board did not add the proposed zoning amendments to the agenda for its April 15 meeting until the beginning of the meeting. The amendments were on the agenda that was disseminated ahead of the April 22 Planning Board workshop.

published meeting agenda, where public was given advance notice of the meeting and statutory notice requirements were satisfied). More importantly, Wilson has not offered any evidence that any Town body took illegal action during an executive session. *See Cook v. Lisbon Sch. Comm.*, 682 A.2d 672, 678 (Me. 1996) ("[S]ection 409 . . . by its terms is limited to the illegal approval of official actions in executive session." (emphasis in original)). Therefore, sections 406 and 409 do not provide relief. *See Scola v. Town of Sanford*, 1997 ME 119, ¶¶ 5-6, 695 A.2d 1194 (holding that sections 406 and 409 did not prescribe "nullification of the town meeting vote" where the article at issue "was publicly debated prior to its open approval by both the warrant committee and the town meeting").

Finally, Wilson asserts that the May 27 public hearing occurred too close in time to the town meeting. Pl.'s Br. 12-13. Per § 1.6(B) of the Wilton Zoning Ordinance, the Planning Board must hold a public hearing on a proposed amendment at least 15 days "prior to the Town Meeting at which the proposed amendment is to be considered." Wilton Zoning Ordinance, § 1.6(B) (Jt. Ex. 15). Here, the Town Meeting occurred in two parts, with voters casting secret ballots for municipal officers on June 8, and voting on proposed amendments on June 14. The latter is the meeting at which the zoning amendments were "considered," *id.*, and because the public hearing had occurred 18 days prior, there was no violation of the pertinent ordinance. *See Portland Reg'l Chamber of Com. v. City of Portland*, 2021 ME 34, ¶ 23, 253 A.3d 586 (explaining that where ordinance language is "plain and

unambiguous," the court must "interpret ordinance accordingly, unless the result is illogical or absurd" (internal quotation marks omitted)).

For these reasons, Wilson has not demonstrated that it is entitled to a declaratory judgment on Count II.

III. Count III: Amendment Initiation Process (Article 5)

Count III is a challenge to the process the Town used to initiate the Article 5 amendment. Section 1.6(A) of the Zoning Ordinance provides as follows:

> An amendment to this Ordinance may be initiated by:
>
> 1. The Planning Board provided a majority of the Board has so voted;
> 2. Request of a majority of the Selectmen; or
> 3. Written petition of a number of voters equal to at least 10% of the number of votes cast in the Town of Wilton in the last gubernatorial election.

Wilton Zoning Ordinance, § 1.6(A) (Jt. Ex. 15, at 6). Wilson argues that the first public action properly considered as the "initiat[ion]" of the amendment set forth in Article 5 was the Select Board's vote on May 4 to approve the proposed town warrant, and that this action was insufficient because the public was not allowed to comment at the May 4 meeting. Pl.'s Br. at 9-10; Pl.'s Reply Br. at 2. The Town asserts that the Article 5 amendment also was initiated at the Planning Board's May 6 meeting, when it voted to include Articles 4 and 5 on the warrant.[12]

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12 The Town also argues that because § 1.6(A) uses the word "may," the methods of initiation set forth in the Zoning Ordinance are not exclusive. Def.'s Br. at 20-21 (citing *Fitzpatrick v. McCrary*, 2018 ME 48, ¶ 16, 182 A.3d 737). The court notes, however, that when a statute is ambiguous, there is a "well-settled rule of statutory interpretation stat[ing] that express mention of one concept implies the exclusion of others not listed." *Musk v. Nelson*, 647 A.2d 1198, 1201–02 (Me. 1994)

The court concludes that either one of those actions sufficed to initiate the Article 5 amendment in compliance with the Zoning Ordinance. Section 1.6 sets forth three required steps for approval of a zoning amendment: initiation, a public hearing, and approval at a town meeting. Wilton Zoning Ordinance, § 1.6 (Jt. Ex. 15). To "initiate" simply means "[t]o cause to begin." Webster's New College Dictionary, 584 (3d ed. 2008); *see also Portland Reg'l Chamber of Com.*, 2021 ME 34, ¶ 24, 253 A.3d 586 ("We construe words in an ordinance according to their plain meaning and construe undefined or ambiguous terms reasonably with regard to both the objects sought to be obtained and to the general structure of the ordinance as a whole." (internal quotation marks omitted)). The majority vote of the Select Board at the May 4 meeting, as well as the majority vote of the Planning Board at the May 6 meeting, both could be construed as the formal start of the amendment process. Nowhere does the Zoning Ordinance require that the public be allowed to comment at the initiation stage. That is the purpose of the required public hearing. *See supra* at 12-16. Nor does the Zoning Ordinance dictate a timeline the Town must follow, beyond those related to notice and scheduling of the public hearing. The court accordingly concludes that Wilson has failed to meet its burden to demonstrate that the Town's process for initiating the Article 5 amendment violated the Zoning Ordinance.

(referencing concept of "expressio unius est exclusio alterius" (citations omitted)). Section 1.6(A), by explicitly listing three methods of initiation, could be read to "implicitly den[y] the availability of any other." *Id.* The court need not resolve this question, however, because as discussed *infra*, the Town employed methods explicitly approved by the Ordinance.

IV. Count IV: Consistency with Comprehensive Plan (Article 4)

Count IV of the Complaint asserts that the Article 4 zoning amendment is inconsistent with the Town's Comprehensive Plan (the "Plan"). The court finds that Wilson has not met its burden on this count.

All zoning "must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body[.]" 30-A M.R.S. § 4352(2). As the party challenging Article 4, Wilson bears the burden of proving that the amendment is inconsistent with the Plan. *Golder v. City of Saco*, 2012 ME 76, ¶ 11, 45 A.3d 697; *LaBonta v. City of Waterville*, 528 A.2d 1262, 1265 (Me. 1987). The court's task is to "review[] the record to determine whether, from the evidence before it, the legislative body of the Town could have determined that the amendments are in basic harmony with the comprehensive plan[.]" *Vella v. Town of Camden*, 677 A.2d 1051, 1053 (Me. 1996).[13] The court must not "substitute [its] judgment for that of the legislative body." *Id.*; *see also Golder*, 2012 ME 76, ¶ 11, 45 A.3d 697 (requiring that "deference is given to the judgment of the legislative body").

The Town's Comprehensive Plan, adopted in 2009, sets forth a "Vision Statement" that emphasizes the "peaceful, rural" character of Wilton, its "picturesque lakes surrounded by wonderful mountain views," and the "excellent

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[13] The parties submitted a joint stipulation before trial that the record the court should consider in connection with Count IV consists of five documents, all of which the court has reviewed in reaching its decision: (1) Town Meeting Warrant signed 5/4/21; (2) Warrant Article 4 for 6/14/21; (3) Town Meeting minutes for 6/14/21; (4) Town Zoning Ordinance (August 2020); and (5) Town of Wilton Comprehensive Plan (2009).

outdoor recreation opportunities" that are available. Town of Wilton Local Comprehensive Plan 2009, at 4 (Jt. Ex. 16). At the time the Plan was adopted, the Town envisioned a future where "Wilton will continue to preserve its rural character while attracting small businesses[.]" *Id.* Wilson Lake is identified as one of the "important" and "differentiating characteristics" of the Town. *Id.*

As part of its Future Land Use Plan, the Plan designates certain "growth areas," including the Downtown Village, Residential I, Commercial, and Industrial Zones, as those places "most suitable" for "planned growth and development and related infrastructure." *Id.* at 8. The Plan also identifies "critical resource areas"—"those areas in a community most vulnerable to impacts from development." *Id.* at 12. Included in the latter category is the LR&R zone surrounding Wilson Lake. *Id.* at 15. The Town's vision for this area is "to protect the water bodies to the greatest extent." *Id.*

"Tourism" is designated as an important part of the Town's economic future (*id.* at 26), as is the protection and promotion of "outdoor recreation opportunities for all Maine citizens, including access to surface waters," (*id.* at 52). The Plan notes that Wilson Lake has a public boat launch, another point of access for carry-in boats, and a public swimming area. *Id.* at 53, 63-64. Wilson Lake is "the most heavily used water area for recreation," and it is "important for swimming, boating, fishing, and ice fishing." *Id.* at 54. Although the Plan highlights the importance of accessibility to Wilson Lake, it also emphasizes the need to monitor and protect water quality, including on Wilson Lake. *See, e.g., id.* at 65 (noting that prior

"concerns raised over the impact of possible human wastes [sic] from people camping out on boats on Wilson Lake" resulted in a 2005 "live aboard" ordinance); *id.* at 69 (listing the monitoring, protection, and, where warranted, improvement of water quality as a "high priority" for Town officials). In short, the Plan seeks to balance a variety of competing needs and goals, all in service of the overall vision to manage and promote growth in a way that "complements the rural character, the special places, and the values that exist in town today." *Id.* at 4.

Wilson argues that the Article 4 amendment is inconsistent with the Plan because it limits recreational access to Wilson Lake; does not aid in the goal of promoting tourism; and risks the introduction of invasive plant species to the lake by encouraging boaters to trailer boats to and from the public boat launch. Pl.'s Br. at 18-19. However, on the basis of the evidence before them, the voters at the Town Meeting were justified in concluding that Article 4 was in "basic harmony" with the Plan. *Vella*, 677 A.2d at 1053. As just noted, the Plan is written with the explicit goal of promoting growth in a way that "complements" the "special places" in Town, among them Wilson Lake. At times, some of the goals in the Plan may be in competition with one another. In such a circumstance, the legislative body of the Town has "the job of accommodating these multiple goals in a way to advance the overall best interests of the [Town] and its people as defined by the comprehensive plan read as a whole." *LaBonta*, 528 A.2d at 1265. Here, Wilson has failed to meet its burden to demonstrate that Article 4 is inconsistent with the Plan.

CONCLUSION

For the foregoing reasons, the court concludes that Wilson has failed to meet its burden to demonstrate that it is entitled to a declaratory judgment on Counts I, II, III, or IV.

The entry is:

Judgment for Defendant Town of Wilton on Counts I-IV.

The clerk is directed to incorporate this order on the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: 8/17/23

Julia M. Lipez
Justice, Superior Court