STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: January 23, 2013)

EDDY CARVALHO	:	
	:	
v.	:	**C.A. No. PC 00-5899**
	:	
	:	
TOWN OF LINCOLN, et al.	:	
	:	
	:	***Consolidated With***
	:	
TOWN OF LINCOLN	:	
	:	
v.	:	**C.A. No. PC 01-1136**
	:	
EDDY CARVALHO, et al.	:	

DECISION

SAVAGE, J. In the remaining claims in these consolidated actions, Plaintiff Eddy Carvalho contends that the Town of Lincoln and various public officials deprived him of his right to develop a subdivision on his property in violation of his rights to substantive due process, procedural due process, and equal protection as secured by the Fifth and Fourteenth Amendments to the United States Constitution, thereby entitling him to damages under 42 U.S.C. § 1983. For the reasons set forth in this Decision, this Court denies and dismisses Plaintiff's § 1983 claims.

I

FACTS AND TRAVEL

This case arises out of a lengthy and complex land development dispute between Mr. Carvalho and the Defendants.[1] The saga began over seventeen years ago, on April 4, 1995, when Mr. Carvalho filed an application with the Planning Board for development of a subdivision to be called "Forest Park Estates." At that time, Mr. Carvalho owned thirty-six unimproved acres of land shown on Assessor's Plat 20 Lot 15, zoned as RS-20,[2] and located on Breakneck Hill Road in Lincoln, Rhode Island ("Property"). See 00-5899 Compl. ¶¶ 2-3. About half of the Property, roughly eighteen acres, contained wetlands. (Trial Tr. 27-28, Dec. 2, 2010.) Mr. Carvalho obtained pre-application approval from the Planning Board on May 10, 1995 for a twenty lot subdivision.[3] (Board Minutes, 5/10/1995, Joint Ex. 1.)

At the time the Planning Board approved Mr. Carvalho's pre-application, the 1986 Subdivision Ordinance of the Town of Lincoln was in effect ("Old Regulations"). See 00-5899 Compl. ¶ 5. Subsequently, the Town adopted new Planning and Subdivision Regulations which became effective on December 28, 1995 ("New Regulations"). See 2001 W.L. 1097788 at *1. The New Regulations introduced several significant new requirements: namely, that a developer

[1] The facts and travel of this case have been well-documented in prior written decisions of this Court. See Carvalho v. Town of Lincoln, et al., 2005 WL 3074140 (R.I. Super. Ct. filed Nov. 16, 2005) (Krause, J.); Carvalho v. Town of Lincoln, et al., 2001 WL 1097788 (R.I. Super. Ct. filed Sept. 13, 2001) (Silverstein, J.). As such, this Court will discuss only those facts most relevant to the instant decision.

[2] RS-20 zoning districts are designated for residential use with minimum lot areas of 20,000 square feet. See 2001 W.L. 1097788 at *1.

[3] The summary of the minutes from that meeting indicates that Mr. Carvalho's pre-application was "approved as presented." (Planning Board Minutes, 5/10/1995, Joint Ex. 1). The summary specifies that Mr. Carvalho was willing to have the proposed subdivision's sewer system tie into a Town pumping station at nearby Butterfly Estates, that the proposed road length of 1600 feet was in excess of the maximum allowable length, and that Mr. Carvalho would make a monetary donation in lieu of making a land dedication. Id.

(1) have infrastructure and roads in place prior to recording his or her plat; (2) not post a bond prior to recording the plat; (3) use below ground utilities; and (4) use granite curbing.[4] See "Lincoln Subdivision Design Standards Comparison," Joint Ex. 9.

On June 11, 1996, Mr. Carvalho took the next step in the planning process by submitting his Master Plan to the Planning Board for approval.[5] (Letter from Crossman Engineering to Lucinda Hannus, June 11, 1996, Pl.'s Ex. 8.) Shortly thereafter, in a letter dated June 24, 1996, Donald D'Anjou, the Supervisor for the Lincoln Sewer Department, a division of the Lincoln Department of Public Works ("D.P.W."), informed Mr. Carvalho's engineer that the Town had rejected Mr. Carvalho's planned sanitary sewer system for the proposed subdivision. (Letter from Donald D'Anjou, June 24, 1996, Joint Ex. 3.) Several months later, on September 25, 1996, Mr. Carvalho appeared before the Planning Board for a hearing on his Master Plan. At that hearing, the Planning Board indicated that approval of Mr. Carvalho's proposed sewer system was a matter for the D.P.W. to decide and that the Planning Board would follow the D.P.W.'s recommendation. (Board Minutes, 9/25/1996, Joint Ex. 1.) At the Planning Board's

[4] The New Regulations were more lenient with respect to the maximum allowable road length: the Old Regulations apparently forbade roads in excess of 600 feet while the New Regulations forbade roads in excess of 720 feet. See "Lincoln Subdivision Design Standards Comparison," Joint Ex. 9. Nonetheless, Mr. Carvalho's proposed road length violated both the Old and New Regulations. See Board Minutes 5/10/1995, Joint Ex. 1.

[5] Although neither party references the statutory authority governing Mr. Carvalho's proposed subdivision, sections 45-23-25 through 45-23-74 of the Rhode Island General Laws—known as the "Rhode Island Land Development and Subdivision Review Enabling Act of 1992"—provide that subdivision review "consists of three stages of review[:] master plan, preliminary plan and final plan, following the pre-application meeting(s) . . . ." R.I. Gen. Laws § 45-23-39(b). The summary of the Planning Board minutes indicates that the Board made a motion to "approve" Mr. Carvalho's pre-application at the May 10, 1995 meeting. See Board Minutes, 5/10/1995, Joint Ex. 1. While the version of § 45-23-35(a) in effect at that time required planning boards to hold at least one pre-application meeting for subdivision applications, subsection (d) of that provision clarified that "[p]re-application discussions are intended for the guidance of the applicant and shall not be considered approval of a project or its elements." § 45-23-35(d), amended by P.L. 1999, ch. 157, § 1.

next two regular monthly meetings in December 1996 and January 1997, it voted to continue consideration of Plaintiff's Master Plan to a later date. (Board Minutes, 12/18/1996 and 1/22/1997, Joint Ex. 1.)

When the Planning Board next met on February 26, 1997, it discussed whether the Old or New Regulations should apply to Mr. Carvalho's proposed subdivision. (Board Minutes, 2/26/1997, Joint Ex. 1.) Mr. Carvalho's counsel at the time, Andrew Teitz, argued to the Planning Board that Mr. Carvalho should be allowed to proceed under the Old Regulations because he had expended substantial resources in reliance on the Board's approval of his pre-application. Id. The Planning Board, however, rejected Mr. Teitz's suggestion and voted that Mr. Carvalho's proposal must proceed under the New Regulations. Id. Mr. Carvalho appealed the Planning Board's decision to the Lincoln Zoning Board, sitting as the Planning Board of Appeals ("Zoning Board"). (Lincoln Def.'s Post-Trial Mem. 4). In May 1997, the Zoning Board reversed the Planning Board's decision and determined that Mr. Carvalho's proposed subdivision should proceed under the Old Regulations.[6] (Tr. 27, Dec. 1, 2010.)

On November 19, 1997, Mr. Carvalho returned to the Planning Board for the next stage of the planning process: approval of his Preliminary Plan.[7] (Board Minutes, 11/19/1997, Joint Ex. 1.) At that hearing, the Planning Board reiterated that approval of Mr. Carvalho's proposed

[6] It also appears that at the May 1997 hearing, the Zoning Board voted to allow Mr. Carvalho to proceed with his proposed subdivision despite the fact that his proposed road significantly exceeded the maximum length established by the Old Regulations. See Transcript of 2/6/2001 Zoning Board Hearing, Pl.'s Ex. 3 at 18-19, 33-36.

[7] The summary of the Planning Board minutes for November 19, 1997 classifies Mr. Carvalho's application as being at the "preliminary" stage of review. See Board Minutes, 11/19/1997, Joint Ex. 1. At trial, Mr. Carvalho testified that the Zoning Board's May 1997 decision ordered approval of his Master Plan and allowed him to proceed to Preliminary Plan approval, the next stage of the planning review process. (Tr. 27, Dec. 1, 2010.)

sewer system was subject to the recommendation of the D.P.W.[8] Id. Additionally, Planning Board member George Weavill informed Mr. Teitz that the Department of Transportation ("D.O.T.") had plans to pave Breakneck Hill Road sometime in the near future.[9] Id.

On January 28, 1998, when the Planning Board next considered Mr. Carvalho's application, Mr. Teitz informed the Planning Board that it was obligated under the Old Regulations to return to Mr. Carvalho a stamped copy of his plan, indicating any conditions imposed or modifications required, within forty-five days of receipt, and that as of that date, fifty-six days had elapsed without return of the stamped copy of the plan.[10] Id. Mr. Teitz also stressed to the Planning Board that time was of the essence because Mr. Carvalho had a permit

[8] In a letter to the Planning Board, dated April 7, 1998, Robert Schultz, the Director of the D.P.W., wrote, "I do not believe you have the authority to approve a sewer construction plan which does not have the recommendation from the Department of Public Works." Letter from Robert Schultz, April 7, 1998, Joint Ex. 7, 2. Although neither party cites to it, Article B(1)(e) of Section III of the Old Regulations provided that a developer seeking approval of a preliminary plan was required to submit a "[c]ertification by the Sewer Authority of the Town of Lincoln that the proposed sewer service is acceptable in size and location." (1986 Town of Lincoln Subdivision Regulations, Section III, Article B(1)(e), Def.'s Obj. to Pl.'s Mot. to Adjudge in Contempt, Ex. 3.) Article D of Section III of the Old Regulations, however, granted the Planning Board the authority to waive the submission requirement under certain circumstances. See id.

[9] At the November 19, 1997 hearing, Mr. Weavill also pointed out that the relevant Comprehensive Plan suggested that the Property be added to adjacent State lands. (Board Minutes, 11/19/1997, Joint Ex. 1.) Mr. Teitz stated that he would contact the State to explore further whether the State would be interested in purchasing the Property. Id. On February 25, 1998, Mr. Teitz informed the Planning Board that the State had expressed interest in purchasing the Property but lacked the necessary funds. (Board Minutes, 2/25/1998, Joint Ex. 1; Tr. 36, Dec. 2, 1010.) The Department of Environmental Management sent a letter to the Planning Board confirming that the State would not be acquiring the Property. See Board Minutes, 3/25/1998, Joint Ex. 1.

[10] Article B(2)(a) of Section III of the Old Regulations provided, in pertinent part, as follows: "The Planning Board will return one (1) copy of the preliminary plat to the subdivider with the statement of approval, approval subject to modification and the required modification, or disapproval and the reasons for disapproval noted on the plan within forty-five (45) days of receipt." (1986 Town of Lincoln Subdivision Regulations, Section III, Article B(2)(a), Def.'s Obj. to Pl.'s Mot. to Adjudge in Contempt, Ex. 3.)

from the Department of Environmental Management ("D.E.M.") for the proposed subdivision that was set to expire on June 1, 1998. Id.

At the Planning Board's next two hearings in February and March of 1998, the Board heard extensive discussion about Mr. Carvalho's proposed sewer system, including presentations from several experts. (Board Minutes, 2/25/1998 and 3/25/1998, Joint Ex. 1.) Mr. Carvalho wanted to install a so-called "grinder pump system," while the D.P.W. recommended a conventional "gravity" sewer system connected to a Town pumping station. Id. Grinder pumps are essentially individual septic systems installed on the property of each house. (Tr. 10, Dec. 2, 2010.) A low pressure grinder pump system allegedly would have saved Mr. Carvalho approximately $182,500, as compared to a conventional gravity system. See Crossman Engineering Inc. Cost Analysis, June 26, 1996, Joint Ex. 4. One of Mr. Carvalho's experts, Keith Dobie, opined that a low pressure grinder pump system is particularly appropriate for environmentally sensitive areas, such as wetlands, and only requires maintenance about once every ten years. (Board Minutes, 2/25/1998, Joint Ex. 1.) Additionally, Mr. Carvalho's engineer, Steven Cabral, expressed his opinion that a conventional gravity system with a pumping station would be more of a burden to the Town than Mr. Carvalho's proposed sewer system. (Board Minutes, 3/25/1998, Joint Ex. 1.) Finally, Anthony Silva, the Superintendent of Water Pollution Control for the Town of Bristol, informed the Planning Board that there are approximately forty low pressure pumps operating in Bristol, with minimal problems, and that in his opinion, such pumps provide service comparable to that provided by the Town of Lincoln's sewer system. (Board Minutes, 3/25/1998, Joint Ex. 1.) Robert Schultz, the Director of the D.P.W., acknowledged that the D.P.W. has allowed grinder pumps in certain circumstances but expressed D.P.W.'s preference for requiring Mr. Carvalho to tie-in to the Town's sewer system. He

informed the Planning Board that the D.P.W. had made a commitment to provide the Town of Lincoln with high quality town-wide sewer service and, to that end, had made a significant investment in the current sewer system. (Board Minutes, 2/25/1998, Joint Ex. 1.) He disagreed with the assertion that grinder pumps would provide the same level of service. Id.

At the February hearing, Mr. Cabral reminded the Planning Board that Mr. Carvalho's permits from the D.O.T. were set to expire in June; at the March hearing, Mr. Teitz reiterated that time was of the essence because the D.O.T. planned to pave Breakneck Hill Road that coming summer.[11] (Board Minutes, 2/25/1998 and 3/25/1998, Joint Ex. 1.) Mr. Teitz indicated that once the D.O.T. completed the paving, it would be cost prohibitive for Mr. Carvalho to dig up the road, install the sewer line, and repave the road. (Tr. 46, 49-50, Dec. 2, 2010.)

Approximately one month later, in a letter dated April 7, 1998, Mr. Schultz informed the Planning Board that the D.P.W. was recommending against approval of the planned sewer system for Mr. Carvalho's proposed subdivision. (Letter from Robert Schultz, April 7, 1998, Joint Ex. 7 at 2.) Specifically, Mr. Schulz expressed his concern that the additional flow from Mr. Carvalho's proposed development would overburden the Town's pumping station at nearby

[11] The summary of the minutes for the Planning Board's meeting on March 25, 1998 indicates that Mr. Teitz informed the Board that the "D.O.T. plans to repave Breakneck Hill this summer." (Board Minutes, 3/25/1998, Joint Ex. 1.) A letter authored by Mr. Cabral and dated September 27, 2000, however, indicates that the D.O.T. did not plan to commence work on Breakneck Hill Road until early 2001. See Letter from Steven Cabral, September 27, 2000, Pl.'s Mem. in Supp. of Mot. to Consolidate, Ex. E.

The summary of the minutes for the Planning Board's hearing on February 25, 1998 indicate that "Mr. Teitz ask[ed] the Board to move to final and public hearing." (Board Minutes, 2/25/1998, Joint Ex. 1.) According to the summary, the Planning Board passed a motion to "move forward to the informal public hearing at developers [sic] request to get input from abutters and sewer approval, and to approve conditionally with questions on access . . . ." Id. A summary of the minutes for the March 25, 1998 hearing classifies Mr. Carvalho's application as "final." See Board Minutes, 3/25/1998, Joint Ex. 1. Section 45-23-39, as it read in 1998, allowed the Planning Board to combine review stages, but only after it "determine[d] that all necessary requirements have been met by the applicant." § 45-23-39(c).

Butterfly Estates, and thus, if Mr. Carvalho wanted to tie in the sewer system for his proposed subdivision at that location, the Butterfly Estates station would need to be substantially upgraded. See id. at 2. Mr. Schultz also reiterated that the Town had expended considerable resources to provide a high quality gravity sewer system to service 98.5% of its citizens and thus would only allow the type of pumps that Mr. Carvalho proposed in extraordinary circumstances. Id.

At the Planning Board's hearing on April 22, 1998, the Board indicated that it was in receipt of Mr. Schultz's recommendation. (Board Minutes, 4/22/1998, Joint Ex. 1.) Mr. Teitz then informed the Planning Board that he had never received a copy of Mr. Schultz's recommendation. Id. At that meeting, the Planning Board noted that there were three major issues that needed to be resolved prior to holding a public hearing[12] on Mr. Carvalho's application: (1) the sewer system; (2) open space dedication; and (3) storm drainage.[13] Id.

Shortly after the April 22, 1998 hearing, Mr. Teitz sent a letter to Robert Bell, then-Chairman of the Planning Board, attempting to clarify the status of Mr. Carvalho's application. (Letter to Robert Bell, April 27, 1998, Pl.'s Ex. 5.) In the letter, Mr. Teitz wrote that it was his understanding that if Mr. Carvalho and the D.P.W. could agree about the sewer system and storm drainage, and if Mr. Carvalho agreed to certain other modifications, then Mr. Carvalho's

[12] Article C (2)(a) of Section III of the Old Regulations required the Planning Board to "fix a date for public hearing to be held within thirty-six (36) days of the acceptance of the final plat . . . ." (1986 Town of Lincoln Subdivision Regulations, Section III, Art. C (2)(a), Def.'s Obj. to Pl.'s Mot. to Adjudge in Contempt, Ex. 3.) Article C (2)(b) required the Planning Board to give at least five days written notice of the public hearing to the subdivider and all owners of land abutting the proposed subdivision. Id.

[13] The summary of the Planning Board minutes from the April 22, 1998 is somewhat unclear, but it generally references the three issues that needed to be resolved. Specifically, the summary states that the Board voted to "modify [the] plan to include 5% of $70,000. Minimum or sale price as dedication in lieu of land, and providing Mr. Schultz and developer can agree to conventional pump station vs. [sic] grinder pumps, and storm drainage is reviewed and acceptable, then move to public hearing." (Board Minutes, 4/22/1998, Joint Ex. 1.)

proposal could proceed directly to public hearing.[14] Id. Accordingly, Mr. Teitz informed Mr. Bell that Mr. Carvalho would not be appearing at the Planning Board's meeting the following month. Id. Instead, he would address the requested modifications and thereafter would notify the Planning Board when he next intended to appear before it. Id. Mr. Teitz requested that Mr. Bell notify him as soon as possible if his interpretation of the Planning Board's April 22, 1998 decision was incorrect. [15] Id.

Sometime during the next twelve months, Mr. Carvalho began exploring alternative uses for the Property. Specifically, he negotiated the sale of the Property to an out-of-state development firm, the Newton Group L.L.C., which planned to construct an "assisted living facility" on the Property. (Tr. 36-37, Dec. 2, 2010.) The parties made the sale contingent on obtaining a zone change that would allow the proposed facility. (Tr. 31, Dec. 1, 2010.) At the parties' request, the Planning Board recommended approval of the application for a zone change. (Tr. 37, Dec. 2, 2010.) The Lincoln Town Council, however, denied the requested zone change at a hearing on April 20, 1999. (Tr. 31, Dec. 1, 2010.) The Newton Group then exercised its right to cancel the sale. Id. at 32.

After the Town Council denied the zone change and the sale to the Newton Group fell through, Mr. Carvalho did not appear before the Planning Board again for approximately fourteen months because he had run out of funds to pay engineering, attorney and application

[14] In a legal opinion letter, dated August 21, 2000, the Town of Lincoln Assistant Solicitor provided a slightly different characterization of the April 22, 1998 hearing. He agreed that, at that meeting, the Planning Board had requested modifications to the sewer system, the storm drainage design and a payment in lieu of land dedication. (Legal Opinion, August 21, 2000, 00-5899 Compl., Ex. C.) The Assistant Solicitor opined, however, that the Planning Board did not accept Mr. Carvalho's proposal and that "[t]he question of acceptance was not voted upon." Id.

[15] Plaintiff also submitted a copy of a memorandum from Mr. Teitz in which Mr. Teitz indicated that he received a telephone call from Mr. Bell on April 30, 1998 confirming that "the Planning Board will do nothing more until [Mr. Carvalho] asks to appear before the Board again . . . ." (Memo to Eddy Carvalho, May 1, 1998, Pl.'s Ex. 5.)

fees. (Tr. 33, Dec. 1, 2010.) After obtaining the necessary funds from selling another property, Mr. Carvalho returned to the Planning Board on June 28, 2000. Id.; Board Minutes, 6/28/2000, Joint Ex. 1. At this hearing, the Planning Board raised the issue of whether Mr. Carvalho's application to have the Property rezoned constituted abandonment of his subdivision application and, consequently, whether he was required to start the planning process all over again and proceed under the New Regulations. (Board Minutes, 6/28/2000, Joint Ex. 1.) The Planning Board decided to refer the matter to the Lincoln Town Solicitor. See id.

Approximately two months later, the Assistant Town Solicitor, Roger Ross, rendered a written opinion in which he concluded that Mr. Carvalho's application had to proceed under the New Regulations because his appearance "in front of the [P]lanning [B]oard . . . [to] present the [assisted living facility] matter to the town council was tantamount to a formal withdrawal of the earlier [subdivision] proposal." (Legal Opinion, August 21, 2000, 00-5899 Compl., Ex. C 3.) Nonetheless, Mr. Ross concluded that the Planning Board had the authority, under the New Regulations, to allow Mr. Carvalho to continue under the Old Regulations if it found that "requiring [Mr. Carvalho] to refile and proceed under the 'New Regulations' would constitute a 'significant economic hardship.'" Id. Mr. Ross instructed the Planning Board that it had to hold a hearing to determine the issue of "economic hardship." Id. At its August 23, 2000 hearing, the Planning Board informed Mr. Carvalho of Mr. Ross' opinion. (Board Minutes, 8/23/2000, Joint Ex. 1.) Mr. Carvalho's then-attorney, David Spinella ("Mr. Spinella"), objected that he had not received a copy of the opinion. See id.

Beginning with the August 23, 2000 hearing and continuing for several months thereafter in the fall of 2000, the Planning Board discussed the issue of what hardship Mr. Carvalho would suffer if he were forced to re-file his subdivision application under the New Regulations. See

Board Minutes, 8/23/2000, 9/27/2000 and 10/25/2000, Joint Ex. 1. At those meetings, Mr. Carvalho presented the Planning Board with a variety of documentary evidence. See id. Specifically, he presented an itemization of costs incurred, which indicated that he had already expended over $50,000 in engineering fees alone. See Board Minutes, 10/25/2000, Joint Ex. 1. He also presented an itemized list of costs that he would incur under the New Regulations as compared to the Old Regulations, which indicated that the cost of complying with the New Regulations would be in excess of $100,000.[16] See "Regulation Comparison Cost Estimate," Joint Ex. 9.

Additionally, at the September and October 2000 hearings, the Planning Board and Mr. Carvalho continued to discuss the sewer system. See Board Minutes, 9/27/200 and 10/25/200, Joint Ex. 1. Mr. Spinella reminded the Planning Board that Mr. Carvalho had expressed willingness to compromise about the sewer system and some of the requirements of the New Regulations. See Board Minutes, 8/23/2000 and 10/25/2000, Joint Ex. 1. Specifically, Mr. Carvalho was willing to upgrade the capacity of the Butterfly Estates pumping station to allow both his subdivision and other nearby properties to use it. (Board Minutes, 10/25/2000, Joint Ex. 1; Tr. 18-19, Dec. 2, 2010.) The Town preferred, however, that Mr. Carvalho tie-in his subdivision's sewer system to the Great Roads pumping station which did not need upgrading. Id. Mr. Spinella suggested that Mr. Carvalho would agree to the tie-in location for the sewer system if the Town would concede that Mr. Carvalho could follow the Old Regulations with regard to utilities, curbs, and sidewalks. See id. Mr. Spinella further reminded the Planning Board about the need to install whatever sewer system was decided upon before the Town paved

[16] Specifically, Mr. Carvalho estimated that providing sidewalks on two sides of the roadway would cost $42,000; granite curbing would cost an additional $16,000; underground, as opposed to above ground, utilities would cost $50,000; and a payment in lieu of land dedication would cost a minimum of $73,500. See "Regulation Comparison Cost Estimate," Joint Ex. 9.

Breakneck Hill Road. See Board Minutes, 9/27/2000, Joint Ex. 1. Ultimately, at its October 25, 2000 hearing, the Planning Board did not make a determination about his claimed hardship but instead took issue with the length of the planned road for the subdivision, indicating that Mr. Carvalho would need to reconfigure the proposed lots to reduce the road's length. (Board Minutes, 10/25/2000, Joint Ex. 1.)

Mr. Carvalho did not appear at the Planning Board's November 15, 2000 hearing. (Board Minutes, 11/15/2000, Joint Ex. 1.) Instead, on November 14, 2000, he filed a Complaint in this Court in the first of these consolidated cases, seeking: (1) a declaration that the Old Regulations applied to his proposed subdivision (Count I); (2) a writ of mandamus ordering the Planning Board to stamp his plans as preliminarily approved (Count II); (3) a determination that the Town violated his civil rights under 42 U.S.C. § 1983 (Count III); and (4) injunctive relief (Count IV). See Carvalho v. Town of Lincoln, et al., C.A. No. 00-5899 (R.I. Super. 2000). On the same day, Mr. Carvalho filed another appeal with the Zoning Board.[17] See Carvalho v. Town of Lincoln, et al., 2001 W.L. 1097788, at *3 (R.I. Super. Ct. Sept. 13, 2001).

In December 2000, the Zoning Board, sitting as the Planning Board of Appeals, ordered the Planning Board to make a determination about whether Mr. Carvalho's proposal could continue under the Old Regulations. (Tr. 39-40, Dec. 1, 2010.) Shortly thereafter, on January 24, 2001, the Planning Board determined that Mr. Carvalho would have to proceed under the New Regulations because he had failed to make the requisite showing of hardship that could allow him to proceed under the Old Regulations. (Board Minutes, 1/24/2001, Joint Ex. 1.) Mr. Carvalho then filed a third appeal with the Zoning Board. At a hearing on February 6, 2001, the

[17] It is unclear what decision of the Planning Board Mr. Carvalho sought to appeal at that time since the Planning Board did not render an adverse decision on the hardship issue until January 24, 2001. See Carvalho v. Town of Lincoln, et al., 2001 W.L. 1097788 at *3 n.6.

Zoning Board, sitting as the Planning Board of Appeals, voted to reverse the Planning Board's decision that Mr. Carvalho had abandoned his proposal and determined that Mr. Carvalho could proceed under the Old Regulations. See Transcript of 2/6/2001 Zoning Board Hearing, Pl.'s Ex. 3 at 66.

Several days after the Zoning Board voted to reverse the Planning Board, Mr. Carvalho met with Robert Houghton, a developer who was interested in purchasing the Property. (Tr. 40, Dec. 2, 2010.) Mr. Houghton offered Mr. Carvalho $925,000 for the Property, and sometime in mid-February 2001, Mr. Carvalho accepted the offer. Id. at 40-41. On March 12, 2001, Mr. Houghton and Mr. Carvalho executed a purchase and sale agreement for the Property.[18] (Purchase and Sale Agreement, Pl.'s Ex. 12.)

Meanwhile, on February 14, 2001, at a meeting that Mr. Carvalho did not attend, the Planning Board voted to appeal the Zoning Board's February 6, 2001 decision to this Court. (Board Minutes, 2/14/2001, Joint Ex. 1.) On March, 8, 2001, the Town filed a complaint—in the second of these consolidated cases—alleging that Mr. Carvalho had failed to comply with § 45-23-7 and that the Zoning Board had failed to comply with § 45-23-70. See Town of Lincoln v. Carvalho, et al., C.A. No. 01-1136 (R.I. Super. 2001). Specifically, the Town contended that the Zoning Board substituted its judgment for that of the Planning Board and that the Zoning Board reversed the Planning Board's decision without finding prejudicial error, clear error, or lack evidentiary support. Id. at ¶ 9. Mr. Carvalho learned of the Planning Board's appeal of the Zoning Board's decision shortly after he executed the purchase and sale agreement with Mr. Houghton. (Tr. 42, Dec. 2, 2010.) Mr. Carvalho filed a Counterclaim and Cross-claim to the Town's Complaint on April 2, 2001, seeking: declaratory relief (Count I); a writ of mandamus

[18] Mr. Carvalho testified that at the time he executed the Purchase and Sale Agreement, he was aware that the Zoning Board had ruled in his favor. See Tr. 40, Dec. 2, 2010.

(Count II); damages pursuant to § 1983 (Count III); and injunctive relief (Count IV). On April 5, 2001, this Court granted Mr. Carvalho's Motion to Consolidate his Complaint with the Town's appeal.

After a hearing on the merits on May 3, 2001, a hearing justice of this Court issued a written decision on September 13, 2001, holding that the February 6, 2001 decision of the Zoning Board would stand, permitting Mr. Carvalho to proceed with his application for subdivision approval under the Old Regulations. See 2001 W.L. 1097788 at *6 (Silverstein, J.). This decision rendered moot Counts I and IV of Mr. Carvalho's Complaint for declaratory and injunctive relief in Carvalho v. Town of Lincoln, et al., C.A. No. 00-5899 (R.I. Super. 2000) and his similar requests for relief in Counts I and IV of his Counterclaim and Cross-claim in Town of Lincoln v. Carvalho, et al., C.A. No. 01-1136 (R.I. Super. 2001). See id. The hearing justice denied his requests for mandamus in Count II of his Complaint in Carvalho v. Town of Lincoln, et al., C.A. No. 00-5899 (R.I. Super. 2000) and Count II of his Counterclaim and Cross-claim in Town of Lincoln v. Carvalho, et al., C.A. No. 01-1136 (R.I. Super. 2001) and remanded the matter to the Planning Board for further proceedings under the Old Regulations. See id. The decision did not address Mr. Carvalho's § 1983 claims in Count III of his Complaint in Carvalho v. Town of Lincoln, et al., C.A. No. 00-5899 (R.I. Super. 2000) and Count III of his Counterclaim and Cross-claim in Town of Lincoln v. Carvalho, et al., C.A. No. 01-1136 (R.I. Super. 2001).

Shortly thereafter—sometime in the early part of 2002—Mr. Houghton assigned all of his rights under the purchase and sale agreement to L.P.D. Development, L.L.C. ("L.P.D."), which agreed to proceed with developing a residential subdivision in accordance with the plans that Mr. Carvalho had previously submitted. See Carvalho v. Town of Lincoln, et al., 2005 W.L. 3074140

at *3 (R.I. Super. Ct. filed Nov. 16, 2005) (Krause, J.). Mr. Carvalho's refusal to sign the D.E.M. applications necessary for L.P.D. to proceed with the subdivision proposal spawned additional litigation that culminated in a decision by another hearing justice of this Court on November 16, 2005 that ordered Mr. Carvalho to proceed with the closing.[19] See id. at *11 (Krause, J.). Shortly thereafter, Mr. Carvalho conveyed the Property to L.P.D. for $875,000. [20] (Tr. 56-57, Dec. 1, 2010.)

As such, the only remaining claims in these consolidated matters are Mr. Carvalho's contentions that he is entitled to damages under 42 U.S.C. § 1983 because Defendants deprived him of his right to develop his Property in violation of the due process and equal protection clauses of the Fifth[21] and Fourteenth Amendments to the United States Constitution. On December 1, 2010, after pre-trial briefing and discovery, this Court commenced a three-day

[19] The details of the litigation concerning the purchase and sale agreement are not particularly relevant to the instant decision and are well documented in Carvalho v. Town of Lincoln, et al., 2005 W.L. 3074140 at *3 (R.I. Super. Ct. filed Nov. 16, 2005) (Krause, J.).

[20] Mr. Carvalho indicated that $50,000 was deducted at closing from the originally agreed-upon purchase price of $925,000 because L.P.D. had paid for some of the engineering and legal fees. (Tr. 43, Dec. 2, 2010.)

[21] Mr. Carvalho argues that Defendants violated his right to due process as secured by the due process clauses of both the Fifth and Fourteenth Amendments. Mr. Carvalho correctly states that the Fifth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. See L.A. Ray Realty v. Town Council of the Town of Cumberland, 698 A.2d 202, 209 (R.I. 1997). For example, the takings clause of the Fifth Amendment, as well as the protections against self-incrimination and double jeopardy, are incorporated through the Fourteenth Amendment. See Martinez-Rivera v. Ramos, 498 F.3d 3, 8 n.6 (1st Cir. 2002); R.R.I. Realty v. Inc. Vill. of Southampton, 870 A.2d 911, 917 (2d Cir. 1989). Moreover, "local official conduct which infringes upon certain provisions of the Bill or Rights may [] be actionable under § 1983, where the Fourteenth Amendment incorporates those provisions." Sheldon H. Nahmod, 1 Civil Rights and Civil Liberties Litigation: The Law of Section 1983, § 2:3 (4th ed. 2012). However, "[r]ights guaranteed by the Fifth Amendment are not incorporated into the Fourteenth Amendment where such rights . . . can be asserted directly under the Fourteenth Amendment." 16C C.J.S. Constitutional Law § 1462 (2005). The Fourteenth Amendment directly prohibits states from depriving any person of property without due process of law. See Martinez-Rivera v. Ramos, 498 F.3d at 8. Accordingly, in this Decision, the Court will only refer to the Fourteenth Amendment.

bench trial of Plaintiff's § 1983 claims.[22]

At trial, the Court heard testimony as to liability only from Mr. Carvalho and his witnesses: John Mancini, the former Chairman of the Planning Board; and Joseph Raheb, one of Mr. Carvalho's former attorneys. It heard testimony as to damages from Plaintiff's expert, William Coyle, a certified general real estate appraiser and a defense expert, Paul Bordieri, also a certified real estate appraiser.

During the first two days of trial, Mr. Carvalho testified generally about the above

[22] It is noteworthy that Plaintiff's § 1983 claims in these consolidated cases lay dormant for the better part of a decade. Plaintiff first filed a § 1983 claim in his Complaint in the first of these two actions, Carvalho v. Town of Lincoln et al., C.A. No. 00-5899 (R.I. Super. 2000), on November 14, 2000, after the Planning Board began to explore whether his subdivision application was subject to the New Regulations on grounds of abandonment. He filed his second § 1983 claim as part of his Counterclaim and Cross-claim in the second of these two actions, Town of Lincoln v. Carvalho et al., C.A. No. 01-1136 (R.I. Super. 2001), on April 2, 2001, after the Planning Board filed an appeal in this Court from the decision of the Zoning Board that found that he had not abandoned his subdivision application and could proceed under the Old Regulations. While Plaintiff now relies on alleged nefarious conduct on the part of Robert Picerno and Jonathan Oster to support his § 1983 claims, his original § 1983 claim pre-dates Mr. Oster's tenure as Lincoln Town Administrator, he filed his second § 1983 claim within three months of Mr. Oster taking office and never named Mr. Oster as a defendant in connection with his § 1983 claims, and he filed both claims approximately a year before the State lodged criminal charges against Oster and Picerno for bribery and conspiracy on February 16, 2002. See State v. Oster, P102-3047A and State v. Picerno, P102-3047B (R.I. Super. 2002).

Even after the indictment of Mr. Oster and Mr. Picerno on those charges on October 9, 2002, Plaintiff took no action to advance his § 1983 claims for several more years. See id. It was not until the spring of 2007—seven years after first filing suit, while Mr. Oster's case was pending trial and three years after Mr. Picerno had been convicted and sentenced—that Mr. Carvalho took their depositions. See id.; Jonathan Oster Deposition, March 26, 2007, Pl.'s Ex. 15; Robert Picerno Deposition, April 16, 2007, Pl.'s Ex. 18. He took other depositions on which he relied at trial even later. See Paul Brule Deposition, May 24, 2007, Pl.'s Ex. 13; Roger Ross Deposition, Aug. 5, 2010, Pl.'s Ex. 14. As a result, the memories of these material witnesses as to events that transpired in 2000-2001 or even earlier was dim.

Plaintiff never moved to assign his § 1983 claims for trial. Finally, in July 2009—nine years after the litigation ensued—the cases were assigned to trial not on his motion, but on motion of the Town of Lincoln. By the time of trial, Mr. Picerno had completed his jail sentence and moved out of the jurisdiction and Mr. Oster had died. See State v. Oster, P102-3047A and State v. Picerno, P102-3047B (R.I. Super. 2002). As such, neither of them was available to testify at trial, depriving this Court of any meaningful opportunity to assess their credibility.

sequence of events, starting with the initial filing of his pre-application in 1995 through the sale of the Property to L.P.D. sometime in 2005 or 2006. (Tr. 20-73, Dec. 1, 2010; Tr. 1-26, Dec. 2, 2010.) Mr. Carvalho testified that he had essentially invested his life savings into developing the Property into a subdivision. (Tr. 24, Dec. 2, 2010.) He further alleged that the costs of the legal, engineering, and application fees that he had incurred in dealing with the Planning Board's various delays exhausted his financial resources. (Tr. 47-49, Dec. 1, 2010.) According to Mr. Carvalho, he finally ran out of funds and had no choice but to sell the Property. Id. He insisted that despite his two previous attempts to sell the Property to the State and to the Newton Group, it was never his intention to sell the Property. (Tr. 45, Dec. 2, 2010.)

Mr. Carvalho also testified about a previous attorney-client relationship that he had with former Lincoln Town Administrator, Jonathan Oster. (Tr. 65-72, Dec. 1, 2010.) He indicated that Mr. Oster had represented him sometime in the early 1990s in a lawsuit to recover money due for construction services. Id. at 65. According to Mr. Carvalho, the two disagreed about the course of the suit, and their attorney-client relationship ended acrimoniously. Id. at 69. Nonetheless, Mr. Carvalho testified that he later approached Mr. Oster to represent him before the Planning Board on the Forest Park Estates proposal. Id. at 71-72. Due to their previous history, Mr. Oster refused. Id.

On the second day of trial, the Court heard testimony from attorney Joseph Raheb who had briefly represented Mr. Carvalho before the Planning Board in connection with his proposal for Forest Park Estates. (Tr. 95, Dec. 2, 2010.) Mr. Raheb testified about a conversation that he had with his neighbor, Robert Picerno, who served as a member of the Planning Board during the time Mr. Raheb was representing Mr. Carvalho. Id. at 96-97. According to Mr. Raheb, he and Mr. Picerno had a brief conversation outside Mr. Picerno's home in which Mr. Picerno

mentioned that he might know of someone who would be interested in purchasing the Property if Mr. Carvalho did not succeed in developing his proposed subdivision. Id.

Plaintiff next presented John Mancini, the former Chairman of the Planning Board, as a witness. Mr. Mancini testified that he served on the Planning Board from approximately 1997 to 2008 and was appointed Chairman sometime around 2000 to 2001. (Tr. 51-53, Dec. 2, 2010.) Mr. Mancini acknowledged that he had been present at the Zoning Board's December 2000 hearing—at which it voted to overturn the Planning Board—and that in his opinion, it was routine for the Chairman of the Planning Board to appear at an appeal to the Zoning Board of Appeals to answer any questions that might arise. Id. at 70-71. He denied that fellow Planning Board member, Mr. Picerno, had encouraged him to attend. Id. at 73. With respect to the Planning Board's February 14, 2001 vote to appeal the Zoning Board's decision, Mr. Mancini indicated that he had little recollection of the particular circumstances surrounding the Planning Board's decision to file suit. Id. at 76-83.

On the issue of damages, Plaintiff and Defendants both presented certified real estate appraisers, whom the Court recognized as experts, to testify about the fair market value that Plaintiff's proposed subdivision would have had in 2001 if it had been approved. Plaintiff's expert, William Coyle, opined that the proposed twenty-one lot subdivision would have had an approximate fair market value of $1.278 million. (Tr. 110, Dec. 2, 2010.) Defendants' expert, Paul Bordieri, disagreed with some of Mr. Coyle's methodology, in particular with Mr. Coyle's estimated per lot sales price forecasts and Mr. Coyle's assumption that the subdivision would contain twenty-one lots. Id. at 24. Mr. Bordieri opined that based on a thirteen lot subdivision, the estimated fair market value of the Property would have been near $925,000—the contract

price in the purchase and sale agreement entered into between Mr. Carvalho and Mr. Houghton in 2001. (Tr. 30, Dec. 3, 2010.)

In addition to testimony, the parties also submitted numerous exhibits, including summaries of the relevant minutes from the Planning Board's hearings, various correspondence, and several of the cost itemizations that Mr. Carvalho had previously presented to the Planning Board. See Joint Exs. 1-4; 6-9. Plaintiff also submitted the depositions of two Assistant Town Solicitors, Mr. Ross and Paul Brule; Planning Board member, Mr. Picerno; and former Town Administrator, Mr. Oster.[23] See Pl.'s Exs. 12-14, 18, 15. Defendants submitted data on land and real estate sales and price range analyses. See Defs. Exs. E, F, G.

At the close of Plaintiff's evidence, Defendants moved for judgment as a matter of law pursuant to Rule 52(c) of the Rhode Island Rules of Civil Procedure on the grounds that Plaintiff had failed to establish a violation of his constitutional rights. (Tr. 3-8, Dec. 3, 2010.) This Court reserved decision on Defendants' motion. Id. at 13. On December 10, 2010, in accordance with Rule 15 and by stipulation of the parties, this Court granted Plaintiff's Motion to File an Amended Counterclaim and Cross-claim to Conform to the Evidence. In his Amended Counterclaim and Cross-claim, Mr. Carvalho seeks damages pursuant to § 1983 for violations of his constitutional rights to: (1) substantive due process[24] (Count I); (2) procedural due process (Count II); and (3) equal protection (Count III). After trial, both parties submitted post-trial

[23] Defense counsel objected to the admission of Mr. Oster's deposition on the grounds that he is not named as a party defendant in these cases and the Town cannot be held liable for his actions on a theory of respondeat superior. (Tr. 85, Dec. 2, 2010.) The Court reserved ruling on Defendants' objection. Id. at 86. For reasons discussed in this Decision, this Court overrules the Defendants' objection and will consider Mr. Oster's deposition as full evidence in these cases. See note 28, infra.

[24] Mr. Carvalho has included a substantive due process claim in his Amended Counterclaim and Cross-claim despite his counsel previously indicating at trial that Mr. Carvalho would only be arguing that Defendants violated his right to procedural, and not substantive, due process. See Tr. 8, Dec. 3, 2010.

memoranda to this Court.

In his post-trial memorandum, Mr. Carvalho argues that Defendants prevented him from developing his Property in violation of his constitutional rights to due process and equal protection by intentionally delaying, obstructing, or otherwise interfering with approval of his proposed subdivision. Plaintiff asserts that he is entitled to damages in the amount of $412,000, representing the difference between Mr. Coyle's appraised fair market value of the proposed subdivision of $1.287 million and the actual $875,000 price that Mr. Carvalho received at closing when he later sold the Property to L.P.D. In response, Defendants argue that Mr. Carvalho has failed to prove a constitutional violation entitling him to relief under § 1983.

II

STANDARD OF REVIEW

In a non-jury trial, this Court's review is governed by Rule 52(a) of the Rhode Island Rules of Civil Procedure, which provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon . . ." R.I. Super. R. Civ. P. 52(a). Accordingly, in a non-jury trial, "the trial justice sits as trier of fact as well as law." Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). Significantly, the trial justice is not obligated to consider the evidence in a light most favorable to the plaintiff. Hood, 478 A.2d at 184-85. Instead, he or she "weighs and considers the evidence, passes upon the credibility of witnesses, and draws proper inferences." Id.

When rendering a decision in a non-jury trial, "'[t]he trial justice need not engage in extensive analysis . . . .'" Nardone v. Ritacco, 936 A.2d 200, 206 (R.I. 2007) (quoting White v. LeClerc, 468 A.2d 289, 290 (R.I. 1983) (internal quotation omitted)). The Rhode Island

Supreme Court has "'never demanded that a trial justice make findings with respect to every witness or issue in which a full understanding of the issues and the conclusions of the fact finder may be reached without the aid of separate findings.'" Parella, 899 A.2d at 1239 (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (internal citation omitted)). Thus, "even brief findings will suffice as long as they address and resolve the controlling factual and legal issues." Id.

Rule 52(c) allows a Court, in a non-jury trial, to enter judgment as a matter of law after a party has been fully heard on an issue. R.I. Sup. R. Civ. P. 52(c).[25] To do so, the Court must support its decision with findings of fact and conclusions of law. See Broadley v. State, 939 A.2d 1016, 1020 (R.I. 2008). Specifically, when ruling on a Rule 52(c) motion, the Court "weighs 'the credibility of witnesses and determines the weight of the evidence presented . . . .'" Id. (quoting Pillar Prop. Mgmt., L.L.C. v. Caste's, Inc., 714 A.2d 619, 620 (R.I. 1998)). Again, the Court "need not view the evidence in the light most favorable to the nonmoving party."[26] Id. (citing Estate of Meller v. Adolf Meller Co., 554 A.2d 648, 651 (R.I. 1989)).

[25] Rule 52(c) of the Rhode Island Superior Court Rules of Civil Procedure provides, in pertinent part, as follows:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

R.I. Sup. R. Civ. P. 52(c).

[26] Following the non-jury trial of these consolidated cases, this Court opts to make its findings of facts and conclusions of law and render judgment under Rule 52(a). In so doing, however, it has

On appeal, the Supreme Court's review of this Court's findings is "quite deferential." In the Matter of the Dissolution of Anderson, Zangari & Bossian, 888 A.2d 973, 975 (R.I. 2006). Indeed, "'[t]he findings of fact by a trial justice sitting without a jury are entitled to great weight and shall not be disturbed on appeal unless the record shows that the findings are clearly wrong or unless the trial justice overlooked or misconceived material evidence on a controlling issue.'" Id. (quoting Burke-Tarr Co. v. Ferland Corp., 724 A.2d 1014, 1018 (R.I. 1999)).

III

LAW AND ANALYSIS

Mr. Carvalho argues that he is entitled to damages under the Federal Civil Rights Act, 42 U.S.C. § 1983, which provides, in pertinent part:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

42 U.S.C. § 1983. Section 1983 does not create substantive rights; it is instead a vehicle for individuals to seek relief for violations of rights secured by the Federal Constitution or federal statutes. Brunelle v. Town of S. Kingstown, 700 A.2d 1075, 1081 (1997). In practice, § 1983 creates "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." See Carey v. Piphus, 435 U.S. 247, 253 (1978) (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

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considered no evidence proffered by the Defendants and finds, based on the weight and credibility of the evidence presented, that Plaintiff has failed to prove his § 1983 claims of a constitutional violation of his rights by the Defendants. As such, it would reach the same conclusion were it to decide this case as a matter of law under Rule 52(c).

The Rhode Island Supreme Court has stated that under § 1983, "the court is interposed between the state and the people in order to protect the people from unconstitutional actions under color of state law by the Executive, the Legislature, or the Judiciary." L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 209 (R.I. 1997) (citing Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 749 (R.I. 1995)). Thus, for a plaintiff to raise a successful § 1983 claim, he or she "must establish two elements: (1) the conduct complained of was carried out under color of state law[;] and (2) this conduct deprived [the plaintiff] of rights, privileges or immunities secured by the Constitution or laws of the United States." Macone v. Town of Wakefield, 277 F.3d 1, 8 (1st Cir. 2002) (citing Chiplin Enters. v. City of Lebanon, 712 F.2d 1524, 1526-27 (1st Cir. 1983)).[27]

A

Action under Color of State Law

With regard to the first element—that the conduct complained of must be carried out under color of state law—Defendants argue that the Town cannot be held liable under § 1983 for injuries inflicted solely by its agents or employees. While Defendants correctly state that § 1983 does not allow for liability on the theory of respondeat superior, it is well settled that "'[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary . . . relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers.'" L.A. Ray, 698 A.2d at 209-10 (quoting Monell v. Dept. of Soc. Services of N.Y., 436 U.S. 658,

[27] Our Supreme Court has alternatively described § 1983's two-part inquiry as requiring courts to analyze two questions: "First, who acting under color of state law has caused the plaintiff's alleged deprivation, and second, of what federal right, privilege, or immunity secured by the Federal Constitution or federal statutes has the plaintiff been deprived?" Brunelle, 700 A.2d at 1081 (emphasis in original) (quotation omitted).

690 (1978)); accord Altaire Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066, 1069-70 (W.D.N.Y. 1982) (interpreting Monell as allowing imposition of liability on municipality under § 1983 for local board of trustees' denial of building permit)). In particular, the Rhode Island Supreme Court has allowed municipalities to be held liable under § 1983 for actions of their zoning and planning boards in denying permits and other land use applications. See L.A. Ray, 698 A.2d at 209-210 (finding municipality liable under § 1983 for town planning board's denial of subdivision application); Brunelle, 700 A.2d at 1081 (finding "clear showing" that "municipal officials and officers act[ed] under color of state law" where town council denied request for zone change and town building inspector denied request for building permit).

Here, Mr. Carvalho alleges that the members of the Planning Board and other Town personnel, acting in their official capacities, conspired to prevent approval of his proposed subdivision. (Pl.'s Amended Counterclaim and Cross-claim ¶ 20.) Thus, the Court finds that the first requirement for Plaintiff's § 1983 claim—that the complained of conduct was carried out under color of state law—is satisfied.[28]

B

Alleged Constitutional Violations

With regard to the second element of a claim under § 1983—that a plaintiff prove a deprivation of a right secured by the Federal Constitution or federal laws—Mr. Carvalho argues

[28] Defense counsel objected to the admission of Mr. Oster's deposition on the grounds that Mr. Oster is not a named defendant in these matters and that the Town could not be held liable for Mr. Oster's actions under § 1983 on a theory of respondeat superior. (Tr. 85, Dec. 2, 2010.) As discussed, a town may be directly liable under § 1983 for decisions officially adopted or promulgated by its officers and specifically for its officers' denials of land use applications. See L.A. Ray, 698 A.2d at 209-10. Mr. Carvalho generally alleges that Mr. Oster, acting in his official capacity as Town Administrator, conspired to prevent approval of his proposed subdivision. Specifically, he suggests that Mr. Oster, as Town Administrator, must have been involved in or authorized the Planning Board's appeal of the Zoning Board's decision. Thus, the Court will consider Mr. Oster's deposition.

that the entirety of Defendants' conduct in delaying or otherwise obstructing approval of his proposed subdivision deprived him of his rights to: (1) procedural due process; (2) substantive due process; and (3) equal protection, as secured by the Fourteenth Amendment to the United States Constitution. This Court will address each alleged violation in turn.

1

Due Process Claims

The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. Amend. XIV. To establish a due process claim—substantive or procedural—a plaintiff first must establish that he or she possesses a property interest protected by the due process clause. Macone, 277 F.3d at 8 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70 (1972)); see also Brunelle, 700 A.2d at 1084 (Defendants' "action must be directed at a fundamental right protected under the due process clause."). Only after a plaintiff has made this threshold showing will a court then inquire whether the defendant deprived him or her of this protected interest without due process. See Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 56 (1st Cir. 2006) (citations omitted).

a

Protected Property Interest

Mr. Carvalho asserts that he had a protected property interest in the prior approval of his subdivision plan on April 22, 1998 and, more generally, in the right to develop his land. In response, Defendants argue that Mr. Carvalho has failed to establish that he had a protected property interest because his proposed subdivision never proceeded past the preliminary stages

of the planning process. They suggest, therefore, that Mr. Carvalho had no legitimate claim of entitlement to develop the proposed subdivision on his land.

Property interests do not arise from the Constitution; instead, they "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. at 577. While traditional ownership and possessory interests are clearly property deserving of protection under the due process clause of the Fourteenth Amendment, the United States Supreme Court in Roth held that individuals also can have protected interests in "newer" forms of property created by statutory entitlements. 278 U.S. at 577; see Martin A. Schwartz, 1 Section 1983 Litigation § 3.05(B)(1) (4th ed. 2009) (discussing Roth); see also R.R.I. Realty Corp. v. Incorp. Vill. of Southampton, 870 F.2d 911, 915 (2d Cir. 1989) (stating that Roth was "potentially pertinent to land regulation in [its] announcement that a property interest . . . includes not only what is owned but also, in some limited circumstances, what is sought[]"). In Roth, the Court held that to have a protected interest in a benefit sought, "a person clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577.

After Roth, federal circuit courts deciding substantive due process challenges in the land use context have split as to whether a landowner is required to show an entitlement to a permit, variance, or approval in order to have a constitutionally protected property interest. See generally, R.R.I. Realty, 870 F.2d at 915-917 (reviewing due process land regulation decisions after Roth); Daniel R. Mandelker, Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation, 3 Wash. U. J.L. & Pol'y 61, 79-80 (2000) (noting that courts

split in applying entitlement rule to substantive due process claims in land use cases where a local authority has denied a land use approval). A minority of courts take the approach that ownership of the land in and of itself establishes a protected property interest. See DeBlasio v. Zoning Bd. of Adjustment for the Twp. of W. Omwell, 53 F.3d 592 (3rd Cir. 1995), overruled on other grounds by United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392 (3rd Cir. 2003); Burrell v. City of Kankakee, 815 F.2d 1127, 1129 (7th Cir. 1987). The majority of courts, however, apply the so-called "entitlement rule" and require a landowner to show entitlement to the permit or approval to establish a protected property interest. See, e.g., Macone, 277 F.3d at 9; Bituminous Materials v. Rice County, 126 F.3d 1068, 1070 (8th Cir. 1997); Gardner v. Baltimore Mayor & City Council, 969 F.2d 63, 68 (4th Cir. 1992); Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 928 F.2d 1111 (10th Cir. 1991); Mackenzie v. City of Rockledge, 920 F.2d 1554, 1559 (11th Cir. 1991); R.R.I. Realty, 870 F.2d at 917; see also George Washington Univ. v. D.C., 318 F.3d 203, 206-207 (D.C. Cir. 2003) (noting that for land use regulation, majority of circuits require more than ownership interest in land). For procedural due process claims—as distinguished from substantive due process challenges—"courts unanimously apply the entitlement rule . . . in land use cases where a municipality has denied a land use approval." Mandelker, 3 Wash. U. J.L. & Pol'y at 79.

Rhode Island appears to follow the majority approach of requiring a landowner-plaintiff to show entitlement to a permit or approval to make out a substantive due process claim. See, e.g., Pitocco v. Harrington, 707 A.2d 692, 695-696 (R.I. 1998) (holding landowner was entitled to building permit); L.A. Ray, 698 A.2d at 210 ("plaintiffs were entitled as a matter of law to final approval of . . . subdivisions."); Brunelle, 700 A.2d at 1084 ("We question whether Brunelle ever possessed a protected property interest in the granting of a zoning change

petition."). In determining whether a landowner has an entitlement, our Supreme Court's decisions in Pitocco, L.A. Ray, and Brunelle, are instructive: in those cases, the Supreme Court looked to the degree of discretion that the relevant authority possessed to deny or approve the landowner's application; the greater the discretion, the more difficult the proof of entitlement. [29] See 707 A.2d at 696; 698 A.2d at 210; 700 A.2d at 1084.

In Pitocco, for example, the Supreme Court found that a landowner had an entitlement to a building permit because the town building official "had no authority whatsoever 'other than to determine that the proposed construction conform[ed] precisely to the terms of the pertinent provisions of the zoning ordinance.'" 707 A.2d at 696 (quoting Zeilstra v. Barrington Zoning Bd. of Rev., 417 A.2d 303, 308 (R.I. 1980) (internal quotation omitted)). Likewise, in L.A. Ray, the Court concluded that a landowner had an entitlement to final approval of a proposed subdivision where the planning board had only denied the subdivision based on an invalid amendment to a town zoning ordinance. 698 A.2d at 210 (citation omitted). In contrast, the Court found that the same landowner did not have an entitlement to a second distinct proposed subdivision because that particular subdivision was "still at a preliminary stage" and the planning board "could have denied [it] for a myriad of unforeseeable reasons." Id.

In the instant matter, Mr. Carvalho claims a property interest in the alleged prior approval of his subdivision plan on April 22, 1998. In response, Defendants argue that Mr. Carvalho has

[29] Rhode Island's "discretion"-based inquiry is generally in keeping with the line of inquiry pursued by other courts which require a showing of entitlement in land use cases. See generally, R.R.I. Realty, 870 F.2d at 918 ("[T]he entitlement analysis focuses on the degree of official discretion . . . ."); George Washington, 318 F.3d at 207 (noting that courts "pursuing a 'new property' inquiry . . . look[] to the degree of discretion to be exercised by state officials in granting or withholding the relevant permission[]") (internal citation omitted); see also Martin A. Schwartz, 1 Section 1983 Litigation § 3.05(B)(1) (4th ed. 2009) (stating that discretionary standards do not create a reasonable expectation of a statutory benefit and therefore do not create an entitlement).

no property interest because his application never advanced beyond the preliminary stages of the planning process. In support of their argument, Defendants rely on the Rhode Island Supreme Court's pronouncement in L.A. Ray that a landowner did not have a protected property interest in sections of a proposed subdivision that were still at a preliminary stage. See 698 A.2d at 210.

In this matter, the Planning Board had considerable discretion to disapprove Mr. Carvalho's proposed subdivision for a variety of reasons. Although there is some disagreement about the status of Mr. Carvalho's proposal after the Planning Board's April 22, 1998 hearing,[30] both parties agree that there were several significant issues that needed to be resolved before the Planning Board would grant final approval. Both Mr. Teitz's letter and Mr. Ross' opinion letter

[30] There is a good deal of ambiguity as to the status of Mr. Carvalho's application. Mr. Teitz, in his letter to Mr. Bell dated April 27, 1998, appears to understand the Planning Board's April 22, 1998 decision as granting preliminary approval. As such, if Mr. Carvalho addressed the modifications that the Board had requested, his application could move to public hearing. See Letter to Robert Bell, April 27, 1998, Pl.'s Ex. 5. In contrast, Mr. Ross, in his opinion letter dated August 21, 2000, opined that the Planning Board had not voted at its April 22, 1998 hearing to accept Mr. Carvalho's application. See Legal Opinion Letter, August 21, 2000, 00-5899 Compl., Ex. C. Additionally, at the hearing on Mr. Carvalho's third appeal to the Zoning Board on February 6, 2001, Zoning Board member Raymond Arsenault agreed that it was not "very clear" whether the Planning Board had approved Mr. Carvalho's Preliminary Plan at its April 22, 1998 hearing. See Transcript of 2/6/2001 Zoning Board Hearing, Pl.'s Ex. 3 at 17-19.

Resolution of this factual disagreement, however, is unnecessary. This Court does not think that the Supreme Court in L.A. Ray intended the chronological stage of the planning proceedings to be dispositive of the issue of whether a plaintiff has an entitlement to approval of a proposed subdivision. Here, Mr. Carvalho essentially has argued that the Planning Board deliberately delayed and failed to advance his application. To implement a strict chronological rule in such circumstances would have an anomalous result: the more successfully the Planning Board delays an application and halts its progress at an early stage of the subdivision process, the less likely it is that an aggrieved applicant can prove that he or she has a protected property interest. Instead, this Court thinks the better approach to decide if a subdivision applicant has established an entitlement—the better reading of the relevant language from L.A. Ray and the approach more in keeping with the overall teachings of the relevant case law—is to focus on the Planning Board's discretion to deny the application, irrespective of the stage of the proceedings. See L.A. Ray, 698 A.2d at 210 (finding no entitlement where application could have been denied for a "myriad of [] reasons[]"); see also R.R.I. Realty, 870 F.2d at 919 (finding that landowner was not entitled to stage-two permit in three-stage process "based primarily on an assessment of the powers of the [planning authority] as they pertain to the undisputed facts of this case[]").

addressing the April 22, 1998 hearing indicate that Mr. Carvalho needed to modify his plans for the sewer and storm drainage systems. See Letter to Robert Bell, April 27, 1998, Pl.'s Ex. 5; Legal Opinion Letter, August 21, 2000, 00-5899 Compl., Ex. C. Indeed, the design of the proposed sewer system had been a vigorously debated issue nearly since the inception of Mr. Carvalho's plan: the Planning Board had indicated repeatedly that it could not accept Mr. Carvalho's proposed sewer system unless the Director of the Town Sewer Department recommended approval, and Mr. Schultz had written that the Sewer Department would not approve Mr. Carvalho's plans for grinder pumps or his plan to tie in at the Butterfly Estates pumping station.[31] See Board Minutes 9/25/1996 and 11/19/1997, Joint Ex. 1; Robert Schultz Letter to Planning Board, April 7, 1998, Joint Ex. 7. Furthermore, although there is some debate as to whether Mr. Carvalho would have been exempted from complying with the road length requirements,[32] it is also undisputed that his proposed road length greatly exceeded the maximum length provided in both the Old and New Regulations. See Transcript of 2/6/2001 Zoning Board Hearing, Pl.'s Ex. 3 at 33-36. Additionally, both Mr. Carvalho, in his testimony at trial, and Mr. Ross, in his legal opinion letter, noted that there was an unresolved issue as to whether Mr. Carvalho would make a monetary payment in lieu of an open space land dedication. See Tr. 29, Dec. 1, 2010; Legal Opinion Letter, August 21, 2000, 00-5899 Compl., Ex. C. Such protracted and entrenched disputes are not atypical of the land planning process. See Edward H. Ziegler, 4 Rathkopf's The Law of Zoning and Planning § 66:28 nn.4-5 (4th ed. 2012).

[31] While neither party specifically argues this point, this Court notes that under the Old Regulations, submission of a certification of approval of a planned sewer system from the D.P.W. was required before a developer's preliminary plan would be considered complete, unless the Planning Board waived the submission requirement. See n.8, supra, for the full text of the relevant provisions from the Old Regulations.

[32] The Zoning Board discussed whether Mr. Carvalho would be required to comply with the road length requirements at its hearing on February 6, 2001. See n.38, infra.

These issues appeared to have remained unresolved as of the time Mr. Carvalho sold the Property. Although Mr. Carvalho offered to upgrade the Butterfly Estates pumping facility[33] and indicated that he was willing to offer concessions, it appears that as of the February 6, 2001 hearing before the Zoning Board, the parties were no closer to reaching an agreement on these outstanding issues. See Zoning Board Hearing Transcript, 2/6/2001, Pl.'s Ex. 3 at 17-19. In reference to the necessary modifications, the Chairman of the Zoning Board, Raymond Coia, specifically remarked at that hearing, "[s]hould this board sustain your appeal, we are not approving this subdivision, we're allowing you to go back and seek your approval of a subdivision." Id. at 18. Furthermore, in his decision on September 13, 2001, Justice Silverstein, in denying Mr. Carvalho's request for mandamus, specifically found that "the issuance of subdivision approval is discretionary and that there are several issues that need to be resolved between the parties before the project proceeds to final subdivision approval. The parties must agree upon a mutually feasible sewer system proposal and road length." 2001 WL 1097788 at 6. By the time Justice Silverstein rendered his opinion, Mr. Carvalho had already entered into the purchase and sale agreement to sell the Property to Mr. Houghton. See Purchase and Sale Agreement, March 12, 2001, Pl.'s Ex. 12. Four years later, on November 16, 2005, Justice Krause ruled that Mr. Carvalho was required to proceed with the closing to sell the Property to L.P.D., Mr. Houghton's assignee. See 2005 W.L. 3074140 at *11.

Since the undisputed evidence shows that there were significant and complex issues that

[33] Mr. Carvalho offered to upgrade the capacity of the Butterfly Estates pumping facility but the Town preferred that Mr. Carvalho tie-in at the Great Roads pumping facility. See Board Minutes 10/25/2000, Joint Ex. 1. Mr. Spinella suggested that Mr. Carvalho would agree to the tie-in location for the sewer system if the Planning Board would concede that Mr. Carvalho could follow the Old Regulations with regard to utilities, curbs, and sidewalks. See id. Ultimately, however, the Zoning Board, rather than the Planning Board, allowed Mr. Carvalho to proceed under the Old Regulations.

needed to be resolved before the Planning Board would approve Mr. Carvalho's proposal, the Planning Board had multiple reasons to deny Mr. Carvalho's proposal. Thus, the Planning Board possessed a considerable degree of discretion to deny Mr. Carvalho's proposed subdivision.[34] As such, this Court is constrained to find that Mr. Carvalho has failed to prove that he had an entitlement to approval of his proposed development at any time before he sold the Property. See L.A. Ray, 698 A.2d at 210; see also R.R.I. Realty, 870 F.2d at 919 (finding no entitlement to stage-two building permit where "there were several reasons for rejecting the application[]").

Accordingly, this Court finds that Mr. Carvalho has failed to establish that he possessed a property interest protected by the due process clause. Thus, he cannot make out a claim that Defendants deprived him of his rights to substantive and procedural due process as secured by the Federal Constitution.

b

Substantive Due Process

Even if Mr. Carvalho could establish a protected property interest, however, he cannot prove any conduct on the part of Defendants that is violative of his rights to substantive due process. "Substantive due process as opposed to procedural due process, addresses the 'essence

[34] Neither party, in their respective post-trial memoranda, cites any statutory or regulatory provision addressing the Planning Board's discretion to deny Mr. Carvalho's proposal. Nonetheless, it appears that the Planning Board could disapprove the subdivision if Mr. Carvalho failed to make the modifications requested during the preliminary plan review: section 45-23-43(C), as it read in 1998, provided that for approval of final plans, if it is "determine[d] that an application for final approval does not meet the requirements set by local regulations or by the planning board at preliminary approval . . ." the final plan shall be referred to the planning board for review, whereupon, "[t]he planning board shall . . . approve or deny the final plan as submitted." R.I. Gen. Laws § 45-23-43(C) (emphasis added). Although the General Assembly subsequently amended § 45-23-43 in 1999—in the middle of this controversy—subsection (C) of that statutory provision remained substantially unaltered. See P.L. 1999, ch. 157, § 1.

of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible.'" Jolicoeur, 653 A.2d at 751 (quotation omitted). A plaintiff claiming that he or she was deprived of a protected property interest in violation of his or her rights to substantive due process "must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Brunelle, 700 A.2d at 1084 (quotation omitted). For substantive due process, "only the most egregious official [or executive] conduct"—as distinguished from legislative conduct—is considered to be "'arbitrary in the constitutional sense.'" County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)). "[T]he cognizable level of executive abuse of power [is] that which shocks the conscience." Id.; see also Martin A. Schwartz, 1 Section 1983 Litigation § 3.05(B) (4th ed. 2009) (noting that the protections of substantive due process are "reserved not for merely unwise or erroneous government decisions but for egregious abuses of government power shocking to the judicial conscience.").

This standard of requiring conduct that is egregious or shocks the conscience, as reaffirmed in Lewis, 523 U.S. 833, applies to local land use decisions. See Klen v. City of Loveland, 661 F.3d 498, 512 (10th Cir. 2011) (citing Lewis); Mongeau v. City of Marlborough, 492 F.3d 14, 17-18 (1st Cir. 2007) ("a defendant must have engaged in behavior that is 'conscience-shocking': the substantive due process doctrine may not, in the ordinary course, be invoked to challenge discretionary permitting or licensing determinations of state or local decisionmakers . . . .") (internal citations omitted); Koscielski v. City of Minneapolis, 435 F.3d 898, 902 (8th Cir. 2006) (citing Lewis for the proposition that "[d]ue process claims involving

local land use decisions must demonstrate the government action complained of is . . . something more than . . . arbitrary, capricious, or in violation of state law. The action must therefore be so egregious or extraordinary as to shock the conscience.").

Mr. Carvalho argues that the Planning Board violated his rights to substantive due process through various deliberate attempts to interfere with, obstruct, and delay approval of his subdivision proposal. This Court will address Mr. Carvalho's arguments in seriatim.

i

Protracted Proceedings on Abandonment Issue

First, Mr. Carvalho asserts that the Planning Board had no rational or legitimate reason to: (1) extensively debate the issue of whether his application for a zone change in connection with the sale to the Newton Group constituted abandonment of his subdivision proposal; or (2) file suit against the Zoning Board and Mr. Carvalho. Thus, Mr. Carvalho concludes that these actions were motivated by an impermissible purpose: namely, to force him to abandon pursuit of his planned subdivision. In support of this argument, Mr. Carvalho points to the fact that his attorney at the time, Mr. Teitz, sent a letter to the Planning Board, shortly after the April 22, 1998 meeting, in which Mr. Teitz attempted to clarify the status of Mr. Carvalho's application. See Letter to Robert Bell, April 27, 1998, Pl.'s Ex. 5. Mr. Carvalho argues, in essence, that this letter gave the Planning Board sufficient notice that he was not abandoning his plan and that he was relying on the Planning Board to contact him with further information. Thus, according to Mr. Carvalho, the only possible motivation for the Planning Board to debate the abandonment issue at length was its illegitimate desire to stifle his development plans.

Yet, delays in the land planning process—even deliberate and unjustified delays—do not generally rise to level of conduct that shocks the conscience for purposes of substantive due

process. See Klen, 661 F.3d at 511-12 (officials' creation of deliberate delays on application for building permit did not rise to conscience-shocking level); Torromeo v. Town of Fremont, 438 F.3d 113 (1st Cir. 2006) (unjustified delay in issuing permit did not shock the conscience). Indeed, such delays are an undeniable reality of the planning process. See Eichenlaub v. Twp. Of Indiana, 385 F.3d 274, 286 (3rd Cir. 2004) (officials' delaying of permits and approvals did not shock the conscience, but rather were typical of land planning disputes).

Moreover, the Planning Board's extended discussion of the abandonment issue and its decision to sue the Zoning Board were not, as Mr. Carvalho asserts, entirely without explanation. Mr. Mancini explained that the Planning Board believed that it would be unfair to allow Mr. Carvalho to proceed under the Old Regulations when it had required other developers to follow the New Regulations. (Tr. 68, Dec. 2, 2010.) Additionally, the Planning Board was acting, in part, on the recommendation of Mr. Ross. After the Planning Board could not reach its own conclusion about whether Mr. Carvalho had abandoned his subdivision proposal, it referred the matter to Mr. Ross, as Assistant Town Solicitor. He concluded that Mr. Carvalho had abandoned his proposal, but further instructed the Board to hold a hearing on the limited issue of "economic hardship." See Legal Opinion Letter, August 21, 2000, 00-5899 Compl., Ex. C 3. The Planning Board then considered the hardship issue over the course of several months. See Board Minutes, 8/23/2000, 9/27/2000 and 10/25/2000, Joint Ex. 1.

To make the hardship determination, the Planning Board requested certain information from Mr. Carvalho, the gathering of which also took some time. See id. There also was testimony at trial that at the time Mr. Carvalho's application was pending, the Planning Board had a backlog of applications due to a boom in the real estate market. (Testimony of John Mancini, Tr. 64, Dec. 2, 2010.) Additionally, the Planning Board minutes from its February 14,

2001 hearing indicate that the Planning Board based its decision to file suit against the Zoning Board, at least in part, on its belief that the Zoning Board had acted beyond the scope of its authority. (Board Minutes, 2/14/2001, Joint Ex. 1.) Thus, the Planning Board's conduct in discussing the abandonment issue over several meetings and voting to sue the Zoning Board cannot be described as reaching the level of truly irrational conduct that might be deemed violative of Mr. Carvalho's rights to substantive due process. See North Pacifica, L.L.C. v. City of Pacifica, 526 F.3d 478 (9th Cir. 2008) (even where city repeatedly requested more information from developer and required developer to file a new application for permit, delays held not irrational because, in part, city gave explanations for its requests for more information). But for Mr. Carvalho's decision to apply for a zone change as part of his attempt to sell the Property, the issue of abandonment would not have surfaced nor occasioned the protracted proceedings before the Planning Board and Zoning Board.

Furthermore, even if this Court were to agree that the Planning Board's explanations were pretextual and that its conduct did indeed stem from impermissible objectives, improper motives alone are not enough to rise to the level of a violation of substantive due process. See Chainey v. Street, 523 F.3d 200, 220 (3rd Cir. 2008). The local politics, animosities and parochial views typical of local land disputes simply do not suffice to support constitutional due process claims. See Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 832-33 (1st Cir. 1982) ("Here it is merely indicated that town officials are motivated by parochial views of local interests. . . . Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency . . . to rise to the level of a due process violation."); Maple Props., Inc. v. Twp. of Upper Providence, 151 F. App'x 174, 180 (3rd Cir. 2005) ("[T]he politics and

animosities that often animate local decision-making are not matters of constitutional concern.") (citation omitted).

Understandably, Mr. Carvalho was frustrated with the Planning Board's protracted consideration of the abandonment issue over a three-month period. This Court recognizes that the cost of paying his various engineers, lawyers, and other experts to attend all of the Planning Board hearings strained Mr. Carvalho's resources so severely that he apparently sold another property to obtain the requisite funds to continue with his proposal. (Tr. 33, 47-49, Dec. 1, 2010.) This Court further notes that Mr. Carvalho's attorneys, Mr. Teitz and Mr. Spinella, had informed the Planning Board on more than one occasion that time was of the essence because the sewer system needed to be in place before the Town paved Breakneck Hill Road. (Board Minutes, 3/25/1998 and 9/27/2000, Joint Ex. 1.) Nonetheless, Mr. Carvalho fails to convince this Court that the actions or inactions of the Planning Board rose to the level of conduct that is required to show that the Defendants violated his right to substantive due process. See Creative Environments, 680 F.2d at 832 n.9 (stating that local board members' "stray[ing] willfully from 'the proper ends of their governmental duties'" was not necessarily a violation of "'constitutional proportions[]'") (quoting Crocker v. Hakes, 616 F.2d 237, 239 n.2 (5th Cir. 1980)).

ii

The Role of Mr. Picerno

Second, Mr. Carvalho argues that the Defendants violated his rights to substantive due process because one of the Planning Board members, Robert Picerno, had a conflict of interest. While an "[i]mproper motive alone is insufficient to meet the 'shocks the conscience' test," conscience-shocking behavior in the context of zoning actions includes "allegations of

corruption, self-dealing or bias . . . ." Chainey, 523 F.3d at 220 (citing Eichenlaub, 385 F.3d at 286).

Mr. Carvalho specifically alleges that Mr. Picerno knew someone who was interested in purchasing the Property and thus had an interest in thwarting Mr. Carvalho's attempts to develop the Property to force him to sell. In support of this argument, Mr. Carvalho cites the testimony of his former attorney, Mr. Raheb. At trial, Mr. Raheb testified that Mr. Picerno mentioned to him, in conversation, that if Mr. Carvalho did not succeed in obtaining approval of his proposed subdivision, Mr. Picerno knew someone who was interested in purchasing the Property. (Tr. 96-97, Dec. 2, 2010.) Mr. Carvalho argues that the Court should find incredible any testimony of Mr. Picerno to the contrary because he was subsequently convicted for corruption related to his duties on the Planning Board, and because he allegedly attempted to evade a subpoena to testify at trial. See Affidavit of Edwin Semper, Ex. 19.

In his deposition, Mr. Picerno did not directly deny this alleged conversation with Mr. Raheb. (Robert Picerno Deposition, Pl.'s Ex. 18 at 32.) In deposing Mr. Picerno, Plaintiff's counsel did not ask Mr. Picerno whether he told Mr. Raheb that he knew of someone who was interested in purchasing the Property if Mr. Carvalho failed to secure subdivision approval. Instead, Plaintiff's counsel asked, "Did you ever contact Mr. Raheb and ask him if [Mr. Carvalho] was interested in [] selling the [P]roperty?" Id. Mr. Picerno responded, "No." Id. Plaintiff's counsel then followed-up by inquiring, "You have a recollection that that never occurred?" Id. Mr. Picerno answered, "No, I never asked him." Id. Thus, Mr. Picerno was able to deny contacting Mr. Raheb to ask if Mr. Carvalho wanted to sell the Property without ever confirming or denying the conversation to which Mr. Raheb testified.

Even if this Court were to find that Mr. Picerno did suggest to Mr. Raheb that he had a buyer for the Property, this single statement is insufficient to prove a violation of substantive due process. See Locust Valley Golf Club, Inc. v. Upper Saucon Twp., 391 F. App'x 195, 199-200 (3rd Cir. 2010) (finding that allegations of zoning officials' self-dealing and corruption were not so egregious as to shock the conscience where the only evidence of self-dealing was one official's earlier, unsuccessful attempt to purchase property). Mr. Carvalho admits that Mr. Picerno never approached him directly. See Tr. 60, Dec. 1, 2010. Moreover, the former Chairman of the Planning Board, Mr. Mancini, denied that Mr. Picerno had acted to influence the Planning Board's decision to file the lawsuit or had encouraged him personally to attend the Zoning Board hearing in December 2000. (Tr. 73, 81, Dec. 2, 2010.) He also stated that he had no personal knowledge of Mr. Picerno improperly approaching developers. Id. at 83.

Mr. Carvalho has not introduced any other evidence that Mr. Picerno acted corruptly, engaged in self-dealing, or otherwise improperly influenced the Planning Board's consideration of his proposal. Mr. Carvalho did not depose Mr. Picerno for this matter until April 16, 2007, over six years after most of the relevant events in this case had occurred. In his deposition, Mr. Picerno largely denies Mr. Carvalho's allegations or indicates that he does not remember the events surrounding this case. See Robert Picerno Deposition, Pl.'s Ex. 18. Since several attempts to subpoena Mr. Picerno to testify at trial were unsuccessful, counsel for Mr. Carvalho was denied the opportunity to further question Mr. Picerno and this Court never had the benefit of assessing Mr. Picerno's credibility through live testimony. See Affidavit of Edwin Semper, Ex. 19; Tr. 1-2, Dec. 3, 2010. Thus, this Court is left with only Mr. Picerno's stale deposition testimony that did not directly contradict Mr. Raheb's testimony and Mr. Carvalho's insinuations. While it might be tempting to speculate that Mr. Picerno engaged in misconduct in

this case based on his alleged infamous dealings as a power-broker for development initiatives in the Town of Lincoln, those dealings were not made part of the evidence in this case and there is no evidence that Mr. Picerno's past dealings extended to Mr. Carvalho. Speculation simply cannot substitute for evidence. As such, Mr. Carvalho has failed to adduce sufficient evidence of corruption or self-dealing on the part of Mr. Picerno with respect to his subdivision application from which this Court could find a violation of Plaintiff's right to substantive due process.

iii

Regulatory Noncompliance

Next, Mr. Carvalho argues that the Planning Board's failure to return a stamped copy of his subdivision plan within forty-five days of receipt, as required by Section III, Article B(2)(a) of the Old Regulations, constitutes a violation of his right to substantive due process.[35] Yet, notwithstanding the merits of Mr. Carvalho's claim, it is well established that violations of state laws, local regulations or ordinances—even bad faith violations—do not give rise to constitutional substantive due process claims, absent egregious conduct. See, e.g., Bush v. City of Gulfport, 454 F. App'x 270 (5th Cir. 2011); Pagan v. Calderon, 448 F.3d 16, 32 (1st Cir. 2006) ("[M]ere violations of state law, even violations resulting from bad faith, do not invariably amount to conscience-shocking behavior.") (internal quotation omitted); Lindquist v. Buckingham Twp., 106 F. App'x 768, 773-774 (3rd Cir. 2004) (Town's violation of ordinances and court orders not violative of substantive due process); Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 829 (4th Cir. 1995); Anderson v. Douglas County, 4 F.3d 574, 577 (8th Cir. 1993); Las Lomas Land Co., L.L.C. v. City of Los Angeles, 99 Cal. Rptr. 3d 503, 519 (Cal. Ct. App. 2009); Mettler Wallon, L.L.C. v. Melrose Twp., 761 N.W.2d 293, 307 (Mich. Ct. App. 2008).

[35] For the full text of Article B(2)(a) of Section III of the Old Regulations, see n.10, supra.

Indeed, other courts have specifically held that a failure to meet regulatory deadlines is generally not sufficiently egregious or conscience-shocking to support a substantive due process claim. See Norton v. Vill. of Corrales, 103 F.3d 928, 932-33 (10th Cir. 1996) (failure of planning authority to approve or disapprove plat within thirty-five day statutory deadline not egregious or conscience-shocking where planning authority articulated reasons for delay); Cherry Hill Towers, L.L.C. v. Twp. of Cherry Hill, 407 F.Supp. 2d 648 (D.N.J. 2006) (Township's failure to approve reconstruction permit within sixty-five day statutory response deadline did not shock the conscience).

In the instant case, the Town Engineer indicated that the Planning Board's failure to meet the regulatory deadline was not unique to Mr. Carvalho's application, but rather that the Planning Board had not returned a stamped copy of plans to any applicant in the previous fourteen years. See Board Minutes, 6/28/2000, Joint Ex. 1. While the Planning Board's long-standing failure to comply with the regulatory deadline certainly might be considered negligent and violative of state or local law, it is not the kind of deliberate abuse of power or egregious conduct sufficient to constitute a violation of substantive due process.

iv

Arbitrary Action

Furthermore, Mr. Carvalho argues that Defendants made several arbitrary and irrational decisions with respect to his application that, individually or collectively, constituted a violation of his rights to substantive due process. In particular, he cites Mr. Schultz's refusal to let him use grinder pumps and request that he upgrade the capacity of the Butterfly Estates pumping station before connecting his sewer line at that location. Additionally, he cites the Planning

Board's decision at its October 25, 2000 meeting that he needed to reduce the length of his proposed roadway. See Board Minutes, 10/25/2000, Joint Ex. 1.

This Court reiterates that decisions which are merely erroneous or unwise are insufficient to support a substantive due process claim. See, e.g., Sylvia Dev. Corp., 48 F.3d at 829 n.7 (citing Gardner, 969 F.2d at 71 n.3); Pearson v. City of Grand Blanc, 961 F.2d 1211, 1221 (6th Cir. 1992); R.R.I. Realty, 870 F.2d 911, 914 n.1. Only egregious and conscience-shocking behavior constitutes conduct that is "arbitrary in the constitutional sense."[36] Lewis, 523 U.S. at 846 (internal quotation omitted) (emphasis added).

[36] In support of his argument that the Defendants engaged in arbitrary conduct with regard to the sewer system and roadway that violated his right to substantive due process, Mr. Carvalho cites the concurrence in L.A. Ray in which Justice Flanders stated, "[a]lthough I agree with the majority's conclusion that defendants' conduct here was indeed egregious, in my view it did not have to be so—much less "conscience shocking . . . ." See 698 A.2d at 217. To the extent that Mr. Carvalho is suggesting that a lesser standard should apply to his substantive due process claim, this Court cannot agree. The cited language appears in a concurring opinion not endorsed by a majority of the Supreme Court. In contrast, the majority of the Supreme Court stated in L.A. Ray that "substantive due process prevents the use of governmental power for purposes of oppression, or abuse of government power that is shocking to the conscience, or legally irrational action that is not keyed to a legitimate state interest." 698 A.2d at 211 (quoting P.F.Z. Props., Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir. 1991)), overruled on other grounds by San Geronimo Caribe Project, Inc. v. Acevedo-Vila, 687 F.3d 465 (1st Cir. 2012). Additionally, Justice Flanders wrote his concurrence in 1997, without the guidance of the United States Supreme Court's decision in Lewis, 523 U.S. 833, decided in 1998. In Lewis, the United States Supreme Court re-affirmed that the appropriate standard for substantive due process challenges to executive actions is the shocks-the-conscience standard—the standard endorsed by the majority of the Rhode Island Supreme Court in L.A. Ray. See 523 U.S. at 846. A look at subsequent case law confirms that Rhode Island follows the shocks-the-conscience standard for substantive due process claims as articulated in L.A. Ray. See Moreau v. Flanders, 15 A.3d 565, 581 (R.I. 2011) (applying "shocks the conscience" standard to substantive due process claim) (citing L.A. Ray, 698 A.2d at 211); State v. Germane, 971 A.2d 555, 584 (R.I. 2009) (articulating the "shocks the conscience" standard for substantive due process). Finally, a review of other courts' decisions assessing substantive due process claims involving official decisions in the context of land use confirms that, post-Lewis, the "shocks the conscience" standard applies. See generally Bush, 454 F. App'x 270; Klen, 661 F.3d 498; Mongeau, 492 F.3d 14; Koscielski, 435 F.3d 898; Chainey, 523 F.3d 200.

In the instant case, the Planning Board, Mr. Carvalho, and Mr. Schultz debated the sewer issue extensively over several months. Although there is some conflicting evidence about whether the Town had previously allowed the use of grinder pumps,[37] Mr. Schultz explained both in a written opinion and in person before the Planning Board why the Town generally did not favor the use of grinder pumps. See Letter to Planning Board, April 7, 1998, Joint Ex. 7; Board Minutes, 2/25/1998, Joint Ex. 1. Furthermore, a written analysis prepared by Mr. Carvalho's engineers indicated that if the Butterfly Estates pumping station had to process flows both from Mr. Carvalho's proposed subdivision and "potential future flows from the existing properties along Breakneck Hill Road, then upgrades . . . will be required." "Preliminary Sanitary Sewer Analysis for Forest Park Subdivision," Joint Ex. 8 at 12.

This Court cannot conclude from the evidence presented at trial that the Defendants' decision to disallow the use of grinder pumps or require Mr. Carvalho to upgrade the Butterfly Estates facility was arbitrary, much less conscience-shocking. With regard to the road length, it does appear that Planning Board member Diane Ursillo raised this issue very late in the process. See Board Minutes, 10/25/2000, Joint Ex. 1. Nonetheless, Ms. Ursillo's objection was not groundless since Mr. Carvalho's proposed roadway significantly exceeded the limits in both the

[37] Mr. Mancini testified that he was uncertain if the Town had previously approved the use of grinder pumps in subdivisions but suggested that the Town may allow grinder pumps in cases where it is impossible for a house to connect to a sewer line. (Tr. 80, Dec. 2, 2010.) Mr. Picerno believed that the Town generally considered it acceptable for developers to install grinder pumps. (Robert Picerno Deposition, April 16, 2007, Pl.'s Ex. 18 at 25.) Mr. Oster suggested that at the time he took office, there were several lawsuits pending against the Town involving grinder pumps that had malfunctioned or failed to perform adequately. (Jonathan Oster Deposition, March 26, 2007, Pl.'s Ex. 15 at 56.) It was his understanding that the use of grinder pumps could result in a dangerous build-up of methane gas beneath homeowners' properties. Id. at 57.

Old and New Regulations.[38] See Transcript of 2/6/2001 Zoning Board Hearing, Pl.'s Ex. 3 at 33-36. Thus, this Court cannot find that the Planning Board's decisions with regard to the sewer system and road length violated Mr. Carvalho's rights to substantive due process.

In sum, much of the Defendants' conduct may have been utterly unbefitting of public officials purporting to serve the best interests of the Town and its citizens. Mr. Carvalho has failed to prove, however, that they engaged in an abuse of government power sufficiently egregious or conscience-shocking to amount to a violation of his constitutional right to substantive due process.

c

Procedural Due Process

Unlike substantive due process claims, "'in procedural due process claims, the deprivation by state action of a constitutionally protected interest in . . . property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.'" L.A. Ray, 698 A.2d at 213 (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990) (internal citations omitted)) (emphasis in original). Hence, "[p]rocedural due process guards against the modalities of state action, addressing itself to the task of rectifying perceived procedural deficiencies." East Bay Cmty. Dev. Corp. v. Zoning Bd. of Rev. of Town of Barrington, 901 A.2d 1136, 1154 (R.I. 2006) (citing L.A. Ray, 698 A.2d at 210-11)). "The

[38] There was some indication that whether Mr. Carvalho would have to comply with the road length limits depended on whether he could proceed under the Old Regulations. At the Zoning Board's February 6, 2001 hearing, Mr. Spinella and Mr. Mancini indicated that the Zoning Board's May 1997 decision had allowed Mr. Carvalho's proposal to proceed despite the fact that the road length was significantly in excess of the regulatory limits. (Transcript of 2/6/2001 Zoning Board Hearing, Pl.'s Ex. 3 at 18-19, 33-36.) Apparently, it was their understanding that if Mr. Carvalho were required to comply with the New Regulations, the previous exemption for the road length would no longer stand. See id.

fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Matthews v. Eldridge, 424 U.S. 319, 334 (1976) (quotations omitted). In general, procedural due process "'requires certain minimal standards of notice, hearing, and opportunity to respond adequately before a government agency may effectively deprive an individual of life, liberty, or property.'" East Bay, 901 A.2d at 1154 (quoting State v. Manocchio, 448 A.2d 761, 764 n.3 (R.I. 1982)). Nonetheless, procedural due process "is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather "is flexible and calls for such procedural protections as the particular situation demands." Matthews, 424 U.S. at 334.

For land use in particular, the due process requirements of notice and a fair hearing apply when a government body "determin[es] the rights of a particular landowner in regard to the use and development of his [or her] land under criteria for approval set out in a zoning code." Edward H. Zeigler, 1 Rathkopf's the Law of Zoning and Planning § 2:3 (4th ed. 2012). "In addition to procedures required by statute or ordinances, procedural due process constitutionally guarantees that when individual rights are adjudicated, certain 'fundamentally fair' hearing procedures will be afforded an owner." Id.

In pressing his procedural due process claim, Mr. Carvalho first argues that the Planning Board deprived him of his right to develop his Property without constitutionally adequate process when it failed to provide him with notice that it was taking action on his application at its February 14, 2001 meeting. At that meeting, the Planning Board voted to file its appeal of the Zoning Board's February 6, 2001 decision and alleged that Mr. Carvalho failed to comply with statutory requirements. See Lincoln v. Carvalho, et al., C.A. No. 01-1136 (R.I. Super. 2001). Mr. Carvalho contends that if the Planning Board had given him the opportunity to be present at

the hearing, he would have reiterated his previous pleas that time was of the essence and his previous offers to compromise. Mr. Carvalho believes that the delay resulting from the filing of the lawsuit significantly contributed to his depletion of resources and that the Planning Board intended that result. In response, Defendants essentially reiterate their previous argument that Mr. Carvalho has not established that he has a property interest protected by the constitutional guarantee of due process.[39]

As noted previously, this Court concurs with the Defendants' argument. Mr. Carvalho has failed to prove that he possessed a property interest protected by the due process clause. As such, he cannot make out a claim that Defendants deprived him of his Federal Constitutional right to procedural due process.

Even assuming that Mr. Carvalho has established a protected property interest, however, he cannot prove any conduct on the part of Defendants that is violative of his procedural due process rights. This Court finds that the Planning Board's failure to provide him with notice of its February 14, 2001 hearing did not amount to a deprivation of property without constitutionally adequate process. Mr. Carvalho does not identify any statute or ordinance that entitles an adverse party to receive notice or be afforded an opportunity to be heard in advance of a Planning Board's decision to file an appeal with this Court.[40] Section 45-23-71, unamended

[39] Defendants further argue that Mr. Carvalho's procedural due process claim is time-barred by the statute of limitations. Since this Court agrees that Mr. Carvalho does not have a protected property interest and, as will be discussed, finds that he has failed to show a violation of procedural due process even assuming that he does have a protected interest, this Court need not decide whether Mr. Carvalho's claim is time-barred.

[40] This Court's review of the Subdivision Enabling Act of 1992 has failed to reveal a statutory entitlement to such notice. Section 45-23-42 required that a public hearing be held on all major subdivision proposals and that the applicant be given notice of such actions. See § 45-23-42. Section 45-23-41(d) required a public hearing and notice thereof before the planning board made a decision on a preliminary plan. See § 45-23-41(d). Section 45-23-69 required that public notice, as well as notice to all interested parties, be given for hearings before the boards of appeal

since its enactment in 1992, governs appeals of decisions of boards of appeals to this Court and provides that "[w]hen the complaint is filed by someone other than the original applicant or appellant, the original applicant or appellant and the members of the planning board shall be made parties to the proceedings." Sec. 45-23-71. Notably, nothing in that statutory provision requires that an applicant be informed of an appeal to this Court in advance of the filing of the complaint. See Kelley v. Hopkinton Vill. Precinct, 231 A.2d 269, 270 (N.H. 1967) (interpreting statute that provides for appeal from the decision of a zoning board of adjustment to superior court, permits interested parties to appear and further provides that 'the court may order such persons to be joined as parties' as "imposing no requirement of notice to any party in advance of the filing of the appeal"); compare § 45-23-71, with § 6-13.3-3(b) (requiring the Attorney General to give notice to an alleged violator of the Environmental Marketing Act at least thirty days before filing suit). More importantly, Mr. Carvalho does not argue that the lack of notice of the February 14, 2001 hearing in any way deprived him of an adequate opportunity to prepare for the resulting litigation.

Moreover, irrespective of whether state law required that Mr. Carvalho be given notice of the February 14, 2000 hearing, this Court finds that he was afforded all process due to him under the Constitution. See Bell v. Twp. of Concord, 759 F. Supp. 2d 621, 627-28 (E.D. Pa. 2011) (where local law required municipality to inform real estate agent before it filed suit against him, failure to do so was not a violation of due process where agent would have had a meaningful opportunity to be heard). The First Circuit has held previously that a housing developer's rights to procedural due process were not violated when the local planning board held several executive

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and further required that such hearings be public. See § 45-23-69. Similarly, the Old Regulations required a public hearing before final approval of a subdivision was granted. See n.12, supra, for the full text of the relevant regulatory provision. None of these statutory or regulatory provisions appear to be directly applicable to the Planning Board's February 14, 2001 hearing.

sessions to which the developer was not invited. See Creative Environments, 680 F.2d 822, 829-30 (1st Cir. 1982). In holding that the developer had received the process due it under the Constitution, the Court observed that the planning board had met with the developer on at least eleven occasions before denying its application and that the developer, once aggrieved, had recourse to the state courts. See id. In a slightly different but related context, in those states that mandate that meetings of administrative bodies be open to the public under so called "Open Meeting Laws," many allow an exception to allow government bodies to meet in closed executive sessions when discussing pending or anticipated litigation, largely in recognition of the fact that government bodies may need "to make [these] sensitive decisions without the knowledge of various opposing parties."[41] See 35 A.L.R. 5th 113 (1996) (citing Houman v. Mayor and Council of Borough of Pompton Lakes, 382 A.2d 413, 421-22 (N.J. Super. Ct. 1977) and others). Particularly relevant to the instant case, one court has held that a local council was entitled under a litigation exception in the state's open meeting law to hold a closed session when it voted to file an appeal with the state division of tax appeals and decided to retain outside counsel to represent it in such appeal. See Houman, 382 A.2d at 421-22; cf. Accardi v. City of N. Wildwood, 368 A.2d 416, 421-22 (N.J. Super. Ct. 1976) (holding that same litigation exception did not apply to local board's consideration of variance application because the board was considering facts and merits of variance).

In this case, the Planning Board held no fewer than sixteen hearings on Mr. Carvalho's application between May 1995 and January 2001. During that time, the Planning Board

[41] Rhode Island's "Open Meeting Law," as it read in 2001, provided that government bodies may hold closed meetings for "sessions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation." Sec. 42-46-5(a)(2). Although the Legislature subsequently amended § 42-46-5 in 2005, 2006, and 2007, subsection (a)(2) remained unaltered. See P.L. 2007, ch. 433, § 1; P.L. 2006 ch. 602, § 1; P.L. 2005, ch. 134, § 1.

repeatedly heard from Mr. Carvalho and his attorneys at each stage of the process and also heard testimony from various experts. Mr. Carvalho also had recourse to the Zoning Board, sitting as the Planning Board of Appeals, on three occasions. The Planning Board Minutes from the February 14, 2001 hearing indicate that at that hearing, the only issues the Planning Board discussed in connection with Mr. Carvalho's application were whether it should appeal the Zoning Board's February 6, 2001 decision and, if so, whether it would be necessary for the Planning Board to obtain outside counsel. See Board Minutes 2/14/2001, Joint Ex. 1. It also appears from the relevant minutes that the Planning Board sought advice from the Town Solicitor about whether it would be permitted to file such a suit. Id. Since Mr. Carvalho had an adequate opportunity to be heard by both the Planning Board and the Zoning Board on numerous occasions, and since the record indicates that the Planning Board discussed only matters pertaining to litigation and not the merits of Mr. Carvalho's application at the February 14, 2001 hearing, the fact that Mr. Carvalho did not have the opportunity to attend that particular hearing to attempt to dissuade the Board from filing suit does not convince this Court that Mr. Carvalho failed to receive the process due him under the Federal Constitution. See Creative Environments, 680 F.2d at 830.

Second, in a related argument, Mr. Carvalho contends that the Planning Board's failure to provide him notice of the February 14, 2001 hearing is evidence that the Board was biased, had a closed mind or had otherwise prejudged his proposal. Procedural due process requires that when an agency carries out an adjudicatory or quasi-adjudicatory function, it must act impartially and refrain from prejudging the matter before it. See Champlin's Realty Assocs. v. Tikonian, 989 A.2d 427, 443 (R.I. 2010). In general, agency decisionmakers "enjoy a 'presumption of honesty and integrity.'" Id. (quoting Davis v. Wood, 444 A.2d 190, 192 (R.I. 1982)). A litigant may

overcome this presumption through evidence showing a "'risk of unfairness intolerably high.'" Id. (quoting Kent County Water Auth. v. Dept. of Health, 723 A.2d 1132, 1137 (R.I. 1999) (internal citation omitted)). This Court is not convinced that the Planning Board's failure to give Mr. Carvalho notice that it was considering filing an appeal at the February 14, 2001 hearing is sufficient evidence of such an intolerably high risk of bias or prejudgment.[42] Accordingly, Mr. Carvalho has failed to prove that he was denied procedural due process under the Federal Constitution.[43]

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[42] Even if this Court were to consider the failure to give notice together with Mr. Carvalho's previous arguments in support of his claim of a deprivation of substantive due process, it still would not conclude that there was an intolerably high risk of unfairness. In particular, while circumstances indicating an intolerably high risk of bias include those where a decisionmaker has a financial stake in the outcome, see Withrow v. Larkin, 421 U.S. 35, 47 (1975) (citations omitted), Mr. Carvalho has not proved that Mr. Picerno had such a financial stake in the Property. In addition, as discussed previously, even if Mr. Picerno told Mr. Carvalho's former attorney that he knew of someone who would buy the Property if Mr. Carvalho did not receive subdivision approval, that evidence, without more, is insufficient to show the intolerably high risk of unfairness necessary to prove a constitutional deprivation of procedural due process.

[43] Mr. Carvalho generally analogizes the actions of the Defendants in his case to the actions of the defendants in L.A. Ray, 698 A.2d 202. This Court is not persuaded, however, that the facts in the instant case are analogous to the rather exceptional facts in L.A. Ray. In L.A. Ray, the Rhode Island Supreme Court found that town officials had violated an order of this Court, impermissibly altered and improperly adopted a referendum amendment to an ordinance, and distributed the false ordinance to the local zoning and planning boards specifically to prevent approval of plaintiff's residential subdivision. See id. at 211-12. Moreover, the evidence in that case revealed that at least three other applicants in a similar position to the plaintiffs were granted final approval of their subdivisions. See id. at 212. In holding that the defendants had violated the plaintiffs' procedural and substantive due process rights, the Court concluded that "[t]he totality of this evidence exemplifies the animus directed by town officials uniquely toward plaintiffs . . . ." Id. In brief, the evidence in L.A. Ray demonstrated that the town officials had engaged in the kind of remarkably egregious behavior necessary to substantiate a claim for a violation of constitutional due process. Such evidence is entirely lacking in Mr. Carvalho's case.

Mr. Carvalho also cites Roma Constr. Co. v. aRusso, 96 F.3d 566 (1st Cir. 1996), apparently to suggest that allegations of corruption are sufficient to succeed on a claim under § 1983. In Roma, the district court dismissed the plaintiffs' civil rights claims under § 1983. 96 F.3d at 575. The First Circuit reversed, reasoning that if the plaintiffs could prove their allegations that the mayor and town councilmen had routinely engaged in bribery, extortion, corruption and other illegal activities for over a decade, a fact-finder could infer that the town had a widespread and pervasive policy of coercive extortion. See id. at 576. The First Circuit

2

Equal Protection Claim

Mr. Carvalho also argues that Defendants' alleged conduct in delaying and obstructing approval of his proposed subdivision violated his right to equal protection as secured by the Fourteenth Amendment of the Federal Constitution. Specifically, Mr. Carvalho argues that Mr. Picerno and the former Town Administrator, Mr. Oster, conspired to orchestrate the Planning Board's suit against the Zoning Board in an attempt to thwart final approval of his subdivision. Mr. Carvalho does not argue that the Defendants singled him out for discriminatory treatment based on race, religion, gender, or membership in any other particular class. Instead, he essentially makes a "class of one" equal protection claim by alleging that the Defendants' actions were motivated by animus towards him as an individual. In particular, Mr. Carvalho alleges that Mr. Oster had a personal vendetta against him, stemming from the acrimonious end to their previous attorney-client relationship.[44] In support of his argument, Mr. Carvalho alleges that the circumstances surrounding the Planning Board's filing of its complaint against the Zoning Board were suspicious because the Assistant Town Solicitor who signed the complaint could not remember doing so.

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also noted that the plaintiffs would have to prove a causal link between defendants' coercive extortion and their losses. See id. Again, in this case, Mr. Carvalho has made multiple allegations of corruption but has not introduced any proof of such misbehavior.

[44] At trial, Mr. Carvalho testified that he and Mr. Oster had compromised on Mr. Oster's fee such that Mr. Oster was ultimately paid $2000 less than the amount originally agreed upon. (Tr. 69, Dec. 1, 2010.) According to Mr. Carvalho, Mr. Oster thereafter resented Mr. Carvalho because he believed that Mr. Carvalho had cheated him out of the additional $2000. Id. at 70. Mr. Oster, however, stated that as far as he could recall, there was never any issue regarding fees. (Jonathan Oster Deposition, Pl.'s Ex. 15 at 26.) According to Mr. Oster, the two disagreed over execution of judgment. Id. at 33. Regardless, Mr. Carvalho admitted later attempting to hire Mr. Oster to assist with his subdivision application, an overture that Mr. Oster rejected. (Tr. 71-72, Dec. 1, 2010.) Mr. Oster explained that he declined to represent Mr. Carvalho on his subdivision proposal, in part, because he believed that Mr. Carvalho was generally a difficult client who had a tendency for finding fault with his lawyers. (Jonathan Oster Deposition, Pl.'s Ex. 15 at 38-40.)

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deny to any person . . . equal protection of the laws." U.S. Const. Amend. XIV. The Equal Protection Clause is "essentially a direction that all persons similarly situated be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citation omitted). In contrast to a facial challenge to a particular piece of legislation, a litigant may argue that a government actor violated his or her equal protection rights through the selective enforcement or unequal application of otherwise lawful regulations or statutes. See Providence Teachers' Union Local 958 v. City Council of City of Providence, 888 A.2d 948, 952-953 (R.I. 2005). To prove an equal protection violation, a litigant "must show: '(1) [he or she], compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" [45] Id. at 954 (quoting LeClair v. Saunders, 627 F.2d 606, 609-10 (2d Cir. 1980)). A plaintiff need not show that he or she is a member of a class such as a particular

[45] In Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (per curiam), the United States Supreme Court declined to address the plaintiffs' theory that the defendants' differential treatment of them was motivated by "subjective ill will." In a split driven largely by Justice Breyer's concurrence in Olech, some circuit courts have interpreted the Court's decision in Olech as still requiring a plaintiff making a "class of one" equal protection claim to show that the defendant was motivated by ill will, malice or bad faith. See Taplian v. Tusino, 377 F.3d 1, 5-6 (1st Cir. 2004); Purze v. Village of Winthrop Harbor, 286 F.3d 452, 454 (7th Cir. 2002). Other circuit courts have interpreted Olech as allowing a plaintiff to make out a "class of one" equal protection claim by showing that there was no rational basis for the differential treatment. See Lindquist v. City of Pasadena, 525 F.3d 383 (5th Cir. 2008); Warren v. City of Athens, 411 F.3d 697, 711 (6th Cir. 2005); see also Campbell v. Rainbow City, 434 F.3d 1306, 1314 n.6 (11th Cir. 2006) (discussing circuit split after Olech). In Providence Teachers' Union, the Rhode Island Supreme Court required a showing of malice or bad faith. In that case, however, the Court appears to have refrained from deciding whether the plaintiff was advancing a "class of one" claim. Id. at 956 n.10 ("[W]e need not address the plaintiff's first claim of error, viz., that the trial justice erred by ruling that it was necessary for the plaintiff to prove membership in a 'class.'").

race, gender or religion, but instead may advance an equal protection claim as an individual in a "class of one." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam); see also Providence Teachers' Union, 888 A.2d at 956 n.10 (noting, in dicta, that it is the Rhode Island Supreme Court's "understanding that, at least under federal law, an equal protection claim may be advanced by an individual as a 'class of one.'" (citing Olech 528 U.S. at 564) (citation omitted)).

a

Different Treatment of Others Similarly Situated

The first inquiry in reviewing an equal protection claim is whether the plaintiff has "established that he [or she] was treated differently from others similarly situated to him [or her]." Johnson v. City of Minneapolis, 152 F.3d 859, 862 (8th Cir. 1998) (citing Klinger v. Dept. of Corrections, 31 F.3d 727, 731 (8th Cir. 1994)). "'Absent a threshold showing that he [or she] is similarly situated to those who allegedly received favorable treatment, [the plaintiff] does not have a viable equal protection claim.'" U.S. v. Whiton, 48 F.3d 356, 358 (8th Cir. 1995) (quoting Klinger, 31 F.3d at 731)). A showing that two land development projects are similarly situated requires some specificity. Campbell v. Rainbow City, 434 F.3d 1306, 1314 (11th Cir. 2006) (citations omitted); see also Fales v. Garst, 235 F.3d 1122, 1123 (8th Cir. 2001) ("[P]laintiffs failed to offer specific evidence of incidents in which they were treated differently than others who were similarly situated."); Goldfarb v. Town of W. Hartford, 474 F. Supp. 2d 356 (D. Conn. 2007) (granting motion to dismiss equal protection claim where plaintiff failed to provide specifics about others similarly situated); Daddario v. Cape Cod Comm'n, 780 N.E.2d 124, 132 (Ma. App. Ct. 2002) (general allegations that others similarly situated were granted permits held insufficient to make out an equal protection claim).

Here, Mr. Carvalho has not identified any specific instances in which the Defendants treated other similarly situated subdivision applicants more favorably than him. Instead, he generally alleges that the Planning Board's filing suit against its own Zoning Board was unprecedented. In addition, he makes passing reference to the Town's allowing a local restaurant, The Lodge, to tie-in its sewer line at the Butterfly Estates pumping station without requiring upgrades to the facility.

First, Mr. Carvalho has not provided any specific information tending to establish that The Lodge is in any way similar to his proposed subdivision. Common experience counsels that a single restaurant is inherently different from a twenty-one lot residential subdivision. See Clark v. Boscher, 514 F.3d 107, 114 (1st Cir. 2008) (rejecting claim that local officials' denying apartment developer access to city's water and sewer lines while granting access to affordable housing community and industrial park was violation of equal protection because "[b]y their very nature, the affordable housing community and the industrial park differ significantly from [] proposed subdivisions . . . ."). Thus, the restaurant is not a similarly situated property for the purposes of equal protection.

Second, there is a factual dispute as to whether Mr. Carvalho's case is the first time the Planning Board appealed a decision of the Zoning Board. Mr. Brule could not recall another instance in which the Town had sued the Zoning Board during his time as Assistant Solicitor. See Paul Brule Deposition, May 24, 2007, Pl.'s Ex. 13 at 16-17. Mr. Carvalho asserts that the Defendants failed to submit any evidence to prove that the Town has previously filed suit against its Zoning Board. The Planning Board minutes from the February 14, 2001 hearing, however, indicate that Planning Board member Gerald Olean "commented that this is not the first time

[the] Planning Board was to take action where [the] Zoning Board sitting as [the] Planning Board of Appeals overstepped their boundaries."[46] (Board Minutes, 2/14/2001, Joint Ex. 1.)

Even assuming that this is the first time that the Town of Lincoln has filed suit against its Zoning Board, Mr. Carvalho has not presented any evidence of instances of other proposed developments, similar to his, in which the Planning Board failed to file a similar appeal. Without specifics, this Court can only speculate as to whether there were previous instances in which the Planning Board believed the Zoning Board had erred but chose not to file suit. A general allegation that government officials have never before acted in a particular way, without proof of others similarly situated, does not suffice to make out an equal protection claim. See Maulding Dev., L.L.C. v. City of Springfield, 453 F.3d 967, 969-71 (7th Cir. 2006) (rejecting equal protection claim where landowner argued that city had never before taken particular action but where landowner introduced no evidence about any other developer); Swanson v. City of Chetek, 695 F. Supp. 2d 896, 908 (W.D. Wis. 2010) ("[P]laintiffs argue that they were treated differently . . . because the City acted in a way that it had never acted before. Without evidence concerning those other people, this argument cannot establish that those people were similarly situated to plaintiffs."). Mr. Carvalho's general allegation that the Defendants' action is unprecedented thus will not suffice to establish that others similarly situated were treated

[46] Additionally, in his decision on September 13, 2001, Justice Silverstein noted that in at least one instance, the Rhode Island Supreme Court has held that a town or city was an aggrieved party with standing to appeal a decision of its own zoning board. See 2001 WL 1097788 at *5 (discussing City of E. Providence v. Shell Oil Co., 110 R.I. 138, 290 A.2d 915 (1972)). He also cited at least three instances in which the Supreme Court held that a town appealing a decision of its own zoning board lacked standing. See id. (citing Apostolou v. Genovesi, 120 R.I. 501, 388 A.2d 821 (1978); Town of E. Greenwich v. Day, 119 R.I. 1, 375 A.2d 953 (1977); Hassell v. Zoning Bd. of Rev. of E. Providence, 108 R.I. 349, 275 A.2d 646 (1971)); see also Town of Charlestown v. Town of Charlestown Zoning Bd. of Rev., 2012 W.L. 3612317 at *23 (R.I. Super. Ct. filed Aug. 16, 2012) (town filed complaint "on behalf of the municipality itself, the town council, the planning commission or some other municipal body" appealing a decision of its own zoning board).

differently. Without any evidence that others similarly situated received differing treatment, Mr. Carvalho's equal protection claim must fail.

Furthermore, even if this Court were to assume that there existed some previous instance similar to Mr. Carvalho's in which the Planning Board failed to appeal a decision of the Zoning Board, Mr. Carvalho's claim would nonetheless fail to satisfy the second prong of the equal protection inquiry, which requires a plaintiff to show that his or her selective treatment was based on impermissible considerations. Moreover, it is not necessary for this Court to decide whether a Rhode Island plaintiff alleging a "class of one" equal protection violation needs to show malice or lack of a rational basis to satisfy the second prong since Mr. Carvalho cannot satisfy either standard. See Harlen Assocs. v. Incorporated Vill. of Mineola, 273 F.3d 494, 499-502 (2d Cir. 2001) (declining to decide whether Olech requires a showing of lack of rational basis or malice for "class of one" claims where plaintiff could not make either showing); for a discussion of the split on this issue see n.45, supra.

Here, the Planning Board gave legitimate reasons for filing its appeal such that its decision to appeal the Zoning Board's decision cannot be properly characterized as lacking a rational basis. The Planning Board minutes indicate that it believed that the Zoning Board had exceeded its authority. See Board Minutes, 2/14/2001, Joint Ex. 1 (noting that board member Gerald Olean stated that Zoning Board had "overstepped their [sic] boundaries") The Planning Board's initial complaint likewise alleges that the Zoning Board substituted its own judgment for that of the Planning Board and reversed the Planning Board's decision without making the necessary findings required by law. See Lincoln v. Carvalho, et al., C.A. No. 01-1136 Complaint ¶ 9.

In addition, Mr. Carvalho has not offered sufficient evidence that he was a target of any animus on the part of Mr. Picerno or Mr. Oster to raise his claim beyond the level of mere speculation. Plaintiff went to great lengths in his post-trial memorandum to highlight the close relationship between these two municipal actors on all matters of municipal interest, even going so far as to ask this Court, after trial, to take judicial notice of that fact. (Pl.'s Post-Trial Mem. at 18.) He further suggested that "it is irrefutable that Mr. Picerno utilized his Planning Board position . . . to line his own pockets." Id. at 19. Yet, he offered no evidence at trial to support these bald assertions nor did he ask this Court at trial to take judicial notice of any facts relative to the history of Mr. Oster and Mr. Picerno's dealings or their criminal conduct or cases.

Moreover, the evidence Plaintiff did present at trial fell woefully short of proving that any prior misconduct of Mr. Oster or Mr. Picerno vis-à-vis other development projects in Lincoln permeated his subdivision application. Plaintiff asks this Court to rely upon Mr. Oster and Mr. Picerno's respective depositions, taken in 2007, over six years after most of the relevant events in this case had occurred. See id. In his deposition, Mr. Oster admitted that his attorney-client relationship with Mr. Carvalho ended badly[47] and indicated that he was opposed to Mr. Carvalho's use of grinder pumps, but denied ordering the Assistant Town Solicitor, Paul Brule, to file the appeal of the Zoning Board's decision. See Jonathan Oster Deposition, March 26,

[47] Although Mr. Carvalho alleges that Mr. Oster was harboring animus against him due to the bitter end to their attorney-client relationship, the Court notes that Mr. Carvalho thought Mr. Oster sufficiently trustworthy to later ask Mr. Oster to represent him before the Planning Board on the Forest Park Estates proposal—a request Mr. Oster declined. (Tr. 71-72, Dec. 1, 2010; Jonathan Oster Deposition, March 26, 2007, Ex. 15 at 35.) Additionally, there was some evidence that Mr. Carvalho was a litigious individual who had difficulty cooperating with several of his many attorneys. See Robert Picerno Deposition, April 16, 2007, Ex. 18 at 23, 39; Jonathan Oster Deposition, March 26, 2007, Ex. 15. at 38-41; Tr. 28-30, Dec. 2, 2010.

2007, Ex. 15 at 40, 50, 59. He stated that at the time he took office in 2001,[48] he was unaware that Mr. Carvalho's proposal was pending before the Planning Board. Id. at 41. Mr. Picerno did not recall having any conversations with Mr. Oster about Mr. Carvalho and denies having discussed the suit with the Assistant Solicitor. See Robert Picerno Deposition, April 16, 2007, Pl.'s Ex. 18 at 29, 38. He likewise denied reviewing the suit before it was filed. See id. at 30. Mr. Picerno suggested that there may have been a general dislike of Mr. Carvalho among the members of Planning Board because of Mr. Carvalho's litigious reputation, but denied that either he or Mr. Oster personally harbored any animosity against Mr. Carvalho. Id. at 22, 38-39. Mr. Brule indicated that he would have needed permission to file the suit from the Town Council, the Town Solicitor or the Town Administrator but did not remember discussing the suit with any members of the Planning Board or Mr. Oster. See Paul Brule Deposition, May 24, 2007, Pl.'s Ex. 13 at 17-18. Mr. Mancini, the former Planning Board Chairman, did not recall discussing the suit with Mr. Oster or Mr. Picerno. (Tr. 78-81, Dec. 2, 2010.)

Plaintiff did little to impeach the testimony of these municipal officials. As most of them did not testify at trial, this Court had no meaningful opportunity to assess their credibility. As such, even viewing the evidence in a light most favorable to the Plaintiff and giving him the benefit of all reasonable inferences in his favor, Mr. Carvalho has failed to prove the nefarious conduct with respect to his subdivision proposal on the part of Mr. Picerno and Mr. Oster that he suspected and alleged.

While Mr. Carvalho further suggested that the circumstances surrounding the Planning Board's appeal of the Zoning Board's decision were suspicious, he likewise failed to prove that

[48] Mr. Oster did not take office as Town Administrator until January 2001, a short while before the Town filed its suit against the Zoning Board in March 2001, but several months after Mr. Carvalho had already filed his initial complaint in November 2000. See Jonathan Oster Deposition, March 26, 2007, Ex. 15 at 16.

some Town official filed that appeal or ordered its filing to harass him. Mr. Brule, whose name appears on the complaint, does not remember preparing the document or signing his name. See Paul Brule Deposition, May 24, 2007, Pl.'s Ex. 13 at 12-15, 19. He also failed to provide his bar number on the complaint.[49] Id. at 15. While the Court acknowledges that it is disconcerting that Mr. Brule has no recollection whatsoever of the complaint, it is not, standing alone, proof that the complaint was filed solely to harass Mr. Carvalho or delay his subdivision application. Mr. Brule, in his deposition taken in 2007, indicated that it looked like he had signed the complaint and that after twenty-three years of practicing law, it is not uncommon for him to fail to recollect the details of earlier cases. Id. at 19. Thus, Mr. Carvalho has not established either that the filing of the complaint lacked a legitimate reason or was the product of illegitimate animus. He thus would fail to make the necessary showing—that his selective treatment was based on impermissible considerations—to satisfy the second prong of the equal protection inquiry, even had he satisfied the first prong.

IV

CONCLUSION

For all of these reasons, this Court finds that Plaintiff has failed to prove that Defendants violated his rights to substantive or procedural due process or equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution. Accordingly, this Court finds that Plaintiff has failed to establish that he is entitled to relief under § 1983. In light of this conclusion, this Court need not address Defendants' affirmative defenses of qualified immunity

[49] Mr. Brule indicated that in 2007 it was his practice to include his bar number on all of his pleadings. See Paul Brule Deposition, Pl.'s Ex. 13 at 15. When asked if it was his practice to do so in 2001, he replied, "I would have thought so." Id.

or the issue of damages. Accordingly, Plaintiff's § 1983 claim in his Complaint in Carvalho v. Town of Lincoln, et al., C.A. No. 00-5899 (Count III) and his Amended Counterclaim and Cross-claim under § 1983 in Town of Lincoln v. Carvalho, et al., C.A. No. 01-1136 for violations of his constitutional rights to substantive due process (Count I), procedural due process (Count II) and equal protection (Count III) are denied and dismissed.

Counsel shall confer and submit to this Court forthwith for entry, in each of these consolidated cases, agreed upon forms of Orders and Final Judgments that are consistent with this Decision. Final Judgments in each case may enter pursuant to Rule 54(b), as they reflect the disposition of fewer than all claims in those cases and there is no just reason for delay.