STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 21, 2013)

GARY FERNANDES	:	
	:	
v.	:	**C.A. No. PC 12-5459**
	:	
THOMAS BRUCE*, in his capacity as Finance Director of the City of Woonsocket*;	:	
ALAN LECLAIRE, NORMAN FRECHETTE, KATHRYN DUMAIS, RICHARD FAGNANT, RICHARD MASSE*, individually and in his Capacity as Member of the City of Woonsocket Zoning Board of Review, and* ALLEN RIVERS, *individually and in his capacity as Member of the City of Woonsocket Zoning Board of Review*	:	

DECISION

PROCACCINI, J.

> ***As far back as 399 BC, Socrates once described a judge's responsibilities as follows: "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."***[1]

At the heart of this matter is the bedrock principle upon which all judicial and quasi-judicial decision-making rests: impartiality, "a defining feature of the judicial role dating back to antiquity."[2] Gary Fernandes (Appellant) filed this appeal against Thomas Bruce, in his capacity as Finance Director of the City of Woonsocket, and Alan LeClaire (LeClaire), Norman Frechette (Frechette), Kathryn Dumais (Dumais), Richard Fagnant (Fagnant), Richard Masse (Masse), and Allen Rivers (Rivers), individually and in their capacities as members of the City of Woonsocket

[1] Charles Gardner Geyh, The Dimensions of Judicial Impartiality, 65 Fla. L. Rev. 493, 498 (2013) (citing Franklin Pierce Adams, FPA Book of Quotations 466 (1952)).
[2] See id.

Zoning Board of Review (Zoning Board) (collectively Appellees).[3] Appellant seeks reversal of the Zoning Board's decision denying his application for a dimensional variance to install eighteen residential units in a building in Woonsocket. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth below, this Court vacates the Zoning Board's decision and remands the matter to the Zoning Board for a hearing de novo.

I

Facts and Travel

In 2010, Woonsocket city officials met with the Appellant to negotiate Appellant's purchase of a property located at 167 Blackstone Street in Woonsocket, Rhode Island. The property, known as St. Francis House, was a 22,300 square-foot assisted living facility located on a 34,978 square-foot lot owned by the Roman Catholic Diocese of Providence (Diocese). In 2009, the Diocese closed the facility and put the property up for sale. Over time, the lot had fallen off the city's tax rolls and into a state of disrepair. To encourage the Appellant to purchase and revitalize the building, city officials drafted a tax agreement whereby the property taxes would be reduced until 2020 to help offset the cost of rehabilitating the building, including fire code compliance. The Town Council voted to pass this tax agreement on September 20, 2010.

At the time, this lot was located in an R4 zone that allowed multi-family dwelling units but limited the number of units by lot area. The Woonsocket Zoning Ordinances stated the "[m]inimum required lot area shall be six thousand (6,000) square feet for single–family dwelling, plus four thousand (4,000) square feet for each additional dwelling unit on the same lot." Woonsocket, R.I. Zoning Ordinances § 7.5-1 (1994). This provision allowed eight units to be constructed on a 34,978 square-foot lot.

[3] Hereinafter, any references to the Zoning Board do not include board member Fagnant, who recused himself due to a conflict of interest.

In October 2010, prior to purchasing the property, Appellant sought a dimensional variance in order to install seventeen units. After the Zoning Board denied this first application, the Appellant proceeded to purchase the property in December 2010. Thereafter, the Appellant submitted another application in March 2011 for thirteen units and sought a dimensional variance to add five units to the allowable eight units. Again, the Zoning Board denied the application. Prior to submitting a third application for dimensional relief, the Appellant constructed eight units as allowed under the Woonsocket Zoning Ordinances. On July 9 and July 23, 2012, the Zoning Board held hearings regarding Appellant's third application for a dimensional variance for an additional ten units, which is at issue in this case.

The hearings were held before board members LeClaire, Frechette, Rivers, Dumais, and Masse. The Appellant presented several witnesses in support of his application, including a registered architect, a registered civil engineer, and a former Woonsocket city planner. James Cournoyer and Roland Michaud (Michaud) spoke in opposition of the application. After the close of the hearing, board members Masse, Frechette, and Chairman LeClaire voted in favor of the application, and board members Rivers and Dumais voted against it, resulting in a denial.[4]

It is particularly noteworthy that prior to the initial hearing on July 9, 2012, Rivers told Fagnant, a board member who had recused himself from hearing the case, that he had already decided to vote against the application. In a deposition, Fagnant testified to the conversation as follows:

> "Q: Did you speak with anyone about Mr. Fernandes' application before the meeting . . .

[4] Pursuant to § 45-24-57(2)(iii), "[t]he concurring vote of four (4) of the five (5) members of the zoning board of review sitting at a hearing are required to decide in favor of an applicant on any matter within the discretion of the board upon which it is required to pass under the ordinance, including variances and special-use permits."

> A: Yes. On June 4 of 2012, which I believe was prior to the meeting on June 23rd or the 25th, we had a Zoning meeting. And I walked out with Allen Rivers. And we were at the parking lot across the street. And my question to him was, 'So what do you think of all this that's coming up?' I said, 'It's very interesting.' He goes, 'Yeah, but I'm voting no.' I said, 'How can you vote no when you haven't even heard testimony.' He says, '[W]ell, I'm voting no.' I said, 'Really?' I said, 'Well, okay. That's your decision." And I walked away because I said, 'Well, that's wrong.'
>
> Q: Now, if I tell you that the first meeting on the application was July 9th, that would – that conversation would have been about a month prior?
>
> A: A month prior, yeah."

(Fagnant Dep. 12:19-13:16.)

Moreover, Michaud, who spoke out against the application, has had prior business dealings with Rivers. They are business partners who jointly own several real estate parcels. One parcel was bought one week prior to the July 9, 2012 hearing, and the other was bought two months before that hearing. (Michaud Dep. 64:13-24.) Further, Michaud obtained an option to purchase property Rivers owns in Massachusetts in September or October 2011. Id. at 67:17-68:2. The option was viable as of the date of the first hearing. Lastly, Rivers was a political supporter of Michaud who put up signs for him when Michaud was running for office. Id. at 70:10-71:6.

The Appellant appealed the Zoning Board's decision, and a hearing was held before the Superior Court, Carnes, J., on November 21, 2012, regarding Appellant's motion to remand this matter to the Zoning Board. Judge Carnes remanded the matter to consider Rivers' alleged conflict of interest and for further proceedings to review and refine any findings of fact. After nearly two months had passed without a hearing on these issues, Appellant filed a motion to adjudge the Appellees in contempt for failure to comply with Judge Carnes's order and requested

enforcement of the prior order. A hearing was then held before the Superior Court, Procaccini, J., on January 24, 2013. At the conclusion of the hearing, the parties agreed to speak with Rivers to ask if he would recuse himself. (Hr'g Tr. 18:22-19:16, Jan. 24, 2013.)

In February 2013, the Rhode Island Ethics Commission (Ethics Commission) issued an opinion regarding the specific question of "whether the Code of Ethics prohibit[ed] [Rivers'] participation in the Zoning Board's reconsideration of [the] variance application . . . ." Op. R.I. Ethics Commission No. 2013-9 (Feb. 2013). The Ethics Commission concluded that:

> "a member of the Woonsocket Zoning Board of Review, a municipal appointed position, is not prohibited by the Code of Ethics from participating in the Zoning Board's reconsideration of a variance application, notwithstanding his business associate's past appearance as a remonstrant in that matter and the possibility that his business associate may appear again during the public comment portion of the variance hearing."

Id. The opinion, however, was "strictly limited to the Code of Ethics and provide[d] no opinion as to whether the Woonsocket City Charter, the Woonsocket Code of Ordinances or any other statutes, regulations, rulings or policies prohibit[ed] his participation in this matter." Id. The Ethics Commission also "provide[d] no opinion regarding whether [Rivers], in his quasi-judicial capacity as a member of the Zoning Board, should be disqualified from participating because of bias or prejudice." Id. (citing Champlin's Realty Associates. v. Tikoian, 989 A.2d 427 (R.I. 2010)).

Following this opinion, the Zoning Board eventually held a hearing on March 11, 2013 to consider whether Rivers should recuse himself due to a conflict of interest. (Hr'g Tr. 5:1-6:5, Mar. 11, 2013.) At that hearing, the Zoning Board concluded that Rivers did not need to recuse himself. Rivers then stated his findings of fact in support of the denial of Appellant's application

on the record. Id. at 16:18-22:15. Following the Zoning Board's decision, Appellant filed the instant, timely appeal.

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by § 45-24-69(d), which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
>
> (1) In violation of constitutional, statutory, or ordinance provisions;
> (2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

When reviewing a decision of a zoning board, the trial justice "'must examine the entire record to determine whether "substantial" evidence exists to support the board's findings.'" Salve Regina College v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). Rhode Island law defines "substantial evidence" as "'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" Lischio v. Zoning Bd. of Review of North

Kingston, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981)).

In conducting its review, the trial justice may "'not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.'" Curran v. Church Cmty. Hous. Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)). This deference is due, in part, to the fact "that a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance." Monforte v. Zoning Bd. of Review of East Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). Nevertheless, an administrative decision may be vacated if it is clearly erroneous in view of the reliable, probative and substantial evidence contained in the whole record. Sec. 45-24-69(d); Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 399 (R.I. 2001).

III

Analysis

On appeal, the Appellant asserts various grounds to support his claim that the Zoning Board's decision is in excess of its authority. Those grounds are that (1) the Zoning Board improperly considered previous applications as a basis for denial; (2) its findings contradicted the expert testimony presented and are not supported by the substantial evidence in the record; (3) the decision is based upon an application of the wrong legal standard; and (4) the decision is in violation of ordinance, statutory, and constitutional provisions in light of Rivers' pre-hearing conduct and relationship with one of the remonstrants. The Appellant seeks reversal of the Zoning Board decision and requests fees under G.L. 1956 § 42-92-1 et seq.

Before this Court reaches the merits of this appeal, however, it must first consider whether the Appellant received a fair and impartial hearing as required by the Due Process Clause. The Appellant argues that he was denied a fair hearing because Rivers stated how he would vote prior to the initial hearing, he had business dealings with Michaud, and his failure to disclose his business dealings with Michaud allegedly violated G.L. 1956 § 36-14-5, the ethics statute.[5] The Appellant also asserts that the Ethics Commission's opinion incorrectly concluded that Rivers was not required to recuse himself during the public comment portion of the hearing as there is no public comment portion to a zoning board hearing. According to the Appellant, Rivers' statements and business relationship with Michaud deprived him of a full and fair reconsideration of his application.

In response, the Appellees argue that the Appellant received a fair, unbiased hearing. The Appellees point to the Ethics Commission's opinion stating that Rivers was not required to recuse himself from participating in the Zoning Board's reconsideration. Furthermore, the

[5] Section 36-14-5 states in pertinent part:

> "(a) No person subject to this code of ethics shall have any interest, financial or otherwise, direct or indirect, or engage in any business, employment, transaction, or professional activity, or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his or her duties or employment in the public interest and of his or her responsibilities as prescribed in the laws of this state, as defined in § 36-14-7.
> . . . .
> (f) No business associate of any person subject to this code of ethics shall represent him or herself or any other person, or act as an expert witness before the state or municipal agency of which the person is a member or by which the person is employed unless:
> (1) He or she shall first advise the state or municipal agency of the nature of his or her business relationship with the person subject to this code of ethics; and
> (2) The person subject to this code of ethics shall recuse him or herself from voting on or otherwise participating in the agency's consideration and disposition of the matter at issue."

Appellees claim that Fagnant's deposition was taken six months after the conversation between Fagnant and Rivers. In their brief, the Appellees state that "Mr. Fagnant's memory appears to be suspect and it appears that he has a bias against Rivers," but offer nothing to substantiate a faulty memory. To support their claim of Fagnant's bias, the Appellees simply allege that the day after the Zoning Board voted on the application, Fagnant called a local radio talk show to complain about Rivers. (Fagnant Dep. 23:12-25:18.)

The Due Process Clause embodies one of the American judiciary's most cherished values: the right to an impartial and disinterested tribunal. See U.S. Const. amend. XIV, § 1; Marshall v. Jerrico Inc., 446 U.S. 238, 242 (1980); Davis v. Wood, 444 A.2d 190, 192 (R.I. 1982). The judicial system depends ". . . not on custom or the will of strategically placed individuals, but on the common law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement." Boddie v. Connecticut, 401 U.S. 371, 374 (1971). To protect the integrity of our courts and other adjudicative bodies, the Due Process Clause "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." Marshall, 446 U.S. at 243. "At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done' . . . ." Id. at 242 (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

This fundamental principle of a neutral adjudicator has been applied to zoning boards, which are "vested with a substantial measure of quasi-judicial power under the local law regulating the use of land within their jurisdiction." Barbara Realty Co. v. Zoning Bd. of Review of Cranston, 85 R.I. 152, 156, 128 A.2d 342, 344 (1957); see also Town of Richmond v.

Wawaloam Reservation, Inc., 850 A.2d 924, 933 (R.I. 2004). Specifically, the Rhode Island Supreme Court has said that zoning board members:

> "are called upon to perform the always delicate duty . . . of deciding whether or not a landowner may be granted a special exemption or privilege from compliance with the law which binds all others who own land in the same district. Such a power must be exercised with strict impartiality or there will inevitably result a loss of public confidence in the policy of the zoning ordinance and in the integrity of the officials charged with the responsibility of administering it. A member of a zoning board, therefore, should not in any matter affecting the granting or denying of applications for exceptions or variances say or do anything which would furnish a bias for raising an inference that he was biased in favor of one side or another."

Barbara Realty Co., 85 R.I. at 156, 128 A.2d at 344.

In Barbara Realty Co., the Supreme Court addressed the issue of whether a zoning board member's statements regarding how he would vote before hearing any testimony violated the Due Process Clause. Id. at 154, 128 A.2d at 343. In that case, a petition was filed to review the City of Cranston Zoning Board's decision, which granted an application for a variance to permit the use of certain property for a motor lodge. Prior to the hearing, a zoning board member spoke with a remonstrant about a proposed change in the zoning ordinance that would permit the building of the motor lodge where the remonstrant lived. The remonstrant said that he would object to the proposed change. In response, the board member said, "'What difference does it make, we are going to shove it down your throats anyway.'" Id. Although the remonstrant said, "'You would object to it if you lived there,' [the board member] replied: 'I don't live there and I don't care.'" Id. The Barbara Realty Co. Court concluded that the statements were "sufficiently grave" to justify the claim that the board member was not impartial. The Court further explained:

> "In the circumstances we are convinced that it will be more in keeping with the high canons of justice and fair play if he is disqualified and the board is ordered to hear the application *de novo* with one of the alternate members sitting in his place. Such a rehearing will tend to maintain public confidence in the administration of the zoning ordinance."[6]

Id. at 156, 128 A.2d at 344.

Similarly, in Champlin's Realty Associates, the Rhode Island Supreme Court considered whether comments made by members of the Rhode Island Coastal Management Council prior to and throughout an administrative hearing to expand a marina constituted bias. Champlin's Realty Associates, 989 A.2d 443-48. As to one hearing member, the Supreme Court upheld the trial court's finding of bias stating that "he had settled on a desired outcome long before the full council hearing and that he worked tirelessly to advance it." Id. at 445. In particular, he made no secret of his opposition to the marina plan both to his colleagues and the local media. The Supreme Court also found that a second hearing member was biased since he told town officials that the applicant was entitled to an expansion of the marina and displayed a personal bias against the town. Id. at 445-46. In its decision, the Supreme Court noted that, after the hearing, the second hearing member made negative comments about the town's witnesses and its alternative plan.[7]

[6] Most recently, our Supreme Court in State v. Uhlmann reaffirmed the importance of maintaining public confidence in our judicial bodies and explained that even the appearance of bias or impropriety may warrant recusal. See State v. Uhlmann, No. 13-277-M.P. (R.I. Oct. 4, 2013) (Order). The Court observed that a determination must be made whether "'a reasonable person might question [the judge's] ability to remain impartial in hearing the case . . . .'" Id. (quoting In re Bulger, 710 F.3d 42, 46 (1st Cir. 2013)).

[7] As to a third member, the Supreme Court found that his ex parte communications with the executive director of the Rhode Island Coastal Management Council and communication with the governor regarding the status of the case, "while improper, [were] insufficient to demonstrate the prejudgment and bias necessitating disqualification." Champlin's Realty Associates, 989 A.2d at 447.

In this case, the record demonstrates that even prior to the hearing regarding Fernandes' application, Rivers had already precluded consideration of further evidence on the matter. Like the board member in Barbara Realty Co. and the first two hearing members in Champlin's Realty Associates, Rivers had already decided how he would vote prior to the hearing. Therefore, Rivers' statements were "sufficiently grave" to taint the entire Zoning Board proceeding. See Champlin's Realty Associates, 989 A.2d at 447. Moreover, Rivers cast a deciding vote in the Zoning Board's denial of the application. These facts conclusively undermine the appearance of impartiality and are patently offensive to the Due Process Clause's guarantee of an impartial and disinterested tribunal. See Marshall, 446 U.S. at 243 (explaining that "'justice must satisfy the appearance of justice'" and that this "'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties'") (quoting In re Murchison, 349 U.S. 133, 156 (1956); Offut v. United States, 348 U.S. 11, 14 (1954)).

In addition to Rivers' statements, other facts suggest his bias. For example, Rivers had engaged in business dealings with Michaud, including an option to purchase property Rivers owns in Massachusetts that was still viable as of the July 9, 2012 hearing. (Michaud Dep. 64:13-24, 67:17-68:2.) Furthermore, Rivers was a political supporter of Michaud who put up signs for him when Michaud was running for office. Id. at 70:10-71:6. These facts, in combination with Rivers' pre-hearing declarations, further undermine the bedrock principle of strict impartiality required by Rhode Island Supreme Court precedent. See Barbara Realty Co., 85 R.I. at 156, 128 A.2d at 344; see also Marshall, 446 U.S. at 242 (stating that "[t]he neutrality requirement [of the Due Process Clause] helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law").

The Appellees argue that Rivers did not need to recuse himself and rely on the Ethics Commission's advisory opinion, stating that the Code of Ethics did not prohibit Rivers from participating in the Zoning Board's reconsideration of the variance application. See Op. R.I. Ethics Commission No. 2013-9. As an initial matter, this Court is puzzled as to what import, if any, the Ethics Commission's decision carries given that it "provid[ed] no opinion regarding whether [Rivers], in his quasi-judicial capacity as a member of the Zoning Board, should be disqualified from participating because of bias or prejudice." Id. (citing Champlin's Realty Associates, 989 A.2d at 472). Nor did the Ethics Commission opine about whether the Woonsocket City Charter, the Woonsocket Code of Ordinances or any other statutes, regulations, rulings or policies prohibited Rivers' participation in the reconsideration. Rather, the Ethics Commission strictly limited the opinion to a potential Code of Ethics violation. However, the broader questions of whether Rivers' participation violated other constitutional or statutory provisions and whether he should have disqualified himself because of bias or prejudice remained unanswered.

Furthermore, the Ethics Commission failed to address the facts most relevant to the Zoning Board recusal issue in this case: Rivers' statements clearly manifesting his predisposition to vote against the Appellant's application prior to the hearing. Simply put, its opinion provides minimal guidance because the conduct at issue transcends ethics and implicates the constitutional guarantee of a fair and impartial hearing.

Based on all of these facts—Rivers' pre-hearing statements to Fagnant that he was voting against the application, his past business dealings with Michaud, and the limited scope and applicability of the Ethics Commission's opinion—this Court concludes that Rivers should have recused himself from the hearing to avoid the clearly demonstrated appearance of impropriety

and bias. See Davis, 444 A.2d at 192; Morin v. Zoning Bd. of Review of Warwick, 89 R.I. 406, 411, 153 A.2d 149, 151 (1959). Rivers' arrogant and offensive conduct is repugnant to the fundamental principle of judicial impartiality embodied in the Due Process Clause. The Zoning Board's decision finding no conflict of interest and allowing Rivers to participate in and vote at the hearing was not only characterized by an abuse of discretion but rendered the entire proceeding unconstitutional. Since Appellant did not receive a fair and unbiased hearing, this Court does not need to reach the merits of the Zoning Board's decision.

IV

Conclusion

The record establishes that the Appellant did not receive a fair trial and an unbiased hearing as guaranteed by the Due Process Clause. The Zoning Board's failure to provide such a hearing constituted an abuse of discretion. Accordingly, the decision of the Zoning Board is remanded for a new hearing on the Appellant's application de novo, in conformance with the Woonsocket Zoning Ordinances and with one of the alternate members sitting in Rivers' place. [8] Counsel shall submit the appropriate judgment for entry.

[8] See Woonsocket, R.I. Zoning Ordinances § 13.2-7(2) ("The first alternate shall vote as an active member if a member of the board is unable to serve at a hearing.").

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Fernandes v. Bruce, et al.**
CASE NO:	**PC 12-5459**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 21, 2013**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
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For Defendant:	**Joseph P. Carroll, Esq.**