STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: April 20, 2020)

GREEN DEVELOPMENT, LLC A/K/A WIND ENERGY DEVELOPMENT, LLC,	:	
Plaintiff,	:	
v.	:	**C.A. No. WC-2018-0519**
TOWN OF EXETER ZONING BOARD OF REVIEW; RICHARD BOOTH, IN HIS CAPACITY AS CHAIRMAN OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; JOSEPH ST. LAWRENCE, IN HIS CAPACITY AS VICE-CHAIRMAN OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; THOMAS MCMILLAN, IN HIS CAPACITY AS A MEMBER OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; RICHARD QUATTROMANI, IN HIS CAPACITY AS A MEMBER OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; TIMOTHY ROBERTSON, IN HIS CAPACITY AS A MEMBER OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; SUSAN FRANCO-TOWELL, IN HER CAPACITY AS AN ALTERNATE MEMBER OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; MARIA LAWLER, IN HER CAPACITY AS TOWN TREASURER FOR THE TOWN OF EXETER; TOWN OF EXETER, AS A MUNICIPAL ENTITY, AND FRANCIS DIGREGORIO, PERSONALLY	:	
Defendants.	:	

DECISION

LANPHEAR, J. This matter is before the Court on the appeal of Petitioner Green Development, LLC a/k/a Wind Energy Development, LLC (Petitioner) from a decision of the Town of Exeter Zoning Board of Review (Zoning Board or Respondents). The Zoning Board's decision upheld the findings of the Exeter Planning Commission (Planning Board), which, in turn, denied the Petitioner's application for a master plan approval to construct a ground-mounted commercial solar array within the Town of Exeter. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, Petitioner's appeal is denied, and the Zoning Board's decision is affirmed.

I

Facts and Travel

A

The Application and Planning Board Review

In 2016, Petitioner was actively working toward installing several solar energy fields in Exeter, Rhode Island (Town).[1] Petitioner sought to construct the fields on approximately seven acres of land, designated as Assessor's Plat 68, Block 1, Lot 1, with an address of 84 Exeter Road, Exeter, Rhode Island. Petitioner planned to install a gravel road to service the fields. The lot, in its existing state, contained a church with a parking lot, grassy fields, and a wooded area.

[1] In 2015, the Town had enacted an ordinance establishing regulations governing the construction of solar projects. The ordinance allowed solar projects to be built in rural/residential districts upon issuance of a special use permit. All projects must be in compliance with the Town Comprehensive Plan in order to be approved.

The land that Petitioner sought to construct the fields on is designated RU-4 Zoning District (Rural/Residential), which required a special use permit. Concerning the purpose of RU-4 Districts, the Town Ordinances state the following:

> "2.1.3 *Rural District, RU-4.* The purpose of this [RU-4] zone is to protect land now used for forestry, farming and related activities and the natural habitat and wildlife and to preserve the area's rural character. This [RU-4] zone provides land suitable for low density residential development and reserves land for future farming, forestry, conservation practices and recreational uses." Town Zoning Ordinances, Art. II, Sec. 2.1.3.

To complete these fields, Petitioner needed permission and permits from the Town. First, Petitioner would have to gain approval from the Planning Board and the Zoning Board. In the fall of 2017, Petitioner submitted its application for development to the Planning Board.

Utility scale solar projects were considered a major land development by the Town, which require review in three stages—Master Plan/Comprehensive Plan review, Preliminary Plan Review, and Final Plan review. During the Master Plan Review, the Planning Board reviewed the application in four separate hearings over the span of six months.

During this time, Exeter's Town Planner, Ms. Ashley Sweet, issued a memorandum to the Planning Board recommending that Petitioner's application be denied. Ms. Sweet's memorandum stated that the project consisted of 7160 solar panels covering 7.07 acres of the 15-acre lot, which already contained a church, an outbuilding, and parking areas. Ms. Sweet found that the project would simply be too large—it was poised to occupy a majority of the field and all of the wooded area on site. Ms. Sweet was also concerned that the site would be visible from the public road.

Ms. Sweet further found that the project failed to comply with lot coverage requirements stipulated by the Town Zoning Ordinances—the project would result in 23.2% lot coverage, while the Zoning Ordinances only allow 15% coverage on RU-4 zoned parcels. As such, Ms. Sweet

found Petitioner's calculations and assessments to be inaccurate. Lastly, Ms. Sweet found that the solar panels were "structures" under the Zoning Ordinances. This designation was significant because "structures" must be considered when calculating lot coverage. Overall, Ms. Sweet believed the project to be an industrial use, which is verboten in an RU-4 zone.

After Ms. Sweet's memorandum was published, the Planning Board continued to consider the application during its meetings. The Planning Board heard from Kevin Morin, an engineer from DiPrete Engineering, who was contracted by Petitioner. Mr. Morin submitted an environmental community impact study in support of the application. Mr. Morin testified that the project would raise tax revenue to the Town, as well as provide alternative energy. Mr. Morin also stated the project would be shielded from the view of the public by vegetation. However, Mr. Morin explained that the project would not create additional costs for schools and other community facilities.

On February 27, 2018, at a meeting of the Planning Board, Board Member Francis DiGregorio explained that he was worried that the project would not "complement the rural nature of the area." Resp't's Mem. 3. He believed that the scale of the project did not comply with the Town Comprehensive Plan and the project would mingle the solar panels with the church buildings.

On March 10, 2018, the Planning Board visited the site where Petitioner sought to construct the project accompanied by a representative of Petitioner, Mr. Mark DePasquale, who advocated for the project. Mr. DePasquale testified that the project would leave most of the natural land undisturbed.

After the Planning Board's site visit, Mr. DiGregorio again expressed objection to the project, stating that the project could not go forward because it would be an industrial use in a

residential zone. Shortly thereafter, Ms. Sweet drafted a memorandum that stated the proposed project was industrial in nature and therefore not allowed in a residential zone. The minutes of the March 27, 2018 Planning Board meeting state the project is inconsistent with the Town Master Plan. Petitioner took objection to both Mr. DiGregorio's objection and Ms. Sweet's memorandum. Petitioner wrote to Attorney Peter Ruggiero, the Town's Assistant Solicitor, stating that Ms. Sweet was rendering her personal opinion on the project, in violation of Petitioner's due process rights.

At the May 22, 2018 meeting of the Planning Board, Petitioner moved for a continuance in order to request a variance from the Zoning Board. The Planning Board denied Petitioner's motion. Mr. DiGregorio testified that Petitioner's motion was a distraction and the Planning Board could issue a decision that evening.

On June 26, 2018, in response to Mr. DiGregorio's comments, Petitioner's counsel, Attorney John Mancini, delivered correspondence to Mr. DiGregorio and Ms. Sweet, expressing Petitioner's disapproval of their respective comments and alleging personal biases. Petitioner requested that Mr. DiGregorio and Ms. Sweet recuse themselves from the matter. Petitioner also alleged that Mr. DiGregorio and Ms. Sweet were conferring with independent counsel, Attorney Kelly Morris. Petitioner asserted that this was inappropriate. At that evening's Planning Board meeting, Attorney Ruggiero advised the Planning Board that personal bias is not to be considered. Mr. DiGregorio and Ms. Sweet denied all allegations of bias and did not recuse themselves.

At the June 26, 2018 meeting, the Planning Board unanimously denied Petitioner's application. It found that the project was inconsistent with the Town Comprehensive Plan.[2] Petitioner timely appealed the Planning Board's decision to the Zoning Board.

[2] The Planning Board found, among other things, that the project did not conform to the Town Comprehensive Plan because: the project would fail to promote economic diversification because it would only provide temporary jobs; the project would be large and therefore inconsistent with

B

Amendment to the Town Zoning Ordinances

On July 16, 2018—in between the Planning Board's decision and the Zoning Board's decision—the Exeter Town Council, by a vote of 3-2, passed an amendment to the Town Zoning Ordinances. This amendment changed the zoning designation of fifteen lots to permit the construction of solar projects as a matter of right—Petitioner no longer needed permission from the Zoning or Planning Board for its project. However, the Planning Board objected to the amendment, finding that it did not comply with the Town's Comprehensive Plan.

In November of 2018, after the election of several new Town Council members, a subsequent amendment was enacted that revoked the July amendment allowing the construction of solar projects by right. Petitioner nevertheless sought to continue its project as a matter of right under the July amendment. This Court denied that request in *Green Development, LLC v. Town of Exeter*, No. WC-2018-0636, 2019 WL 1348609 (R.I. Super. Mar. 21, 2019).

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the rural characteristics of the Town; the project would harm natural and cultural resources; Petitioner had not supplied detailed drainage and stormwater designs; the project would make the area less desirable to live in; the project would constitute a commercial/industrial use in a residential zone; and the project would not promote conservation. The Planning Board also found that it was unable to make a positive finding regarding any environmental impacts of the study.

C

Appeal to the Zoning Board

Petitioner submitted its appeal to the Zoning Board on August 3, 2018. The Zoning Board conducted a hearing on September 13, 2018, where Petitioner argued that the Planning Board improperly decided its application because it complied with the Town Comprehensive Plan.

The Zoning Board considered the following questions:

> "(a) Whether the Planning Board properly denied the application on the ground that it was inconsistent with the Exeter Comprehensive Plan as set forth in Paragraph One of its Decision.
>
> "(b) Whether the Planning Board properly denied the application on the grounds that it did not conform to the Exeter Zoning Ordinance as set forth in Paragraph Two of its Decision.
>
> "(c) Whether the Planning Board properly denied the application because the Board could not make a positive finding as to [the Land Subdivision Ordinances (LDSR)] § 3.5.3−that there "will be no significant negative environmental impacts"−as set forth in Paragraph Three of its Decision.
>
> "(d) Whether the Planning Board properly denied the application because the Board could not make a positive finding as to LDSR § 3.5.6—that the proposal will "provide for adequate surface water run-off" and "preservation of natural, historical, or cultural features that contribute to the attractiveness of the community"—as set forth in Paragraph Six of its Decision.
>
> "(e) Whether the alleged bias of the Town Planner and/or Planning Board Member Frank DiGregorio violated the Applicant's procedural due process rights and amounted to "prejudicial procedural error." Pet'r's Mem. 16 (quoting Zoning Board Decision 4-5); *see also* Zoning Board Decision 5.

Petitioner argued that the Planning Board's findings were not supported by evidence and were clearly erroneous. Petitioner also argued that a project that is allowed via special use permit is automatically consistent with the Comprehensive Plan. According to Petitioner, because the

Town Zoning Ordinances allow utility scale solar projects, applications for these projects are automatically consistent with the Comprehensive Plan by operation of law.

Petitioner also argued a number of other issues to the Zoning Board, namely: that the Planning Board's characterization of the project as "industrial" was erroneous because solar projects are not defined by that term in the Town Zoning Ordinances; that the Planning Board should have conditionally granted Petitioner's application in order to allow Petitioner to seek a variance from the Zoning Board; that Petitioner's environmental impact study showing no negative environmental impacts was uncontested; the issue regarding storm and drain water designs was considered too early; that the Planning Board exceeded its authority by making findings concerning the Zoning Ordinances and variances; that the Planning Board erroneously required Petitioner to provide engineering plans; and Ms. Sweet and Mr. DiGregorio should have recused themselves.

In response, the Planning Board advanced that the most important issue on appeal was the weight of the evidence. It stated that if there was even a scintilla of evidence to support the Planning Board's findings, then those findings should be upheld. However, the Planning Board may not simply "rubberstamp" applications it is presented with. Resp't's Mem. 23. The Planning Board asserted that the main reason for the denial of Petitioner's application was "the scale of the project and the fact that such a large percentage of the lot would be developed." *Id.* at 7 (quoting Zoning Board Decision at 6).

The Planning Board also addressed the accusation of bias and demand for recusals. It argued that Ms. Sweet and Mr. DiGregorio did not meet the standard for bias under *Champlin's Realty Associates v. Tikoian,* 989 A.2d 427, 443 (R.I. 2010) (holding that adjudicators have a presumption of honesty and integrity that may only be overcome by evidence that '"the same

person(s) involved in building one party's adversarial case is also adjudicating the determinative issues' or if 'other special circumstances render the risk of unfairness intolerably high'") (quoting *Kent County Water Authority v. State (Department of Health)*, 723 A.2d 1132, 1137 (R.I. 1999)). Specifically, Mr. DiGregorio testified that he acted appropriately, and that his consultation with Attorney Morris was solely regarding a proposed amendment to the Town Zoning Ordinances which would have affected his real property. He also stated that he is not predisposed against solar projects.

Ms. Sweet denied that she was biased against this proposed development and that her job is to advise the Planning Board. She explained that she believed Petitioner sought to develop too large of an area; as such, much of the site would have to be redeveloped, which puts the property's habitat and natural features at risk. She also expounded that the Planning Board could not make a positive finding that the project would comply with the Comprehensive Plan. She reiterated that the Comprehensive Plan seeks to maintain a rural character for the Town.

The Zoning Board unanimously affirmed in part and reversed in part. It upheld the Planning Board's finding that Petitioner's application was inconsistent with the Town Comprehensive Plan. The Zoning Board held the following: the site of the project would be overdeveloped; the unique natural characteristics of the land would be lost; and the project would negatively affect the character of the Town. The Zoning Board also upheld the Planning Board's finding that the project would cause significant negative environmental impacts. Namely, the Zoning Board noted that the Planning Board was concerned with issues regarding wildlife habitat, drainage and stormwater, cutting of woodland, preservation of natural features, and visibility. The Zoning Board held that there was contradictory evidence regarding these issues but deferred to the factual findings of the Planning Board. Zoning Board Decision 7, 8. Notably, the Planning Board

held that "the Applicant's plans were, by themselves, sufficient evidence to support the Planning Board's determination that the proposal was inconsistent with the Comprehensive Plan." Resp't's Mem. 16 (quoting Zoning Board Decision 7.).

Regarding the issue of Ms. Sweet and Mr. DiGregorio's alleged bias, the Zoning Board found the record to be devoid of any evidence of such. The Zoning Board held that Ms. Sweet "appropriately provided her professional opinions about the Applicant's proposal to the Planning Board." Zoning Board Decision 9. The Zoning Board also held Mr. DiGregorio's actions to be proper. The Zoning Board noted, as concurrent to this matter, the Planning Board heard a case regarding a property to which he was an abutter. Mr. DiGregorio recused himself from that case. The Zoning Board looked to be satisfied that he was sensitive to issues of bias and that his recusal was probative of his objectivity.

However, the Zoning Board did not believe the Planning Board's decision was flawless. The Zoning Board held that the Planning Board erred by rendering a decision based on "dimensional requirements" because issues of dimensional variances fall solely under the jurisdiction of the Zoning Board. Pet'r's Mem. 17 (quoting Zoning Board Decision 8). The Planning Board was reversed on this issue. Petitioner's application as a whole was unanimously denied.

Petitioner sought review by this Court pursuant to § 45-24-69. In its action, Petitioner filed suit against the Chairman and Vice-Chairman of the Zoning Board, members and alternate member of the Zoning Board in their official capacities, the Town Treasurer in her official capacity, the Town of Exeter, and Mr. DiGregorio personally.

II

Standard of Review

When reviewing a local zoning board's decision, § 45-24-69(d) mandates the following:

> "(d) 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:
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> "(1) In violation of constitutional, statutory, or ordinance provisions;
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> "(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." Section 45-24-69(d).

Our Supreme Court requires this Court to "review[] the decisions of a . . . board of review under the 'traditional judicial review' standard applicable to administrative agency actions." *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I. 1998) (quoting *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 284-85, 373 A.2d 496, 501 (1977)). Judicial review of an administrative agency is essentially an appellate proceeding. *Notre Dame Cemetery v. R.I. State Labor Relations Board.*, 118 R.I. 336, 338, 373 A.2d 1194, 1196 (1977). Accordingly, the trial justice "lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute his or her findings of fact for those made at the administrative level." *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986) (citing *E. Grossman & Sons*, 118 R.I. at 285-86, 373 A.2d at 501). However, the applicant always

bears the burden to demonstrate why the requested relief should be granted. *See DiIorio v. Zoning Board of Review of City of East Providence*, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969) (requiring "an applicant seeking relief before a zoning board of review to prove the existence of the conditions precedent to a grant of relief").

In reviewing a zoning decision, the Court '"must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). "'Substantial evidence . . . means 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 Board of Review of Town of North Kingstown*, 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)). If the Court '"can conscientiously find that the board's decision was supported by substantial evidence in the whole record,"' it must uphold that decision. *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). However, in cases that involve questions of law, this Court conducts a *de novo* review. *Tanner v. Town Council of East Greenwich*, 880 A.2d 784, 791 (R.I. 2005).

III

Analysis

Petitioner challenges the Planning Board's denial of its application and argues that the Zoning Board, which sat in an appellate capacity, erred by upholding the Planning Board's decision. This Court also sits as an intermediate appellate court—as such, this Court will not find facts or weigh the credibility of the evidence but shall review each finding to determine whether

the Planning Board's decision was supported by substantial evidence. *Salve Regina College*, 594 A.2d at 880. This Court will do so by reviewing the record, evidence, and conclusions of the Planning Board. *See id.*

Petitioner further contends that its application is automatically consistent with the Comprehensive Plan; that the Planning Board made legal and procedural errors; and that Ms. Sweet and Mr. DiGregorio should have recused themselves.

A

Substantial Evidence of Inconsistency with the Town Comprehensive Plan

The main thrust of the Planning Board's decision was that Petitioner's application was inconsistent with the Town Comprehensive Plan. The Zoning Board upheld this Planning Board's finding. Petitioner argues that there is a lack of evidence that showed inconsistency with the Comprehensive Plan. This Court finds there to be substantial evidence that supports the Planning Board's decision.[3]

The Planning Board made a thorough and detailed analysis regarding Petitioner's application. In sum, the Planning Board found that the project was inconsistent with the Comprehensive Plan chiefly because it would not compliment the goal of furthering the Town's

[3] It should be noted that a similar application was filed with the Town of Coventry. The applicant sought to construct a solar field in western Coventry. Mr. Morin, Mr. DePasquale, and Ms. Hannah Morini, who was from Petitioner's organization, all testified in favor of the application. The application was denied by the Coventry Planning Board—the facts and travel of that case are quite similar to this matter. The Coventry Planning Board found that the application was inconsistent with the local Comprehensive Plan because the application was incompatible with the Comprehensive Plan's goal of preserving the rural nature of western Coventry. The Zoning Board upheld the Planning Board findings. The applicant sought further review from this Court, which upheld those findings as well. *See Wed Coventry Seven, LLC v. Town of Coventry Zoning Board of Appeals*, No. KC-2018-0567, 2019 WL 3802363 (R.I. Super. Aug. 7, 2019).

rural nature as solar panels are industrial in nature. The Planning Board was also concerned that the project would harm the natural features of the land, as well as its habitat. The Planning Board was not convinced by Petitioner's environmental impact study; the Planning Board feared there was inadequate preparation to deal with water run-off issues.

The record demonstrates that the Planning Board carefully studied Petitioner's application in conjunction with the Comprehensive Plan. At the start of the Planning Board's decision, it noted the pertinent parts of the Comprehensive Plan, including:

- Preserving the Town's rural character.
- Minimizing development impacts to natural and cultural resources.
- Ensuring the Town remains a low-density residential community with rural identity.
- Encouraging the Town should work to promote conservation of open space and natural resources.
- Protecting prime farmlands, historic resources, and preventing soil erosion associated with land removal or development, while preserving as many features as possible.
- Expressing concern that loss of forested area results in a reduction of green space, wildlife habitats and passive recreation areas. *See* Planning Board Decision, Ex. 1.

Reviewing these goals, the Planning Board found that Petitioner's application did not further these goals due to the following reasons:

- "Allowing full maximized use of the site with a solar facility installation, leaving little to none of the site in its natural state is not supporting minimization of development impacts to natural resources." *See* Planning Board Decision, Ex. 1, Section 2.5.5.
- "Allowing such a development proposal DOES adversely affect and DOES detract from Exeter's unique natural and environmental resources and the general character of the Town." *Id*. at Section 4.1.1.

- The Application would "result in commercial development on residentially zoned lots that is inconsistent with the rural character of the town." *Id*. at Section 5.2.6b.

- "Utility scale solar is industrial development. In its simplest terms it is the installation of structure to capture electricity for profit by a company."[4] *Id*. at Section 5.2.7b.

- "This is commercial/industrial development in a residential zone. That concept could be appropriate under certain circumstances but maximizing almost the entire property for use as a utility scale solar installation is not sensitive to the natural environment." *Id*. at Section 5.2.6b.

- "Solar facilities on residentially zoned land must be sensitive to the neighborhood and the character of the Town. This site will be heavily covered by the installation and there is little room left to preserve any character or natural features present with and on the site." *Id*. at Section 5.2.7b.

- "[M]aximizing the land occupied and leaving little to nothing in the way of natural features is contrary to the goals of the Subdivision Regulations and this section of the Comprehensive Plan." *Id*.

- "The manner in which this site is proposed to be developed, with almost the entire property contained within either buildings, driveways and parking or solar development will result in the loss of those forested areas on site and the reduction of green space and wildlife habitats." *Id*. at Section 5.5.6b-1.

- "[T]his proposal uses a majority of the site without regard for impacts to natural resources and does not retain any natural vegetation. The proposal essentially strips the site of existing

[4] Petitioner faults the Planning Board for finding its project to be an "industrial/commercial" use because solar projects are not defined as such in the Town Zoning Ordinances. However, the Planning Board cannot be faulted for concluding that Petitioner is seeking to make money. The Merriam-Webster Dictionary defines "industry" as "a distinct group of . . . profit-making enterprises." It also defines "commercial" as "viewed with regard to profit." *Industry*, Merriam-Webster Dictionary, 2020 (Mar. 25, 2020); *Commercial*, Merriam-Webster Dictionary, 2020, (Mar. 25, 2020). The Planning Board is justified in using the ordinary, plain meaning of the words. *Lang v. Municipal Employees' Retirement System of Rhode Island,* 222 A.3d 912, 915 (R.I. 2019) (citing *In Re B.H.*, 194 A.3d 260, 264 (R.I. 2018)) (explaining that unambiguous language is to be given their plain and ordinary meanings).

vegetation and replaces it with artificial looking landscaped rows of trees and shrubs." *Id*. at Section 5.5.7d.

- "This site presently contributes to the town's rural character and unspoiled natural setting by providing scenic vistas of open fields and stands of forested areas. This proposed development would replace both of those amenities with solar panels screened by a row of landscaped plantings." *Id.* at Section 5.5.8a.

The Planning Board was especially concerned with the possible environmental impacts of Petitioner's application. The Planning Board also said the following:

> "It is unknown at this time if there will be known significant negative environmental impacts from the proposed development . . . but it should be noted that a considerable area that currently is available as habitat for wildlife will be altered and leave the majority of the site developed by either existing buildings, driveways/parking . . . or the proposed utility scale solar installation. The small forested area would be clear cut and areas of the site leveled to provide for a flat area void of vegetation for installation of the solar facility. The applicant has provided no information to mitigate this issue and as such the Planning Board is unable to make a positive finding that no negative environmental impact will occur." Planning Board Decision ¶ 3.

Importantly, the record further shows that Ms. Sweet found that the project failed to comply with lot coverage requirements of the Town Zoning Ordinances. Ms. Sweet found that the project would result in 23.2% lot coverage, which would violate the Town Zoning Ordinances because RU-4 zoned land may only have 15% of the lot covered. The Planning Board agreed and found that the project did not conform to the Zoning Ordinances. This finding is significant because applicants have no right to proceed with projects that do not comply with a town comprehensive plan as well as the town zoning ordinances. *See West v. McDonald,* 18 A.3d 526, 536 (R.I. 2011) (explaining that an application must conform with a town comprehensive plan and the town ordinances). In order to proceed with a nonconforming project, an application must seek a variance or other exception. *See McKendall v. Town of Barrington,* 571 A.2d 565, 567 (R.I. 1990)

(explaining that a landowner must apply for a variance or an exception in order to build on a substandard lot) (citing *R.J.E.P. Associates v. Hellewell*, 560 A.2d 353, 355 (R.I. 1989)).

Petitioner claims that the Planning Board only made "general, conclusory statements." Pet'r's Mem. 20. The Court disagrees—it is evident that the Planning Board clearly and scrupulously analyzed Petitioner's application and the Comprehensive Plan. It is clear to the Court that the Planning Board soundly and succinctly enumerated its reasons for denying the application, and the Court finds them to be thorough and appropriate. The Court notes that the Planning Board had a plethora of resources at its disposal to make its findings, including the testimony of witnesses, the DiPrete Engineering environmental impact study, a first-hand view of the property via site visit, and a detailed memorandum from the Town Planner, Ms. Sweet.

Many of Petitioner's objections to the Planning Board's decision are factual in nature. For example, Petitioner argues that its project would not create any adverse environmental impacts based off the DiPrete Engineering study. However, the record shows that the Planning Board reviewed the study, weighed its credibility, and rejected it. For Petitioner to contemporaneously argue that the study is dispositive of the issue regarding whether the project will not have any adverse environmental consequences is asking this Court to make a finding of fact, which it will not do. *Notre Dame Cemetery*, 118 R.I. at 338, 373 A.2d at 1196.

Petitioner further cites a number of propositions which it believes show that the project would actually aid the town—the project will create a diversified tax base, increase tax revenue, bar further residential development of the land, and shift the tax burden from Town citizens to Petitioner, and so on. Regardless of any veracity of these claims, this Court may not substitute

judgment for that of the Planning Board; the Planning Board clearly determined the bad outweighed the good.[5] *Notre Dame Cemetery*, 118 R.I. at 338, 373 A.2d at 1196.

In sum, the Planning Board's decision was supported by substantial evidence. *See id.* The Planning Board thoroughly and conscientiously reviewed the facts of the application and reached a sound conclusion.

B

Procedural and Legal Arguments

Petitioner also makes a number of arguments alleging that the Planning Board made various procedural and legal errors that mandate reversal. Chiefly, Petitioner argues that the Planning Board should have granted Petitioner "conditional" master plan approval, and that it was entitled to completely surpass comprehensive board review because the Town Zoning Ordinances allow solar projects.[6]

[5] Petitioner also maintains that the grassy field where the solar panels would be placed would remain a grassy field "but for the implementation of solar panels on it." Pet'r's Reply Mem. 9. The Planning Board was entirely free to reject the contention that a grassy field covered in solar panels is manifestly different than a natural, undeveloped, grassy field.

[6] Petitioner makes another procedural argument which may be disposed of briefly. Petitioner argues Respondents made Petitioner submit a comprehensive study, which is not necessary at comprehensive plan review. However, the Planning Board minutes show that the Planning Board only requested "conceptual" plans and that more detailed plans were coming later; Petitioner then chose to submit the DiPrete Engineering study in response to the request. Planning Board Decision ¶ 6.

i

"Conditional Master Plan Approval"

Petitioner argues that the Planning Board erred by failing to grant conditional master plan approval in order to allow Petitioner to seek a variance from the Zoning Board. To that point, Petitioner also alleges that the Planning Board overstepped its bounds by inappropriately interpreting Zoning Ordinances because planning boards are boards of limited powers and are barred from interpreting zoning ordinances. *See Mello v. Board of Review of City of Newport*, 94 R.I. 43, 49, 177 A.2d 533, 535-36 (1962) (holding that local boards do not have powers beyond what was granted to them in the enabling act). As an issue arose regarding the jurisdictions and powers of planning and zoning boards, the Court finds it necessary to enumerate the roles of each.

Every municipality in Rhode Island must have a planning board or commission. *Munroe v. Town of East Greenwich*, 733 A.2d 703, 707 n.2 (R.I. 1999) (citing § 45-22-1). Municipal planning boards have the power to "adopt, modify and amend regulations and rules governing land development and subdivision projects within that municipality and to control land development and subdivision projects pursuant to those regulations and rules." *Id*. at 706 (citing § 45-23-51). Accordingly, planning boards create comprehensive plans and review development applications to determine consistency with the comprehensive plan. *See Camara v. City of Warwick*, 116 R.I. 395, 405 n.6, 358 A.2d 23, 30 n.6 (1976) (holding that § 45-22-6 requires planning boards to prepare comprehensive plans for their respective municipalities) (citing § 45-22-6)); *West*, 18 A.3d at 536 (holding that a planning board, in reviewing an application for a development, must make a finding of consistency with the comprehensive plan in order to approve the project) (citing § 45-23-60)). Importantly, a planning board must also find a proposed project to be in compliance with the municipal zoning ordinances in order to go forward. *Id.* (citing § 45-23-60).

In turn, municipal zoning boards are empowered to hear appeals from the determinations of administrative officers made in the enforcement of the zoning laws, and in addition they may authorize deviations from the comprehensive plan by granting exceptions to or variations in the application of the terms of local zoning ordinances. *Olean v. Zoning Board Review of Town of Lincoln*, 101 R.I. 50, 52, 220 A.2d 177, 178 (1966) (citing *Garreau v. Board of Review*, 75 R.I. 44, 49, 63 A.2d 214, 217 (1949)). However, an applicant that requires a variance or a special use permit from a zoning board is required to first obtain an advisory recommendation from the planning board, as well as conditional approval, in order to obtain zoning board relief. *Sciacca v. Caruso*, 769 A.2d 578, 584 n.9 (R.I. 2001) (citing § 45-23-61(a)(1)); Section 45-23-61(a)(2).

Therefore, in our matter, the Planning Board had the duty to determine whether Petitioner's application was consistent with the Comprehensive Plan and the Zoning Ordinances. *West*, 18 A.3d at 536. The Planning Board undertook this duty and determined Petitioner's application was inconsistent with both; the evidence shows that the Planning Board did not interpret the Zoning Ordinances, but simply applied them. *See id*. The Planning Board then found that Petitioner's application was ineligible for a dimensional variance under the Zoning Ordinances—this determination was not for the Planning Board to make; this power falls solely to the Zoning Board. *Olean*, 101 R.I. at 52, 220 A.2d at 178. However, the Zoning Board caught this error and reversed the Planning Board on these grounds. There is nothing more for this Court to do—the error has been corrected.

Further, the Planning Board's error regarding eligibility for a variance is collateral to its adverse decision against Petitioner—the Planning Board's slim error does not alleviate Petitioner of the burden of undergoing Comprehensive Plan and Zoning Ordinances review. The evidence demonstrates that the Planning Board examined Petitioner's application in light of the

Comprehensive Plan, as well as the Zoning Ordinances, and found that it was inconsistent with both.

Lastly, Petitioner could not apply to the Zoning Board for a variance as a matter of right—the Planning Board's approval of the application was prerequisite to its ability to seek a variance. *Sciacca*, 769 A.2d at 584 n.9. Therefore, Petitioner can lodge no objection against the Planning Board for failing to allow Petitioner conditional approval to seek a variance because Petitioner must receive approval of its application in order to proceed. *Id*. The Planning Board may not simply rubber stamp the application. *See Coffey v. Maryland-National Capital Park and Planning Commission*, 441 A.2d 1041, 1044 (Md. 1982). Concurrently, Petitioner cannot cast blame on the Zoning Board because the application was not in its hands yet. *Sciacca*, 769 A.2d at 584 n.9.

Although the Planning Board marginally exceeded its authority, it was corrected by the Zoning Board. The Planning Board was still legally bound to consider the merits of Petitioner's application—the evidence demonstrates that the Planning Board completed its statutory duty free of other error.

ii

"Conditionally Permitted Use"

Petitioner believes that it was entitled to bypass Comprehensive Plan review. Petitioner argues that a town ordinance that allows a specific use inherently means that the use is automatically consistent with the town comprehensive plan. Translating that to our matter, Petitioner argues that because solar projects are conditionally permitted uses in RU-4 zones by the Town Zoning Ordinances, they are automatically consistent with the comprehensive plan.[7]

[7] Petitioner is correct that the Town Council amended the Zoning Ordinances in 2015 to allow utility solar projects in RU-4 zones upon the issuance of a special use permit.

Petitioner advances that the Planning Board's denial of its application is a veto of the Town Zoning Ordinances and the wishes of the Town Council.

In response, Respondents argue that just because utility scale solar projects are conditionally permitted uses does not mean a project is automatically consistent with the Comprehensive Plan. Respondents claim that the Comprehensive Plan review is not a "rubber-stamp" of applications and that automatic consistency would render planning and zoning boards useless. *Coffey*, 441 A.2d at 1044 (citing *Levin v. Livingston Township*, 173 A.2d 391, 394 (N.J. 1961) (explaining that planning boards do not merely rubber-stamp applications)).

Petitioner is incorrect; Petitioner's argument places the burden of proof on the Town. Petitioner does not believe it need make a showing of consistency, and believes the Town has the burden to disprove the validity of the project. Petitioner cites *Westminster Corp. v. Zoning Board of Review of City of Providence*, for this proposition, arguing that land uses that have been permitted by special use permit are otherwise deemed permissible uses, subject to reasonable conditions of approval, if necessary. 103 R.I. 381, 385-86, 238 A.2d 353, 356 (1968).

However, *Westminster* itself states that the purpose of the special use permit in the context of zoning "is to establish within the ordinance conditionally permitted uses" and "require[] proof that the public welfare and convenience will be substantially served . . ." *Id*. at 391, 238 A.2d at 359. The case law is clear that this burden of proof rests squarely on the petitioner—the burden of proof in a special use permit application is on the applicant. Thus, if the applicant fails to present adequate competent evidence to prove that the applicable standard for issuing a special use permit has been met, the zoning board of review must deny the application. *See Toohey v. Kilday*, 415 A.2d 732, 735 (R.I. 1980); *Dean v. Zoning Board of Review of City of Warwick*, 120 R.I. 825, 831,

390 A.2d 382, 386 (1978); *R-N-R Associates v. Zoning Board of Review of City of Providence*, 100 R.I. 7, 12, 210 A.2d 653, 656 (1965).

While it is true that allowing a use in a particular district implicitly demonstrates a legislature conclusion that the use is harmonious with other uses in the district, it still may be excluded if standards for special exceptions are not satisfied. *Perron v. Zoning Board of Review of Town of Burrillville*, 117 R.I. 571, 574, 369 A.2d 638, 640 (1977). Essentially, these permits "partake of the character of permitted uses, but they are not permitted uses." Roland F. Chase, *Rhode Island Zoning Handbook*, § 77, 160 (3d ed. 2016).

Concurrently, the Planning Board's denial of Petitioner's application is not a veto of the Zoning Ordinances; an action of a local board is only considered a veto if a planning or zoning board bars applications "under any circumstances." *Perron*, 117 R.I. at 574, 369 A.2d at 640-41. It does not remove the requirements of planning or zoning board approval. Further, there is no requirement that a town's ordinances and its comprehensive plan be completely in unison—our Supreme Court has explicitly stated "[t]here is no requirement that the zoning ordinances and comprehensive plan be identical." *West*, 18 A.3d at 541. In fact, the two are intended to work in concert. *See id*. at 535-36. One is not automatically consistent with the other. *See id*.

Here, the Planning Board did not advance a policy of automatic or unconditional denial; to the contrary, it examined Petitioner's application thoroughly in the context of the goals of the Comprehensive Plan. Only after careful examination and consideration did the Planning Board deny the application; it also did so on specific and well-articulated grounds. There has been no mutiny against the Town Zoning Ordinances or Town Council.

Petitioner also urges this Court to look to *Old Farm, LLC v. Silveira, et al.*, a prior decision of this Court, where the Middletown Zoning Board was reversed for failing to consider the merits

of an application to build a shopping center. No. NC-2012-0288, 2013 WL 399237 (R.I. Super. Jan. 28, 2013). Petitioner posits that *Old Farm* stands for the proposition that a plaintiff may proceed forward with the development of a solar facility, without regard to the comprehensive plan, if the zoning ordinances allow for the construction of solar facilities. The Court disagrees.

In *Old Farm*, the petitioner sought a special use permit to construct a 35,000 square foot shopping center. *Id*. at *1. The town's comprehensive plan allowed for the construction of these types of shopping centers if a petitioner was granted use variance and dimensional relief. *Id*. The town ordinances also allowed construction if a petitioner obtained a special use permit. *Id*. The Middletown Zoning Board did not review the merits of Old Farm's application, citing that Old Farm did not request the proper relief, and finding that the town ordinance that allowed for these types of shopping centers was invalid because it was inconsistent with the town comprehensive plan. *Id*. The Zoning Board then found it did not have jurisdiction to hear the matter. *Id*.

This Court, sitting as an appellate court, reversed, holding that the Zoning Board lacked the power to determine the validity of zoning ordinances. *Id*. at *3. The Court remanded the case and instructed the Zoning Board to consider the merits of the application. *Id*. at *6. Importantly, and contrary to Petitioner's assertion, the Court stated the following:

> "While the Board may properly consider the compatibility between Old Farm's petition for special use permits and the comprehensive plan at a hearing on the merits of the application, the Board committed error when it concluded that the comprehensive plan trumped existing zoning ordinances such that the Board lacked jurisdiction to hear Old Farm's petition." *Id*. at 5.

This language clearly finds that a board may still review an application in light of a comprehensive plan. *Old Farm* made findings on the powers and jurisdiction of a zoning board to determine the validity of town ordinances—nothing further. Thus, it is clear that *Old Farm* does not stand for the proposition that a zoning ordinance robs a board from the ability to consider an

application's consistency with a comprehensive plan—Petitioner's argument that it may surpass Comprehensive Plan review is misplaced.

In sum, the existence of conditionally permitted uses in a town ordinance does not equate to automatic consistency with the town comprehensive plan; the burden rests solely on the applicant to present adequate competent evidence to prove that the applicable standard for issuing a special use permit has been met. *Dean*, 120 R.I. at 831, 390 A.2d at 386.

C

Alleged Bias and Recusal Motion

In the natal stages of this case, it was alleged by Petitioner that Exeter Town Planner Ms. Ashley Sweet and Planning Board Member Mr. Francis DiGregorio were biased against the application and injected personal dislike for solar projects into their deliberations. Petitioner alleged that Ms. Sweet and Mr. DiGregorio improperly refused to recuse themselves and that the Zoning Board erroneously upheld their decisions. Petitioner argues that both Mr. DiGregorio and Ms. Sweet were predisposed against solar projects.

Petitioner points to Mr. DiGregorio's statements made in Planning Board meetings, such as that he believed "no solar" should be permitted in any RU-4 zone. Pet'r's Mem. 43. Petitioner also points to Ms. Sweet's memorandum, where she urged that Petitioner's application be rejected. Petitioner also objects to Mr. DiGregorio and Ms. Sweet's contact with Attorney Morris; Petitioner posits that the parties had been in contact for "months" during the process of Petitioner's application. *Id*. at 45. Both Mr. DiGregorio and Ms. Sweet strongly protested Petitioner's claims. The Zoning Board sided with both Mr. DiGregorio and Ms. Sweet.

"When an administrative agency carries out a quasi-judicial function, it has an obligation of impartiality on par with that of judges." *Champlin's Realty Associates*, 989 A.2d at 443 (citing

Town of Richmond v. Wawaloam Reservation, Inc., 850 A.2d 924, 933 (R.I. 2004)). Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, administrative tribunals must not be '"biased or otherwise indisposed from rendering a fair and impartial decision."' *Id.* (quoting *Davis v. Wood*, 444 A.2d 190, 192 (R.I. 1982)); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (holding that the Due Process Clause entitles a person to an impartial and disinterested tribunal).

At the same time, as the trial justice noted, adjudicators in administrative agencies enjoy a "presumption of honesty and integrity." *Champlin's Realty Associates*, 989 A.2d at 443 (quoting *Davis*, 444 A.2d at 192). This presumption may be overcome through evidence that '"the same person(s) involved in building one party's adversarial case is also adjudicating the determinative issues' or if 'other special circumstances render the risk of unfairness intolerably high."' *Id.* (quoting *Kent County Water Authority*, 723 A.2d at 1137). Significantly, an agency adjudicator must not become an '"advocate or participant."' *Id.* (quoting *Davis v. Wood*, 427 A.2d 332, 337 (R.I. 1981)). To maintain public confidence in the fairness of the agency's decision making, an agency adjudicator also must not prejudge a matter before the agency. *Id.* (citing *Barbara Realty Co. v. Zoning Board of Review of Cranston*, 85 R.I. 152, 156, 128 A.2d 342, 344 (1957)).

Our Supreme Court has held that a judge must recuse himself or herself when the judge possesses '"a personal bias or prejudice by reason of a preconceived and settled opinion of a character calculated to impair his [or her] impartiality seriously and sway his [or her] judgment."' *Id.* (quoting *Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174, 185 (R.I. 2008)). A finding of bias is a finding of fact; thus, the factfinder must be accorded deference on this issue. *Id.*

The standard for recusal is high—the preconceived or settled opinion of the adjudicator must '"seriously"' impair his or her impartiality or sway his or her judgment. *Id*. (quoting *Ryan,* 941 A.2d at 185). As such, this Court does not believe the actions of Mr. DiGregorio or Ms. Sweet rise to serious impartiality.

The Court believes that Mr. DiGregorio's "no solar" comment was taken out of context. The minutes of the February 27, 2018 Planning Board meeting show that Mr. DiGregorio said the following:

> "Utility scale solar systems are an industrial type use that is currently and appropriately prohibited in residential zones by our zoning ordinance. I have since come to the conclusion that utility scale solar systems are clearly in conflict with both the Comprehensive Plan and Zoning Ordinance[s] and should be prohibited in residential zones…" and "should be permitted by Special Use Permit only in locations where they are not in conflict with the Comprehensive Plan and zoning [sic], do not negatively impact abutters, and are appropriately regulated." Planning Board Minutes, Feb. 27, 2018.

It is therefore clear to the Court that Mr. DiGregorio does not display an improper bias against solar projects. Mr. DiGregorio simply does not believe it is appropriate to place industrial uses in rural/residential zones unless they are harmonious with the Comprehensive Plan and Zoning Ordinances. The fact that Mr. DiGregorio believes exceptions can be made to the bar on industrial uses in RU-4 zones removes any question of bias and is indicative of his impartiality and objectivity. Mr. DiGregorio simply made an adverse finding against Petitioner, which in itself is not sufficient to prove bias. *See Recycling, Inc. v. Commissioner of Energy & Environmental Protection*, 178 A.3d 1043, 1063 (Conn. App. Ct. 2018) (citing *State v. Fullwood*, 484 A.2d 435, 440 (Conn. 1984)).

The Court further observes that Mr. DiGregorio expressed objection to the landscaping and buffering of the property. This was a concern that was shared by many on the Planning and Zoning Boards—there is no indicia of bias in these statements and observations.[8]

Regarding Ms. Sweet, this Court finds no error in her memorandum or her statements. Ms. Sweet, as the Town Planner, has the specific task of determining whether projects are in conformance with the Comprehensive Plan. The evidence demonstrates that Ms. Sweet's conclusion was on the merits of the application—she believed that the project was too large and that large-scale utility solar projects are not rural/residential uses. At no point did Ms. Sweet render anything but her professional and learned opinion. There is no evidence in the record that shows Ms. Sweet would object to a solar project that conformed to proper standards.

Turning to the parties' contacts with Attorney Morris, both Mr. DiGregorio and Ms. Sweet explained that the representation was regarding an independent matter.[9] Specifically, Mr. DiGregorio retained Attorney Morris to challenge the July 2018 amendment to the Zoning

[8] Mr. DiGregorio was named as a defendant in his personal capacity, even though this is an administrative appeal and Petitioner has not sought any relief against him. This Court disfavors naming public officials in their personal capacity when the matter spurs from actions taken in their official capacities—such lawsuits may serve to have a chilling effect on public officials, who may worry about taking controversial actions out of fear of being sued. *See generally Mancini v. City of Providence*, 155 A.3d 159, 165 (R.I. 2017) (noting that individual liability of supervisors for official acts would create a chilling effect on decision making); *Bramesco v. Drug Computer Consultants*, 834 F. Supp. 120, 123 (S.D.N.Y. 1993) (noting that individual liability for the acts of an entity can have a chilling effect on the ability of the entity to perform). As such, Mr. DiGregorio may be protected from liability under G.L. 1956 § 9-1-31.1, which states "(b) Limitation of Liability. Notwithstanding any other law, a qualified member of a public body shall not be held civilly liable for any breach of his or her duties as such member, provided that nothing herein contained shall eliminate or limit the liability of a qualified member: (1) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (2) For any transaction from which such member derived an improper personal benefit; or (3) For any malicious, willful or wanton act."

[9] This matter is *DiGregorio v. Lawler*, Nos. WC-2018-0407, WC-2018-0590, 2020 WL 203834 (R.I. Super. Jan. 8, 2020).

Ordinances because he believed that his real property was going to be affected. [10] Regarding the representation, Mr. DiGregorio said the following:

> "I only sought outside legal counsel after I became an abutter to one of the properties requested to be rezoned by Mr. Mancini's client to permit utility scale solar systems 'by right.'" Planning Board Minutes, June 6, 2018.

Mr. DiGregorio was free to retain counsel to protect his rights. The record is devoid of evidence that Attorney Morris ever represented or advised Mr. DiGregorio and Ms. Sweet regarding Petitioner's application.

In sum, this Court finds nothing that it believes seriously impaired the impartiality or swayed the judgment of either Mr. DiGregorio or Ms. Sweet. *Ryan,* 941 A.2d at 185. The holding of the Zoning Board is affirmed.

IV

Conclusion

This Court holds that the decision of the Planning Board was supported by substantial evidence and that the Planning Board made no meaningful errors of law. Nor does this Court believe Mr. DiGregorio or Ms. Sweet demonstrated personal bias against Petitioner's application. Petitioner's appeal is denied. The decision of the Zoning Board affirming and denying the holdings of the Planning Board is affirmed. Petitioner's requests for attorney's fees is denied.

[10] Mr. DiGregorio did in fact recuse himself from this matter when it was before the Planning Board. Mr. DiGregorio is clearly aware and sensitive to issues of impartiality.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Green Development, LLC v. Town of Exeter Zoning Board of Review, et al.**
CASE NO:	**WC-2018-0519**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**April 20, 2020**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**John O. Mancini, Esq.; Nicholas J. Goodier, Esq.; William M. Dolan, Esq.; Elizabeth M. Noonan, Esq.; Nicholas L. Nybo, Esq.; John Tarantino, Esq.; William K. Wray, Jr., Esq.**
For Defendant:	**Stephen J. Sypole, Esq.** **Michael DeSisto, Esq.**