STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: April 18, 2024)

THOMAS & CYNTHIA SCULCO,	:	
Plaintiffs/Appellants	:	
	:	
v.	:	
	:	
TOWN OF HOPKINTON ZONING BOARD OF REVIEW SITTING AS THE BOARD OF APPEAL, JONATHAN URE, RONNIE J. SPOSATO, DANIEL HARRINGTON, III, JOSEPH A. YORK, DANIEL C. BARUTI, PHILIP SCALISE, CLIFFORD HEIL, JR., named in their official capacities as members of the TOWN OF HOPKINTON ZONING BOARD OF REVIEW SITTING AS THE BOARD OF APPEAL, and the TOWN OF HOPKINTON PLANNING BOARD, RON PRELLWITZ, EMILY SHUMCHENIA, CAROLYN LIGHT, AL DIORIO, KEITH LINDELOW, JOHN PENNYPACKER, CECIL WAYLES, named in their official capacities as Members of the TOWN OF HOPKINTON PLANNING BOARD, and RI-95, LLC,	:	**C.A. No. WC-2022-0243**
Defendants/Appellees	:	

DECISION

LANPHEAR, J. Before this Court is Appellants Thomas and Cynthia Sculco's (collectively the Sculcos) appeal from the June 23, 2022 decision of the Hopkinton Zoning Board of Review, sitting as the Board of Appeal (the Zoning Board), which upheld the Hopkinton Planning Board's approval of RI-95, LLC's master plan application. Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

I

Facts and Travel

The Sculcos' appeal challenges the Planning Board's approval of RI-95's master plan application for an approximately eighty-one-acre commercial solar array and a 15,000 square foot accessory storage facility on an undeveloped parcel of land that abuts their property. The subject property is located in the Town of Hopkinton at 0 Palmer Circle, Assessor's Plat 11, Lot 47A, and consists of approximately 251.96 acres. The Property is one of the parcels that was rezoned in 1990 to house the planned Brae Bern resort hotel project.

A

Background

In 1990, the Brae Bern Limited Partnership, Mary Palmer, and James Romanella & Sons, Inc., were planning to build a hotel resort in Hopkinton, RI on parcels currently identified on the Tax Assessor's maps as Plat 11, Lots 47, 47A, 47D, 38, and 39 (the Brae Bern parcels). In anticipation of the Brae Bern Project, the developers applied to the Hopkinton Town Council to rezone their parcels from RFR (residential) and Light Industrial into a Planned Unit Development (PUD) zone, to accommodate their intended uses. Because Hopkinton did not have an ordinance that provided for PUD zones at the time, the Planning Board recommended that the Town Council deny the rezone application, establish a PUD ordinance, and then have the developers reapply pursuant to such ordinance. (R., April 25, 1990 Planning Board Minutes, 3.)

On July 2, 1990, rather than follow the Planning Board's recommendation, the Town Council simultaneously created a "mixed-use planned development" designation as a new permitted use under the "Commercial Zone" section of the zoning ordinance and rezoned the Brae Bern Project parcels to that new designation, subject to certain restrictions contained in the Town

Council Meeting Minutes. (1990 Town Council Minutes, 248-254; R., July 2, 1990 Hopkinton Zoning Ordinance Amendment (1990 Zoning Ordinance Amendment).) Shortly thereafter, in an unexpected turn of events, the Brae Bern Project was abandoned by the developers; however, the rezone and accompanying restrictions remained in effect.

In 1994, the Brae Bern zone was reclassified as a Commercial Special district when Hopkinton updated its zoning ordinance. The newly established "special" districts were composed of parcels that had been previously rezoned by the Town Council subject to use limitations, restrictions, and conditions. The updated ordinance expressly provided that "[t]he terms of such limitations, conditions, and/or restrictions shall continue to be applicable to each said property and shall be deemed readopted and incorporated herein." (Hopkinton Zoning Ordinance (1994), § 4.)

Later, in 2011, the Assistant Town Solicitor for Hopkinton issued an opinion to the Town's Building and Zoning Official stating that the restrictions imposed on the Brae Bern parcels only applied if the land was used for a "mixed-use planned development," otherwise any uses generally permitted in a commercial zone would be allowed. (R., January 18, 2011 Memorandum from Assistant Town Solicitor (2011 Assistant Solicitor's Mem.).) In reliance thereon, the zoning official issued a letter echoing that opinion to Roy Dubs, a developer who was interested in building on some of the Brae Bern parcels. (R., February 1, 2011 Correspondence from Zoning Official.) Subsequently, after the Town added Photovoltaic Solar Energy Systems (PSES) as a permitted use in commercial zones in 2016, the Planning Board approved two solar developments, approximately five acres each, on parcels subject to the Brae Bern rezone – specifically Plat 11, Lots 47D and 47 – in 2018 and 2019, respectively (Palmer Circle I & II solar projects). (R. May 5, 2021 Planning Board Meeting Transcript, 5:4-13.)

B

Zoning Certificate and Preapplication Meeting

In 2019, RI-95's principal, Vincent Marano, approached Hopkinton town officials with the intent of developing a solar project on the Property. Before moving forward with the project, Mr. Marano requested an official determination that solar was a permitted use on the Property. On December 27, 2019, the Town's Zoning Official issued a Zoning Certificate for the Property. On December 31, 2019, an amendment to the Certificate was issued, indicating that use code 486, commercial solar installation, was a permitted use for the subject property.

On February 5, 2020, the Planning Board conducted a preapplication meeting for RI-95's planned solar development, entitled Stone Ridge at Hopkinton.

On March 30, 2020, then-Hopkinton Town Solicitors issued a confidential written opinion to the Planning Board regarding the applicability of the Brae Bern restrictions. The solicitors' memorandum stated that "a commercial special district allows for all current commercial uses, including use 486 allowing PSES installations." Further, the solicitors opined that, "in this particular case, a Court [would] likely resolve any ambiguities regarding uses in favor of the landowner under the doctrine of equitable estoppel" due to the applicant's reliance on the 2011 interpretations from the assistant solicitor and zoning official as well as the 2019 Zoning Certificates. Accordingly, the solicitors concluded that the Planning Board should read the Commercial Special district as allowing all current commercial uses because if the Board were to decide otherwise, "it would trigger a court challenge that would result in an overruling of the Board." (R., March 30, 2020 Memorandum from Hopkinton Town Solicitors (2020 Solicitors' Mem.), at 1, 5-6.)

C

Master Plan Review

On June 15, 2020, RI-95 applied to the Planning Board for master plan approval for the Stone Ridge project. The application was certified complete on September 8, 2020, after a resubmission to include missing materials. The Planning Board held hearings on the application on seven different dates over nine months.

October 7, 2020 Planning Board Hearing

The Planning Board conducted the first master plan public information meeting for the Stone Ridge proposal on October 7, 2020. The Sculcos' property directly abuts the subject property. The Sculcos appeared with counsel at the meeting and formally objected to the application on the grounds that the Brae Bern rezone did not allow for the large-scale solar use proposed by RI-95.

Planning Board Vice-Chairman's April 7, 2021 Facebook Comment

In addition to objecting to the Stone Ridge solar proposal, the Sculcos simultaneously submitted a petition to the Town Council requesting that it amend the Hopkinton Zoning Ordinance to prohibit large-scale solar developments throughout the Town. Their petition was proceeding before the Town Council at the same time the Stone Ridge application was being considered by the Planning Board.

It is alleged, not established, that: On April 6, 2021, the Westerly Sun published a letter to the editor from a Hopkinton resident which criticized the proposed solar amendment and referred to the Sculcos as "mean-spirited, Johnny-come-lately, yuppy, NIMBYs who seem hell-bent to turn our rural town into snobby suburbs." (R., Mimi Karlsson, Letter to the Editor, *Letter: I'm Worried about Hopkinton's farmers*, WESTERLY SUN, April 6, 2021.) The letter was also posted onto

Facebook on April 7, 2021. The Vice-Chair of the Planning Board, Ronald Prellwitz, added a comment to the post, stating: "Remember, the Sculcos have an agenda, they are land developers." (R., April 7, 2021 Facebook Comment.) By publicly commenting on the post, Mr. Prellwitz also caused the letter to be reposted to his Facebook wall. In response, on April 15, 2021, the Sculcos' counsel sent a letter to counsel for the Planning Board requesting that Mr. Prellwitz either recuse himself or be disqualified from considering RI-95's master plan application based on his public comment about the Sculcos. (R., April 15, 2021 Letter from Sculcos' Counsel.)

May 5, 2021 Planning Board Hearing

At the May 5, 2021 Planning Board hearing, the Sculcos again requested that Mr. Prellwitz recuse himself from hearing the application based on his Facebook comment. (R., May 5, 2021 Planning Board Meeting Transcript, 24:16-27:18.) The Planning Board Chairman left it up to Mr. Prellwitz to decide whether he ought to recuse himself. *Id*. at 29:11-16. Mr. Prellwitz chose not to recuse, stating: "My attorney told me if I recuse I would be admitting guilt to something, and I don't think I did anything wrong." *Id*. at 30:21-24.

At the same hearing, the Planning Board also unanimously voted in favor of a motion to find that the doctrine of equitable estoppel prevented the Town from changing its mind concerning the lawful use of the Property for solar projects. *Id*. at 4:13-7:3. The Planning Board's determination that it was equitably estopped from finding that the Brae Bern restrictions prevented solar use was based on (1) the 2011 interpretations from the Assistant Town Solicitor and zoning official; (2) the Planning Board's prior approval of the Palmer Circle I and II solar developments; and (3) RI-95's reliance on the 2019 Zoning Certificates issued to it which reaffirmed the prior determinations regarding the use of the Property. *Id*. at 4:22-7:3.

Planning Board Decision

Following the May 5, 2021 meeting, the Planning Board held two more master plan review hearings before voting on the application on July 21, 2021. (Planning Board Decision, 1-3.) On July 21, 2021, the Planning Board decided to grant RI-95's master plan application by a vote of three to two with Members Alfred DiOrio, Ronald Prellwitz, and Carolyn Light voting in favor and Members Emily Shumchenia and Keith Lindelow voting against. (R., July 21, 2021 Planning Board Meeting Transcript, 101:21-102:8.)

D

Appellate Travel

On August 20, 2021, the Sculcos appealed the Planning Board's Decision to the Zoning Board, sitting as the Board of Appeal, and argued (1) that the Brae Bern rezone does not allow for the Stone Ridge solar development; (2) that it was error for Mr. Prellwitz not to recuse himself from hearing RI-95's application; and (3) that it was error for the Planning Board to vote that it was bound by equitable estoppel to find that the Stone Ridge project was a permitted use. The Zoning Board held hearings on the appeal on October 21, 2021 and March 30, 2022 before unanimously voting to uphold the Decision of the Planning Board on June 16, 2022. The Zoning Board issued a written decision on June 23, 2022. (R. Zoning Board Decision.) The Zoning Board's Decision set forth the following conclusions of law:

> "1. The Planning Board's determination that the use of the subject parcel as a PSES was a permitted use was reasonable and based on a fair reading of the zoning ordinance.
>
> "2. Because the Planning Board's determination, based on the multiple consistent interpretations of the Zoning Ordinance, that the use of the subject parcel as a PSES was a permitted use was reasonable, [the Zoning Board] does not consider the issues of equitable estoppel or the non-recusal of a member of the Planning Board." *Id*. at 10.

On July 8, 2022, the Sculcos timely appealed the Zoning Board's Decision to this Court.

II

Standard of Review

The Superior Court's review of a decision of a zoning board of review, sitting as a board of appeal, is governed by § 45-23-71(d), which provides:

> "The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of appeal 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 that are:
>
> > "(1) In violation of constitutional, statutory, ordinance, or planning board regulations provisions;
> > "(2) In excess of the authority granted to the planning board 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 45-23-71(d).

When reviewing an appeal from a decision of a board of appeal, the Court "shall consider the record of the hearing before the planning board[.]" Section 45-23-71(c). "This Court 'lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute . . . findings of fact for those made at the administrative level.'" *Revity Energy LLC v. Hopkinton Zoning Board of Review*, No. WC-2021-526, 2022 WL 17249332, at *6 (R.I. Super. Nov. 21, 2022) (quoting *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986)). "The judgment of the board will be affirmed if the Court 'can conscientiously find that the board's decision was supported by substantial evidence in the whole record.'" *Id.* (quoting *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004)). Substantial evidence is '"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 the Town of North Kingstown*,

818 A.2d 685, 690 n.5 (R.I. 2003) (quoting *Caswell v. George Sherman Sand & Gravel Co.*, 424 A.2d 646, 647 (R.I. 1981)). However, questions of law are not binding upon this Court and "may be reviewed to determine what the law is and its applicability to the facts." *Narragansett Wire Co. v. Norberg*, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977).

III

Analysis

A

Brae Bern Restrictions

The Sculcos primarily argue that the Planning Board erred in granting RI-95's master plan application because the Brae Bern rezone restrictions prohibit the proposed Stone Ridge project's solar uses. As noted above, when the Town Council rezoned the Brae Bern parcels in 1990, it did so subject to certain restrictions contained in the July 2, 1990 Town Council Minutes. (1990 Town Council Minutes, 248-254.) One such restriction, contained in paragraph 11(b) of the Minutes, provided:

> "The maximum number of structures and the uses in this zone permitted in connection with this project shall be as proposed:
>
> "i. one hotel and one conference center having a combined total of 200 rooms;
>
> "ii. one country club;
>
> "iii. 165 units of residential housing;
>
> "iv. one 18 hole golf course." *Id.* at 252.

The Sculcos assert that the Town Council intended this restriction to serve as an exhaustive list of what is permitted on the rezoned Brae Bern parcels. They contend that the restriction necessarily prohibits any non-enumerated uses, such as solar, from occurring on those parcels.

In response, the Zoning Board argues that its interpretation of the Brae Bern amendment should be given deference because it was reasonable and based on a plain reading of the pertinent

ordinances. Specifically, the Zoning Board relied on seven consistent determinations issued by Hopkinton town officials between 2011 and 2020 which all concluded that the Brae Bern amendment allows not only those mixed-uses that had been approved for the Brae Bern Project, but also the other permitted 'by right' uses for a commercial zone.[1] *See* Zoning Board Decision, 9-10. However, only two of those seven determinations provide a substantive interpretation of the language of the Brae Bern amendment and only one of those two considers the additional restrictions contained in the Town Council Minutes.

The first interpretation of the Brae Bern amendment was provided by a former Assistant Town Solicitor in a 2011 memorandum to the building and zoning official. In his memorandum, the Assistant Solicitor asserted that "the Town Council did not require, and I don't believe that it could, that the [Brae Bern parcels] be used for the singular purpose of the 'Mixed-use planned development.'" (2011 Assistant Solicitor's Mem., 2.). Contrary to the Assistant Solicitor's assertion, the Town Council was expressly authorized by G.L. 1956 § 45-24-4.1 to require that rezoned lots be used for a singular purpose. *See* G.L. 1956 § 45-24-4.1 (1988 Reenactment). Section 45-24-4.1, which was in effect at the time of the Brae Bern amendment, but has since been repealed, provided in pertinent part:

> "Provided, however, notwithstanding the provisions of § 45-24-2 the town or city council *may in approving a zone change limit the change to one (1) of the permitted uses in the zone* to which the subject land is rezoned, *and impose such limitations and conditions and restrictions, including without limitation, . . . upon the use of land as it deems necessary*." *Id*. (emphasis added).

[1] The seven consistent determinations relied upon by the Town include: (1) the 2011 Assistant Town Solicitor's legal opinion; (2) the 2011 zoning official's correspondence; (3) the Planning Board's approval of Palmer Circle I in 2018; (4) the Planning Board's approval of Palmer Circle II in 2019; (5) the December 27, 2019 Zoning Certificate issued to the Applicant; (6) the December 31, 2019 amendment to that Zoning Certificate; and (7) the 2020 Town Solicitors' legal opinion. (Zoning Board Decision, 9-10.)

Acting on this authority as a condition for granting the Brae Bern rezone, the Town Council imposed the use restrictions contained in paragraph 11(b) of the July 2, 1990 Minutes on the rezoned parcels in order to limit the use of that land to the proposed Brae Bern Project uses. (1990 Town Council Minutes, 248-254.)

However, the Assistant Solicitor neglected to even acknowledge the existence of the paragraph 11(b) use restrictions in his memorandum. The additional restrictions contained in the 1990 Town Council Minutes are key. The 1994 update to the Hopkinton Zoning Ordinance expressly provided that, with respect to commercial special districts, any use restrictions previously imposed by the Town Council were formally readopted and thus still applicable. (Hopkinton Zoning Ordinance (1994), § 4.) The Assistant Solicitor's 2011 legal opinion is inapplicable to the instant dispute because the Sculcos' central argument – that the Brae Bern parcels are beholden to strict use limitations – is rooted in the language of those additional restrictions in paragraph 11(b) of the 1990 Town Council Minutes.

The second interpretation of the Brae Bern amendment was provided by former Town Solicitors in their 2020 memorandum to the Planning Board. The 2020 memorandum addressed the alleged conflict between the "mixed-use planned development" description contained in the language of the July 2, 1990 zoning ordinance amendment and the aforementioned paragraph 11(b) use restrictions imposed by the Town Council. (2020 Solicitors' Mem. at 3-5.) The "mixed-use planned development" was described in the amended ordinance as "combining any of the permitted uses listed in items 1 through 15 above and hotels or motels, conference centers, golf

courses, swimming areas, country clubs and central facilities for water distribution and waste treatment."[2] (1990 Zoning Ordinance Amendment.)

The solicitors asserted that if the 11(b) restrictions were controlling for all future development applications on the Brae Bern parcels, the two provisions would be in conflict because the ordinance language described the "mixed-use planned development" designation as encompassing all of the other "Commercial Zone" permitted uses while the 11(b) restrictions strictly limited the use of the land to the proposed Brae Bern Project uses. As such, they concluded that the 11(b) restrictions should be interpreted as applying exclusively to the defunct Brae Bern Project because applying them to future projects on the Property would render the description contained in the language of the amended ordinance superfluous.

However, counsel's conclusion – that the 11(b) restrictions should be applied exclusively to the Brae Bern Project applicants rather than to the rezoned land in general – "is plainly inconsistent with venerable and settled principles in the law of land use." *Preston v. Zoning Board of Review of Town of Hopkinton*, 154 A.3d 465, 468 (R.I. 2017). Our Supreme Court in *Preston* established that "a zoning authority is not free to impose [an occupant specific] condition on the use of land. It is well settled that the law of zoning governs the use of the land itself, not those who occupy it." *Id*. On the other hand, the imposition of specific restrictions on the rezoned land in general was clearly authorized by § 45-24-4.1. *See Sweetman v. Town of Cumberland*, 117 R.I. 134, 150, 364 A.2d 1277, 1288 (1976) ("[The language of § 45-24-4.1] clearly indicates that the council may limit the application of the conditions to those parcels which are rezoned by amendment, and that identical conditions need not be imposed on land in the same use category,

[2] The phrase "permitted uses listed in items 1 through 15" encompassed all of the other "Commercial Zone" permitted uses in existence at the time of the July 2, 1990 amendment.

but not covered by the amendment.").[3] Thus, the only reasonable interpretation of the 11(b) restrictions is that they travel with the land.

Moreover, in reaching their conclusion, the solicitors misconstrued the scope of the July 2, 1990 amendment to the "Commercial Zone" section of the zoning ordinance. The solicitors interpreted the adopted ordinance language as pertaining specifically to the Brae Bern parcels when, in actuality, it served to establish a new "Commercial Zone" permitted use, which the Brae Bern land was then specifically incorporated into by reference. The term "permitted use" is defined in the Hopkinton Zoning Ordinance as "[a] use by right which is specifically authorized in a particular zoning district." (Hopkinton Zoning Ordinance (1989-present), § 2.) Thus, by establishing "mixed-use planned development" as a permitted use, the Town Council made the amendment generally applicable to the commercial zoning district, rather than specific to the Brae Bern parcels. Therefore, because the adopted ordinance language is generally applicable to the commercial use category and the 11(b) restrictions are specific to the Brae Bern parcels, the two provisions are not in conflict: the specific restrictions are controlling.

Accordingly, this Court finds that the Zoning Board erred in relying on the prior determinations from Hopkinton town officials to uphold the Planning Board's master plan approval for the Stone Ridge solar project because those determinations misconstrued the Brae Bern amendment such that they are clearly erroneous. Under the Town's current zoning scheme, the proposed Stone Ridge uses are prohibited on the Property because the rezoned Brae Bern parcels are limited to the maximum number of structures and uses enumerated in paragraph 11(b) of the July 2, 1990 Town Council Minutes.

[3] This case was superseded by statute in 1994 after § 45-24-4.1 was repealed, but it was binding in 1990 at the time of the Brae Bern rezone.

B

Equitable Estoppel

The Sculcos next assert that the Planning Board erred when it found that it was bound by estoppel to conclude that the Stone Ridge solar project was a permitted use on the Brae Bern parcels because the Planning Board lacks jurisdiction to apply equitable estoppel. They further assert that the Zoning Board erred in failing to address the equitable estoppel issue on appeal. The Zoning Board counters that it could not address the estoppel issue on appeal because it lacks jurisdiction to apply equitable estoppel. The Zoning Board's decision refused to consider the issue of equitable estoppel. On appeal, the Zoning Board's memorandum did not address the Sculcos' argument that the Planning Board lacked jurisdiction to apply equitable estoppel. Despite the Zoning Board's position, RI-95 maintains that both the Planning Board and Zoning Board had jurisdiction to apply equitable estoppel.

Under G.L. 1956 § 8-2-13, "[t]he superior court shall, except as otherwise provided by law, have exclusive original jurisdiction of suits and proceedings of an equitable character and of statutory proceedings following the course of equity[.]" Conversely, planning boards, like zoning boards, "are creatures of statute; hence they possess only the powers, rights, duties, or responsibilities conferred upon them by the Legislature." *Zeilstra v. Barrington Zoning Board of Review*, 417 A.2d 303, 309 (R.I. 1980) (citing *Hassell v. Zoning Board of Review of East Providence*, 108 R.I. 349, 351-52, 275 A.2d 646, 648 (1971)). Notably, there are no Rhode Island statutes that convey any equitable powers upon either planning boards or zoning boards. Further, the Rhode Island Supreme Court has held that a zoning board is "without jurisdiction to consider the principle of equitable estoppel[.]" *Town & Country Mobile Homes, Inc. v. Zoning Board of Review of City of Pawtucket*, 91 R.I. 464, 468, 165 A.2d 510, 512 (1960).

The Supreme Court has recognized that a zoning board can make an equitable determination but only under the limited factual circumstances in which a valid building permit is issued prior to a change in the municipality's zoning ordinance that, on its face, renders the permit invalid. *See Shalvey v. Zoning Board of Review of City of Warwick*, 99 R.I. 692, 693-700, 210 A.2d 589, 590-94 (1965); *Tantimonaco v. Zoning Board of Review of Town of Johnston*, 100 R.I. 615, 621, 218 A.2d 480, 483-84 (1966). In *Shalvey* and *Tantimonaco*, the Court held that "even when an applicant acquires a permit which is valid when issued, 'unless he proceeds in good faith to incur substantial obligations in reliance thereon, the permit may be vacated or revoked because of subsequently adopted amendments to the zoning ordinance which prohibit the proposed use of the land.'" *Tantimonaco*, 100 R.I. at 620, 218 A.2d at 483 (quoting *Shalvey*, 99 R.I. at 698, 210 A.2d at 593). As a means of effectuating that holding, the Court recognized the authority of municipal zoning boards "to determine in an exercise of the factfinding power conferred upon them by the enabling act the extent to which substantial performance was undertaken in reliance on the permit in good faith." *Shalvey*, 99 R.I. at 700, 210 A.2d at 594. Neither *Shalvey* nor *Tantimonaco* stand for the proposition that a planning board or zoning board can freely apply equitable estoppel as it sees fit. Rather, both of those cases required a determination that the applicant acted in substantial reliance on the issuance of a building permit.

The limited circumstances of *Shalvey* and *Tantimonaco* are not currently before this Court. Here, no building permit had ever been issued to RI-95 for the Stone Ridge solar project and solar was never actually a permitted use of the Property. The only thing that had been issued to RI-95 prior to the estoppel determination was the 2019 zoning certificate, which was based on prior misinterpretations of the Brae Bern amendment. The Supreme Court has held that equitable

estoppel does not apply to a government official's misapplication of the law because to hold otherwise

> "'would undermine the integrity and structure of our state government because it would allow every government official to act as his own mini-legislature, cashiering those laws he or she dislikes, is ignorant of, or misinterprets, and instead molding the law to be whatever the government official claims it to be[.]'" *Martel Investment Group, LLC v. Town of Richmond*, 982 A.2d 595, 600 (R.I. 2009) (quoting *Romano v. Retirement Board of the Employees' Retirement System of Rhode Island*, 767 A.2d 35, 39-43 (R.I. 2001)).

Further, the Court has expressly provided that "a zoning certificate is not legally binding." *Parker v. Byrne*, 996 A.2d 627, 633 (R.I. 2010).

Accordingly, any contention that the Planning Board lawfully applied the doctrine of equitable estoppel is without merit. The Planning Board lacked both jurisdiction and a sufficient basis upon which to apply equitable estoppel. The Planning Board's estoppel vote was nothing more than a creative, tactical maneuver which unnecessarily sidetracked the issue, stifled discussion, and skewed the vote on RI-95's master plan application. Compounding the error, the Zoning Board erred by not addressing the Planning Board's unauthorized estoppel determination when it was presented on appeal. While it is true that the Zoning Board did not have authority to apply equitable estoppel itself, it had a duty, pursuant to § 45-23-70, to point out "prejudicial procedural errors" committed by the Planning Board and to reverse such errors when necessary.

C

Alleged Bias and Non-Recusal

Although the disposition here is already clear, another issue must be addressed. The Sculcos also argue that the Vice-Chair of the Planning Board evidenced a bias against them through his social media conduct and should have recused himself from considering RI-95's master plan application.

"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 v. Tikoian*, 989 A.2d 427, 443 (R.I. 2010) (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.'" *Green Development, LLC v. Town of Exeter Zoning Board of Review*, No. WC-2018-0519, 2020 WL 1983047, at *13 (R.I. Super. April 20, 2020) (quoting *Champlin's Realty Associates*, 989 A.2d at 443); *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, . . . adjudicators in administrative agencies enjoy a 'presumption of honesty and integrity.'" *Champlin's Realty Associates*, 989 A.2d at 443 (quoting *Davis v. Wood*, 444 A.2d 190, 192 (R.I. 1982)). "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 v. State (Department of Health)*, 723 A.2d 1132, 1137 (R.I. 1999)). "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)).

"Rhode Island's standard for disqualification based on bias or prejudice is well-settled." *Id.* at 444. 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*. at 443 (quoting *Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174, 185 (R.I. 2008)).

Here, it is alleged that while the Planning Board was actively considering RI-95's master plan application – which the Sculcos had formally objected to at a hearing before the Planning Board – Vice-Chair Ronald Prellwitz reposted a negative article about the Sculcos on his Facebook wall and commented on the post that "the Sculcos have an agenda, they are land developers." (R., April 7, 2021 Facebook Comment.) While the Vice-Chairperson's conduct may not rise to the level of that of the CRMC members in *Champlin's Realty Associates*, it may still justify disqualification based on the appearance of a preconceived and settled opinion regarding the Sculcos and their motives for opposing solar development at a time when they were actively opposing a solar development proposal before the Planning Board.

Rhode Island's Code of Ethics requires that "public officials and employees must adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be open, accountable, responsive, avoid the appearance of impropriety, and not use their position for private gain or advantage." G.L. 1956 § 36-14-1. To advance that goal, the Code of Ethics prohibits members of municipal boards from participating in their official capacity on matters in which they may have "any interest, financial or otherwise, direct or indirect" and requires that members disclose this potential conflict. *See* §§ 36-14-4, 36-14-5, 36-14-6, and 36-14-7. The Ethics Commission has stated that a board member who is an abutter to a property being considered before the board may have his or her "personal vested property rights . . . affected as a result of the decision" and clearly advises that, "whenever such a matter appears before . . . a member of [a zoning board,] he [or she] should (a) notify the [board], in writing, of the nature of his [or her]

interest in the matter at issue, and (b) recuse from any participating or vot[ing] as a [zoning board] member in connection with said matter." R.I. Ethics Commission Advisory Opinion No. 95-27.

It is not this Court's role to jump into an ethics controversy on its own or even to address a close call, particularly when it will have little effect on the underlying result. The Ethics Commission is designed to regulate such controversies. Where it is beyond doubt that officials have gone too far and circumvented the established principles of fair play or have subverted their commission's actions, the courts will step in. *See Champlin's Realty Associates* (upholding the Superior Court trial justice's decision to conduct an evidentiary hearing regarding an agency chairperson's bias and subsequent finding that he should not have taken part in the agency's decision).

While the Court does not ignore the issue, it need not reach the issues concerning the Vice-Chairperson's refusal to recuse himself. A remand would be inappropriate because this Court's decision is based on errors of law as set forth above. The Court finds the conduct highly questionable and leaves the issues for coordinate agencies of government. It notes, however, the Vice-Chairperson cast the deciding vote in a 3-2 tally; and, as a result, this case continued through the zoning board, to this Court, and three years of litigation, involving numerous counsel.

IV

Conclusion

The erroneous application of the Brae Bern amendment requires reversal of the Zoning Board decision. For the reasons stated herein, this Court grants the Sculcos' appeal and reverses the Zoning Board's decision upholding the Planning Board's approval of RI-95's master plan application. The application of RI-95 is therefore denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Sculco v. Town of Hopkinton Zoning Board of Review Sitting as the Board of Appeal, et al.**
CASE NO:	**WC-2022-0243**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**April 18, 2024**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**Peter F. Skwirz, Esq.; Andrew M. Teitz, Esq.**
For Defendant:	**Stephen J. Sypole, Esq.; Kenneth J. Sylvia, Esq.; Christopher J. O'Connor, Esq.; William Landry, Esq.**