STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: May 27, 2022]

DANIEL ZEVON, HOLLY ZEVON, JOSEPH MARINO, JESSICA MARINO, CARL SWANSON, CAROL SWANSON, A. RONALD MANCINI, M. DRAKE PATTEN, WRIGHT DETER, JUSTEN DIMAIO, KATE DIMAIO, WALTER LAWRENCE, CLARA LAWRENCE, CHRISTINE MORETTI, MATTHEW MORETTI	:	
V.	:	**C.A. No. PC-2019-6129**
RONALD ROSSI, SOUTHERN SKY RENEWABLE ENERGY RI—NATICK AVE-CRANSTON LLC, and MICHAEL SMITH, KEN MANSON, STEVEN SPIRITO, ROBERT STROM, FREDERICK VINCENT, KATHLEEN LANPHEAR, ANNE MARIE MACCARONE, JOSEPH MORALES and ROBERT DESTEFANO, in their capacities as Members of the Cranston City Plan Commission, MATTHEW GENDRON, THOMAS BARBIERI, CHRISTOPHER BUONANNO, JOY MONTANARO, PAULA MCFARLAND, CRAIG NORCLIFF, ROBERT COUPE, DONALD ROACH, JR. and JOSH CATONE, in their capacities as Members of the City of Cranston Zoning Board of Review sitting as the Platting Board of Review	:	

VOGEL, J. Daniel and Holly Zevon, Joseph and Jessica Marino, Carl and Carol Swanson, A. Ronald Mancini, M. Drake Patten, Wright Deter, Justen and Kate DiMaio, Walter and Clara Lawrence, and Christine and Matthew Moretti (collectively, Appellants) bring this appeal from a

May 13, 2019 decision of the City of Cranston Zoning Board of Review sitting as the Platting Board of Review (the Platting Board). The Platting Board upheld a decision of the Cranston City Plan Commission (the Plan Commission), which had approved the Master Plan Application (Application) of Southern Sky Renewable Energy RI—Natick Ave-Cranston LLC (Southern Sky or Applicant). In the Application, Southern Sky sought to build a solar farm referred to as the Natick Solar Project (the project) on property located in Western Cranston. This Court exercises jurisdiction over this matter pursuant to G.L. 1956 § 45-23-71. For the reasons set forth herein, the Court remands the case to the Plan Commission to reopen public comment in accordance with appropriate notice requirements. The Court denies Appellants' request for the Court to disqualify the vote of Plan Commission Chair Michael Smith (Smith) for bias.

I

Background

a. Cranston Plan Commission

On November 9, 2018, Southern Sky filed an application with The City of Cranston Planning Department to build a 29.7-acre solar farm on property which it would lease from Ronald Rossi (Rossi).[1] That parcel is identified as Assessor's Plat 22-3, Lots 108 and 119 and is zoned A-80. (Application). It is located in Western Cranston.

The "Project Narrative" accompanying the Application stated that Rossi would lease approximately 29.7 acres of land to Southern Sky to "develop, install, and operate an[] 8.1-megawatt (dc) ground mounted solar energy field." *Id.* The Natick Solar Project would generate electricity for sale to National Grid. *Id.* Southern Sky represented that it would comply with all applicable city ordinances, and that the proposed project is a permitted use under the Cranston

[1] The application was signed by Ronald Rossi but submitted on behalf of Southern Sky.

Zoning Code and is consistent with the Comprehensive Plan. *Id*. Southern Sky stated that the farm would meet all the dimensional requirements for Cranston's A-80 zone. *Id.* Southern Sky further represented that its construction of the solar farm would accommodate wildlife with a raised six-foot perimeter fence, would maintain the existing perimeter vegetation, and would create a buffer planting plan to visually screen the solar panels from neighboring properties. *Id*.

The Plan Commission held public Informational Meetings on the Application on December 4, 2018, January 8, 2019 and February 5, 2019.

At the first Informational Meeting, Joshua Berry (Berry), Senior Planner for the City of Cranston Planning Department, provided attendees with an overview of the plan. (Tr. 2:21-24, Dec. 4, 2018.) He reviewed emails received from members of the public, presented the staff memo, and recommended conditional approval of the Application. *Id.* at 50:25-56:7. Counsel for Southern Sky, along with its president, project manager, and landscape architect, commented in support of the project. *Id*. at 7:24-20:24; 21:2-22:21; 23:18-30:18; 34:1-38:25. Counsel for Southern Sky described his client's submission as conceptual rather than a final plan. *Id*. at 8:11-22.

Nine members of the public, including counsel for Appellants, spoke in opposition to the proposed Master Plan Application. *See generally id.* at 57:3-101:12. Appellants raised concerns over potential damage from blasting, the project's effect on wildlife, and the overall impact on their residential neighborhood. *Id.* at 57-101. They requested that the Plan Commission conduct a site visit. *Id*. Appellants' attorney urged the Plan Commission to postpone approval of the Application to enable his clients to challenge the contention that the project was consistent with the Plan. *Id.* at 78:1-7. At the conclusion of the December 4, 2018 meeting, the Commission voted to revisit the matter at the next scheduled session on January 8, 2019 and, in the interim, to conduct a site visit. *Id*. at 124:7-126:11.

On December 8, 2018, the Plan Commission visited the proposed project site in the company of members of the public and Appellants' attorney. (December 8, 2018 Minutes.)

On January 3, 2019, counsel for Southern Sky emailed the city planner to advise that his client intended to relocate the panels to the west and southwest areas of the lot but that Southern Sky would finalize the design after approval of the Master Plan Application. (Jan. 3, 2019 Email.) In response, Berry revised the staff recommendation memo; it continued to recommend approval but added five additional conditions. (Staff Draft Recommendation Memo 1/4/19). Before the second Informational Meeting, the Appellants engaged the services of a land use consultant, Ashley V. Sweet (Sweet). Sweet concluded the project was consistent with neither the Comprehensive Plan nor the zoning ordinance. (Sweet Report at 20.)

During this same time frame, Appellants provided Berry with six specific requests—namely, that:[2]

1. There be a distance to project setback;
2. Their property be protected to prevent damage from mechanical manipulation by requiring inspections of their septic systems, wells, and foundations before and after any mechanical manipulation;
3. Southern Sky provide additional housing for Appellants and their pets during ledge removal;
4. The work be performed only from 9:00 am to 5:00 pm Monday through Friday, excluding holidays;
5. Southern Sky use only of organic seed mix for planting under the panels, which seed mix would be consistent with types of seeds planted in New England, and no herbicides or other hazardous chemicals be used under the panels; and
6. Southern Sky fund an escrow account to cover any potential loss in property values. (Requests from Abutters.)

On January 8, 2019, the Plan Commission resumed the public informational meeting that began on December 4, 2019. (Tr. 2:15-17, Jan. 8, 2019.) During this session, members of the public

[2] The "Natick Ave Solar Project Requests from Abutters January 2019" does not indicate which abutters joined in with the request.

voiced their objections. *Id*. at 48:13-50:13, 82:24-105:12. A land development expert engaged by Southern Sky reported that he found that the project would comply with all applicable ordinances and the Cranston Comprehensive Plan. Sweet shared her report in opposition to that opinion. *Id*. at 43:4-47:1, 59:15-78:12. Additionally, counsel for Southern Sky and the project manager for its engineering firm addressed the revision to the previous plan removing and relocating solar panels on the site. *Id.* at 21:20-25:12. Southern Sky also presented a representative of a blasting company who expressed his familiarity with Tennessee Gas Pipeline's (TGP) and the State's blasting requirements. *Id*. at 32:1-37:4.

Jason M. Pezzullo, the City of Cranston Planning Director, opined that the proposed project is permissible under the Comprehensive Plan. He referenced unidentified decisions from the Rhode Island Superior Court supporting that conclusion. *Id*. at 109:24-110:4. He noted that this would be the fourth or fifth solar project in Cranston. *Id*. at 110:15.

At the end of the second Informational Meeting, the Plan Commission voted to close public comment. *Id*. 117:9-19. The Plan Commission voted to continue the matter to February 5, 2019 to enable Southern Sky to provide an updated site map with the new solar panel locations. The Plan Commission also voted to add the six requests submitted by the abutters as conditions to the Master Plan approval, to encourage a dialogue between the abutters, staff and Southern Sky. *Id.* at 129:13-130:25.

Following the January 8, 2019 meeting, the staff, Southern Sky and the abutters exchanged a series of emails. On January 10, 2019, Berry emailed counsel for Southern Sky to request a revised site plan and to seek responses to the six requests submitted by the abutters. Berry assured counsel that Southern Sky was not obligated to comply with the requests but merely to address them. (Email from Berry, Jan. 10, 2019.) Counsel for Southern Sky replied that he would review

the requests but that he would not respond until after the approval of the Master Plan application. (Email from Counsel for Southern Sky, Jan. 10, 2019.)

On January 23, 2019, counsel for Southern Sky responded to the abutters' requests in a letter to Pezzullo. (Letter to Pezzullo, Jan. 23, 2019). He noted that Southern Sky had provided a conceptual overview of the expected buffers and had submitted a revised site plan. In the event of blasting, all proper protocols would be followed along with all federal and state requirements. He offered to test direct abutters' wells, with their permission, before beginning blasting. Counsel reiterated that Southern Sky would follow safety procedures to ensure that the abutters did not sustain property damage. He indicated that Southern Sky would follow the hours of operation consistent with the city ordinances. Southern Sky offered to build a footpath or walking trail on Appellant M. Drake Patten's farm at Southern Sky's expense. However, Southern Sky refused to provide an escrow account to compensate abutters for potential change in property values in the absence of data suggesting that Natick Solar Project would negatively impact property values. *Id.*

On January 25, 2019, Southern Sky provided Berry with its most recent site plan. (Jan. 25 Email.)

On January 29, 2019, Berry stated in an email to Plan Commission Chair Michael Smith (Smith): "After the January 8th meeting, I recall you stating that you had really strong sources about the environmental impacts of solar development. I'm curious if you could share those with me, I'd like to talk a look." (Jan. 29 Email, 2:06 pm.) Smith responded:

> "[T]here have been a plethora of climate change stories published over the past couple of weeks. The one on the front page of today's Journal is typical of the dire consequence that have been and will be affecting us locally- unless we do our very best to reduce the carbon footprint. That's the basic premise underlying my decision on the matter." *(*Jan. 29 Email, 2:29 pm.)

Smith suggested Berry should feel free to use the materials he provides to him but that he would "link them back to their source - mostly federal government (EPA)." *Id*.

Smith sent these documents to Berry noting that they came from "multiple sources, as reputable as I could find." (Jan. 29 Email, 8:20 pm.) These sources included:

1. The Environment is Everyone's Business: Renewable Energy has Potential to Create Wave of New Jobs from ecoRI News;
2. The Stats on CO_2 Reduction of Solar Farms which included data from the EPA;
3. Concerns over Natick Solar Proposal written by Eric Beecher; and
4. Environmental Impact of Agriculture from Wikipedia. *Id*.

On January 31, 2019, the staff submitted an addendum to its Staff memo and also provided the Plan Commission with multiple exhibits demonstrating that solar installations are consistent with the Comprehensive Plan.[3] (Staff Addendum to Memo, Jan. 31, 2019.) The addendum recommended adding conditions for approval in response to the abutters' requests relating to the Buffer Plan, Protection of Property, and Wildlife and Pollinator Protections. *See Id.* at 8-10.

Before the February 5, 2019 Informational Meeting, the Staff again modified its memo by adding additional conditions to the recommended approval of the Application. (Staff memo, Feb. 4, 2019.)

[3] The exhibits included: (A) 2015 document which described the steps to passing Ordinances 7-15-04 and 7-15-15, (B) Plan Commissions' answers to a letter from Councilman Stycos regarding Ordinances 7-15-04 and 7-15-15, (C) PC- 2015-5506, *United States Investment & Development Corporation v. Robert Strom, et al.* Complaint (D) PC-2016-5739. *United States Investment & Development Corporation v. The Platting Board of Review of the City of Cranston, et al.* Complaint, (E) Portion of the public meeting for Hope Farm 10 MW Solar Array, (F) PC-2015-5506 *United States Investment & Development Corporation v. Robert Strom, et al* Affidavit of Planning Director Peter Lapolla regarding Ordinances 7-15-04 and 7-15-15, (G) PC-2016-5739, *United States Investment & Development Corporation v, The Platting Board of Review of the City of Cranston, et al,* Decision, and (H) PC-2015-5506, *United States Investment & Development Corporation v. Robert Strom, et al.* Order on Cross Motions for Summary Judgment and Judgment.

On February 5, 2019, the Plan Commission held the final informational meeting regarding the Natick Solar Project. (Feb. 5 Minutes.) Berry presented the final Staff Memo and explained the updated site map to show the new location of the solar panels. (Tr. at 3-4, Feb. 5, 2019.) Berry noted the Abutters' Requests and Southern Sky's Responses. *Id*. at 7:14-19. He acknowledged that, since public comment closed during the last meeting, staff and select commissioners have received additional correspondence expressing opposition to the plan. However, he stated that the staff recommendation remained unchanged. *Id*. at 10:17-25.

Commissioner Vincent (Vincent) proposed, and the Commission approved, an additional condition to the Master Plan approval—that the City hire its own landscaper to review all the buffering plans and would establish a committee to oversee those plans. *Id*. at 28:29:16.

Smith shared that he had conducted his own research on climate change and offered that, based upon his review of the Environmental Protection Agency website, the Natick Solar Project would benefit future generations. *Id*. at 34:7-37:24.

Counsel for the Appellants objected to the introduction of evidence produced after the close of public comment, and, in particular, the addition into the record of over 100 pages of "data, information, and evidence." *Id*. at 39:18-24. He noted that his clients were not given an opportunity to respond to the January 23, 2019 letter submitted to the Planning Director by Southern Sky. *Id*. at 44:24-45:14. He urged the Commission to reject the application. Id. 45:12-14.

Counsel for Southern Sky indicated that his client had no objections to the added conditions referenced both in the Final Staff memo and at the February 5, 2019 information meeting. *Id*. at 51:10-11.

The Plan Commission voted to approve the Master Plan with a 5-to-4 vote. *Id*. at 54:20-24.

On February 11, 2019, the Plan Commission issued its written decision conditionally approving the Master Plan application. (Plan Commission Decision) In the decision, the Plan Commission adopted the findings of facts set forth in the Staff Memos. (Staff Memos Jan. 31, 2019 and Feb. 4, 2019, Plan Commission Decision) The Plan Commission approved the Master Plan application subject to 13 conditions: the 12 conditions recommended by staff and an additional condition proposed by Vincent at the February 5, 2019 Informational Meeting. *Id.*, (Tr. 28:29:16, Feb. 5, 2019.) Accordingly, the approval was subject to the following:

1. The applicant shall use an inclusive approach with the direct abutters to develop an effective buffering plan. The applicant will demonstrate that they have considered the abutter's request for buffer widths, both the understory and canopy so as to appear naturalized, focus on native species and include a mix of maturities, coniferous and deciduous species.
2. The applicant shall submit the Buffering Planting Plan to the Conservation Commission for review and comments as part of the Preliminary Plan process. Required changes to the Buffering Planting Plan (including buffer widths) may result in alterations to the current proposed layout of the solar installations. The widths of the buffers will be required to be as wide as necessary to effectively screen the solar panels and equipment. Required widths may vary depending on the topography or other site conditions.
3. Under the provisions of the City of Cranston's Subdivision Regulations Section III (C)(9), a professional landscape architect will be hired by the City to conduct an independent peer review on any and all buffer plans proposed. As part of its independent review, the Commission's landscape architect seek input and information from an Advisory Committee composed of the developer's representative, a Planning Department representative, a Commissioner appointed by the Chair of the Plan Commission; and two representatives of the neighborhood - one of which should be an abutting property owner. The Advisory Committee shall follow the intent of Condition of Approval #1.
4. The applicants shall receive Preliminary DPR approval prior to submission of a Preliminary Application with the Planning Department.
5. The applicant will work with the Tennessee Gas Pipeline (TGP) to ensure that the project will be consistent with the terms and conditions of the easement.
6. The Preliminary Plan site plan shall provide the dimension of the curb opening on Natick Avenue.

7. The development shall follow existing grades as much as possible, where changes are required, they shall be kept as minimal as possible. In the event of ledge or rock, removal of such shall be mechanical as much as possible.
8. Storm water management shall follow existing topography and utilize R.I.D.E.M Best Maintenance Practices (BMP's) to ensure conformance to City code. Said plan shall attempt to enhance any conditions (existing and proposed) at, to or near adjacent wetlands and Natick Avenue.
9. As discussed at the DPR pre-application meeting, any transmission lines and/or utility pole relocations within the Natick Avenue Right-of-Way are carefully coordinated with the appropriate utilities.
10. The applicant will demonstrate that they have considered testing wells of direct abutters (with their permission) prior to any blasting activities and the blasting company (if utilized) will follow the customary procedures for pre-blasting inspections of surrounding properties.
11. Seed mix to be used under panels shall be organically sourced (non GMO or otherwise enhanced seeds) and consist of local seed varieties that would be found in NE meadows.
12. Control of growth under the panels must be limited to mechanical methods. No herbicides or other chemical means may be used to control growth under the panels.
13. During the Development Plan Review phase, the applicant will work with the Planning Department to explore the feasibility of the proposed walking trail as offered in SSRE's letter to Jason Pezzullo, dated January 23, 2019, signed by Robert D. Murry of Taft & McSally, LLP (February Staff Memo Exhibit K). (Plan Commission Decision, Feb. 11, 2019.)

b. Zoning Board of Review sitting as the Platting Board of Review

Appellants took a timely appeal from the Cranston Plan Commission's Decision to the Cranston Board of Review sitting as the Platting Board of Review. (Appeal, Mar. 1, 2019.) On appeal, Appellants contended that the Plan Commission Decision was based upon "prejudicial procedural error, clear error, and lack of support by the weight of the evidence in the record." *Id*. Specifically, Appellants argued that their procedural and substance rights were prejudiced because

> "improper and prejudicial *ex parte* communication and site visit(s) between commission members and the developer and its agents which served to, *inter alia*, prejudice the rights of my clients, interested persons, abutters and the public
>
> "improper and prejudicial inclusion of a multitude of evidence and data in the record after close of the public hearing with no opportunity of the public and my clients to meet such evidence and data with countervailing evidence and data which served to, *inter*

> *alia*, prejudice the rights of my clients, interested persons, abutters and the public
>
> "improper consideration of changes and modification to the project area and the master plan initially proposed, after close of the public hearing which served to prejudice the rights of my clients, interested persons and the public." *Id*.

The parties submitted memoranda in support of their respective positions, and, on May 8, 2019, the Platting Board heard the appeal. (Hearing before Platting Board, May 8, 2019.) The hearing consisted solely of argument of counsel. Pertinent to this decision, counsel for the Appellants argued that his clients were not given an opportunity to comment on the revised site plan modifying the boundaries of Southern Sky's proposed lease and decreasing the leasehold estate from 29.7 to 27.3 acres. *Id*. at 15:16-20. The revisions to the site plan provided a new location for 500 solar panels, but Appellants were not afforded the opportunity to review and comment on this change. *Id*. at 16:7-8. Counsel noted that Appellants were unable to confront the voluminous exhibits added to the final Staff Memo. *Id*. at 19:3-14. Counsel claimed that Smith was biased and was predisposed to voting in favor of the Application based upon his personal focus on climate change. Counsel complained that Smith improperly had conducted independent private research on the issue. *Id*. at 21:16-18. Counsel argued that Smith made his decision based on outside research and prejudice. *Id*. at 25:16-20. However, counsel acknowledged that Appellants did not have direct evidence that Smith's decision was based upon his predisposed view that the project would be beneficial to fighting climate change. *Id*. at 64:15-67:10.

Counsel further challenged the communication from Smith to Berry after the close of public comment when Smith provided Berry with materials outside the public record. *Id*. at 23:11-13.

Counsel for Southern Sky argued that the Plan Commission had the right to close the public comment and that there were no improper *ex parte* communications because the Plan Commission is permitted to communicate with its staff. *Id.* at 40-43:8-11. He concluded by contending that the Appellants failed to meet their burden and that the decision of the Plan Commission should be affirmed. *Id*. at 48:15-18.

Counsel for the Plan Commission defended the procedures followed by the Commission and argued that the Plan Commission had made the required findings of fact. *Id*. at 49:18-51:25. He concluded that the Plan Commission's findings were precise on every issue and included conditions which addressed the abutters' needs. *Id*. at 61:6-10.

The Platting Board of Review acknowledged that the chair of Plan Commission acts in a quasi-judicial role. *Id*. at 83:10-16. However, after considering Appellants' concerns about Chair Smith's *ex parte* conduct and alleged prejudice, the Platting Board of Review rejected the contention for failure of Appellants to meet the required burden required to sustain that argument. *Id*. at 94:14-19.

On May 13, 2019, the Platting Board issued a written decision denying the appeal and affirming the decision of the Plan Commission conditionally granting Southern Sky's Master Plan Application. (Platting Board Decision.) In its decision, the Platting Board reviewed the facts and travel of the proceeding before the Planning Board. The Platting Board noted that members of the public attended the site visit to the property on December 8, 2018. *Id*. at 1. The Board found that the Plan Board voted to approve the application after considering "hearing … the presentation of Objectors, extensive public comments." *Id.* The Platting Board concluded that the "Plan Commission made the required findings that the Application met the requirements contained in

the City of Cranston Subdivision and Land Development Regulations and the Cranston Zoning Code." *Id.*

The Platting Commission noted that the Appellants focused their appeal on claimed "Prejudicial Procedural Error." *Id.* at 2. The Platting Commission addressed the Appellants' claim that Smith conducted research on global warming and had *ex parte* communications with Plan Commission staff. The Commission found "that the actions of Chairman Smith when advocating for the project . . . was not Prejudicial Procedural Error which warranted a reversal or remand of the Decision." *Id.* at 3. The Platting Commission found that the Plan Commission staff "properly advised the Plan Commission during the hearings and that public comment on the application was lengthy and comprehensive." *Id.* The Platting Board concluded that "the Plan Commission did not commit prejudicial procedural error by closing public comment on the application when it did during the multiple hearings. *Id.*

The Platting Board did not address Appellants' argument that they were not given an opportunity to review and address revisions to the site plan which provided a new location for 500 solar panels or the admission of over 100 pages of material after the close of public comment.

Appellants took a timely appeal to this Court from the decision of the Platting Board.

II

Standard of Review

In reviewing decisions of the Zoning Board of Review sitting as the Platting Board of Review, the Superior Court utilizes the judicial review standard as provided in § 45-23-71, which govern appeals of a decision by zoning board of appeals to the Superior Court. [4] It provides:

[4] Here, the Zoning Board of Review sat as the Platting Board of Review for an appeal from a decision of the Cranston City Plan Commission. *See* § 45-23-66; City of Cranston's Subdivision and Land Development Regulations § XI.

> "The court shall not substitute its judgment for that of the . . . board [of review] 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 which are:
> "(1) In violation of constitutional, statutory, ordinance or planning board 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(c).

Section 45-23-70(a) provides that "[t]he board of appeal shall not reverse a decision of the planning board or administrative officer except on a finding of prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record."

The Superior Court reviews the decisions of a plan commission or board of review under the traditional judicial review standard applicable to administrative agency actions. *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977). The Superior Court does not conduct a *de novo* review of such decisions. *Id*.

III

Analysis

a. Post-public-comment submissions

Appellants complain that, after the Plan Commission closed public comment, the Commissioners accepted over 100 pages of exhibits into evidence, which Appellants had no opportunity to confront. They further claim that the Public was not afforded the opportunity to review and comment on the revised site plan in which Southern Sky relocated 500 solar panels.

Appellees dismiss these concerns and argue any additional materials offered into evidence after the Commissioners closed public comment were minor and no prejudicial error occurred. They stress that the project is at the Master Plan stage of review, and there will be more opportunities for the public to address the application before construction is approved. Southern Sky notes that no revisions to the Master Plan materially affected it. Southern Sky further argues that the "series of nights of hearings and a site visit" met the statutory requirement for oral and written comment. (Southern Sky Mem. Facts and Law 14.)

The Court notes that the City of Cranston's Subdivision and Land Development Regulations provides for an informational meeting as set forth below:

> "(c) Informational Meeting - A public informational meeting shall be held prior to the Planning Commission decision on the master plan, unless the master plan and preliminary plan approvals are being combined, in which case the public informational meeting shall be optional. In such case, review stages may be combined only after the Planning Commission determines that all necessary requirements for all stages so combined have been met by the applicant.
>
> "(1) Public notice for the informational meeting is required and shall be given at least seven (7) days prior to the date of the meeting in a newspaper of general circulation within the City. Postcard notice shall be mailed by the applicant to all property owners within the notice area. The notice area for informational meetings shall be one hundred (100') feet from the perimeter of the parcel being subdivided or developed in all zoning districts. Cost of all advertising shall be borne by the applicant.
>
> "(2) At the public informational meeting the applicant, or his or her representative(s) shall present the proposed development project for the benefit of the Planning Commission and the public. The Planning Commission shall allow oral and written comments from the general public. All public comments shall be made part of the public record of the project application." City of Cranston's Subdivision and Land Development Regulations § V(F)(2)(c).

This requirement is clear. It mandates that the Plan Board hold a public informational meeting with notice to property owners. This precludes the Planning Board from voting on the Application until the public is given the opportunity to submit oral and written comments on the Application. If the Commission chose to accept additional evidence, whether in the form of over 100 pages of material or a revised site plan after public comment was closed, or both, it was incumbent on the Planning Board to reopen the session for additional comment before voting on the Master Plan Application. That requirement cannot be avoided merely because the Appellees characterize the additional evidence as insignificant or because Berry suggested that the additional information did not impact his recommendation to approve the Application. Regardless of the opportunities afforded the Appellants to voice their opposition to the Application and to visit the site, they were denied the chance to comment on submissions added to the record after the close of public comment. The applicable local regulations and state law mandate that the Appellants have the right to comment on whatever evidence was added to the record before the Commissioners voted on the Master Plan Application. By depriving them of that right, the additional submissions are tantamount to *ex parte* communications.

The Rhode Island Supreme Court has held "no litigious facts should reach the decision maker off the record in an administrative hearing." *Champlin's Realty Associates v. Tikoian*, 989 A.2d 427, 440 (R.I. 2010) (citing *Arnold v. Lebel*, 941 A.2d 813, 821 (R.I. 2007)).

Further, "under § 42–35–9(e) and § 42–35–10(4), if the decision maker 'intends to consult any documentary source or person concerning facts or opinions about the merits of an appeal,' he or she must notify the parties so that they may 'contest any such evidence' and 'cross-examine any people consulted.'' *Id*. at 441. While the prohibition on *ex parte* communications applies to

communication with agency staff members, "communication regarding general matters [are] permissible." *Id*.

Normally, the appropriate remedy for an *ex parte* communication is to "remand to the agency for supplementation of the record with the *ex parte* communications to be included to allow the parties to appropriately respond and cross-examine." *Id*. at 442. Here, the challenged materials were added to the record at the last session, but after public comment closed. Adding materials to the record after closing public comment is no different than when a decision maker relies on such materials without making sure they are placed on the record. Either way, they are not subject to challenge by interested parties. In this case, the Plan Commission closed public comment prematurely and failed to reopen it after receiving additional evidence into the record. The applicable ordinance guarantees the Appellants the right to review and comment on that evidence, and that right cannot be denied by dismissing the submissions as insignificant.

Nonetheless, the Court would not order remand of the case to the Plan Commission to correct a non-prejudicial error. The Court notes that many of the voluminous materials included in the February 5, 2019 exhibit were copies of court cases. Although Appellants' counsel may have wanted the opportunity to address the applicability of those cases to the Southern Sky project, the failure of the Commission to afford him that opportunity would not rise to the level of denying the Appellants their right to comment on the proposed project.

However, the Plan Commission received a revised site plan after the close of public comment. Admittedly, the public will have additional opportunities to comment on the project before it is approved, and the approval of the Master Plan Application does not foreclose them from doing so. However, the Plan Commission voted to approve the Application based on what was before them, and that included a revised site plan. Before voting on the Application, the Plan

Commission was required to afford the public the opportunity to review the revised site plan and to comment on the changes that were made to the original submission. Implicit in affording the public the right to comment on a Master Plan Application is the right to review the application as it appears before the Plan Commission before the vote. The Plan Commission either closed public comment prematurely or should have reopened it when additional evidence was added to the record.

b. Smith's alleged bias

Although this case will be remanded to the Plan Commission to reopen public comment, the Court first must address Appellants' contention that Smith should be disqualified for bias. The Commission approved the application by a vote of 5 to 4, making Smith's vote a deciding one. (Tr. 54:20-24, Feb. 5, 2019.) Appellants argue that Smith engaged in improper *ex parte* communications and demonstrated a predisposition toward approving the Master Plan application and argue that he should have been disqualified from voting on the application. Appellees counter that Smith's conduct did not constitute improper *ex parte* communications and did not rise to the level that would warrant disqualification. They defend his emails to Berry and the outside research he provided to him as permissible communication with staff on general matters. *See Champlin's*, 989 A.2d at 441. The Court disagrees.

Rhode Island General Laws § 42-35-13 "prohibits *ex parte* communication with anyone about contested or material adjudicatory facts or opinions concerning the merits of an applicant's pending appeal." *Arnold*, 941 A.2d at 820. The statute states:

> "members or employees of an agency assigned to render an order or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except

> upon notice and opportunity for all parties to participate." G.L. 1956 § 42-35-13.

The purpose of this prohibition "is to prevent litigious facts from reaching the decision-maker off the record in an administrative hearing." *Arnold,* 941 A.2d at 820. However, the prohibition is not absolute, as "§ 42-35-13 authorizes hearing officers to engage in *ex parte* communication with agency staff members about general matters pertaining to the discharge of his or her duties. General matters would include 'private communications concerning procedure or timing.'" *Id*. at 821. Specifically, the statute states "but any agency member: (1) [m]ay communicate with other members of the agency, and (2) [m]ay have the aid and advice of one or more personal assistants." Section 42-35-13.

In *Champlin's,* appellants alleged that certain Coastal Resources Management Council (CRMC) Commissioners had demonstrated bias in favor of Champlin's application to expand its marina on Block Island and that they should have been disqualified from voting on the application. *Champlin's,* 989 A.2d at 440. The trial justice conducted an evidentiary hearing,[5] and found the conduct of three commissioners, Michael Tikoian, Gerald Zarrella and Paul E. Lemont, to be so egregious and biased as to warrant disqualification. *Id.* at 435. Specifically, Tikoian had pressured the subcommittee members to favor a compromise plan prepared by a staff member and threatened a subcommittee member that he would not be reappointed by the Governor when his term expired if he opposed the compromise plan. Tikoian also engaged in improper contact with the Governor's office keeping them apprised of the status of the application. *Id.* at 444. Zarrella had demonstrated personal animosity toward the Town in favor of Champlin's application when he told town officials that Champlin's was "entitled to this expansion" and that islanders who opposed to it were

[5] In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. GL § 42-35-15(f)

"naïve." Like Tikoian, he acted as an advocate and abdicated his role as an impartial decision maker. *Id.* at 445.

The third commissioner, Lemont, had *ex parte* communications in connection with the staff-created compromise plan and had accompanied Tikoian to meet with the Governor to discuss the proposal. At the evidentiary hearing, Lemont admitted "that he was influenced by outside pressures." *Id.* at 446. The trial justice deemed Lemont disqualified based on this in-court admission.

On appeal, the Supreme Court upheld the trial judge's decision disqualifying Tikoian and Zarrella, because she based her findings of bias on legally competent evidence. However, the Court reversed the trial judge's decision as to Lemont. The Court found that, even though Lemont engaged in impermissible *ex parte* communications, his conduct did not rise to the level requiring disqualification. *Id.* at 448-449. The Court found that the Lemont's in-court statement constituted part of his mental process and thus was improperly elicited from him. *Id.* at 447-48. The Court reasoned that Lemont held a quasi-judicial role and as such, he was immune from testifying about his "mental process in evaluating the evidence and reaching a decision." Id. at 439. Having stricken that statement from consideration, the Court found that "the remaining legally competent evidence [was] far too flimsy" to justify disqualifying him. *Id*. at 447. Although he had improper *ex parte* communications in connection with the staff created compromise plan and accompanied Tikoian to meet with the Governor, Lemont did not pressure anyone to favor his viewpoint. Id. at 447-449. The Court noted that disqualification is a severe sanction. *Id.* at 447.

Champlin's provides guidance in determining whether Smith's *ex parte* communications and statement as to the "basic premise" of his vote justifies a finding of bias. Here, Smith improperly conducted outside research on climate change and reviewed an article on the Natick

Solar Project[6] and relied on that research to assist him in determining the issues before the Commission. He shared the research with staff while acknowledging that the "basic premise underlying [his] decision on the matter" was concern over "dire consequences that have been and will be affecting us locally - unless we do our very best to reduce the carbon footprint. That's the basic premise underlying my decision on the matter." (Jan. 29 Email, 2:29 pm.) Conducting research and sharing it with Berry went beyond the permissible communications between a decision maker and agency staff member about general matters. The research materials he reviewed and his communications with Berry about those materials were *ex parte* communications prohibited by § 42-35-13.

Smith notes that climate change was the "basic premise underlying" [his] vote in favor of the Master Plan application, but he does not indicate it was the sole factor he considered. Certainly, he could give more weight to one factor over another, and the Court cannot speculate as to his mental process. His words do not clearly and unambiguously suggest that he disregarded the evidence and based his vote solely on his environmental concerns. Even Appellants' counsel acknowledged that he had no direct evidence that Smith's decision was based upon his environmental concerns. (Tr. 64:15-67:10, May 8, 2019.) As an adjudicator, Smith is entitled to a '"presumption of honesty and integrity."' *Champlin's*, 989 A.2d at 443 (quoting *Davis v. Wood*, 444 A.2d 190, 192 (R.I. 1982)). Smith's statement provided an example of his mental process but was not supported by facts suggesting that he disregarded other evidence offered at the

[6] Smith reviewed and shared with Berry a published article on the proposed project before the agency written by a non-party Eric Beecher, titled "Concerns over Natick Solar Proposal."

informational meetings. Accordingly, the Court declines to interpret Smith's statement as evidence of bias that warrants disqualification.

Nevertheless, Smith violated his role to carry out a quasi-judicial function, in which he was obligated to remain impartial throughout the proceedings. *See id.* at 443. Conducting outside research and reading an article addressing the very project he would be deciding was regrettable. However, "the occurrence of *ex parte* contacts does not require disqualification in every instance." *Champlin's*, 989 A.2d at 447. In this case, the Court refrains from imposing severe sanction but cautions Smith to better insulate himself from improper *ex parte* contacts in the future.

IV

Conclusion

For the reasons set forth herein, the Court remands the case to the Planning Board to reopen public comment with appropriate notice to give Appellants and other members of the public the opportunity to review and comment on all additions to the record that were received after the close of public comment. The Court denies Appellants' request to disqualify Plan Commission Chair Smith's vote for bias.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Daniel Zevon, et al. v. Ronald Rossi, et al.**
CASE NO:	**PC-2019-6129**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 27, 2022**
JUSTICE/MAGISTRATE:	**Vogel, J.**
ATTORNEYS:	
For Plaintiffs:	**Patrick J. Dougherty, Esq.**
For Defendants:	**William R. Landry, Esq.; Robert D. Murray, Esq.**