

Before the
STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. H96 HRA 035-15/15

HUD No. 01-95-0378-8

In the matter of

Henry Blaine Gaffney
and Charlean S. Gaffney
Complainants

v.

DECISION AND ORDER

Town of Cumberland, Cumberland Zoning Board of
Review and Thomas M. Bruce III, Finance Director
Respondents

INTRODUCTION

On April 18, 1995, Henry Blaine Gaffney and Charlean S. Gaffney (hereafter referred to as the complainants) filed a charge with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission) against the Town of Cumberland, Cumberland Zoning Board of Review, and George Cross, Finance Director¹. The Town of Cumberland, Cumberland Zoning Board of Review and Thomas Bruce, III will hereafter be referred to as the respondents. (See Footnote 1 below.) The charge was also brought against N. David Bouley, Town Planner. The complainants alleged that the respondents and Mr. Bouley discriminated against them with respect to interference with complainants' rights to own, enjoy and utilize their property free from discrimination due to race and color, violations of Section 34-37-5.1 of the Rhode Island Fair Housing Practice Act and of Section 818 of the Fair Housing Act, 42 U.S.C. Section 3617. This charge was investigated. On July 17, 1997, Preliminary Investigating Commissioner Randolph Lowman assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the respondents and Mr. Bouley violated the provisions of Section 34-37-5.1 of the General Laws of Rhode Island. On April 4, 1999, a Notice of Hearing and Complaint issued. The Complaint alleged that the respondents and Mr. Bouley discriminated against the complainants with respect to interference with complainants' right to own, enjoy and utilize their property free from discrimination based on race and color. A hearing on the Complaint was held on August 23, 2000 before Commissioner Camille Vella-Wilkinson.

¹ Thomas M. Bruce III is the current Finance Director, so he has been substituted for George Cross.

On June 5, 2001, the Commission issued a Decision and Order.

The Decision and Order held that the complainants did not prove by a preponderance of the evidence that Mr. Bouley discriminated against them with respect to interference with complainants' rights to own, enjoy and utilize property because of their race and color in violation of R.I.G.L. Section 34-37-5.1. The Commission dismissed with prejudice the Complaint against Mr. Bouley. That dismissal was not appealed and therefore Mr. Bouley is no longer a respondent in the instant case.

The Decision and Order held that the complainants proved that the Town of Cumberland, Cumberland Zoning Board of Review and the Finance Director discriminated against them with respect to interference with complainants' rights to own, enjoy and utilize property because of their race and color in violation of R.I.G.L. Section 34-37-5.1 and ordered relief.

The respondents filed a complaint in Superior Court to appeal the Decision and Order. On November 2, 2007, Superior Court Justice Judith Savage issued a Decision (hereafter Court Decision). The Court Decision rejected the respondents' argument that the complainants² failed to exhaust administrative remedies and that the Commission Decision was in excess of the Commission's statutory authority. Overturning a portion of one of the Commission's findings of fact, the Court Decision found that the Commission Decision was affected by error of law. The Court Decision held that the Commission had erroneously concluded that the Planning Board had the authority to waive the requirement that the subdivided properties have 100 feet of frontage on a public street. The Court Decision remanded the case to the Commission for reconsideration in light of the Court Decision. In its remand, the Court Decision required that the Commission consider the liability of the Zoning Board separately from the liability of the Planning Board, taking into account their distinct responsibilities. The Court Decision provided that the Commission could consider whether the complainants sought or received guidance from the respondents in the approval process. In addition, the Court Decision provided that the remedy provided by the Commission was affected by the Commission's legal error. The Court Decision also noted that the decision of the Zoning Board was final and that the Commission could not determine the propriety of the Zoning Board decision. The Court Decision recommended that the parties consider whether they could agree that the surviving complainant (Mrs. Gaffney) would pursue a new request for subdivision and variance.

After the case was remanded to the Commission, the parties were engaged in discussions on various matters related to the Court Decision for some time and a new attorney entered his appearance for Mrs. Gaffney. On April 8, 2009, the complainant filed a response to the Commission's request for briefs on the proper application of the Court Decision. On April 10, 2009, the respondents filed a Reply. The Commission requested regulations and ordinances from the respondents which they provided.

² Henry Blaine Gaffney died while the case was on appeal.

JURISDICTION

The Commission previously found that the Commission has jurisdiction over the respondents with respect to the allegations of the Complaint and the Court Decision upheld the Commission's finding with respect to jurisdiction.

FINDINGS OF FACT

The following are the Findings of Fact made by the Commission in the original Decision and Order. The portion of one Finding of Fact which was overturned by the Court Decision has been deleted. The remaining Findings were not overturned by the Court Decision.

1. The complainants are Black.
2. The complainants have lived in Cumberland, Rhode Island since 1975. The house in which they lived was on Nate Whipple Highway in Cumberland. They were one of the few black families in town. They purchased a lot on Old Reservoir Road in Cumberland, Rhode Island. The lot was approximately 3.08 acres. There was a house on the lot. The complainants rented the house to a series of tenants. The complainants decided that they would like to subdivide the lot into three lots with three houses so that they and two of their sons could live on the property.
3. The complainants started the process to obtain approval by the Planning Board for the proposed subdivision of their property. The approval process contains four stages, the Preapplication Sketch Plan phase, the Preliminary Plat phase, the Final Plat phase and the Public Hearing. The Planning Board's approval is not final until after a Public Hearing is conducted at which abutting property owners and other interested parties may comment. Respondent's Exhibit B, pp. 8 – 11. If the Planning Board denies approval, the subdivider may appeal to the Zoning Board of Review. Respondent's Exhibit B, p. 6.
4. At the first stage, the Preapplication Sketch Plan phase, the subdivider gives the Planning Board preliminary information and the Planning Board must give either approval, in principle, approval subject to modification, or disapproval and the reasons therefor. Respondent Bouley, who was Deputy Planning Director for the Town of Cumberland from January 1990 to December 1990 and Director of Planning Development for the Town of Cumberland from December, 1990 until January 29, 1998, described the Preapplication Sketch Plan phase as follows:

... the applicant comes in with a very conceptual idea, sort

of like something on the back of an envelope. I have this much land, and if I divide it in this way, and my numbers and projections and my calculations work out; is that something that the board could be expected to approve? From that, the whole idea of this process is not to incur a lot of cost for professionals, for engineers, for surveyors if a concept, at its face isn't going to proceed or if the board is somewhat negative about it.

Trans. pp. 94-95.

5. On October 15, 1990, the complainants submitted information for the Preapplication Sketch Plan phase. Mr. John Andrews, a land surveyor, explained that the complainants were proposing to subdivide their lots into three lots with a right of way to service the lots. The Preapplication Sketch Plan clearly did not meet the Subdivision Regulation requirement that "[a]ll lots shall front on an existing or proposed public street. All lots shall have a minimum of one hundred (100) feet of frontage." Respondent's Exhibit B, p. 23, Section V(E)(1). It was explained that there was no water to these lots, that water would have to be put in. Mr. Andrews asked whether the Planning Board would accept 40 feet for a possible road. The Board voted "to grant preapplication approval to [the complainants] ... subject to the availability of water to the parcel and also language right of way be conveyed in deed." Respondent's Exhibit A, p. 1.
6. At the second stage, the Preliminary Plat stage, the subdivider is responsible for giving more complete and detailed information on the proposal. The Planning Board can give a statement of conditional approval, a statement of conditional approval subject to modifications, or a statement of disapproval and the reasons for disapproval. Respondent's Exhibit B. Mr. Joseph Simanski, a Planning Board member from 1987 to 1996, testified that the Preliminary Plat stage involves having the property surveyed, getting a professional engineer to provide the details of development, but not yet getting approval from outside agencies such as the Department of Environmental Management or the water department. Trans. p. 95.
7. The complainants went through the Preliminary Plat stage two times. On August 18, 1992, the Planning Board had a meeting on the complainants' Preliminary Plat proposal. The complainants were clear that there would be a right of way to the back two parcels. One of the Planning Board members, Mr. Simanski, stated that he would like a turn-around for emergency vehicles at the end of the proposed cul de sac. Respondent's Exhibit A, Minutes of August 18, 1992, p. 5. [When citation is made to the minutes of the Planning Board contained in Respondent's Exhibit A, the page number will not be the sequential page numbers of the exhibit, but the page number of the original minutes on that date.] The Planning Board voted to approve

the Preliminary Plat with the conditions that the proposed relocation of the garage be shown, that the proposed turn-around for emergency vehicles be shown, that the zoning be listed on the drawing, that a note be added with regard to topography and that there be ISDS (individual sewer disposal system) approval. On April 19, 1994, the complainants submitted a Final Plat proposal. The Final Plat was denied, in part because of the length of time since the Preliminary Plat was approved.

8. On July 19, 1994, the complainants submitted a Preliminary Plat proposal. Mr. Andrews, a professional land surveyor, and a professional engineer were present on behalf of the complainants. The Planning Board voted to grant Preliminary Plat approval and to move to Final Plat.
9. The Final Plat stage involves submitting a finished plat to the Planning Board for public hearing and recordation. The Planning Board reviews the Final Plat and, if it accepts it, fixes a date for public hearing on the Final Plat. Respondent's Exhibit B. Mr. Simanski testified that, with respect to the first three stages,: "There are different levels of what is to be submitted so that someone doesn't have to go out and spend a lot of money and a lot of time on a plan that conceptually wasn't a good idea." Trans. p. 97.
10. The complainants' Final Plat was considered at a Planning Board meeting on September 20, 1994. The minutes of that meeting state that Mr. Thomas Letourneau, who would be a neighbor of the complainants if the subdivision were approved, raised questions, "primarily regarding the issue of access surface water problem from the site." Respondent's Exhibit A, Minutes of September 20, 1994, p. 5. The Planning Board voted to continue the Final Plat stage "and require that petitioner bring plans up to Subdivision standards." Respondent's Exhibit A, Minutes of September 20, 1994, p. 5. The Minutes contain no clarification as to how the Plan did not meet Subdivision standards.
11. The complainants' Final Plat was considered again at a Planning Board meeting on October 18, 1994. A professional surveyor, Mr. Andrews, and a registered engineer, Ronald Kershaw, were present with the complainants. Mr. Kershaw explained his report, explained mitigating structures that were planned to deal with water run-off and stated that the "mitigating structures will reduce the storm flow from the site to less than the present run-off." He further stated that the structures "will have the effect of reducing the run-off from the Gaffney property." Respondent's Exhibit A, Minutes of October 18, 1994, p.7. Respondent Bouley noted that the Public Director had not yet signed off on the map. Ruth Howard, an abutter of the property, expressed concerns about the cesspool being too close to her well. Respondent Bouley raised concerns with maintenance of the mitigating structures and about whether the Planning Board should waive the

regulations requiring lots to be on an existing street. Respondent Bouley also brought up that 911 stated that they could not give a 911 number to the proposed lots because there was no street. Mr. Simanski discussed his problems with the houses not being on a public street. Mr. Andrews, complainants' representative, asked the Planning Board whether the complainants should continue with the process or whether it would be futile. The Minutes reflect a Motion made to deny Final Plat because of footage, no private streets, 911 numbers and the lack of a signature from the Town Engineer. However, the Minutes are apparently incomplete as there is no record of a vote. Respondent's Exhibit A, Minutes of the October 18, 1994 meeting.

12. The Minutes of the Planning Board's meeting of November 22, 1994 reflect that the public hearing for the complainants was tabled until the December meeting. Respondent's Exhibit A, Minutes of the November 22, 1994 meeting, p. 4.

13. The Planning Board held a continued public hearing on the complainants' plat on February 21, 1995. The Minutes of the February 21, 1995 meeting state that Final Plat was denied in October 18, 1994. Respondent's Exhibit A, Minutes of the February 21, 1995 meeting, p. 7. Mr. Andrews, a professional surveyor representing the complainants, asked that the Planning Board reconsider its decision to deny Final Plat and allow additional information and testimony. The Planning Board agreed to do so. Mr. Andrews presented information that the Town Highway and Sewer Superintendent stated he had no problem with the proposed surface water design. Mr. Andrews stated that he had spoken with 911 coordinators and that they told him that houses on a private road could be assigned 911 numbers. Mr. Andrews asked that the Planning Board waive the private street prohibition and the frontage requirement and said that he could satisfy the 911 requirements. He stated that he had run a test of the site and the results met all ISDS regulations. Mr. Letourneau, a neighbor of the site, talked about surface water problems. The Planning Board voted to continue Final Plat for review of 911 and to get more engineering information. The minutes state as follows:

Mr. Gaumond stated that he has no problems with the driveways along with the other Board members.

The Board members generally agreed that they have no problem with frontage.

Respondent's Exhibit A, Minutes of February 21, 1995, p. 9.

14. The minutes of the March 21, 1995 Planning Board meeting relating to

consideration of Final Plat for the complainants, start with Mr. Kershaw, a registered engineer representing the complainants, stating that the only remaining issue was the 911 house number assignment and that a letter was received from the 911 office stating that they did not have a problem with the numbering. Mr. Letourneau, a neighbor of the parcel, commented that "it was the law" that a septic system had to be 200 feet from a public water supply and that he wanted to know what made a well different from a water supply. The Planning Board voted to deny the Motion that Final Plat be approved. The minutes do not state the reason why the Motion was denied. Respondent's Exhibit A, Minutes of March 21, 1995, p. 10.

15. On April 18, 1995, a public hearing was held on the complainants' plat. Mrs. Ruth Howard, an abutter, objected to the proposal. Mr. Letourneau presented photographs of his property and notes made by Mr. Letourneau, which he described as notes of a meeting he had with the Principal Sanitary Engineer of the ISDS Section of the Department of Environmental Management. The Planning Board voted to "deny Public Hearing" and the reasons given were: "Lack of street frontage, Private road prohibited and the Subdivision is contrary to Subdivision Regulations." Respondent's Exhibit A, Minutes of April 18, 1995, p. 5.
16. The complainants appealed the denial to the Cumberland Zoning Board of Review which held a public hearing on June 14, 1995. Mr. Andrews was present along with the complainants, their sons, Mr. Letourneau and Mrs. Howard. Mrs. Howard testified in opposition to the appeal and testified about the water problem and erosion. Mr. Letourneau testified in opposition to the appeal and gave photographs of the water problem he had on his property. Mr. Andrews stated that all of the obligations and regulations required under the subdivision control law had been met except for the private drive and frontage "which was asked in the very beginning for the Planning Board to waive that requirement." Mr. Andrews also stated that "that requirement has always been in the design of the subdivision." Respondent's Exhibit A, Minutes of the Cumberland Zoning Board of Review held June 14, 1995, p. 2. The Cumberland Zoning Board of Review unanimously upheld the decision of the Planning Board and denied subdivision approval "because of the lack of street frontage, private road prohibited in this subdivision, and that it is contrary to the subdivision regulations of the Town of Cumberland." Respondent's Exhibit A, Minutes of the Cumberland Zoning Board of Review held June 14, 1995, p. 2.
17. The Town of Cumberland Subdivision Regulations that were effective in September 1987 (hereafter referred to as the Subdivision Regulations) provide that Preapplication Sketch Plans shall contain the "[I]ocation of private wells within 200 feet of the subdivision." Respondent's Exhibit B, p. 14. The Subdivision Regulations do NOT contain any explicit standard

for the distance that a septic field must be from a private well. Respondent's Exhibit B. Respondent Bouley did not testify that the required standard was that a septic system must be 200 feet from a private well. He testified that DEM [the Rhode Island Department of Environmental Management] regulates the construction of facilities but that that it was a town regulation on "making sure that a well is not too close to an ISDS system or any kind other kind of septic system ..." Trans. p. 104. He further testified that: "In a watershed, the requirement is that a survey, usually at the preliminary or final stage, has to identify all wells and all septic systems within 200 feet of the entire perimeter of a property." Trans. pp. 104-105 [Emphasis added]. While he was asked questions about whether a septic system on the complainants' property could be placed more than 200 feet from the neighbor's well, he never testified that the standard was that the septic system had to be 200 feet from a private well. Trans. pp. 105 – 107. He also testified that a septic system could not be placed 200 feet from the property lines on complainants' lot (Trans. p. 107), but there is no indication in the testimony or in the Subdivision Regulations that an ISDS system must be 200 feet from both property lines. In the minutes of the Cumberland Planning Board for March 21, 1995, Mr. Letourneau, a neighbor of the property, states that "in Cumberland it is the law that the septic system has to be 200 feet from a public water supply. He wanted to know what makes a well different from a public water supply." Respondent's Exhibit A, Minutes of the Planning Board, March 21, 1995, p. 9. There is no notation in the minutes that any of the members of the Planning Board or staff disputed Mr. Letourneau's comment that the septic system must be 200 feet from a public water supply or stated that there was a standard for the distance of a septic system from private wells. In the Cumberland Code, there is a section on location of private sewage disposal systems that provides:

The type, capacities, location, and layout of a private sewage disposal system shall comply with all recommendations of the state department of public health. No permit shall be issued for any private sewage disposal system employing subsurface soil absorption facilities where the area of the lot is less than 25,000 square feet. No septic tank or cesspool shall be permitted to discharge to any natural outlet. Cumberland Code §40-139 (Ord. of 7-8-76(2), art. XIII, §B).

The Regulations of the Rhode Island Department of Environmental Management, Division of Groundwater and ISDS Rules and Regulations Establishing Minimum Standards Relating To Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems (hereafter referred to as the DEM regulations) effective on January 2, 1990

and as amended in 1992 and 1994 provided that:

SD 2.15 Location of Wells – No person shall locate or cause to be located, any part of an individual sewage disposal system within 100 feet of a private well or within 400 feet of a public well, consistent with SD 3.05.

SD 3.05 Location – The horizontal distances between the parts of an individual sewage disposal system and the items listed in the following table shall not be less than shown: [the chart shows that the minimum distance from a private well to a distribution box, dosing tank or septic tank is 75 feet, that the minimum distance from a private well to a disposal trench, bed or chambers is 100 feet, that the minimum distance from a private well to a seepage pit is 200 feet, that the minimum distance from a private well to a building sewer is 50 feet and that the minimum distance from a private well to a privy is 50 feet.]

18. The Final Plat submitted to the Planning Board by the complainants, signed by Mr. Andrews, gives the locations of private wells. Respondents' Exhibit C. Using the scale on the plan, all three proposed parcels could contain septic systems that were more than 100 feet from abutters' wells and seepage pits that were more than 200 feet from abutters' wells.
19. The Planning Board and the Zoning Board of Review did not give the distance of proposed septic systems from private wells as a reason for denying the subdivision.
20. The Subdivision Regulations provide, under the Section on Design Standards, that "All lots shall front on an existing or proposed public street. All lots shall have a minimum of one hundred (100) feet of frontage." Respondent's Exhibit B, p. 23, Section V(E)(1). Section G of the Section on Design Standards provides that:

Where strict adherence to the design standards is not feasible due to special conditions of the land or other features of the subdivision, or where in the Board's opinion such adherence would not allow for best design, the Planning Board may vote to modify the requirement in Section V, provided that such modification is not contrary to the general intent of these Regulations. Such modification shall not include the reduction of lot standard below the requirements of the Zoning Ordinance of the Town of Cumberland.
Respondent's Exhibit B, p. 24, Section V(G).

21. The Planning Board approved a subdivision in the same Plat as complainants' proposed subdivision, called the Jason's Grant subdivision. It was built in the 1990's. This subdivision was on a hill above the property of the complainants, Mrs. Howard and Mr. Letourneau. Mr. Letourneau testified that he had opposed Jason's Grant because of his concern for surface water runoff. Trans. pp. 142-143. Mr. Gaffney had observed water running off the Jason's Grant subdivision onto Mr. Letourneau's property.
22. At the time of the denial of the complainants' Final Plat, there were other lots in Cumberland that did not front on an existing street. There were several houses that were built in the late 1980's on Diamond Hill Road, near where the complainants lived, that did not front on an existing street. Complainants' Exhibit 1. There was also a house built on Pine Swamp Road between the late 1980's and the date of the hearing in August 2000 that did not front on an existing street.
23. Mr. Simanski was a member of the Planning Board from 1987 to 1996. He testified at the Commission hearing that the Planning Board was concerned about private rights of way because of maintenance and safety and that "we just did not approve of private rights-of-way." Trans. pp. 118, 119. He further testified that: "There was a lot of problems with this subdivision right from the beginning." Trans. p. 120. The minutes of the October 15, 1990 Planning Board meeting reflect that it was Mr. Simanski who moved to grant pre-application approval to the complainants subject to the availability of water and language on the right of way being conveyed in deeds. All Planning Board members voted in favor. Respondent's Exhibit A, Minutes of the October 15, 1990 meeting. At the Planning Board meeting on August 18, 1992, Mr. Simanski stated that he would like a turn-around for emergency vehicles at the end of the cul de sac. Respondent's Exhibit A, Minutes of the August 18, 1992 meeting, p. 5. Mr. Simanski was among the Planning Board members who on that day unanimously passed a motion to approve the preliminary plat for the complainants with conditions, including identifying the proposed turn-around for emergency vehicles. Respondent's Exhibit A, Minutes of the August 18, 1992 meeting, p. 6. At the February 21, 1995 Planning Board meeting, Mr. Simanski was present and the minutes indicate that Mr.

³ This Finding of Fact went on to say: "At the time in question, the Planning Board had the authority to waive the requirement that lots shall front on an existing or proposed public street and that they have a minimum of 100 feet of frontage." This is the specific finding that was overturned by the Court Decision.

Gaumond "stated that he has no problems with the driveways along with the other Board members." The minutes also state that the Board "members generally stated that they have no problem with frontage." Respondent's Exhibit A, Minutes of the February 21, 1995 meeting, p. 9. Mr. Simanski was among those who voted to continue Final Plat for review of 911 and to get more engineering information.

24. Respondent Bouley testified that he could not recall any subdivision applications that had no frontage on an existing street that were finally approved, testifying that:

I know that board members were specifically – would specifically mention those things and it would discourage people from pursuing those because they couldn't be approved. ... [A]ll the board members that were there, they were very strenuous about saying they would not waive those regulations.

Trans. p. 99.

25. Respondent Bouley raised concerns at one of the Planning Board meetings about difficulties with the complainants' proposed subdivision. Respondent's Exhibit A, Minutes of the October 18, 1994 meeting, p. 8. He also wrote a letter to the Zoning Board of Review in June 1995 enclosing the Planning Board's minutes relating to complainants' subdivision. The letter states that the Planning Board asks that its findings be sustained by the Zoning Board of Review. Respondent's Exhibit A, Attachment to Minutes of the Zoning Board of Review.

Commission Decision and Order, pp. 2-9.

After reviewing the evidence again pursuant to the Court Decision's remand, the Commission makes the following additional Findings of Fact:

26. In 1990, the Cumberland Zoning Ordinance required that new buildings front on a public street. Cumberland Zoning Ordinance, as amended July 1990, p. 1-16c. Starting in 1994, the Cumberland Zoning Ordinance required that there be 100 feet of frontage in R-1 areas and frontage was defined as "[t]hat portion of a lot abutting a street". Cumberland Zoning Ordinance, adopted June 24, 1994, Article 4, p. 31; Article 10, No. 77, p. 103. The Planning Board did not have the authority to waive frontage requirements contained in the Town Zoning Ordinance.
27. Mr. Bouley's job as the staff member for the Planning Board was to "provide information, to meet with the applicants, to apprise them of what the next steps were, to advise them in writing what things were missing" Trans. pp. 97-98.

28. Mr. Bouley testified that "each of those steps [in the application process] is designed in such a way that the applicant has spent as little money as necessary in order to provide the information necessary and not spend too much time ... for a project that isn't going to go anywhere". Trans. pp. 112-113.
29. On many occasions when the complainants' application was before the Planning Board, their representative, Mr. Andrews, asked whether it was feasible to proceed and the Planning Board did not inform him or the complainants that it was not feasible.
30. The complainants expended a great deal of money and time in meeting the requirements set by the Planning Board over the years while their application was under review.
31. The minutes of the February 21, 1995 Planning Board meeting state, with respect to the complainants' subdivision application, that:

Mr. Gaumont stated that he has no problems with the driveways along with the other Board members.

The Board members generally agreed that they have no problem with frontage.

Respondent's Exhibit A, Minutes of February 21, 1995, p. 9.

The composition of the Planning Board did not change between the February 21, 1995 meeting and the meeting in April 1995 when the members denied the complainants' subdivision application citing lack of street frontage and private road.

32. Nine of the fourteen Planning Board members who were serving at the time of the April 1995 meeting, when the complainants' subdivision application was denied, were also serving in July 1994 when the Planning Board members present voted unanimously to give Preliminary Plat approval to complainants' subdivision application.

CONCLUSIONS OF LAW

The complainants proved that the Town of Cumberland and the Finance Director discriminated against them with respect to interference with complainants' rights to own, enjoy and utilize property because of their race and color in violation of R.I.G.L. Section 34-37-5.1.

The complainants did not prove by a preponderance of the evidence that the Cumberland Zoning Board of Review discriminated against them with respect to interference with complainants' rights to own, enjoy and utilize property because of their race and color in violation of R.I.G.L. Section 34-37-5.1.

DISCUSSION

The Court Decision required that the Commission consider the actions of the Planning Board separately from the actions of the Zoning Board of Review in light of their different responsibilities. Since the decision of the Zoning Board of Review is final and the Commission is without authority to assess the propriety of that decision at this point, the focus of the Commission is on whether the process of the respondents was discriminatory and not on whether the respondents' process led to a discriminatory decision. The Commission's focus is consistent with the allegations of the Complaint before the Commission which alleged that: "Respondents' actions have subjected the complainants to disparate treatment in comparison to white applicants, under similar circumstances". Complaint, p. 2.

THE TOWN OF CUMBERLAND CAN BE HELD LIABLE FOR THE DISPARATE TREATMENT OF THE COMPLAINANTS BY THE PLANNING BOARD

The Town of Cumberland and the Town Finance Director are named respondents in the instant suit. They are the proper parties to be held accountable for the actions of the Planning Board.⁴

When a tort action is filed with respect to the actions of a subdivision of a municipality, the municipality is the proper party. See Peters v. Jim Walter Door Sales of Tampa, Inc., 525 A.2d 46 (R.I. 1987) (the plaintiff alleged that the school committee was negligent; the municipality, not the school committee, is the proper defendant because a suit against a municipal department is a suit against the municipality itself) and Heaton v. Fillion, 2004 WL 1769683 (R.I. Super. 2004) (the police department is only a department or subdivision of the municipality and therefore the police department was not a proper party defendant in this tort claim). In East Providence School Committee v. Smith, 896 A.2d 49, 53 (R.I. 2006), the Court discussed Peters as follows: "the principles set forth in Peters are instructive with respect to the issues before us here because that opinion makes clear that the municipality, rather than the school committee, is the real party in interest when money damages are at stake". See also Hauser v. Davis, 2000 WL 1910031 (R.I. Super. 2000), which discussed the plaintiff's tort claims against a municipality for the actions of its agencies, including its planning board⁵, and ultimately denied the town's motion for summary judgment, in part because the actions of the "town agencies" did not establish a claim that they were immune under the public duty doctrine. The Planning Board is a subdivision/agency/department of the Town of Cumberland and therefore the Town of Cumberland is the proper party to answer for its actions in this case.

⁴ There are statutory provisions which require that, in some circumstances, on an appeal of a Planning Board of Appeal decision, Planning Board members must be named. See R.I.G.L. Section 45-23-71(a).

⁵ In its discussion, the Court refers to one of the counts as follows: "To the extent the plaintiff is seeking to hold the defendant town liable in tort for its approval or disapproval of development plans in the exercise of its jurisdiction through its planning board, the doctrine applies in the absence of any of the established exceptions. [Cite omitted]." *Id.* at p.7.

The Complaint before the Commission contains specific allegations against the Planning Board, Complaint, p. 2. Moreover, the evidence before the Commission at its administrative hearing specifically addressed the actions of the Planning Board, Trans. *passim*. The Town of Cumberland, therefore, was well aware that the Planning Board's actions were a subject of the hearing.

Based on the foregoing, the Commission concludes that the Town of Cumberland may be held liable for discriminatory actions of the Planning Board even though the Planning Board was not separately named in the Complaint.

THE COMPLAINANTS PROVED THAT THE TOWN OF CUMBERLAND DISCRIMINATED AGAINST THEM ON THE BASIS OF RACE AND COLOR BY SUBJECTING THEM TO DISPARATE TREATMENT IN THE PLANNING BOARD PROCESS

From the date of the first Planning Board meeting on the complainants' subdivision application, the Planning Board did not have authority by itself to waive the frontage requirements in the Town Zoning Ordinance.⁶

The Planning Board held nine substantive meetings with respect to the complainants' subdivision application. At four of those meetings, the Planning Board voted to approve the complainants to proceed to the next step or indicated that the public/private street and frontage issues were not a problem or could be overcome if the complainants took particular steps. See Findings of Fact Paragraphs 5, 7, 8, 10 and 13 above. When the complainants' representative asked, on a number of occasions, whether the application was feasible, the Planning Board did not inform him or the complainants that it was not feasible. The purpose of the Preapplication Sketch Plan phase, according to the respondents' witness, Mr. Bouley, was as follows:

... the applicant comes in with a very conceptual idea, sort of like something on the back of an envelope. I have this much land, and if I divide it in this way, and my numbers and projections and my calculations work out; is that something that the board could be expected to approve? From that, the whole idea of this process is not to incur a lot of cost for professionals, for engineers, for surveyors if a concept, at its face isn't going to proceed or if the board is somewhat negative about it.
Trans. pp. 94-95.

Mr. Bouley testified that his own role was to: "provide information, to meet with the applicants, to apprise them of what the next steps were, to advise them in writing what things were missing" Trans. pp. 97-98. The Planning Board and its staff member, Mr. Bouley, failed at the Preapplication Sketch Plan meeting and every subsequent meeting to inform the complainants of

⁶ As elucidated in the Superior Court Decision, the complainants were required, under R.I.G.L. Section 45-23-61(1) to: "first obtain an advisory recommendation from the planning board, as well as conditional planning board approval for the first approval stage for the proposed project, ..., then obtain conditional zoning board relief, and then return to the planning board for subsequent required approval(s)".

the actual process necessary to obtain approval. In the absence of the proper process for approval, the complainants' subdivision application was doomed from the start for a reason clear from the start: lack of required frontage.

The Commission finds that the complainants proved that the Town of Cumberland discriminated against them because of their race and color whether the Planning Board knew or did not know that it lacked the authority to waive the frontage requirements.

Even if the Planning Board mistakenly believed that it had the power to waive the frontage requirements, its actions with respect to the complainants were discriminatory. The analysis in the original Commission Decision and Order, concluding that the complainants proved that the reasons given by the Planning Board for its actions were a pretext for discrimination, would still apply.⁷

⁷ The analysis would change only with respect to the finding that the Planning Board had the authority to waive the frontage requirements. What would be substituted is that the Planning Board held the incorrect belief that they had the authority to waive the frontage requirements. The concluding paragraph of the analysis was as follows:

Looking at all of the evidence presented, the Commission finds that the reasons given by respondents are a pretext for discrimination. The Commission found contradictions between the testimony of respondents' witnesses and the other evidence. Respondents' witnesses testified that a private road in a subdivision would cause rejection. However, there was evidence that other subdivisions with private roads had been approved, the Planning Board [believed that it] had the authority to waive the private road restriction and the Planning Board members gave Preapplication Sketch Plan approval and Preliminary Plat approval to the proposal knowing that it had a private road and less than 100 feet of frontage. Mr. Simanski, a former Planning Board member who testified about how subdivisions with private roads were denied by the Planning Board, himself suggested conditions on the private road of complainants during two meetings and voted preliminary approval. If the frontage on a public road requirement was the real reason why the subdivision was denied, why was it not denied at the first hearing? The purpose of the Preliminary Sketch Plan phase was to spare expense to applicants who had untenable proposals. Other circumstances highlighted in testimony, but not cited in respondents' decisions, were unconvincing. Mr. Gaffney was unsure whether respondents' actions were motivated by discrimination, while Mrs. Gaffney believed that discrimination was the cause. The complainants were one of few black families in the town and their proposal would have resulted in three black households in one area. Given the lack of credibility of the testimony of respondents' witnesses, the evidence that complainants' proposal was not treated in the same way as other subdivision proposals and the evidence that a proposal should be rejected at the Preapplication Sketch Plan phase if it contained intractable problems, the Commission finds that the proffered reasons given by the respondents were pretexts for discrimination. See Des Verges v Seekonk Water District, 601 F.2d 9 (1st Cir. 1979) (A municipal

Likewise, if it is the case that the Planning Board understood that it did not have the authority, by itself, to waive the frontage requirements, the complainants proved that the Planning Board discriminated against them because of their race and color. The Fair Housing Practices Act, Section 34-37-5.1 provides in relevant part that:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this chapter....

The Planning Board's diversion of the complainants away from the proper process for obtaining approval, and imposition of various conditions for a Planning Board approval that could never be given, constituted interference with the complainants' right to enjoy their property, because of the complainants' race and color.

Not only is the Preliminary Sketch Plan phase designed to weed out applications that cannot be approved, but "each of those steps [in the application process] is designed in such a way that the applicant has spent as little money as necessary in order to provide the information necessary and not spend too much time ... for a project that isn't going to go anywhere". Testimony of Mr. Bouley, Trans. pp. 112-113.

From October 1990 to February 1994, the Planning Board gave interim approvals and required the complainants to revise their application in several different ways and to obtain various approvals, causing the complainants to expend their time and resources for an application that could not be approved. This is contrary to the way that the Planning Board treated white applicants.⁸ Mr. Bouley, testifying on how the Planning Board treated applicants with no public street frontage, stated that the planning board members: "would specifically mention those things and it would discourage people from pursuing those because they couldn't be approved. [T]hey were very strenuous about saying that they would not waive those regulations". Trans. p. 99. Mr. Simanski, a Planning Board member through all the years that the complainants sought approval of their application, testified that the Planning Board was concerned about private rights of way because of maintenance and safety and that "we just did not approve of private rights-of-way." Trans. pp. 118, 119. He further testified that: "There was a lot of problems with this subdivision right from the beginning." Trans. p. 120. The Town of Cumberland discriminated against the complainants in the Planning Board process by failing to treat them in the same way that they treated white applicants. Mr. Bouley, whose responsibility was to meet with applicants and tell them the next steps, did not fulfill his responsibility to the complainants. The steps in the

corporation is liable under federal civil rights statutes when its action delays a housing development because of the anticipated race of the property owners).
Commission Decision and Order, pp. 15-16.

⁸ At the time of their application, the complainants were one of few black families in town. It is reasonable to infer that other applications before the Planning Board were from white families.

Planning Board process, which were designed to inform applicants as soon as possible if their applications were not feasible, were turned into an obstacle course for the complainants where preliminary approvals led the complainants to believe that their application could be approved if the complainants did various studies, changed their plans and obtained various approvals. The respondents' witnesses testified that the Board was vigorous in opposing applications with no public street frontage and that the problems with the complainants' application were evident from the start but they did not explain why they did not inform the complainants of this. They did not explain why they gave preliminary approvals to the complainants' application, when it could not be approved. *See e.g., 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673 (D.C. Cir. 2006) (Fair Housing Act violation established, in part, by city officials' use of different methods for dealing with hazardous housing in Hispanic neighborhoods than for hazardous housing in neighborhoods which were not Hispanic); *Samaritan Inns v. District of Columbia*, 1995 WL 405710 (D.C. Dist Ct. 1995), *aff'd in part, reversed in part on the issue of damages*, 114 F.3d 1227 (D.C. Cir. 1997) (discriminatory intent found that established a Fair Housing Act violation based in part on the actions of District officials in failing to inform the plaintiffs of the proper classification for their habitation which required the plaintiffs to make unnecessary representations and in following procedures contrary to the Construction Code); *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984) (plaintiff subdivision developer stated a cause of action when it alleged that the town planning board committed a civil rights violation by imposing outrageous conditions for approval of a development in which the purchasers were Italian-surnamed); *Community Housing Trust v. Department of Consumer and Regulatory Affairs*, 257 F.Supp.2d 208 (D. D.C. 2003) (discriminatory procedural requirements are sufficient to state a violation of the Fair Housing Act; imposing a more burdensome occupancy approval process on group homes constituted disability discrimination); *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 648 F.Supp.2d 805 (D. La. 2009) (departure from normal procedures on subdivision application is one of the factors that proves discriminatory intent under the Fair Housing Act). The complainants proved that the Planning Board treated them differently than white applicants and the respondents did not provide a credible and lawful explanation for the disparate treatment. The complainants proved that the Town of Cumberland discriminated against them because of their race and color with respect to the Planning Board process.

THE COMPLAINANTS DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE
THAT THE ZONING BOARD OF REVIEW DISCRIMINATED AGAINST THEM ON THE
BASIS OF THEIR RACE AND COLOR

The Court Decision emphasized that the Zoning Board of Review, in this instance, was hearing the appeal of the decision of the Planning Board and in that capacity its powers were circumscribed.

When rendering its decision, a zoning board cannot substitute its own judgment for that of the planning board; rather, it must consider the issue on the board's findings and record. R.I.G.L. 1956 § 45-23-70(a). ... A planning board's decision may only be reversed by a zoning board if it finds prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record. *Id.* at § 45-23-70(a).

Court Decision, pp. 24-25.

The Court Decision also elucidated that the Town Zoning Ordinance requirement that the subdivided properties have proper frontage could not be waived by the Planning Board by itself and that the complainants did not follow the proper procedure to request a variance. The Court Decision provided that the Commission could not rule on the propriety of the Zoning Board Decision since the Zoning Board Decision was not appealed and was final. Given the Zoning Board's limited role in reviewing the Planning Board decision, the fact that the proposed subdivision did not comply with the Town Zoning Ordinance and the finality of the Zoning Board decision, the Commission finds that the complainants did not prove by a preponderance of the evidence that the Zoning Board of Review subjected them to discrimination.

DAMAGES

The Commission will schedule a hearing to allow the parties to present evidence on the proper damages and additional relief which should be awarded.

ORDER

- I. With respect to the Cumberland Zoning Board of Review, having reviewed the evidence presented on August 23, 2000 in light of the Court Decision, the Commission, with the authority granted it under R.I.G.L. Section 34-37-5(i), finds that the complainants have failed to prove the allegations of the Complaint against the Cumberland Zoning Board of Review and hereby dismisses the Complaint against the Cumberland Zoning Board of Review with prejudice.
- II. With respect to the Town of Cumberland and Thomas M. Bruce III, Finance Director, violations of R.I.G.L. Section 34-37-5.1 having been found, the Commission hereby orders:
 - A. That the respondents cease and desist from all unlawful housing practices under Title 34, Chapter 37 of the General Laws of Rhode Island;
 - B. That the Town of Cumberland provide training to the Planning Board of the Town of Cumberland and the staff who assist the Planning Board on state and federal fair housing laws and provide a certification to the Commission within six (6) months of the date of this Order that the training has been completed, a list of the people who were trained and the name of the trainer;
 - C. That the Town of Cumberland post a copy of the Commission fair housing poster prominently in all town offices that deal with issues relating to housing accommodations.

- III. With respect to damages and other relief, the Commission will schedule a hearing to allow the parties to present arguments and evidence on those issues.
- IV. The attorney for the complainants may file a Motion and Memorandum for Award of Attorney's Fees no later than forty-five (45) days from the date of this Order. The Town of Cumberland and Thomas M. Bruce III, Finance Director may file a Memorandum in Opposition no later than forty-five days after receipt of the complainants' Motion. The parties' attention is directed to Sanchez v. Carvalho, Commission File No. 07 EAO 185 (Decision on Attorney's Fees February 1, 2010) for factors to be generally considered in an award of attorney's fees under the state anti-discrimination laws. If any party would like the hearing on damages to include the issues involved in the determination of an appropriate award of attorney's fees, the party should request it in its memorandum.

Entered this [12th] day of [March], 2010

_____/S/_____
Camille Vella-Wilkinson
Hearing Officer

I have read the record and concur in the judgment.

_____/S/_____
John B. Susa
Commissioner

