STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: AUGUST 1, 2012)

TOWN OF CUMBERLAND and STEPHEN WOERNER, Finance Director	:	
v.	:	**C.A. No. PC 10-2096**
CAMILE VELLA-WILKINSON, JOHN B. SUSA and NANCY KOLMAN-VENTRONE, in their Capacities as Commissioners of the Rhode Island Commission for Human Rights; THE RHODE ISLAND COMMISSION FOR HUMAN RIGHTS; HENRY BLAINE GAFFNEY; and CHARLEAN S. GAFFNEY	:	

DECISION

SAVAGE, J. This is an appeal by the Town of Cumberland seeking reversal of a decision of the Rhode Island Commission for Human Rights that found that the Town of Cumberland, by and through Stephen Woerner, in his official capacity as Finance Director (collectively, the "Town"), had discriminated against Henry Blaine Gaffney and Charlean S. Gaffney on the basis of race in the review process and ultimate denial of their application for a subdivision. For the reasons set forth in this decision, this Court reverses the decision of the Commission.

I
Facts and Travel

A
Application Before the Planning Board

In 1975, the Gaffneys purchased property in the Town of Cumberland, Rhode Island. They and their children lived in one house, located at 575 Nate Whipple Highway, Cumberland, Rhode Island, and they owned and rented out another house on 12 Old Reservoir Road in Cumberland, Rhode Island, designated as Assessor's Plat 59, Lot 29 (the "Property"). (Admin. R. Ex. 6, Comm'n Hr'g Aug. 23, 2000 ("Tr."), at 5-7.) The Property consisted of approximately 3.08 acres, and, with only 94.93 feet of public road frontage, the Property was a pre-existing nonconforming lot of record, as it has less than the required 100 feet of frontage. Id.

After a number of years, the Gaffneys wished to subdivide the Property on Old Reservoir Road into three lots: a 1.04 acre lot containing the existing dwelling and two new lots consisting of 1.04 acres and 1.03 acres, respectively. Id.; Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Oct. 15, 1990, at 1. The proposed new lots did not have any frontage on a public street and would be accessed by a forty-foot private right-of-way. Id.

On October 15, 1990, the Gaffneys submitted their pre-application sketch plan[1] to the Planning Board.[2] (Admin R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Oct. 15, 1990, at 1.)

[1] The subdivision approval process consists of four stages: (1) an applicant's submission of a pre-application sketch plan to the Planning Board; (2) an applicant's submission of a preliminary plat to the Planning Board; (3) an applicant's submission of a final plat to the Planning Board; and (4) a public hearing on the applicant's request for subdivision approval conducted by the Planning Board. Town of Cumberland Sub. Regs., § III; see R.I. G.L. 1956 § 45-23-38. At the pre-application sketch plan phase, the applicant must submit an "informal drawing which shows the basic design and facilities of a proposed subdivision." Town of Cumberland Sub. Regs., § I, Art. B, Item 5, at 2. The purpose of requiring an applicant to submit a pre-application sketch plan is to prevent a landowner from incurring the cost and expense of planning and development if the subdivision concept, on its face, is unacceptable to the Planning Board. (Admin. R. Ex. 6, Tr. at 97-98.) The Planning Board's approval of a subdivision of property is not final until it

Attorney John Andrews ("Attorney Andrews"), who was a land surveyor and present at the hearing on behalf of the Gaffneys, explained that the pre-application sketch plan proposed a subdivision of the Property into three lots with a private forty-foot right-of-way to provide access to the two new parcels that were proposed. Id. Attorney Andrews further proposed that the garage existing on the current lot would be moved because it was presently located where the proposed right-of-way would be developed. Id. He also explained that there was no water to the proposed lots such that a water line of 500 feet would have to be installed for the lots. Id.

After presenting the pre-application sketch plan, Attorney Andrews asked the Planning Board if it would approve the forty-foot private driveway. Id. In response, Planning Board member Ralph Ryan stated that the Board "would have no problem." Id. Planning Board member Joseph Simanski explained, however, that the "[f]orty foot [right-of-way] would be for a private driveway and would not be the Town's responsibility." Id. He also suggested that further research should be conducted regarding water availability and that language conveying the private right-of-way should be added to the deeds of the proposed lots. Id. He then made a motion, which was seconded by Planning Board member Steven Saucier, to grant pre-application approval, "subject to the availability of water to the parcel and also language of right[-]of[-]way … conveyed in deeds." Id. The Planning Board voted unanimously in favor of the motion. Id.

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conducts a public hearing. See § 45-23-42. If the Planning Board denies an application, the applicant can appeal to the Zoning Board of Review. Town of Cumberland Sub. Regs., § III; see § 45-23-57.

[2] The Planning Board members at this time were Joseph Simanski, Martin Tagliaferro, Michael Erskine, Edward DeRosier, Richard Engert, Howard Sheats, Ralph Ryan, Steven Saucier, Catherine Souza, Priscilla Sankey, Suzanne Almeida, and Kenneth Pascale (listed here and in subsequent footnotes in the order of their years of service, with the longest serving member listed first).

Almost two years later, on August 18, 1992, the Gaffneys submitted a preliminary plat to the Planning Board for conditional approval.[3] (Admin R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Aug. 18, 1992, at 2.) At the hearing on their request, Eric Gaffney, one of the Gaffneys' two sons, represented his parents before the Planning Board. Id. At this meeting, Eric Gaffney summarized the subdivision proposal and represented to the Planning Board that the total length of the right-of-way would be approximately 470 feet. Id. Planning Board member Timothy Draper expressed his concern that a safety vehicle would not be able to turn around if it had to get down the right-of-way and explained that he would like to see a cul-de-sac on the right-of-way. Id. Planning Board member Simanski echoed that concern, stating that he "would like a turn around for emergency vehicles at the end of the cul[-]de[-]sac." Id.

Eric Gaffney then discussed the water main, explaining that the Town did not require a specific size of water main on the right-of-way. Id. Planning Board member William Flynn, however, expressed concern that the Town may want a water main to run down the right-of-way. Id.

Finally, Eric Gaffney explained that the garage would need to be relocated because it was currently located on the proposed right-of-way. Id. at 3. In response, Planning Board member Martin Tagliaferro stated that he would like the next drawing to show where the garage would be relocated. Id. at 3. Planning Board member Simanski added that "the applicant must meet [the] preliminary checklist," although the minutes do not reflect the preliminary checklist requirements or what requirements the Gaffneys' proposal did not meet. Id.

[3] The Planning Board members at this time included Joseph Simanski, Martin Tagliaferro, Michael Erskine, Edward DeRosier, William Flynn, Richard Susi, Timothy Draper, E. Michael Sweeney, Frank Joseph, Witold Kloczkowski, Jeannette Departhy, David Darlington, Donald Reilly, Jr., Ramiro Delgado, and Howard Sheats.

Planning Board member Draper made a motion, seconded by Planning Board member Donald Reilly, Jr., to approve the preliminary plat with the following conditions: "show the proposed relocation of [the] garage with the added setback lines, identify [the] proposed turn around for emergency vehicles, list zoning on the drawing, confirm lot 27, Assessor's Plat 59, add general note with regard to topography[,] and provide ISDS [individual sewer disposal system] approval." Id. The Planning Board voted unanimously to grant the motion unanimously. Id. The minutes reflect that Planning Board member Simanski added after the vote that he "would like [the] final checklist met." Id.

On April 19, 1994—almost two years after the Planning Board had approved the preliminary plat—the Gaffneys submitted a final plat to the Planning Board for approval.[4] (Admin R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., April 19, 1994, at 4.) Attorney Andrews, counsel to the Gaffneys, and Thomas Letourneau, an abutting property owner, were present at the meeting. Id. The minutes reflect that "the planning board questioned why the Gaffneys had waited so long between stages to return to the planning board for continued approval"; however, the minutes do not reflect that the Gaffneys ever explained why they waited so long to submit their delay in submitting the final plat. Id. at 4. Letourneau then "advised the board of some serious surface water problems in the area [a]ffecting his property, the Gaffney's property[,] and others in the area." Id.

Planning Board member Tagliaferro made a motion, which was seconded by Planning Board member Donald Costa, to deny approval of the Gaffneys' final plat "because there were a significant number of requirements for [f]inal [p]lat which were not met and because the

[4] The Planning Board members at this time were Joseph Simanski, Martin Tagliaferro, Michael Erskine, Edward DeRosier, William Flynn, Richard Susi, Timothy Draper, E. Michael Sweeney, Frank Joseph, Matthew Brady, Albert Lamoureux, Rene Gaumond, Antonio Albuquerque, and Donald Costa.

petitioner had not returned to the board in well over the six (6) months deadline."[5] Id. The Planning Board then voted unanimously to deny the Gaffneys' request for final plat approval—although Planning Board members William Flynn and Richard Susi abstained from voting. Id. The minutes do not reflect which final plat requirements the Gaffneys' request failed to satisfy. Id. After the Planning Board voted, however, Planning Board member Tagliaferro made an additional comment that "the Gaffney's [sic] need more engineering input, more information on water[,] and a new abutters list." Id.

On July 19, 1994, the Gaffneys resubmitted their preliminary plat to the Planning Board for approval.[6] (Admin R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., July 19, 1994, at 5.) It is not clear in the minutes if this preliminary plat was identical to the preliminary plat that the Gaffneys submitted on August 18, 1992. Id. The minutes simply reflect that there was "[a] brief presentation of the proposed development ... made by the Gaffneys and their attorney [John Andrews]." Id. The minutes then note that Planning Board member Susi made a motion to grant preliminary approval and allow the Gaffneys to submit their final plat, which was seconded by Planning Board member Matthew Brady. Id. at 6. The Planning Board voted unanimously to grant the motion and approve the Gaffneys' preliminary plat. Id.

On September 20, 1994, the Planning Board reviewed the final plat submitted by the Gaffneys.[7] (Admin R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Sept. 20, 1994, at 7.) Henry

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[5] The requirement that the final plat be submitted to the Planning Board for approval within six months after its approval of the preliminary plat is provided for in § III, Art. C, Item 1 of the Cumberland Subdivision Regulations.

[6] The Planning Board members at this time were Joseph Simanski, Martin Tagliaferro, Michael Erskine, Edward Desrosier, William Flynn, Richard Susi, Timothy Draper, E. Michael Sweeney, Frank Joseph, Matthew Brady, Albert Lamoureux, Rene Gaumond, Antonio Albuquerque, and Donald Costa.

[7] The Planning Board members at this time were Joseph Simanski, Martin Tagliaferro, Michael Erskine, Edward Desrosier, William Flynn, Richard Susi, Timothy Draper, E. Michael Sweeney,

Gaffney summarized the request for final plat approval before the Planning Board, and the Planning Board reviewed correspondence from Letourneau, an abutter. Id. The minutes provide that Letourneau sent a letter that "raised a number of objections and concerns regarding the proposed subdivision[,] primarily the issue of excess surface water problem from the site," although the minutes do not detail Letourneau's specific objections and concerns. Id. Planning Board member Susi moved to continue the hearing on the final plat and to "require that the petitioner bring [the] plans up to Subdivision standards," which was seconded by Planning Board member Antonio Albuquerque. Id. The Planning Board voted unanimously to grant the motion, although the minutes do not detail why the Planning Board believed that the Gaffneys' final plat was not in compliance with subdivision standards. Id.

On October 18, 1994, the Planning Board held the hearing on the Gaffneys' request for final plat approval.[8] (Admin R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Oct. 18, 1994, at 8.) Attorney Andrews and Ronald Kershaw, a registered engineer within the State of Rhode Island, were present on behalf of the Gaffneys. Id. During the hearing, Kershaw answered questions by the Planning Board members regarding the drainage issue and changes made to the proposal by the applicants since the last meeting. Id.

As to the drainage issue, Planning Board member Simanski asked Kershaw to "explain the information submitted to the board members on hydrological calculations versus the net zero run-off requirement." Id. Kershaw answered that the information submitted focused on a change in the hydrological characteristics of the Gaffneys' plat. He explained that "[t]he existing

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Frank Joseph, Matthew Brady, Albert Lamoureux, Rene Gaumond, Antonio Albuquerque, and Donald Costa.

[8] The Planning Board members at this time were Joseph Simanski, Martin Tagliaferro, Michael Erskine, Edward DeRosier, William Flynn, Richard Susi, Timothy Draper, E. Michael Sweeney, Frank Joseph, Matthew Brady, Albert Lamoureux, Rene Gaumond, Antonio Albuquerque, and Donald Costa.

site is a very flat expanse" and that the "flat area covers almost all of the lot except in the northeasterly corner where it begins to rise at a rate of 10 feet in 130 feet." Id. at 8-9. Kershaw also explained that he used the Modified Rational Methodology to calculate the run-off of this proposed development, which is an accepted method of calculation for small sites in Rhode Island, and that he analyzed the run-off for a 25-year storm event. Id. at 9. Kershaw elaborated that mitigating structures "will reduce the storm flow from the site to less than the present run-off[,] according to the report." Id. These mitigating structures would include "4'x4'x4' pre-cast concrete leaching galleys located at each corner of the new homes." Id. Kershaw represented that "[t]he calculations show that the increase in run[-]off will fill the structures to a depth of only [two feet, ten inches]," and "[d]uring a tropical rain storm[,] the structure will fill to a depth of [four feet] with water that would at the present time flow onto the abutters property." Id. Kershaw thus concluded that "[t]his will have the effect of reducing the run-off from the Gaffney property." Id.

Following the explanation of drainage by Kershaw, Planning Board member Simanski invited individuals present from the community to raise any concerns or questions regarding the subdivision application. Ruth Howard, an owner of abutting property at 20 Old Reservoir Road, Cumberland, Rhode Island, explained that she had a concern with water flowing onto the abutters' property. Id. Howard also explained that her well was in her backyard, and she expressed concern that the Gaffneys' proposed cesspool was too close to her well. Id. Howard elaborated that "a farmer who owned the land previously had a ditch so the water would pass around his property because the abutters always had problems with water run-off from the Gaffney[s'] property." Id.

Planning Board member Rene Gaumond then asked Kershaw if "galleys would help some of the water problem in the area." Id. at 10. Kershaw answered that galleys were "designed to accept about 60% or 2/3 capacity based on the 25-year storm. So if there is still 1/3 of the water which is not addressed[,] the galleys will not essentially reduce the total amount of flow off the property." Id.

Town Planner N. David Bouley raised a concern regarding the posting of bonds for the maintenance of the galley system. He pointed out that "[i]n all cases[,] the Board has required that bonds be posted to govern the operations of these galley systems since they would normally be on property proposed for public ownership." Id. He explained further that "[w]ithout having any public improvements or public right[-]of[-]way ownership involved at all, and therefore not having a bond, [he] wasn't sure how these items will be guaranteed." Id.

Town Planner Bouley added that he spoke to Public Works Department Director John Marzano "who declined to sign the Gaffneys['] subdivision map because he needed a more detailed analysis and questioned the calculations submitted by the petitioners['] engineers." Id. Planning Board member Gaumond responded that he did not "feel comfortable without Mr. Marzano's approval of the routing sheet/map." Id. at 9. He also expressed concern that the Gaffneys proposed to locate the septic tank under the garage. Id. at 10. Kershaw confirmed that there would be a septic tank located under the garage, but he explained that the proposed right-of-way would not go over the septic tank. Id.

In addition, Town Planner Bouley observed that "there is a note on the Gaffneys['] route sheet from 911 [coordinators] that they were not able to give a 911 house number to any of the proposed lots because there is no street proposed for development which can be used to identify their lots from the other public right[-]of[-]way areas." Id. He also noted that "[i]t is not 911's

practice to issue house numbers off of driveways[.]" Id. In response to his concern, Planning Board member Draper read a letter from North Cumberland Fire Chief Jesse Carpenter "pertaining to private driveways," although the minutes do not detail the content of the letter. Id.

Town Planner Bouley raised a final concern as to the right-of-way, asking whether the Board would be prudent in waiving the provision of the subdivision regulations that requires lots to be on an existing or a proposed street. Id. Planning Board member Simanski referenced the Subdivision Regulations at Section 5, Article E, Item 1, that mandates that "[a]ll lots shall front on an existing or proposed public street" and "[a]ll lots shall have a minimum of one hundred (100) feet of frontage," and Section 5, Article C, Item 4, which provides that "[p]rivate streets shall not be allowed nor shown on a plan." Id. The minutes provide that the "Board members asked if they have the power to amend these regulations," and Planning Board member Simanski answered that "they can waive the 100 foot frontage." Id. He then explained, however, that the Planning Board would be creating "very bad precedent" in approving the Gaffneys' final plat with no frontage and a private right-of-way because "anyone who owns 4 acres of land [could] put a right[-]of[-]way through their property and subdivide [it,] thereby creating a number of lots with private drive resulting in house number problems, public safety problems and bad development planning." Id. at 10-11.

Before the Planning Board voted, Planning Board member Tagliaferro stated that he agreed with Planning Board member Simanski that "there are just to[o] many problems and to[o] many bad precedents" being set if the Gaffneys' petition is approved. Id. Planning Board member Tagliaferro then explained that rather than denying the Gaffneys' request for final plat approval, the Planning Board should continue the Gaffneys' application through the final stages because he recalled the Planning Board made a mistake once before in rejecting a proposal

before it went to the public hearing phase. Id. Assistant Town Solicitor Richard Kirby agreed, recommending that the Planning Board vote on the Gaffneys' final plat as it was presented to the Planning Board at that hearing but then allow the Gaffneys to put their case forward again at a public hearing. Id. He explained that Rhode Island law states that an applicant cannot be denied through the subdivision process until it has been afforded a public hearing.[9] Id.

Attorney Andrews asked for an official decision from the Planning Board as to "whether the applicant should continue with the process or whether such a decision would be futile." Id. at 11. The minutes do not reflect whether the Planning Board answered Attorney Andrews' question. Rather, the minutes show that Planning Board member Draper made a motion, seconded by Planning Board member Costa, to deny approval of the Gaffneys' final plat. The stated reasons were:

> 1.) Section 5, Article E, Item 1, 'F[ron]tage;' 2.) Section 5, Article C, Item 4, 'No Private Streets;' 3.) 911 cannot assign numbers properly based on the fact the proposed lots are not on public or proposed streets; 4.) Board needs a signed signature from the Town Engineer stating he approved the drainage systems and the galley systems.

Id. While the minutes of the meeting of October 18, 1994 do not reflect whether the Planning Board voted on the motion at that time, the record of the public hearing that followed on February 21, 1995 suggests that the Planning Board voted to deny the Gaffneys approval of their final plat at its October 18, 1994 meeting. (Admin R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Feb. 21, 1995, at 13.)

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[9] Rhode Island law provides that the Planning Board's approval of a subdivision is not final until it conducts a public hearing. See § 45-23-42 ("A public hearing is required for a major land development project or a major subdivision or where a street extension or creation requires a public hearing for a minor land development project or minor subdivision.") The Cumberland Subdivision Regulations, entitled "Submission Requirements," also provide, in pertinent part, that "the board may not waiver any requirements for public hearing or public notice." Town of Cumberland Sub. Regs. § III, Art. E.

At the February 21, 1995 public hearing on the Gaffneys' request for approval of their final plat,[10] Attorney Andrews asked the Board to reconsider its decision to deny approval. (Admin. R. Ex. 6, Tr. at 7; Admin R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Feb. 21, 1995, at 13.) In support of this request, he asked to submit additional information and testimony addressing the four reasons the Board provided for its denial, including the lack of frontage, the prohibited private right-of-way, the 911 number requirement, and the need for approval from the Town Engineer for the drainage and galley system. Id. at 13.

With regard to the frontage requirement and private right-of-way, Attorney Andrews asked the Planning Board to waive these requirements. Id. at 14. He explained that at the preliminary plat meeting on August 18, 1992, the Planning Board requested that a cul-de-sac be made part of the private right-of-way and that a water line be installed and that the Gaffneys had met these conditions. Id. Planning Board member Tagliaferro responded that the Board was not comfortable with creating private streets. Id. Letourneau, an abutter, added that if a road were to be put in, an existing septic system would need to be buried and placed underground. Id.

As to the issue with the 911 numbering assignment, Attorney Andrews explained that he was confident that the Gaffneys' proposal could satisfy the 911 system's numbering requirements. Id. at 13. He recalled that the Planning Board had concerns with the 911 numbering system based on a statement by Joann Grenier, the Town's 911 Coordinator, that a 911 number could not be issued for residential structures located off of a private road. Id. Grenier also had noted that if an emergency vehicle could not find the correct 911 house number,

[10] The Planning Board members at this time were Joseph Simanski, Martin Tagliaferro, William Flynn, Richard Susi, Timothy Draper, E. Michael Sweeney, Frank Joseph, Matthew Brady, Albert Lamoureux, Rene Gaumond, Antonio Albuquerque, Donald Costa, Robert McGinnis, and Denise Wilbur. Twelve of the fourteen Planning Board members were the same as those members who comprised the Planning Board at the October 18, 1994 meeting where the Planning Board voted to deny the Gaffneys approval of their final plat.

any resulting complications would be the owner's responsibility. Id. In response, Attorney Andrews explained that he spoke "to other 911 coordinators and they indicated that there is an acceptable way to assign numbers on a private drive." Id.

Finally, Attorney Andrews addressed that the fourth reason for the denial concerning insufficient data from the Town Engineer about the surface water problem on the Property. Id. Town Planner Bouley read a letter from Raymond N. Depault, Highway and Sewer Superintendent, which stated that Depault did not have a problem with the proposed surface water retention design and that the implementation of the plan should prevent water from running onto Old Reservoir Road. Id. In addition, Planning Board member Gaumond noted that, at the last meeting, it was suggested to the Gaffneys that they get in touch with Robert Geddes of Meadowbrook Development Corporation, who was proposing a subdivision abutting the Gaffneys' property, to straighten out the surface water problem in the general area. Id. Attorney Andrews responded that there were some discussions on this matter and that additional steps could be undertaken so that additional water would not run off onto other abutting properties. Id. He explained that a detention catch basin with underground structures would be created rather than a retention pond. Id.

After Attorney Andrews presented the additional evidence, Planning Board member Costa made a motion, which was seconded by Planning Board member Gaumond, to reconsider the Gaffneys' request for final plat approval. Id. at 14. The Planning Board voted to grant the motion to reconsider the petition, with ten votes in favor of granting the motion and one vote—by Planning Board Member Albert Lamoureux—to deny it. Id.

During the reconsideration of the Gaffneys' petition, Letourneau, who was present as an abutter, stated that he was concerned with the way the land was being developed. Id. He

highlighted that a surface water problem already existed in the area and that water was always bubbling out of the ground. Id. Further, he expressed his opinion that the surface water problem could not be solved by a drywell. Id. He explained that his property was 100 feet from the proposed development and that his drywell did not work and his septic system was always backed up. Id. He continued to explain that he previously petitioned to subdivide his own lot, but his application was denied for the same reasons the Gaffneys were being denied. Id. Letourneau also explained that "when it snows or ice forms on the road, in order to get on the road[,] the speed necessary to make the hill places the vehicle right in front of what would be the proposed new roadway." Id.

In response to Letourneau's concerns, Planning Board member Gaumond noted that a study had been done on this issue by RGK Company and submitted to Public Works Department Director Marzano. Id. Director Marzano then provided a letter to the Planning Board "accepting underground water storage tanks" and providing that "the Town is comfortable with the proposed surface water solution proposal." Id. In addition, Henry Gaffney offered to run a water main to the three proposed houses, at which point Planning Board member Gaumond suggested running a water main to the rest of the houses to solve the drinking water problem. Id. Attorney Andrews also explained that he "ran a test on the site and that the results met all ISDS regulations." Id. at 15.

After further discussion about surface water issues, Planning Board member Gaumond suggested continuing the hearing on final plat approval until the issue concerning the designation of 911 housing numbers could be resolved, giving the Board more time to obtain additional engineering information. Id. He further stated that "he has no problems with the driveways along with the other Board members." Id. The minutes also reflect that "[t]he Board members

generally stated they have no problem with frontage." Id. Planning Board member Gaumond then made a motion, which was seconded by Planning Board member Albuquerque, to continue the review of the Gaffneys' final plat for additional information concerning 911 house numbering and engineering. Id. Planning Board member Simanski was among those who voted to continue the hearing with respect to the final plat for those purposes. Id. In fact, all Planning Board members voted to grant the motion, except for Planning Board member Tagliaferro. Id.

On March 21, 1995, the Planning Board held the hearing on the Gaffneys' request for approval of their final plat. (Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., March 21, 1995, at 16.) Robert Kershaw was present, a registered engineer on behalf of the Gaffneys, along with the Gaffneys' two sons. Id. Kershaw clarified that the only remaining issue was assigning the 911 house numbers. Id. The minutes provide that "[a] letter was received f[ro]m the 911 office stating they didn't have a problem with the housing numbering." Id.

The Planning Board asked if any of the community members who were present had additional comments. Id. Letourneau, an abutter, responded that he wanted to point out a few items that he had discovered since the last meeting. Id. Specifically, he explained that the Gaffneys' property was in a watershed area, and Cumberland law requires that a septic system must be 200 feet from a public water supply. Id.

Town Planner Bouley then read the motion made at the last meeting, which was made by Planning Board member Gaumond and seconded by Albuquerque, where it was voted to continue the hearing concerning final plat approval for review of additional information concerning the designation of 911 housing numbers and engineering. Id. at 17. Planning Board member Tagliaferro noted that the Gaffneys provided approval of the proposed 911 house numbers and additional engineering information. Id. He asked "if the [Planning] Board could

deny the application with the information previously submitted." Id. Planning Board member Gaumond made a motion, seconded by Planning Board member Albuquerque, to approve the Gaffneys' final plat and move to the public hearing stage. Id. The motion failed, with eight Planning Board members voting to deny approval of the final plat and five members voting to approve it. Id. The minutes do not identify who voted which way. Id. The Planning Board then scheduled the public hearing, at the Gaffneys' request, to coincide with its next regularly scheduled meeting. Id.

The Planning Board held the public hearing on the Gaffneys' request for final plat approval on April 18, 1995. (Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Apr. 18, 1995, at 18.) Attorney Andrews and Kershaw were present on behalf of the Gaffneys. Planning Board member Simanski asked that the record reflect that the Planning Board had denied the Gaffneys' request for approval of their final plat at its last meeting and that the Gaffneys had requested a public hearing. Planning Board member Michael Erskine moved to open the public hearing, seconded by Planning Board member Costa, and the Planning Board voted unanimously to grant the motion. Id.

The public hearing began with a discussion by Letourneau, an abutter, regarding a letter he submitted to the Planning Board, dated April 17, 1995, which provided information and comments that were made to him during a meeting that he had with Mohamed J. Freji, P.E., P.L.S., the principal sanitation engineer of the ISDS section of the Rhode Island Department of Environmental Management. The minutes do not indicate the content of this letter. Letourneau also submitted an envelope that contained pictures of his property for the Planning Board members to view. Id. Ruth Howard, another abutter, requested that her objection to the proposal be put on the record. Id. at 19.

Henry Gaffney then expressed that it was his belief that the subdivision would not affect the abutters and that the groundwater level would remain the same. He also explained that he believed Kershaw's drainage plan would remedy the run-off problems. Id.

Planning Board member Tagliaferro made a motion, which was seconded by Planning Board member Albert Lamoureux, to deny the Gaffneys' petition. The Planning Board voted to deny approval of the Gaffneys' final plat with nine members voting in favor of denial and four members voting against it. The minutes provide that the Planning Board denied final plat approval due to "Lack of Street Frontage, Private road prohibited and the Subdivision is contrary to Subdivision Regulations." Id. at 19.

B
Appeal to the Zoning Board

After the Planning Board's decision to deny the Gaffneys' subdivision application, they timely filed their appeal to the Zoning Board, sitting as the Planning Board of Appeals. On June 14, 1995, the Zoning Board conducted a public hearing on the Gaffneys' appeal. (Admin. R. Ex. 6, Cumberland Zoning Bd. of Review Mins., June 14, 1995, at 2.)

During the hearing, Attorney Andrews, Henry Gaffney, the Gaffneys' two sons, and two abutters, Letourneau and Howard, testified. Id. Attorney Andrews explained that the application process had been ongoing for years and that he believed that the Gaffneys had met all of the requirements of the Cumberland Subdivision Regulations, except as to their proposed private road and street frontage. Id. As to those requirements, he noted that the Gaffneys had asked the Planning Board to waive them since the first hearing. Id. Henry Gaffney and his sons provided further testimony to support the subdivision application. Letourneau presented photographs of the surface water problem on both his property and the Gaffneys' property. Id. Howard also provided testimony that there was a surface water problem in the area.

After the hearing, a member of the Zoning Board moved to uphold the Planning Board's decision to deny the Gaffneys' subdivision application, which was approved. Id. The Zoning Board denied the subdivision application based on the same reasons provided by the Planning Board: "lack of street frontage, private road prohibition in this subdivision, and that it is contrary to the subdivision regulations of the Town of Cumberland." Id. Significantly, the Gaffneys never appealed the Zoning Board decision to the Superior Court. Instead, they filed a charge of racial discrimination with the Rhode Island Commission for Human Rights.

C
Human Rights Commission Charge

In their charge filed with the Human Rights Commission on April 18, 1995, the Gaffneys alleged that the following parties had discriminated against them on the basis of race: the Town of Cumberland; the Cumberland Zoning Board of Review; George Cross, the Finance Director, in his official capacity; and Town Planner Bouley. The Gaffneys asserted, more specifically, that these parties had discriminated against them with regard to their right to own, enjoy, and utilize their property free from discrimination due to race and color, in violation of § 34-37-5.1 of the Rhode Island Fair Housing Practices Act ("FHA"), R.I. Gen. Laws § 34-37-1 et seq., and § 818 of the Federal Fair Housing Act, 42 U.S.C. § 3617.

On July 17, 1997, the Commission began a four-year investigation of the Gaffneys' discrimination charges, after which Preliminary Investigating Commissioner Randolph Lowman assessed the information gathered from the investigation. (Admin. R. Ex. 1, Compl.) Lowman found probable cause to support a discrimination claim against the Planning Board and issued a formal complaint. Id. In the complaint, he alleged that the Planning Board had denied the Gaffneys' subdivision application "allegedly because [the Gaffneys] lacked the necessary frontage and had a prohibited private road," yet the Planning Board "has approved several

petitions for white applicants with less or no frontage" and "other lots with private roads." Id. He further alleged that the Planning Board "demanded the [Gaffneys] meet numerous requirements," but that "[w]hite applicants were not given the same requirements." Id. Based on the following, Lowman concluded that the Planning Board's actions "have subjected the [Gaffneys] to disparate treatment in comparison to white applicants, under similar circumstances." Id.

The case moved to the formal hearing stage on August 23, 2000. (Admin. R. Ex. 6, Tr. at 1.) Henry Gaffney, acting pro se, testified that he first filed for permission to subdivide property that he owned with his wife on 12 Old Reservoir Road in October of 1990. Id. at 5-6. He testified that they "went to a number of meetings where each time [they] went, [they] were given something else to be done." Id. at 6. Henry Gaffney then testified that at the February 21, 1995 hearing, it was his understanding that all of the concerns raised by the Planning Board members had been addressed except for the 911 housing number designations. Id. at 7. Despite the fact that the Planning Board took no issue with their proposed private road or lack of street frontage, he claimed that the Board denied final plat approval for lack of frontage and the private right-of-way. Id. Henry Gaffney testified that he was under the belief that the Planning Board had agreed to waive these requirements of the Subdivision Regulations from the start. Id. at 8.

Henry Gaffney explained that they believed that they were being discriminated against because there were "a number of instances that the planning board has allowed things very, very similar to ours. Allowing properties to be built without frontage, private roads—gravel roads very near our property, right off of Diamond Hill Road." Id. at 8-9. He argued that "there were four properties, four houses, none of which have frontage on existing roads," and "more recently, on Pine Swamp Road, they have allowed something very, very similar, three houses with a small

cul-de-sac going in. The one in the middle cannot possibly have road frontage and the two on the side do not face the street." Id.

Attorney Richard Cardozo ("Richard Cardozo"), the Assistant Solicitor representing the Town at the hearing, then cross-examined Henry Gaffney. Id. at 10. During the cross-examination, Henry Gaffney admitted that he was unaware that a subdivision application could not be approved until after a public hearing. Id. at 14, 20. When asked about the extended review process before the Planning Board, he acknowledged that on April 19, 1994, the Planning Board had denied the original application that they had filed in October of 1990 due to the Gaffneys' delay in returning to the Planning Board. Id. at 13. He further admitted that they had refiled their application in April of 1994, which was first heard in July of 1994 and ultimately denied in October of 1994. Id. at 13-14. He conceded, in fact, that the whole process, including the Planning Board hearings on the pre-application sketch plan, preliminary plan, and final plan, as well as the public hearing on the final plan, all took place within a six-month period. Id. at 18. The public hearings on February 21, 1995 and March 21, 1995, he admitted, were the result of the Gaffneys' request for the Planning Board to reconsider their application.

Counsel also asked Henry Gaffney about the Pine Street lot, the Diamond Hill Road lots, and the Jason's Grant subdivision. Henry Gaffney admitted that he was not familiar with the application process or procedure these lots underwent to gain approval from the Planning Board. Id. at 48-50. He testified that he did not review the subdivision application for the lots, he did not know if the subdivision plans were put before the Planning Board, and he could not say whether these applications presented similar circumstances to the Gaffneys' application. Id. at 52-53. He also testified that he did not know of any other subdivision applications that had the

same problems they faced, including: no frontage on an existing street, a private road, surface water problems, 911 concerns, and water contamination problems. Id. at 48.

Henry Gaffney made a concluding statement that "we felt discriminated [against] because we were not allowed to utilize a piece of property that we owned as we would like to, which we do not feel would create any problems with anyone else. ... [W]e have been told that it would be waived, as far as the frontage and allowing the private road. ... [W]e just feel that it was discriminatory in not allowing us to utilize the property as we desired after all the effort we put forth to meet the planning board's requirements." Id. at 55-57. Significantly, Henry Gaffney explained that he did not believe that the discrimination was motivated by race, but that his wife did believe their race was a motivating factor. Id.

Charlean Gaffney then testified. Id. at 58. She said that she believed that they were discriminated against by the Town because "they told us they would waive ... one hundred foot frontage as long as we could get water there," "[w]e went to many meetings ... [a]nd each time we would go to a meeting, they would tell us to do something differently," and their taxes went up from $300 to almost $3,000 since buying the property but neighboring lots' taxes had not gone up as much. Id. at 59-65.

On cross-examination, it was clarified that the Gaffneys originally purchased their lot for approximately $30,000 to $35,000 and that it had increased in value to over $100,000. Charlean Gaffney also admitted that she had filed an appeal with the Cumberland tax assessor, and the Town had reduced their taxes. Id. at 70-72.

Town Planner Bouley then testified. Id. at 93. Bouley summarized the four-step process under the Subdivision Regulations that had been in effect since 1987. See n.1 supra. He explained that the purpose of the pre-application stage of the process was "not to incur a lot of

cost for professionals, for engineers, for surveyors if a concept, [on] its face isn't going to proceed or if the board is somewhat negative about it." Id. at 94-95. He clarified, however, that the Planning Board cannot deny an application at this stage. He went on to describe that the preliminary plat is the next stage of the process where the details of the project are developed, although permits or approvals from various outside agencies are not required at this stage. Id. at 95. According to his testimony, the regulations specifically provide that the plat "is submitted to the planning board for conditional approval or disapproval. Such a plan is not an instrument for recordation[,] and conditional acceptance by the planning board is not binding." Id. at 96. He emphasized that no approvals can be binding until a final public hearing. Id.

Town Planner Bouley testified further that it was his role on the staff "to provide information, to meet with applicants, to appraise them of what the next steps were, to advise them in writing what things were missing, [and] what requirements as far as fees and those kinds of things were necessary." Id. at 97-98. Bouley also explained that "[t]he board can alter its regulations, but in all those years [the eight years total that Town Planner Bouley served as the Deputy Planning Director and Director of Planning] and all the board members that were there, they were very strenuous about saying they would not waive those regulations." Id. at 98-99. He also explained that he does not recall a subdivision application being presented that included a private right-of-way that was ultimately approved at the public hearing. Id. at 99.

On cross-examination, Town Planner Bouley described the Planning Board's process to waive a subdivision requirement. He explained that, while one member may state that he or she would waive a requirement, this statement does not bind the Planning Board. Rather, the Planning Board either makes a motion to specifically waive the requirement or preserves the issue of waiver for the next stage of review. Id. at 113-15.

Planning Board member Simanski testified next, explaining that he did not recall any application being approved without any frontage, although there were instances where the minimum 100-foot frontage requirement was waived to a lesser amount, "but never less than the zoning ordinance," because the Planning Board "didn't have the authority to do that." Id. at 116, 118. He also testified that he did not recall any subdivisions with private rights-of-way that were approved, and he explained that the Planning Board was "very concerned about private rights-of-way because of maintenance and safety." Id. at 118-19.

Finally, Letourneau, an abutter, testified that he had raised concerns to the Planning Board regarding surface water problems in the area and possible well contamination issues. Id. at 129, 131. He presented the photographs he submitted to the Planning Board that depicted the property in the area and the surface water buildup. Id. at 131, 134-37, 139-43. He explained that he tried to subdivide his property but that the Planning Board denied his request due to the surface water problems. Id. at 137. Letourneau also presented and discussed the April 17, 1995 letter that he submitted to the Planning Board, where he listed numerous objections to the Gaffneys' proposed subdivision. Id. at 138-39. Finally, he described a conversation that he had with one of the Gaffneys' sons after the Planning Board denied the Gaffneys approval of their final plat. The son asked Letourneau if he and the neighbors still would have an objection to the subdivision application if the Gaffneys ran a water line down Old Reservoir Road with access to Town water. Letourneau responded that he would no longer have an objection to the application because his whole concern was the potential contamination of his well water, which he relied on as his source of water. Id. at 144.

On June 5, 2001, the Commission issued its first decision in this matter. (Admin. R. Ex. 8, Comm'n Dec'n, June 5, 2001.) It found that the Gaffneys were one of the few black families

in Cumberland, Rhode Island. It also determined that the Gaffneys' pre-application sketch plan clearly did not meet the Cumberland Subdivision Regulation requirement that "[a]ll lots shall front on an existing or proposed public street," and that "[a]ll lots shall have a minimum of one hundred (100) feet of frontage"; however, the Commission found that the Planning Board had the authority to waive these requirements. (Admin. R. Ex. 8, Comm'n Dec'n, June 5, 2001 (citing Town of Cumberland Sub. Regs., § V, Art. E, Item 1.))

The Commission further found that, at the time the Planning Board denied approval of the Gaffneys' final plat, several houses had been built in the late 1980's on Diamond Hill Road that, similar to the Gaffneys' proposal, did not front on an existing street. Id. at 10 (citing Admin. R. Ex. 4, Complainants' Ex.) It found that there was a house built on Pine Swamp Road between the late 1980's and the date of the hearing on August of 2000 that did not front on an existing street. Id. The Commission made these findings based solely on Henry Gaffney's testimony, as the Gaffneys did not submit any corroborative testimony or evidence to support his assertions in this regard.

The Commission also concluded that Planning Board member Simanski changed his position and made inconsistent statements during the course of the Planning Board hearings. It found that initially, at the first Planning Board meeting on October 15, 1990, he made a motion to grant pre-application approval to the Gaffneys, subject to the rights-of-way being conveyed in deeds, which was passed unanimously by the Planning Board. Id. (citing Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Oct. 15, 1990). Similarly, at the next Planning Board meeting on August 15, 1992, it found that he again evidenced no issue with the proposed rights-of-way, stated that he wanted a cul-de-sac at the end of the right-of-way for emergency vehicles, and voted to approve the preliminary plat. Id. (citing Admin. R. Ex. 5, Cumberland Planning Bd.

Mtg. Mins., Aug. 15, 1992, at 5.) The Commission also noted that Simanski moved to continue the hearing on the final plat on February 21, 1995, where the minutes reflect no articulated concern by him or other Planning Board members with the proposed private rights-of-way or frontage. Id. (citing Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Feb. 21, 1995, at 9). Yet, it found that Simanski and the other members of the Planning Board ultimately voted to deny the Gaffneys' subdivision application because of "Lack of Street Frontage, Private road prohibited and the Subdivision is contrary to Subdivision Regulations." Id. (citing Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Feb. 21, 1995). The Commission noted that at the hearing before the Commission on August 23, 2000, Simanski appeared to change his position, stating that the Planning Board did not approve private rights-of-way and that there were problems with the Gaffneys' subdivision from the beginning. Id. (citing Admin. R. Ex. 6, Tr. at 118-20.)

With regard to the issue of the ISDS, the Commission found that the Rhode Island Department of Environmental Management Regulations provide that no person shall locate any part of an ISDS within 100 feet of a private well and that the minimum distance from a private well to a seepage pit is 200 feet. (Admin. R. Ex. 8, Comm'n Dec'n, June 5, 2001, at 6-7.) The Commission noted that the Subdivision Regulations do not contain any explicit standard for the distance that a septic field must be from a private well. Id. at 6 (citing Town of Cumberland Sub. Regs.). In the Gaffneys' case, the Commission found that the final plat depicted the locations of the proposed septic system on the three lots, all of which were more than 100 feet from the abutters' wells, and that the seepage pits reflected on the final plat were more than 200 feet from those wells. Id. at 7. As such, the Commission suggested that there was no evidence that the proposed ISDS violated local or state regulations. Further, the Commission found that the

distance of the proposed septic systems from the private wells was not an explicit reason for denial of the subdivision application nor was there any suggestion that the Zoning Board or Planning Board could have been relying on the ISDS as a reason for denial. Id. at 8.

Based on these findings, the Commission concluded that the Gaffneys proved that the Town of Cumberland, Cumberland Zoning Board of Review, and the Finance Director of Cumberland, in his official capacity, discriminated against them and interfered with their right to own, enjoy, and utilize property based on their race and color in violation in § 34-37-5.1. Id. at 10, 17. The Commission ordered the respondents either to approve the final plat subdivision plan or pay the Gaffneys all of the expenses they incurred in preparing plans and attending hearings after October 15, 1990. Id. at 16-17. The Commission also dismissed the Complaint against Town Planner Bouley, finding that the Gaffneys did not prove, by a preponderance of the evidence, that he had discriminated against them. Id. at 10, 17.

D
Human Rights Commission Decision on Remand

After the Commission's decision, the Town of Cumberland, the Cumberland Zoning Board, and the Finance Director of Cumberland, in his official capacity, filed a timely appeal of the decision in the Rhode Island Superior Court. On November 2, 2007, this Court rendered a decision that found that the Gaffneys had exhausted their administrative remedies and that the Commission did not act in excess of its statutory authority in applying the FHA to the Gaffneys' charge of discrimination. Town of Cumberland v. Susa, C.A. No. PC-2001-3726, 2007 WL 4357113 (Super. Ct. Nov. 2, 2007) (Savage, J.) (Admin. Rec. Ex. 11). This Court found, however, that the Commission's decision was affected by error of law because it had concluded erroneously that the Planning Board had the authority to waive the requirement of the Subdivision Regulations that property must have 100 feet of frontage on a public street. Id. The

Court also held that the remedy ordered by the Commission was affected by legal error. Id. The Court remanded the case to the Commission for reconsideration in light of its decision. Specifically, the Court required the Commission to consider the liability of the Zoning Board separate from that of the Planning Board and whether the Gaffneys sought or received guidance from the Planning Board in the approval process. Id.

Upon remand, the parties did not request a new hearing, but instead asked the Commission to reconsider the case based on the original record. The Commission requested and received regulations and ordinances from the Town for review and, on March 12, 2010, issued a Second Decision and Order on the matter. (Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010.) Except for the finding of fact that was found to have been clearly erroneous by this Court in its original decision (namely, that the Planning Board could have waived the frontage requirements), the Commission reiterated the findings from its original decision. Id. at 3-11. In addition, the Commission determined that the Planning Board did not have the authority to waive the frontage requirement. Id. at 11-12. The Commission also found that Attorney Andrews asked on many occasions whether it was feasible to proceed with the Gaffneys' proposed subdivision, but the Planning Board never answered the question. Id. at 11-12. Additionally, the Commission made a finding that the Planning Board composition did not change between the February 21, 1995 hearing, when the Planning Board members generally agreed that they had no problem with the frontage and private road requirements, and the April 18, 1995 meeting, when the Planning Board members denied the subdivision application for lack of street frontage and the proposed private road. Id. at 11-12.

Based on its findings of fact, the Commission concluded that the Planning Board had discriminated against the Gaffneys on the basis of race. First, the Commission found that the

Planning Board imposed numerous meetings and requirements on the Gaffneys during the subdivision application process that were not imposed on white applicants. Specifically, the Commission found that "the Planning Board failed at the [p]re[-]application [s]ketch [p]lan meeting and every subsequent meeting to inform the complainants of the actual process necessary to obtain approval," and "[i]n 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." (Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010, at 14-15.) The Commission noted that the Planning Board held nine substantive meetings, and when asked by the Gaffneys and their engineer if the application were feasible, the Planning Board did not inform them that it was not feasible, despite Town Planner Bouley's testimony that the purpose of the meeting on the pre-application sketch plan was to inform the Gaffneys of the actual process to obtain approval. Id. at 14-15; see § 45-23-61(a)(1).

Further, the Commission concluded that there was evidence of racial discrimination based on the less-than-credible testimony of the Town's witnesses at the August 23, 2000 hearing before the Commission. In particular, the Commission found that there were contradictions between the testimony of the Planning Board members and the other evidence presented during the hearing. The Planning Board members testified, for example, that they could not waive the public road and frontage requirements, but there was evidence that it had approved other subdivisions with private roads and little or no frontage. Id. at 15 n.7.

Finally, the Commission concluded that the Planning Board's decision was discriminatory because the Board had not treated the Gaffneys in the same way as white applicants. The Commission determined that the Planning Board "[diverted] the complainants away from the proper process for obtaining approval, and [imposed] various conditions for a

Planning Board approval that could never be given." Id. at 16. The Commission found in this regard that "the Planning Board gave interim approval and required the complainants to revise their application in several different ways ... to obtain various approvals, causing the complainants to expend their time and resources for an application that could not be approved"; in addition, the Board did not "explain why [it] gave preliminary approval[] to the complainants' application, when it could not be approved" when the application process was designed to "weed out" applications that could not be approved. Id. at 16-17 (citing Tr. at 112-13). The Commission concluded that "[a]t the time of their application, the complainants were one of the few black families in town," such that it was "reasonable to infer that other applications [treated more charitably by] the Planning Board were from white families." Id. at 16 & n.8.

Ultimately, the Commission found that the Town had discriminated against the Gaffneys by interfering with their rights to own, enjoy, and utilize property because of their race and color in violation of the Rhode Island Fair Housing Practices Act, § 34-37-5.1. The Commission also dismissed the complaint against the Cumberland Zoning Board of Review, finding that the Gaffneys could not prove that the Zoning Board discriminated against them. Id. at 17-18. Following the decision, the Town timely filed this appeal. This Court has jurisdiction pursuant to R.I. Gen. Laws § 42-35-15.

II
Standard of Review

This Court's review of a decision of the Commission is governed by the strictures of the Rhode Island Administrative Procedures Act, which provides as follows:

> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the

> administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 42-35-15(g). In reviewing an agency decision, a court's review is limited to determining whether substantial evidence existed to support the decision. Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights, 484 A.2d 893, 897 (R.I. 1996). "Substantial evidence" is that which a reasonable mind might accept to support a conclusion. Id. "[I]f 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of R.I. v. State of R.I. Dep't of Business Regs., 996 A.2d 91, 95 (R.I. 2010). Thus, when examining the certified record, this Court may not substitute its judgment for that of the agency as to the weight of the evidence or its findings of fact. Interstate Navigation Co. v. Div. of Pub. Utils. & Carriers of R.I., 824 A.2d 1282, 1286 (R.I. 2003) (citations omitted); Newport Shipyard, Inc., 484 A.2d at 897.

This Court will "reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Baker v. Dep't of Emp't Training Bd. of Rev., 637 A.2d 360, 363 (R.I. 1994) (quoting Milardo v. C.R.M.C., 434 A.2d 266, 272 (R.I. 1981)). Questions of law, however, are not binding upon a reviewing court and may be freely reviewed to determine the law and its applicability to the facts. State Dep't of Envtl. Mgmt. v. State Labor Rels. Bd., 799 A.2d 274, 277 (R.I. 2002) (citing Carmody v. R.I. Conflicts of Interest Comm'n, 509 A.2d 453, 458 (R.I. 1986)).

III
Analysis

The Town contends that the Commission's decision is affected by error of law because it failed to hold a particular individual responsible for the discriminatory practices. Further, the Town maintains that the Commission's decision is clearly erroneous because there is no evidence to suggest racial motivation. The Town also alleges that the Commission's decision is arbitrary and capricious because the Commission failed to properly consider all of the reliable, probative, and substantial evidence of record from the hearing. Finally, the Town argues that this Court should consider the fact that the Gaffneys refused to resolve this dispute amicably, as the Town suggested in 2003.

The Gaffneys and the Commission counter that the Commission properly found that the Planning Board, as a public entity, violated the state and federal FHA, such that the municipality, by and through the Finance Director in his official capacity, is the proper party. In addition, they argue that there are sufficient facts to support the Commission's finding of discrimination. Further, they maintain that the Commission properly followed its rules and regulations in conducting the preliminary investigation and the August 23, 2000 hearing. Finally, the Gaffneys contend that it is improper, pursuant to Rule 408 of the Rhode Island Rules of Evidence, for the Town to mention, or the Court to consider, any settlement discussions between the parties.

A
Proper Parties

The Town argues that it and its Finance Director are not proper parties to this suit. Specifically, the Town maintains that neither the Commission nor the Gaffneys ever alleged any discriminatory practices on the part of its Mayor, Town Council, or Town Treasurer and that the law required the Commission to name one or more specific individuals, rather than the Town, as

having engaged in unlawful discrimination. The Commission and the Gaffneys respond that in an action filed with respect to the conduct of a subdivision or agency of a municipality—here, the Planning Board—the municipality is the proper party.

In Rhode Island, any suit against a municipal department is a suit against the municipality itself such that a plaintiff must name the municipality as a party defendant. See Cummings v. Godin, 119 R.I. 325, 377 A.2d 1071 (1977). Municipal agencies are not entities capable of being sued; they are merely administrative arms of a municipality that do not have a legal identity separate and apart from the municipality itself. See Peters v. Jim Walter Door Sales of Tampa, Inc., 525 A.2d 46 (R.I. 1987) (holding that the East Providence School Committee—a municipal body—was not a proper party defendant and that the City of East Providence should have been named as a party defendant in the suit); see also Committee v. Smith, 896 A.2d 49, 53 (R.I. 2003) (holding that a suit against a municipal department is a suit against the municipality itself); Serpa v. Amaral, 635 A.2d 1196, 1198 (R.I. 1994) (holding that an action against the pension board was an action against the town for the purposes of procedural requirements, based on its finding that "a pension board that is composed of town officials and serves town employees is a municipal board for the same reasons the WBS [Water Supply Board] in Pawtucket was found to be part of the municipal corporation [in Hervieux v. Papineau, 611 A.2d 838, 841 (R.I. 1992)]"); Reindl v. City of Leavenworth, 361 F. Supp. 2d 1294 (D. Kan. 2005) (holding that a suit against a municipality and a suit against a municipal official acting in his or her official capacity are the same).

Similarly, zoning boards and planning boards are entities that have no legal identity separate from the municipality in which they operate. See Munroe v. Town of East Greenwich, 733 A.2d 703, 710 (R.I. 1999). Indeed, it is well-established in Rhode Island that zoning, land

development, and subdivision regulations constitute a valid exercise of a municipality's police power. Id. With respect to a zoning board, our Supreme Court has recognized that "it is an administrative body whose duties are quasi-judicial," and "[i]t is wholly a statutory creature which has been assigned a definite, but limited, role in the administration of the zoning laws, and it is without powers, rights, duties or responsibilities save for those conferred upon it by the legislature." Town of Coventry Zoning Bd. of Rev. v. Omni Dev. Corp., 814 A.2d 889, 896-97 (R.I. 2003) (quoting Hassell v. Zoning Bd. of Rev. of East Providence, 108 R.I. 349, 351, 275 A.2d 646, 648 (1971)).

The planning board is also a creature of statute that has quasi-judicial powers that are limited by its enabling legislation to enforce the Land Development and Subdivision Review Act, §§ 45-23-26 to 45-23-74, and local regulations. See §§ 45-22-7; 45-23-51. Pursuant to § 45-23-51, the control over land development and subdivision projects by the municipality is required to be conferred upon the planning board. § 45-23-51. That statute provides:

> The city or town council shall empower, by ordinance, the planning board to adopt, modify and amend regulations and rules governing land development and subdivision projects within that municipality and to control land development and subdivision projects pursuant to those regulations and rules.

See § 45-23-51. Further, pursuant to § 45-23-32(32), a "planning board" is defined as "[t]he official planning agency of a municipality, whether designated as the plan commission, planning commission, plan board, or as otherwise known." § 45-23-32(32).

Here, in its March 12, 2010 decision, the Commission concluded that the Town was the proper party defendant in the Gaffneys' action against it. It found, in reliance on Peters, that "[w]hen a tort action is filed with respect to the actions of a subdivision of a municipality, the municipality is the proper party." See Admin. R. Ex. 14, March 12, 2010, at 13 (citing Peters,

525 A.2d at 47). According to the Commission, discrimination actions more closely resemble common law tort or contract actions than any equitable cause of action, such that Peters controls. See FUD's, Inc. v. State, at 727 A.2d 692, 697 (R.I. 1999).

This Court agrees that the Town is the proper party to answer the Gaffneys' allegations of discrimination. See Post v. City of Fort Lauderdale, 750 F. Supp. 1131, 1132-33 (S.D. Fla. 1990) (dismissing federal civil rights claims against zoning and police departments because city is proper party); see also Monell v. Dept. of Social Servs., 436 U.S. 658 (1978) (holding that municipalities can be liable for civil rights violations, but that municipal departments or divisions cannot be held liable). The Planning Board here is a subdivision of the Town such that any claim of discrimination against it is properly brought as a claim against the municipality itself. See Cummings v. Godin, 119 R.I. 325, 377 A.2d 1071 (1977); § 45-23-51. Further, it is well-recognized that federal Fair Housing Acts, which prohibit discrimination in housing on the basis of race, apply to municipalities. See U.S. v. City of Parma, 661 F.2d 565, 572 (6th Cir. 1981) (recognizing that the federal Fair Housing Act applies to municipalities); United Farmworkers of Florida Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir.1974) ("The importance of the City's presence as a named party defendant lies in the fact that relief against the City officials may not always provide a complete substitute for relief against the City itself."). Accordingly, this Court concludes that the Commission's finding that the Gaffneys properly named the Town a party defendant was not affected by error of law.

While the Town argues that specific individual members of the Planning Board should be named as party defendants, its argument demonstrates a fundamental misapprehension of law. As discussed previously, except where it is otherwise provided by statute, a municipal corporation should be sued in its proper corporate name and not in the names of the individuals

who compose it. See Buckner v. Clay, 306 Ky. 194, 206 S.W.2d 827 (1947) ("Accurately, suits by or against a municipal corporation should be in its corporate name and not by or against the individuals composing it, or the council, or its officers, or its corporate authorities."); cf. People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725 (E.D. Va. 1992) (holding city liable under the federal Fair Housing Act for illegal acts and deeds of its employees under theory of respondeat superior).

In this case, the Gaffneys made clear in their testimony that they were suing the Town for discrimination. See Schroeder v. De Bertolo, 879 F. Supp. 173 (D.P.R. 1995) (where discrimination suit under FHA was brought against "members of the condominium board of directors," without listing each individual member's role in the discrimination, as the members were elected to communally represent the interest of all owners in a condominium and the collective duties of the board included enforcing condominium regulations). While the Gaffneys may have properly named the individual members of the planning board, under the appropriate factual scenario, the members are not necessary or indispensable parties. See Super. R. Civ. P. 19; cf. U.S. v. Borough of Audubon, N.J., 797 F. Supp. 353 (D.N.J. 1991) (explaining that provisions of the federal Fair Housing Act forbidding discrimination on the basis of handicap and prohibiting coercion, intimidation, or interference with the exercise or enjoyment of civil rights prohibit discriminatory housing practices by municipal government as well as private parties); Weaver v. Boyles, 172 F. Supp. 2d 1333 (D. Kan. 2001) (explaining that an agency of a city does not have the capacity to be sued as a separate entity; the city is a necessary and indispensable party to any action filed either by or against the agency). Accordingly, the Court is not convinced by the Town's argument that one or more specific individuals of the Planning Board must be named as party defendants for this action to proceed.

In addition, the Court finds that the Gaffneys properly named Stephen Woener as a party defendant in his official capacity as Finance Director. It is a generally accepted principle that a suit brought against a state official acting in his or her official capacity equates to a suit against the state. See Capital Properties, Inc. v. State, 749 A.2d 1069, 1081 (R.I. 1999) (discussing that a suit against a state official acting in his official capacity constitutes a suit against the state) (citing Will v. Michigan, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)); see also Valcourt v. City of Providence, 18 R.I. 160, 26 A. 45 (1893) (explaining that claims against municipal corporations can be prosecuted at law in Rhode Island only by action against the town treasurer or city treasurer after presenting an account to the town council or the city council). It follows, then, that a suit brought against a municipal official, such as a municipal finance director in his official capacity, is a suit against the municipality. See Feeney v. Napolitano, 825 A.2d 1 (R.I. 2003) (effectively treating lawsuit against treasurer as lawsuit against town). Accordingly, the acting Finance Director, Stephen Woerner, sued in his official capacity, is a proper party, and the suit against him shall be treated as a suit against the Town. See Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) ("Official-capacity suits ... 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'") (quoting Monell, 436 U.S. at 690 n.55, 98 S.Ct. at 2035 n.55). The Commission's conclusion that the Town of Cumberland and Stephen Woerner, in his official capacity as Finance Director, were named properly as party defendants is thus legally correct and free from any error of law.

B
Discrimination

The Town next argues that there was no reliable evidence introduced that the Planning Board's actions were racially motivated. Specifically, the Town argues that the Commission concluded that the Gaffneys faced disparate treatment by the Planning Board without sufficient

evidence to support that conclusion. The Commission and the Gaffneys respond that the Commission had substantial evidence of record to demonstrate that the Planning Board's proffered reasons for denying the Gaffneys' subdivision application were a pretext for discrimination.

As outlined in the Court's previous decision, the statutory scheme in the case at bar involves the Rhode Island Fair Housing Practices Act, which is designated "to safeguard the right of all individuals to equal opportunity in obtaining housing accommodations free of discrimination." § 34-37-1 (cited in Town of Cumberland v. Susa, C.A. No. PC-2001-3726, 2007 WL 4357113 (Super. Ct. Nov. 2, 2007) (Savage, J.)). As such, "[t]he right of all individuals in the state to equal housing opportunities ... regardless of race ... is hereby recognized as, and declared to be, a civil right." § 34-37-2. In furtherance of this purpose, the Rhode Island Fair Housing Practices Act designates certain practices as unlawful:

> It shall be unlawful to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of ... any right granted or protected by this chapter. No owner under this chapter or any agent of these shall discriminate in any matter against an individual because he or she has opposed any practice forbidden by this chapter, or because he or she has made a charge, testified, or assisted in any manner in any investigation, proceeding, or hearing under this chapter.

§ 34-37-5.1. Similarly, the federal Fair Housing Act provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any rights granted or protected by [sections relating to discrimination in the sale or rental of housing, residential real estate-related transactions, or the provisions of brokerage services].

42 U.S.C. § 3617.

Rhode Island law interpreting § 34-37-5.1 is sparse. As the Rhode Island Fair Housing Practices Act mirrors the core provisions of its federal analog, however, our Supreme Court instructs that this Court should look to decisions of the federal courts that interpret and apply the federal statute for guidance as to how to interpret and apply our state statute. See Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights, 484 A.2d 893, 897-98 (R.I. 1984) (It is well-recognized that in construing other statutes, which interpret civil rights guaranteed under both federal and state law, our Supreme Court has accepted guidance from decisions of the federal courts.).

Under federal law, a plaintiff seeking relief under the federal Fair Housing Act, 42 U.S.C. § 3617, must show: (1) plaintiff is a member of a class protected under the Act; (2) plaintiff exercised a right protected by the Act or aided others in exercising such rights; (3) defendant's conduct was at least partially motivated by intentional discrimination; and (4) defendant's conduct constituted coercion, intimidation, threat, or interference on account of having exercised, aided, or encouraged others in exercising a right protected by the Act. People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725 (E.D. Va. 1992); see Newport Shipyard, 484 A.2d at 897-98 (examining federal case law in process of interpreting state employment discrimination statute); Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998) (using federal law to interpret state law). It necessarily follows, therefore, that to prevail with their claims of discrimination under the Rhode Island Fair Housing Practices Act, the Gaffneys must prove: (1) they are members of a class protected under the Act; (2) they exercised rights protected under the Act; (3) the Planning Board, in denying their subdivision application and making them jump through unnecessary procedural hoops in their attempt to advance their application, was at least partially motivated by intentional discrimination; and (4) the Planning

Board action in that regard, which the Commission specifically found to include the "diversion of the [Gaffneys] away from the proper process for obtaining approval, and imposition of various conditions for a Planning Board approval that could never be given," interfered with rights of the Gaffneys protected by the Act. Id.; see Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010 at 16.

This Court will examine the four elements of the Gaffneys' discrimination claim to determine whether the Commission correctly found that they proved their claim of discrimination under the Act. It will examine the first two elements of their claim together, as the analysis regarding those elements is straightforward. The question of whether the Gaffneys met the third and fourth elements commands the Court to engage in a more detailed and sensitive inquiry as both elements require proof of discriminatory intent. See Mich Prot. & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 347 (6th Cir. 1994).

1
Members of Protected Class Exercising Rights Protected Under the Act

Utilizing these four elements to evaluate the Gaffneys' cause of action, it is undisputed that the Gaffneys are members of a protected class under the Rhode Island Fair Housing Practices Act. Just as the federal statute prohibits discrimination or preferences in housing based on race, see 42 U.S.C. §§ 3603-3606, 3617, the Rhode Island statute does the same. See §§ 34-37-2, 34-37-5.1. As black citizens of the Town, the Gaffneys are entitled to these protections. It likewise is undisputed that the Gaffneys exercised the right to pursue housing protected under the Rhode Island Fair Housing Practices Act by seeking subdivision approval from the Planning Board. See § 34-37-5.1. As such, the Commission correctly found that the Gaffneys satisfied the first two elements of their claim of discrimination under the Act.

2
Intentional Discrimination

The central question revolves around the third and fourth element of the Gaffneys' Rhode Island Fair Housing Practices Act claim—intentional discrimination. Under the state and federal Fair Housing Acts, a plaintiff may allege three distinct causes of action: intentional discrimination or disparate treatment, disparate impact, or failure to make reasonable accommodations. See Gamble v. City of Escondido, 104 F.3d 300, 304-07 (9th Cir. 1997) (describing the three causes of action); Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48 (2d Cir. 2002) (same). Here, the Gaffneys advance only a theory of disparate treatment, which requires the plaintiffs to present evidence showing that the challenged conduct "was due in part or whole to discriminatory intent." McGinest v. GTE Serv. Corp, 360 F.3d 1103, 1123 (9th Cir. 2004).

To prove intentional discrimination, a plaintiff may establish that the defendants had discriminatory intent either directly, through direct or circumstantial evidence, or indirectly, through the time-honored burden-shifting analysis outlined by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 663 (1973).[11]

[11] Under the McDonnell-Douglas framework:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for [its actions]. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered … were not its true reasons but were a pretext for discrimination.

Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981) (citing McDonnell-Douglas, 411 U.S. at 802-04); see Barros, 710 A.2d at 683-85 (adopting the McDonnell-Douglas framework); Caron, 307 F. Supp. 3d at 369.

See, e.g., East-Miller v. Lack County Hwy. Dept., 421 F.3d 558, 563 (7th Cir. 2005); Campbell v. Robb, 162 Fed. App'x. 460, 474-75 (6th Cir. 2006) (adapting the McDonnell-Douglas burden-shifting analysis to retaliation claims under 42 U.S.C. § 3617) (citing Mercer v. Princeton Square Apartments, 228 F.3d 631, 634 (6th Cir. 2000)); Lindsay v. Yates, 578 F.3d 407, 415 (6th Cir. 2009) (same); cf. Barros, 710 A.2d at 685; Caron, 307 F. Supp. 2d at 369 (applying the McDonnell-Douglas test to the Rhode Island Fair Housing Practices Act claim).

Here, the Commission did not find, nor do the parties argue, that there is direct evidence of intentional discrimination. See, e.g., Kormoczy v. HUD, 53 F.3d 821, 824 (7th Cir. 1995) ("Direct evidence is that which can be interpreted as an acknowledgment of the defendant's discriminatory intent."). Rather, the Commission found indirect evidence of discriminatory intent after applying the McDonnell-Douglas framework. (Admin. R. Ex. 8, Comm'n Dec'n, June 5, 2001.) The Town appealed to this Court, and this Court, in turn, remanded the case back to the Commission to examine "[w]hether the denial [of the Gaffneys' subdivision application] was a pretext for discrimination." See Town of Cumberland v. Susa, C.A. No. PC-2001-3726, 2007 WL 4357113 (Super. Ct. Nov. 2, 2007) (Savage, J.).

On remand, the Commission explained that "[s]ince 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." (Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010, at 13.) The Commission explained that focusing on whether the Planning Board's process was discriminatory was "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.'" Id.

The Commission then concluded that the Planning Board's procedural abnormalities were a pretext for discrimination, based on the Planning Board's "diversion of the [Gaffneys] away from the proper process for obtaining approval, and imposition of various conditions for a Planning Board approval that could never be given, [which] constituted interference with the complainants' right to enjoy their property, because of the complainants' race and color." The Commission "infer[red] that other applications before the Planning Board were from white families," because at the time of the Gaffneys' application, they were one of the few black families in town. (Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010, at 16 n.8.)

Now before the Court is the Town's appeal of the Commission's second decision.[12] The Town argues that no reliable evidence was introduced at any stage to suggest the Town officials were racially motivated. The Gaffneys and the Commission respond that the Commission's decision was based on reliable evidence that the Town's unfair treatment of the Gaffneys was due to their race and color.

In reviewing the Commission's decision, this Court recognizes that the issue of discriminatory pretext focuses on the ultimate question of "discrimination vel non." Casey v. Town of Portsmouth, 861 A.2d 1032, 1037 (R.I. 2004). To prove discriminatory pretext, a

[12] The Court is mindful that "[o]nce a [hearing] has been conducted, this Court will not decide whether a plaintiff has met her burden of making a prima facie case, or whether a defendant has met the alternative burden of producing evidence of a legitimate rationale for [its adverse action]" under the McDonnell-Douglas test. Kormoczy v. HUD, 53 F.3d 821, 823 (7th Cir. 1995) (citing cases). Accordingly, the review of this Court is limited to a review of the Commission's finding of discriminatory intent based on the Commission's finding that the Planning Board's process for reviewing the Gaffneys' subdivision application was a pretext for discrimination. Id.; see Pignato v. American Trans. Air, Inc., 14 F.3d 342, 347 (7th Cir. 1994) ("[D]espite certain apparent weaknesses revealed by the record in [Plaintiff's] prima facie case[,] we leave without further comment the district court's finding that he had established it.").

plaintiff need not offer "'smoking gun'" evidence of discrimination. Barros, 710 A.2d at 685. Rather, a plaintiff must prove that defendant's reasons offered for its actions were a pretext and that it actually acted with discriminatory animus. Casey, 861 A.2d at 1038. There must be sufficient evidence for a reasonable fact finder to conclude that the defendants were motivated by a protected characteristic in performing the challenged conduct. In determining whether a plaintiff met the required burden of proof, the Superior Court does not reweigh the evidence; if the evidence before the agency warrants either of two opposed findings, the Court is bound by the findings of the agency. Newport Shipyard, Inc., 484 A.2d at 897. The ultimate inference of discrimination is stronger when the reasons for the defendant's actions are "accompanied by a suspicion of mendacity." Barros, 710 A.2d at 685 (quoting Hicks, 509 U.S. at 511).

To find discriminatory intent, a court may evaluate evidence derived from consideration of numerous factors, including: (1) the historical background of the decision; (2) the "sequence of events leading up to the challenged decision[]"; (3) departures from "normal procedural sequences"; and (4) legislative or administrative history of the challenged decision. LeBlanc, 67 F.3d at 425; see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). In addition, a court can consider whether a defendant adhered to a policy with full knowledge of its predictable segregative effects. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979); see Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536, 99 S.Ct. 2971, 2978 n.9, 61 L.Ed.2d 720 (1979); Pers. Admin. of Massachusetts v. Feeney, 442 U.S. 256, 279 n.25, 99 S.Ct. 2282, 2296 n.25, 60 L.Ed.2d 870 (1979). Accordingly, a complainant can establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the [defendant] or indirectly by showing that the [defendant's] proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256.

In this case, the Commission found discriminatory intent because: (1) the Planning Board approved the same type of subdivision for a similarly situated party outside the protected class; and (2) the Gaffneys' were required to meet numerous requirements that white applicants were not required to meet. Yet, the Town argues that there is no documentary evidence suggesting that the Planning Board approved subdivision applications for white applicants with less or no frontage or with private roads, such that the Commission's conclusion that white applicants were not subjected to the same requirements as the Gaffneys is unsupported by the evidence and speculative. The Commission and the Gaffneys respond that the Commission properly inferred that other approved subdivision applications were for white applicants given the "extremely small population of black residents in the Town at that time."

A review of the Commission's decision shows that its conclusion that the Planning Board subjected the Gaffneys to a different application process than similarly situated white applicants was simply based on a finding that, "[a]t the time of their application, the complainants were one of the few black families in town," and therefore, "[i]t is reasonable to infer that other applications before the Planning Board were from white families." (Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010 at 16 n.8.) The Commission then concluded that the Planning Board acted with discriminatory intent in rejecting the Gaffneys' application because, in the past, it had approved several subdivision applications, presumed to have been brought by white applicants, with no frontage or less than the required frontage and private roads, and it had not subjected these applicants to the same procedural requirements in the subdivision application review process as the Gaffneys. (Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010, at 15 n.7, 16-17.) Yet, the record reveals a lack of competent evidence to support the Commission's findings in this regard.

In this case, the only evidence presented of disparate treatment was Henry Gaffneys' anecdotal testimony that they were one of the few black families in Cumberland and, therefore, the other subdivisions without frontage and with private roads were owned by white applicants. See King v. Phelps Dunbar, LLP, 844 So.2d 1012, 1023 (La. App. 4th Cir. 2003) (finding plaintiff's disparate treatment argument failed when the only evidence presented of disparate treatment was plaintiff's own opinion without a presentation of any facts showing that he was treated differently than similarly situated non-minority employees). No evidence was presented as to whether these properties were owned exclusively by white applicants, whether white families were the ones to submit applications on their behalf, or whether there were other extenuating circumstances surrounding subdivision applications for these properties that offer justification for their approval. See Tr. 118; Admin. R. 8, Commission Decision, June 5, 2001, at 11; see also Gamble, 104 F.3d at 306–07; cf. Dove v. Bayer Healthcare, 281 Fed. App'x. 703 (9th Cir. 2008) (plaintiff failed to establish that similarly situated individuals were treated more favorably when plaintiff presented no evidence as to either how the individuals performed in their interviews for a position or the composition of the applicant pool). Neither the complaint nor the record informs this Court of the dates on which the Planning Board approved any other subdivision applications or the approval process used by the Planning Board in approving those applications. See Tr. at 51; see also Gamble, 104 F.3d at 305.

Further, during Henry Gaffney's testimony, it became clear that the Gaffneys did not possess sufficient knowledge of the circumstances pertaining to the other properties to state categorically that they were comparable to the Gaffneys' own request for subdivision approval. All that is known is that lots exist in Cumberland that lack frontage or contain private rights-of-way similar to the lot for which to the Gaffneys sought subdivision approval. Henry Gaffney

drew the inference that because such properties and the irregularities in their design "exist … I assume they're accepted by the town." (Admin. R. Ex. 6, Tr. at 5-7.) However, Henry Gaffney did not produce evidence of any application made by a white family that was analogous or comparable to his own family's subdivision request. Cf. 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673 (D.C. Cir. 2006) (in case involving alleged discrimination in implementation of community revitalization plan, complainants produced statistical evidence and maps illustrating the percentage of Hispanic residents by census block group). When he was asked, for example, if he knew of any subdivision applications that the Planning Board had approved that had no frontage, a private road, surface water problems, 911 concerns, and water contamination problems, Henry Gaffney replied, "No, of course not." (Admin. R. Ex. 6, Tr. at 48.) When asked if he reviewed the subdivision applications for the lots he described, Henry Gaffney admitted, "No, I did not." (Admin. R. Ex. 6, Tr. at 52.) Similarly, when the Commission asked him about one specific property he listed that had a private right-of-way, he acknowledged that the lot could have been constructed prior to the adoption of the Town's subdivision regulations and that it could have been approved due to grandfather rights. (Admin. R. Ex. 6, Tr. at 50.)

This Court thus finds that the only evidence presented to the Commission of disparate treatment was Henry Gaffney's testimony that some lots exist—including the lots on Diamond Hill Road, Pine Swamp Road, and the Jason's Grant subdivision—that lack frontage or contain a private right-of-way similar to the Gaffneys. See Admin. R. Ex. 8, Comm'n Dec'n, June 5, 2001, at 11 (citing Tr. at 8-9, 48-51, 118)). Aside from noting these variances, which granted to other lots in Cumberland—which variances could have been the product of zoning relief granted by the Zoning Board of the type the Gaffneys never sought or obtained—the Gaffneys offered no

further evidence that the Planning Board acted arbitrarily, irrationally, or in a way that consciously discriminated against them. See Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (R.I. 1976) (explaining that imposing differing conditions on property in the same land-use category does not constitute wholly arbitrary differentiation and owners of property in the same land-use category are not necessarily similarly situated). Accordingly, there was a lack of competent evidence presented to show that the circumstances pertaining to the other properties were comparable to the Gaffneys' own request for subdivision.

Similarly, there was an absence of evidence to support the Commission's finding that the procedural abnormalities to which the Planning Board subjected the Gaffneys' subdivision application were suggestive of discriminatory motive. It is true that the Planning Board reversed its positions with great frequency. It is likewise true that "procedural abnormalities can provide a basis for finding discriminatory intent." Macone v. Town of Wakefield, 277 F.3d 1, 6 (1st Cir. 2002). Yet, the record is bereft of any evidence demonstrating that the procedural process required by the Planning Board here was motivated by racial animus as opposed to non-discriminatory benign reasons (i.e. its philosophy about proper planning and development, misapprehension of its powers, or general incompetence). Caron v. City of Pawtucket, 307 F. Supp. 2d 364, 369 (D.R.I. 2004) (denying a discrimination claim because there was no evidence that the zoning board's procedural abnormalities were motivated by racial animus).

The Planning Board had plenary discretion to deny the Gaffneys' application based on the competent evidence before it. Indeed, "municipalities are traditionally afforded wide discretion in zoning." Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (citing Vill. of Belle Terre v. Boraas, 416 U.S. 1, 8-9 94 S.Ct. 1536, 1540-41, 39 L.Ed.2d 797 (1974) (upholding a zoning ordinances as a constitutional exercise of legislative

discretion). A planning board can be wrong or incompetent without being racially bias. Here, the Planning Board acknowledged that the Gaffneys' original application did not meet the requirements of the Subdivision Regulations that "[a]ll lots shall front on an existing or proposed public street," that "[a]ll lots shall have a minimum of one hundred (100) feet of frontage," and that granting a subdivision application that did not meet these requirements would set bad precedent. See Gamble, 104 F.3d at 306 (citing Desmond v. County of Contra Costa, 21 Cal. App. 4th 330, 25 Cal. Rptr. 2d 842 (1993); Guinnane v. San Francisco City Planning Comm'n, 209 Cal. App. 3d 732, 257 Cal. Rptr. 742 (1989)). It is well-recognized in the federal courts that if a government body is acting within the ambit of legitimately derived authority, a court should be reluctant to find that its action violates the FHA. Metro. Hous. Dev. Corp., 558 F.2d at 1293 (citing Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867, 876-77 (6th Cir. 1975)). Further, the FHA imposes no affirmative obligation on municipalities to approve all proposed affordable or minority housing projects. Macone v. Town of Wakefield, 277 F.3d 1, 8 (1st Cir. 2002).

Throughout the Planning Board minutes, it is clear that there were many problems with the Gaffneys' subdivision application. The Planning Board members, for example, continually noted that the application did not meet the requisite subdivision regulations and expressed concern that its approval would result in bad precedent. At the pre-application sketch plan meeting, for example, Planning Board members Draper and Simanski noted their concern with the private right-of-way and access by emergency vehicles. (Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Aug. 18, 1992.) Further, the Planning Board repeatedly voted to continue the hearings on the Gaffneys' application so they could bring their plan up to subdivision standards until it finally denied approval of the application at the final plat hearing on October 18, 1994. (Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Aug. 18, 1992;

Sept. 20, 1994; Apr. 19, 1994; Sept. 20, 1994; Oct. 18, 1994.) In fact, Planning Board member Simanski raised this concern about compliance with the subdivision standards on multiple occasions throughout the review process, including at the August 18, 1992 hearing on the preliminary plat, at the April 19, 1994 hearing where he voted to deny the Gaffneys' original application partly because their application did not meet a number of requirements for the final plat stage, and at the September 20, 1994 hearing where he voted to deny approval of the Gaffneys' final plat application as it was not up to subdivision standards. (Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Aug. 18, 1992, Sept. 20, 1994; Apr. 19, 1994.)

Further, at the October 18, 1994 continued final plat approval hearing, Planning Board member Simanski stated that the Planning Board would be creating "very bad precedent" if the Gaffneys' petition were approved with no frontage and a private right-of-way. (Admin. R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Oct. 18, 1994, at 8.) He noted that if the Planning Board approved the Gaffneys' application, then "anyone who owns 4 acres of land [could] put a right of way through their property and subdivide thereby creating a number of lots with private drive resulting in house number problems, public safety problems and bad development planning." Id. Planning Board member Tagliaferro agreed with him.

After a review of the record, this Court finds that the Commission failed to consider the Planning Board's persistent objections to the lack of frontage and private right-of-way. There is no indication that the procedural abnormalities in the Planning Board's review process were motivated by racial animus. Instead, the Commission and the Gaffneys simply rely on the fact that the Planning Board denied their application and ask this Court to infer that the Planning Board did not submit white applicants to a similar procedure. Compare Caron, 307 F. Supp. 2d at 369 (unfavorable city zoning decisions, standing alone, do not constitute any direct or indirect

evidence of discriminatory intent) with Cmty. Hous. Trust v. Dep't of Consumer and Regulatory Affairs, 257 F. Supp. 2d 208 (D.D.C. 2003) (where an ordinance that applied different standards to persons on the basis of their disability violated the federal FHA). Such speculative evidence, however, is insufficient to support a finding of discrimination. Macone v. Town of Wakefield, 277 F.3d 1 (1st Cir. 2002) (holding that evidence of discrimination was insufficient because it was merely speculative).

Accordingly, the Court finds that the Commission's determination that procedural abnormalities in the Planning Board's review process were motivated by racial animus is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. There is no evidence that the procedural abnormalities connected with review of the Gaffneys' subdivision application were motivated by any racial animus on the part of the Planning Board. See Caron, 307 F. Supp. 2d at 369. To the contrary, the record demonstrates that the Planning Board worked with the Gaffneys as they revised and resubmitted their subdivision application.

The Commission and the Gaffneys, however, argue that evidence supports the Commission's finding of racial animus because the Planning Board did not properly advise the Gaffneys of the review process and placed a more onerous burden on the Gaffneys than other applicants seeking subdivision approval. Specifically, the Commission notes that Town Planner Bouley was responsible for providing "information, to meet with the applicants, to apprise them of what the next steps were and to advise them in writing what things were missing," but that he and the Planning Board failed to inform the Gaffneys of the actual process necessary to obtain approval. See Admin. R. Ex. 6, Tr. at 97-98, 112-13; see also § 45-23-35.

In considering the Commission and the Gaffneys' argument, the Court notes that § 45-23-35 describes the pre-application meeting, which allows applicants to meet with the appropriate

officials for advice "as to the required steps in the approval process, the pertinent local plans, ordinances, regulations, rules and procedures and standards which may bear upon the proposed development project." § 45-23-35. Pre-application meetings, however, are not mandatory. Section 45-23-35(a) provides that "[p]re-application meetings may be held for administrative and minor applications, upon request of either the municipality or the applicant." § 45-23-35(a) (emphasis added). Similarly, § 45-23-35(b) provides that "[a]t the pre-application stage[,] the applicant may request the planning board or technical review committee for an informal concept plan review for a development." § 45-23-35(b) (emphasis added).

Despite a finding that a pre-application meeting is not mandatory, the record in this case reveals that the Planning Board did review and discuss the Gaffneys' pre-application sketch plan at the October 15, 1990 meeting. Specifically, Planning Board member Simanski explained that the "[f]orty foot [right-of-way] would be for a private driveway and would not be the Town's responsibility," and he suggested that further research should be conducted regarding water availability and that language conveying the private right-of-way should be added to the deeds of the proposed lots. (Admin R. Ex. 5, Cumberland Planning Bd. Mtg. Mins., Oct. 15, 1990, at 1.) In addition, Henry Gaffney's testimony from the Commission hearing suggests that he was aware of zoning regulations regarding frontage and private roads, which he believed the Planning Board could and would waive. (Admin. R. Ex. 6, Tr. at 30-31.) His understanding of the zoning regulations suggests that he was provided an opportunity to gather advice and guidance as to the approval process. See § 45-23-35. Moreover, "[a]ll persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it." Texaco, Inc. v. Short, 454 U.S. 516, 532 (1981) (citing North Laramie

Land Co. v. Hoffman, 268 U.S. 276, 283 (1925)). Accordingly, this Court finds that the Planning Board did comply with the proper review process provided in § 45-23-35, and it was incumbent on the Gaffneys to be aware of and conform to the legal requirements of the planning process.

Even if the Planning Board did not follow the proper procedure under § 45-23-35, a review of the record reveals that there is no evidence establishing a nexus between the Planning Board's actions and the Gaffneys' race. See Caron, 307 F. Supp. 2d at 369. The Gaffneys argue that the abnormal procedure in itself supports racial animus. However, a similar argument was rejected by the federal court in Caron, where the plaintiff attempted to prove that being forced to appeal multiple times to the zoning board and the Superior Court constituted direct evidence of discrimination. Id. However, the court in that case denied the plaintiff's discrimination claim because procedural abnormalities alone do not prove that the zoning board was motivated by any racial animus. Id.

Finally, the Commission and the Gaffneys argue that the Commission's finding of discriminatory pretext based on procedural abnormalities is supported by its determination that the Planning Board members' testimony was not credible regarding the application process for a subdivision. The Town disagrees.

The Commission considered Planning Board member Simanski's testimony that the Planning Board "just did not approve of private rights-of-way," and that "[t]here [were] a lot of problems with this subdivision right from the beginning." (Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010, at 9 (citing Admin. R. Ex. 5, Tr. at 118-20.) The Commission also noted Town Planner Bouley's testimony that the Planning Board members "discourage people from pursuing [applications with no frontage on an existing street] because [those applications] couldn't be

approved," and that the Planning Board members "were very strenuous about saying they would not waive those regulations." (Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010, at 9 (citing Admin. R. Ex. 5, Tr. at 99, 118-19.)

Despite this testimony, the Commission determined that Planning Board member Simanski and Town Planner Bouley were not credible because Henry Gaffney testified about other subdivisions that were approved with less or no frontage and private roads. The Commission concluded that there was a contradiction between Planning Board member Simanski and Town Planner Bouley's testimony that applications with private right-of-ways and no frontage were discouraged and Henry Gaffneys' testimony about other subdivisions that were approved with private roads and less or no frontage. The Commission then concluded that this contradictory testimony supported a finding of discriminatory pretext because the Planning Board did not explain why it did not deny the subdivision application at the first hearing if the requirement for frontage on a public road was the "real reason" for the denial. (Admin. R. Ex. 14, Comm'n Dec'n, March 12, 2010, at 15.)

However, contrary to the Commission's finding, the testimony of the Town's witnesses actually supports the conclusion that there are no recorded cases of white applicants being offered privileges that were denied the Gaffneys. Town Planner Bouley testified, for example, that in his eight years as the Deputy Planning Director and Director of Planning for the Town, he "c[ould not] recall any" subdivision applications submitted for approval that were approved at the public hearing level with no frontage on an existing street. (Admin. R. Ex. 6, Tr. at 99.) Also, when asked about subdivision applications that included private rights-of-way, he testified that he did not "know of anywhere they've approved private roads," regardless of whether the applicant was black or white. (Admin. R. Ex. 6, Tr. at 103.)

Planning Board Member Simanski gave almost the exact same answers when asked similar questions. (Admin. R. Ex. 6, Tr. at 117-18.) When asked whether, "in [his] experience on the planning board, [he] recall[ed] an occasion where an application was submitted for a subdivision with no frontage on a preexisting street where that application was finally approved at the public hearing," he responded, "To the best of my knowledge, I can't recollect any applications being approved without any frontage." (Admin. R. Ex. 6, Tr. at 117-18.) He also was asked if he recalled the planning board approving a subdivision application that included a private right-of-way, to which he responded, "I don't believe we had approved any subdivisions that have private rights-of-way." (Admin. R. Ex. 6, Tr. at 118.) Simanski further explained that the Planning Board is "very concerned about private rights-of-way because of maintenance and safety." Id.

The only testimony offered to support the proposition that the Gaffneys were forced to undergo different procedural requirements than white applicants is Henry Gaffney's testimony. However, the Gaffneys did not present any evidence to prove that any subdivision application had been approved without frontage or with private roads. They likewise presented no evidence to suggest that the Planning Board had employed any different process regarding other subdivision applications that sought approval for private roads and no frontage. (Admin. R. Ex. 6, Tr. at 118; Admin. R. 8; Comm'n Dec'n, June 5, 2001, at 11.) While Henry Gaffney testified anecdotally as to the existence of surrounding lots without frontage or with private roads, including the Pine Street lot, the Diamond Hill Road lots, and the Jason's Grant subdivision, he admitted that he was not familiar with the application process or procedure these lots underwent to gain approval from the Planning Board. (Admin. R. Ex. 6, Tr. at 48-50, 52-53.) Perhaps more importantly, there was no evidence presented that the lots Henry Gaffney referenced as having

been granted subdivision approval were owned, at the time of approval, by white families. Although he testified, based on personal knowledge, that the house on lot 287 was constructed and occupied by a white family, he did not indicate that a white applicant received subdivision approval for that project. See Admin. R. Ex. 6, Tr. at 50; cf. Toohey v. Kilday, 415 A.2d 732, 727 (R.I. 1980) (Our Supreme Court has recognized that the "lay judgments of neighboring property owners on the issue of the effect of the proposed use on neighborhood property values … have no probative force."). Accordingly, the Gaffneys did not present competent evidence to contradict the Planning Board members' testimony.

In the absence of concrete evidence, there is no competent evidence to refute the testimony of Planning Board member Joseph Simanski and Town Planner Bouley. Upon review of the record, therefore, this Court finds that the Commission did not have substantial evidence of record to find that the Gaffneys proved that the Planning Board's reasons were not its true reasons for rejecting the Gaffneys' subdivision application. This Court thus finds that the Commission's decision is affected by error of law and constituted an abuse of discretion as it impermissibly rejected the uncontradicted and competent evidence before it. See Murphy, 959 A.2d at 542.

For all of these reasons, this Court finds that the Commission erred in determining that the Planning Board's decision was motivated by racial animus. See Sweetman, 117 R.I. at 151, 364 A.2d 15 1289 (explaining that imposing different conditions on similar property is not arbitrary differentiation per se). The Commission's decision in this regard was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

This Court must note, however, that it reaches this decision with reluctance. It is clear that the Gaffneys have, as phrased by the Court's November 2, 2007 decision, "been forced to

undergo a protracted subdivision approval process, and the expenses associated with it, and that they were treated unfairly by the Planning Board." Town of Cumberland v. Susa, C.A. No. PC-2001-3726, 2007 WL 4357113 (Super. Ct. Nov. 2, 2007) (Savage, J.). Yet, the deficiencies and unfairness of this process does not equate to a deprivation of their right to equal housing opportunities under the law. Accordingly, this Court cannot uphold a decision that finds the that Town of Cumberland, through its Planning Board, discriminated against the Gaffneys based on race.[13]

C
Statutory Requirements

In light of this Court's ruling in favor of the Town, it does not need to reach the Town's argument that the Commission failed to adequately investigate the Gaffneys' discrimination claim and properly conduct the hearing and assess the evidence before it. Even if the Court did examine these issues raised by the Town, however, it would reject the Town's arguments. The

[13] In light of this Court's decision, it need not address the final element of a claim of discrimination under the Rhode Island Fair Housing Practices Act (namely, whether the Planning Board's conduct constituted coercion, intimidation, threat, or interference on account of the Gaffneys having exercised a right protected under the Act). Even were this Court to address that element, it is clear that the record discloses no coercion, intimidation, or threats by the Planning Board and there is no suggestion that the Gaffneys ever felt coerced, intimated, or threatened by the Planning Board. The record similarly is devoid of the kind of evidence of interference that Courts have recognized as actionable under the state and federal FHA. "Interference" under the statute can encompass a "pattern of harassment, invidiously motivated." Halprin v. Prairie Single Family Homes, 388 F.3d 327, 330 (7th Cir. 2004). Though the case law is not uniform, the common view is that interference encompasses more than physical force or intimidation. See, e.g., Mich. Protection & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 347 (6th Cir. 1994) ("Section 3617 is not limited to those who used some sort of 'potent force or duress,' but extends to other actors who are in a position directly to disrupt the exercise or enjoyment of a protected right and exercise their powers with a discriminatory animus."). The phrase "interfere with" has been recognized to encompass such overt acts as racially-motivated firebombings and threatening notes as well as less obvious, but equally illegal, practices such as exclusionary zoning, deflating appraisals because of discriminatory animus and insurance redlining. Mich. Protection & Advocacy Serv., Inc., 18 F.3d at 347.

Commission conducted the preliminary investigation with "all dispatch" in obtaining adequate information to determine whether probable cause existed of unlawful discriminatory practices, pursuant to Rule 5.01. After the Commission conducted the preliminary investigation under Rule 5.01 and found probable cause, the Commission held a hearing on August 23, 2000. While Rule 10.05 provides that the Commission had the authority to "order[] the appearance of any person and the production of any books, papers, documents or tangible things," this authority is discretionary to the Commission. See Rule 10.05(B).

Further, despite the Town's argument that the Commission should have requested further documentation relating to the surrounding lots that Henry Gaffney discussed, our Supreme Court recognizes that while a hearing officer "may participate in the proceeding whenever necessary to the end that the hearing proceed in an orderly, expeditious fashion," an administrative hearing officer "must be impartial and must not attempt to establish proof to support the position of any party to the controversy." Davis v. Wood, 427 A.2d 332, 337 (R.I. 1981). If the Commission had taken a more active role in the procedure, as the Town argues it should have, there is a risk that the Commission would have become an advocate or participant rather than an impartial trier of fact. Id. Accordingly, this Court finds that the Commission properly exercised its discretion so as to remain an impartial trier of fact and properly considered all reliable, probative, and substantial evidence produced at the hearing. See Rule 10.05(A) & (B).

This Court notes that it cannot properly consider the additional evidence submitted by the Town regarding the surrounding lots. Review of an agency decision under § 42-35-15(f) "shall be confined to the record." This Court will not reweigh evidence nor substitute its judgment on questions of fact for that of the agency under review. See Newport Shipyard, Inc., 484 A.2d at 897.

D
Settlement

The Town also argues that this Court should consider that it has attempted to resolve this pending dispute many times but that the Gaffneys refuse to settle. Specifically, the Town argues that the references to settlement attempts were in response to the Court's comments in footnote 24 of its decision of November 7, 2007 where it recommended that "the parties may wish to agree that the applicant may pursue the subdivision approval process anew in tandem with a requested variance." The Town argues that in 2003, it offered to remand the Gaffneys' application to the Planning Board for approval of the three lot subdivision if the Gaffneys reconfigured the roadway, thus eliminating any problem with frontage. Charlean Gaffney, however, declined the offer as she did not like the shape of the proposed lots. The Gaffneys and the Commission respond that the Town is barred from introducing evidence of any attempts to resolve this controversy.

Under the Rhode Island Fair Housing Practices Act, "[the Commission] shall endeavor to eliminate the unlawful housing practices by informal methods of conference, conciliation, and persuasion. Nothing said or done during these endeavors may be used as evidence in any subsequent proceeding." § 34-37-5. Further, Rule 405 of the Rhode Island Rules of Evidence provides that evidence of compromise or attempts to compromise a claim that is in dispute "is not admissible to prove liability for or invalidly of the claim or its amount." Accordingly, this Court finds that evidence of attempted resolution of the matters at issue in this litigation is inadmissible by either party and will not be considered by this Court in these proceedings. Indeed, as this precept of inadmissibility is well-established in the law because it can serve to prejudice or mislead the finder of fact, the Town erred in mentioning its prior efforts to resolve its dispute with the Gaffneys in connection with its appeal.

IV
Conclusion

For all of the reasons stated in this Decision, and upon review of the entire record, this Court finds that the Commission's decision that the Town of Cumberland, by and through Stephen Woerner, in his official capacity as Finance Director of the Town of Cumberland, discriminated against the Gaffneys in the manner in which it handled and ultimately denied their subdivision application was not supported by reliable, probative, and substantial evidence of record and was affected by errors of law such that it prejudiced substantial rights of the Town. Accordingly, the Commission's decision, which found that the Planning Board had unlawfully discriminated against the Gaffneys on the basis of race and color, is reversed.

Counsel shall confer and submit to this Court forthwith for entry an agreed upon form of judgment that is consistent with this Decision.