

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

October 30, 2019

FILE COPY

Case Name: **Z-1 Express, LLC v City of Manchester**
Case Number: **216-2018-CV-00275**

You are hereby notified that on October 29, 2019, the following order was entered:

RE: FINAL ORDER:

See copy of Order attached. (Messer, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Gregory E. Michael, ESQ; Roy W. Tilsley, ESQ; Brett William Allard, ESQ; Peter R. Chiesa, ESQ;
Gregory T. Muller, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Z-1 Express, LLC

v.

City of Manchester

Docket No. 216-2018-CV-00725

ORDER

Plaintiff appeals the decision of the City of Manchester Zoning Planning Board denying its application for a conditional use permit. The Court held a hearing on September 9, 2019. For the reasons that follow, the decision of the Planning Board is VACATED and the matter is REMANDED.

On January 8, 2018, Plaintiff submitted an application for a conditional use permit allowing it to construct a convenience store and gas station on property it owns in Manchester. (Certified Record (“CR”) Vol. I, Tab 2.) The Board held public hearings on February 1 and 15, 2018, at which there was vigorous opposition to the project from the residents in close proximity to the site. (CR Vol. III, Tab 2 at 1–47.) During those hearings, Manchester Alderman Joseph Levasseur sat as a primary member of the Planning Board. (*Id.*)

On February 20, 2018, before the Board held its final deliberative session, Manchester Alderman Elizabeth Moreau, an alternate member of the Planning Board who did not attend the public hearings, posted a message on a Facebook group called

“Wellington Hill Area Residents,” a group that Plaintiff represents was created for the sole purpose of opposing the conditional use permit application. (Case index # 16.) The post read as follows:

Just an update for when the station goes to vote. Both myself, and Alderman Levasseur are in agreement that it does not fit that neighborhood and should not go through. As we are on the planning board as primary and alternate we will vote against this proposal.

(Id.) Both Aldermen Moreau and Levasseur were also members of the Facebook group.

(Id.) On February 26, 2018, Plaintiff filed a letter with the Board requesting that Aldermen Moreau and Levasseur both recuse themselves based on the Facebook post, arguing it demonstrated that they had prejudged the application. (Id.)

On March 1, 2018, the Board met again to conduct deliberations on Plaintiff’s application. (CR Vol. III, Tab 2 at 49.) Prior to deliberating, Alderman Levasseur addressed Plaintiff’s assertion that he should recuse himself or be disqualified. (Id.) Alderman Levasseur stated that the posting was made after the public hearings and he had not prejudged the issue. (Id.) He explained that he only spoke to Alderman Moreau about the case because he believed he may not be able to vote because he was going away on vacation, and therefore asked Alderman Moreau to sit in for him. (Id.) He then stated he returned from his vacation early to vote himself because he was concerned that Alderman Moreau would not be able to vote as a result of the Facebook post. (Id.) Ultimately, Alderman Levasseur stated he did not believe that he had prejudged the case and was within his rights to vote, and declined to recuse himself. (Id. at 50–51.)

The Planning Board then entered into deliberations. (Id. at 51.) A member of the Board immediately moved to deny the application, and Alderman Levasseur seconded the motion. (Id.) At the close of deliberations, the Board took a vote, which resulted in a

3-3 tie, with one member abstaining. (Id. at 56.) The Board tabled the matter and reconvened on March 15, 2018. (Id. at 56, 58.) After a brief discussion, the Board voted again, resulting in 4-3 vote in favor of denying Plaintiff's application. (Id. at 61.)

On appeal, Plaintiff argues that Alderman Levasseur ought to have recused himself from deliberations as he prejudged the application. "Our State Constitution demands that all judges be as impartial as the lot of humanity will admit." Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 267 (1984). "This applies similarly to members of boards acting in a quasi-judicial capacity." Id. "No member of a . . . planning board . . . shall participate in deciding or shall sit upon the hearing of any question . . . if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law." RSA 673:14, I. "If it appears that any juror is not indifferent, he shall be set aside on that trial." RSA 500-A:12, II.

"The reality that a juror may hold an opinion at the outset of deliberations is . . . reflective of human nature." People v. Allen and Johnson, 264 P.3d 336, 346 (Cal. 2011). "[The court] cannot reasonably expect a juror to enter deliberations as a *tabula rasa*, only allowed to form ideas as conversations continue." Id. However, "[w]hat [the court can] . . . require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination." Id.

At the March 1, 2018 hearing, Alderman Levasseur indicated that he did not believe he needed to recuse himself in part due to his reading of a specific New Hampshire Supreme Court opinion. While the minutes do not name the case, it appears Alderman Levasseur was referring to New Hampshire Milk Dealers' Association v. New

Hampshire Milk Control Board, 107 N.H. 335 (1966). In that case, the plaintiff appealed a decision of the Milk Control Board to eliminate milk price controls, arguing, in part, that the Board should have disqualified its chairman, William Craig, from participating in the underlying proceedings. N.H. Milk Dealers' Ass'n, 107 N.H. at 337. Prior to becoming chairman of the Board, Craig was a member of the State legislature and had co-sponsored a bill to eliminate the authority of the Milk Control Board to fix resale prices of milk.

The Court found that “[i]t is a well-established legal principle that a distinction must be made between a preconceived point of view about certain principles of law or a predisposed view about the public or economic policies which should be controlling and a prejudgment concerning issues of fact in a particular case.” Id. at 339. “There is no doubt that the latter would constitute a cause for disqualification.” Id. “However[,] bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification.” Id. Ultimately, the Court found no evidence that Craig had prejudged the case. Id.

While the Court understands how Alderman Levasseur read this case in a manner to support his conclusion that he did not need to recuse himself, the Court finds that Alderman Levasseur did more than generate an opinion on general policies or principles. In the Facebook post, which occurred prior to deliberations, Alderman Moreau stated that she and Alderman Levasseur not only agreed that the project did not fit the neighborhood, but that they “*will vote against this proposal.*” (Case index # 16 (emphasis added).) When permitted to respond to Plaintiff’s accusation of prejudgment, Alderman Levasseur did not challenge the contents of the post, or claim that Alderman

Moreau mischaracterized his position. In fact, the only comment he made about the post was that he thought it would be an issue “because [Alderman Moreau] had not taken the time to listen to the two hearings and deliberations that were presented by all parties.” (CR Vol. III, Tab 2 at 49.) Further, Alderman Levasseur “reiterated that he did not prejudge this or predetermine anything *until he heard all of the evidence.*” (*Id.* at 50.)

The foregoing strongly indicates that Alderman Levasseur made up his mind about his vote—either individually or through ex parte communications with Alderman Moreau, an alternate member who had not attended or listened to the public hearings—not only based upon the specific facts of the case, but before deliberations took place. In other words, the deliberative process, a key part of the quasi-judicial function of the Planning Board, was undermined by Alderman Levasseur’s conduct. The New Hampshire Supreme Court has consistently noted the importance of the deliberative process in jury trials by protecting it from outside influence. See, e.g., State v. Chapman, 149 N.H. 753, 757 (2003) (“A trial court’s aid to the jury deliberation process is not *per se* impermissible provided the court does not set the tone of the deliberations by directing the jury down a path toward a guilty verdict; any such direction to the jury, however subtle, denies the defendant an impartial jury.”). “The jury room is sacrosanct, and a just verdict cannot be reached if there is an inappropriate interference with or intrusion upon the deliberative process.” State v. Sullivan, 157 N.H. 124, 137 (2008). “[T]rial courts must scrupulously avoid interrupting the natural flow of deliberations without just cause.” *Id.* at 138. A threat to the integrity of jury deliberations poses a threat to the verdict. See State v. Rideout, 143 N.H. 363, 368 (1999) (finding juror’s contact with State witness “may well have contaminated the jury with extraneous

information, threatening the integrity of its deliberations, and hence, its verdict.”).

While there is nothing to indicate that Alderman Levasseur prejudged the case prior to hearing the evidence at the public hearings, the Court finds his failure to enter and participate in deliberations with an open mind achieves the same result. His actions in this case not only threaten the integrity of the deliberative process, and thus the ultimate decision of the Board, but also undermine the public trust in the overall function of the Planning Board. Further, Alderman Levasseur’s mere membership in the Facebook group, which Plaintiff represents exists solely to oppose the instant application, creates the appearance of impropriety. See State v. Bader, 148 N.H. 265, 268 (2002) (“The Code of Judicial Conduct requires disqualification of a judge in a proceeding in which the judge’s impartiality might reasonably be questioned and to avoid even the appearance of impropriety.”). Accordingly, upon consideration of all of the foregoing, the Court finds Alderman Levasseur improperly prejudged the case, and should have recused himself.

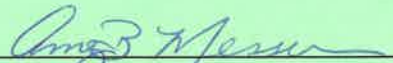
The Court now turns to the question of the appropriate remedy. Plaintiff argues that because the initial vote of the Board was 3-3, the Court should simply remove Alderman Levasseur’s vote and reverse the decision, given that its application would have thereby passed by a 3-2 vote. The Court disagrees. In Winslow, the Supreme Court adopted the standard set out in Rollins v. Connor, 74 N.H. 456 (1908), that “mere participation by one disqualified member was sufficient to invalidate the tribunal’s decision because it was impossible to estimate the influence one member might have on his associates.” 125 N.H. at 268. “In view of the important property rights involved, and the State constitutional mandate for judicial impartiality, we consider this rationale

sufficient to justify the application of the Rollins rule to this case.” Id. The Court therefore concluded that “the requirement of impartiality demands application of the Rollins rule to planning boards.” Id. at 269.

The Court finds Winslow governs this case. Given the concerns identified by the Supreme Court and the standard set forth therein, this Court finds that the proper course of action is to vacate the decision of the Planning Board and remand for further proceedings without the participation of Aldermen Levasseur or Moreau.¹ Accordingly, the decision of the Planning Board is VACATED and the matter is REMANDED for further proceedings consistent with this order.

SO ORDERED.

10/29/2019
Date



Amy B. Messer
Presiding Justice

¹ While not addressed in this order, Alderman Moreau engaged in much of the same conduct as Alderman Levasseur, but is further tainted by forming her opinions without attending or listening to the public hearings.