

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

MELISSA PATTAVINA, et al.

v.

NEWPORT SCHOOL COMMITTEE

DECISION
ON
MOTION TO DISMISS

Held: Affidavits submitted by the Petitioners establish that seven of them are parents of children who are likely to attend the new Pell School. These facts are sufficient to confer standing for the group's appeal of the decision of the Newport School Committee on the design of the school. The Petitioners seek to raise the issues of whether the School Committee violated School Construction Regulations by failing to involve the Ad Hoc School Building Committee in the decision to adopt a "T" design and in failing to provide the public with a meaningful role in reviewing this decision. Since these claims "arise under" a regulation relating to schools, i.e. RIDE's School Construction Regulations, the Commissioner has jurisdiction over this dispute; however, the facts asserted to date do not establish a likelihood of success on the merits.

DATE: May 26, 2011

Travel of the Case

A group of Newport citizens submitted a petition to Commissioner Deborah A. Gist on February 15, 2011. In their petition, the group sought the Commissioner's intervention in a plan for construction of a new elementary school pursuant to a thirty (\$30) million dollar bond referendum placed before Newport voters on November 2, 2010.

The petitioners alleged that the Newport School Committee and members of the school administration deceived the public as to the status of the decision on a design for the new school. Specifically, that the alleged deception was undertaken in order to enlist support for the bond referendum essential for financing the school's construction. According to the February 15, 2011 petition, the School Committee had recently sought to address public criticism of the process utilized and the school design selected by scheduling "input" sessions by which the public could provide suggestions on design features. The petitioners alleged that these sessions failed to provide any meaningful opportunity for input on the school's design. The petitioners allege that the piecemeal design changes agreeable to the School Committee are not adequate for remedying substantial flaws in the selected "T" design. An immediate hearing and intervention by the Commissioner has been requested in order to address the lack of consensus on the school's design. The petitioners request that the Commissioner immediately order the School Committee to undertake a public engagement process for purposes of ultimately selecting a design proposal reflective of the community's vision for the new school.

The matter was assigned to the undersigned on February 15, 2011 and a pre-hearing conference was held on February 18, 2011. Counsel for the Newport School Committee was present and the petitioners indicated their intent to retain counsel to represent them before proceeding further into the hearing process. Counsel for the School Committee indicated his intent to file a preliminary Motion to Dismiss and that Motion was filed on April 11, 2011.¹ By agreement of counsel, the petitioners submitted their Objection to the Motion together with a supporting memorandum on April 25, 2011. Counsel for the School Committee then submitted a Reply Brief on May 9, 2011 and to this counsel for the petitioners responded on May 16, 2011 with a Sur-Reply Memorandum. After review of the memoranda, the hearing officer determined that it would be more efficient and helpful to the parties to rule separately (and prior to hearing) on the Motion to Dismiss, rather than consolidating a ruling on the Motion with a decision on the merits of this case.

ISSUES

- Do the petitioners have standing to challenge the decision of the Newport School Committee to adopt a "T" design for the Pell Elementary School?
- Does the Commissioner have jurisdiction to hear this dispute?

¹ Counsel for the petitioners entered his appearance on their behalf on April 4, 2011.

Positions of the Parties

Newport School Committee

Counsel for the School Committee points out that the potential delay caused by this appeal could undermine the successful completion of a construction project for a new elementary school endorsed by a vast majority of Newport voters on November 2, 2010. On February 15, 2011, the School Committee voted to adopt the recommendation of the Pell Building Committee to accept a “T” design presented by HMFH Architects. Time is of the essence in moving forward with the construction phase of this project in order that students and teachers can enjoy the advantages of a new school. Also, expediting the construction process will allow Newport to become eligible for receipt of state reimbursement for a large portion of the building’s construction costs.

Although the good faith of the petitioners is not in question, counsel notes that if this matter proceeds to a full hearing, the need to defend the decision of the School Committee will come at no small expense in terms of the expenditures associated with the hearing process. More importantly, the futility of such an extended process is evident because, even if the petitioners are successful in obtaining the Commissioner’s intervention, it is not likely to result in changing the selection of the general design for the building. If the Newport School Committee is directed to embark upon a process of scheduling public input sessions, issuing a Request for Qualifications (RFQ) to architects and a Request for Proposals (RFP) soliciting alternative designs, and then selects a proposal “according (to) a matrix of criteria” established by the community, the footprint for the building will most likely not be altered. For various reasons, the School Committee would select the same design that it did on February 15, 2011. State law places the power, authority and obligation to make exactly this type of decision relating to school construction with the duly-elected members of the School Committee. R.I.G.L. 16-2-9.

Contrary to the allegation that the petitioners’ due process rights have been “abrogated” by the process followed by the School Committee, counsel for the Committee submitted the affidavit of Superintendent John H. Ambrogi describing in detail the “public vetting” of this project.² Numerous public activities have occurred over the period January 14, 2009 through March 30, 2011, and continue with ongoing meetings of the Pell Building Committee to which the public is invited to participate. In addition, the Rhode Island Department of Education has reviewed and approved this project and determined that it meets all of the standards and requirements of RIDE’s School Construction Regulations (5/24/07). Of importance is the fact that on June 3, 2010, the School Committee and the Board of Regents entered into a Memorandum of Understanding that requires the School Committee to move with “all dispatch” to proceed

² This affidavit was supplemented by the affidavit of Patrick K. Kelley, current chair of the Newport School Committee, describing public outreach for the project.

with the design development of the new school building. Consistent with that obligation, the School Committee is scheduled to finish the design phase and proceed to the construction phase of the project in October or November of 2011.

The School Committee moves on two legal grounds for the dismissal of the petitioners' appeal. First, the School Committee asserts that the petitioners lack standing to bring these issues to the Commissioner because they are not "aggrieved" by any decision or doing of the Newport School Committee. None of the members of the group has identified any specific, individualized "injury" that has resulted from the Committee's actions. The group's interest in school construction, or its advocacy for a specific design, is not a legally protected interest. Whatever the group's concern or grievance, it is nothing beyond that which is common to all members of the Newport community. Under the Rhode Island Supreme Court's requirements set forth in Meyer v. City of Newport, 844 A2d 148, 150 (R.I.2004), the petitioners lack standing to pursue the claims they seek to present to the Commissioner.

Counsel notes the parallels between this case and that brought by a group of citizens who sought to have the Commissioner intervene in a school construction project in the Bristol-Warren Regional School District in 2004. He cites as controlling precedent the Commissioner's decision to dismiss the appeal in Bristol Warren Save Our Schools v. Bristol Warren Regional School Committee³ based on the lack of standing by a group who alleged that there were defects in the process followed by the School Committee, that the project was more costly than alternative plans and that it would have a negative impact on the historical character of Bristol and Warren. In dismissing the group's petition, the Commissioner stated that "The broad authority conferred on the Commissioner to adjudicate disputes under R.I.G.L. 16-39-1 and 16-39-2, the formalities of the hearing process, and its attendant cost justify the restriction of such process to disputes brought by "persons aggrieved." The petitioners from Newport have not demonstrated that they are "persons aggrieved" by the Newport School Committee's action, nor could they since none of them has sustained a concrete injury by virtue of a decision adverse to their personal interests.

The second ground on which the School Committee moves to dismiss this appeal is that the petitioners have not alleged a violation of education law, rule or regulation, or that there is an important issue of statewide education policy, such that the Commissioner has jurisdiction or should exercise jurisdiction over this dispute. The issues here are clearly local and totally within the purview of the Newport School Committee's decision-making authority. If there is dissatisfaction with the selection of the design, or disagreement with the schedule set by the School Committee for construction of the new school, the recourse for those who disagree with these decisions is available at the next election for membership on the Newport School Committee. There is no provision of state law that permits the Commissioner of Education to intervene in such local matters.

³ Decision of the Commissioner dated June 9, 2004.

The School Committee takes the position that its arguments on standing and jurisdiction have merit and that the Commissioner should therefore dismiss this appeal prior to an extensive hearing that will otherwise take place. Not only will such dismissal conserve significant public resources, but it will ensure that the Pell School construction moves forward on schedule and within budget.

Petitioners

The petitioners point out that several of the members of their group are parents of children who will attend the Pell School and therefore the group does have legal standing to challenge the School Committee's decision. They take issue with the process followed in making the decision on a design for a new school that will impact the quality of education provided to elementary students in Newport far into the future. They question the Committee's failure to consult with the Ad Hoc Building Committee when it decided in April of 2010 to adopt a "T" design and then entered into a Memorandum of Agreement with the Board of Regents on or about July 1, 2010. By this Memorandum of Agreement, the School Committee and the Board of Regents agreed that the construction budget would be \$30 million dollars.⁴ Although the School Committee had assembled and put in place an impressive Ad Hoc School Building Committee, including community leaders who could have contributed significantly to the design review process, the School Committee chose not to involve the Ad Hoc Committee when it changed the basic design for the building. The petitioners submit that the failure to involve the Ad Hoc School Building Committee in the decision to adopt the "T" design violated RIDE's School Construction Regulations.

According to the argument of counsel, RIDE's School Construction Regulations define a clear role for school building committees and require that they have a meaningful and ongoing role in all school construction projects to which the Regulations apply.⁵ Counsel cites provisions of the Regulations that describe the required composition and membership of a district's school building committee, require that a conference be held with RIDE representatives and members of the School Building Committee after the Stage 1 Application is approved and before an architectural feasibility study is undertaken, and establishes a timeline for the project. In Stage 2 of the approval process, Section 1.08-2(6) requires that upon submission of a Stage 2 Application, RIDE must conduct a project feasibility review followed by a Plan Review meeting "with the school building committee, design team, commissioning agent...and other applicable parties." Finally, Section 1.09-1, entitled "Design Review", mandates that the school building committee have a role in the architectural and technical peer reviews that RIDE conducts at the completion of each design phase. The school building

⁴ The School Committee had previously submitted a Stage 2 Application for Approval of their school construction project with an "airplane" design and a projected cost of \$39 million dollars. After an initial review of the Application by RIDE staff, the design was changed to a "T" design, with a scaled-down projected cost of \$30 million dollars.

⁵ Section 1.01 provides that "RIDE 1.00 applies to all new school construction and school renovations projects where the total cost exceeds \$500,000."

committee is required to attend all of these meetings, along with the design team, to answer all questions that RIDE may pose about the project's design.

The petitioners submit that the evidence will show that the Ad Hoc Committee, although validly established, did not participate in the school construction process as described in the cited sections of the School Construction Regulations. In fact, the Newport School Committee and its architect did not consult with the Ad Hoc Committee at all in reaching its decision to adopt the "T" design for the new school. By failing to involve the Ad Hoc Committee in this decision, the School Committee "took it upon itself to make the critical decision concerning the Pell Building's design without the benefit of either the Ad Hoc Building Committee's input or that of the general public." (memorandum at page 6).

The petitioners question whether the "Pell Building Committee,"⁶ newly formed in February of 2011, is properly formed under the School Committee's procedures or whether its membership complies with the requirements of the School Construction Regulations set forth in Section 1.08-1(2). In any event, the petitioners argue that the meaningful nature of its role is brought into question, by virtue of the fact that after holding its first meeting on February 2, 2011 to discuss the building's design, the Pell Building Committee voted to recommend (to the School Committee) the "T" design at its next meeting, held just two weeks later on February 14, 2011.

In addition to violations of specific provisions of RIDE's School Construction Regulations, the petitioners allege that the Newport School Committee also violated "the intent" of the Regulations "by failing to consider seriously public input concerning the 'T' design after they decided to adopt it." According to the petitioners, a general design decision was made in April of 2010 and solidified in July of 2010 when a Memorandum of Agreement was signed with the Board of Regents. This Memorandum of Agreement established a budget for the project and provided a commitment for state reimbursement through the school housing aid program. Since the members of the Ad Hoc Building Committee had not had formal involvement in design discussions up to that point, it had not been possible for the Ad Hoc Committee to schedule meetings to solicit public input on a general design for the school.

After the bond referendum was approved in early November 2010, the petitioners allege that the School Committee wasted three months before seriously engaging the public to consider the "T" design and possible alternatives. When that public forum finally took place on February 14, 2011 it was limited by ground rules that barred comments or questions on the "T" design. Despite the lack of public comment on a proposed general design, the Pell Building Committee members

⁶ The members of the Pell Building Committee are not the same as the Ad Hoc School Building Committee. Two of the petitioners were members of the Ad Hoc Committee and were, according to their memorandum, not asked to serve on the Pell Building Committee. The School Committee's memorandum indicates that the initial building committee was renamed the Pell Building Committee when the name of the building was determined.

nonetheless voted immediately after the public forum concluded to adopt the “T” design and recommend this design to the School Committee. This recommendation was approved at the School Committee’s meeting the following evening; again, there was limited opportunity for public comment prior to the vote. The petitioners argue that to limit public consideration of this important issue to less than two weeks is not appropriate and is not consistent with the spirit of RIDE’s regulations.

As to the assertion that they lack standing to press their appeal before the Commissioner, the petitioners submit that among them are seven parents of a total of ten children between the ages of three and seven. These children are likely to attend the Pell School once it opens. Under the parameters for standing established in the case of Bristol-Warren Save Our Schools v. Bristol-Warren Regional School Committee, the petitioners argue they have standing to bring this appeal. They argue that they are “aggrieved” and that their children will suffer concrete injury because of the School Committee’s actions. They deny that their appeal is simply a platform from which to raise their differences of opinion on the best choice of a design for the new school. Rather, it is intended to avoid actual harm to their children.

The petitioners allege that young students, including their own children, will be adversely affected by the design decision made by the Newport School Committee. Beyond issues with the procedures utilized by the School Committee, the petitioners seek an opportunity to address with the School Committee the existence of defects in the current design plan that contravene best educational practices and threaten to detract from the quality of the education that their children will receive. They have submitted the affidavit of a professional architect describing specific design flaws in the current design plan. Implicit in the petitioners’ argument is that if the Commissioner orders the Newport School Committee to engage in a meaningful design review process that includes public engagement, an “educationally deficient” design will be replaced by an improved design for the Pell School.

For the foregoing reasons,⁷ the petitioners request that the Motion to Dismiss be denied and that this case proceed to a full hearing. The petitioners seek to avoid any undue delay to completion of the project. They submit that allowing a window of three to four months to engage a new architect and have a meaningful design review process will permit an August, 2013 school opening. For reasons specified in their memorandum they submit that this timeframe is preferable to opening a new school in the middle of the prior academic year, as is called for by the current project schedule set by the School Committee.

⁷ In their Sur-Reply Memorandum, the petitioners requested that the Commissioner consider the additional argument that the School Committee violated Roberts Rules of Order when it changed the charge and/or role of the Ad Hoc Building Committee without taking a vote.

DECISION

Going back at least as far as 1981, the Commissioner has established precedent that when at least some of the members of a group appealing from a decision or other action of a School Committee are parents of children affected by the School Committee's decision, the group has standing to be heard. Bradford Save Our School Committee v. Westerly School Committee.⁸

In more recent rulings the Commissioner has analyzed the standing of persons who claim to be adversely affected by a school committee's decision in order to ensure that a specific, legally-cognizable "injury" is in fact alleged. In the 2004 case of Bristol-Warren Save Our Schools v. Bristol-Warren Regional School Committee,⁹ the School Committee argued that the petitioners were not persons "aggrieved" and that the organization formed to challenge the School Committee's plans for school construction lacked standing to appeal to the Commissioner. The group in Bristol-Warren alleged that the School Committee had arbitrarily rejected their alternative plan and instead adopted a more costly, ill-conceived plan to meet the elementary facility needs of the district. The Commissioner acknowledged in Bristol-Warren (at page 2 of the decision) that allegations of excessive cost of the project, harm to the quality of life in the towns of Bristol and Warren, and the benefits of alternative plans are very important issues. These claims, however, were insufficient to establish the group's standing. The finding that the group had legal standing for their appeal was based on the fact that the group was comprised of several parents of affected students and that the students were alleged to be **adversely affected** by the School Committee's plan.¹⁰

Pursuant to the affidavit of Ms. Pattavina,¹¹ the group includes seven Newport parents with a total of ten children among them between the ages of three and seven. She asserts that all of these children are "likely to attend" the new Pell School once it opens. Ms. Pattavina's affidavit describes in detail her unsuccessful attempts to become involved in the decision on the design of the new elementary school, thereby limiting the basis of her complaints to alleged procedural irregularities. Her affidavit fails to allege or describe any adverse impact to her child resulting from the School Committee's selection of the "T" design. There is, however, an assertion in the petitioners' memorandum that the "T" design is "educationally deficient" and, pursuant to a supporting affidavit, there exist "flaws" in the "T" design.¹² An examination of the alleged "flaws" and further detail

⁸ Decision of the Commissioner dated September 21, 1981; affirmed by Board of Regents on February 11, 1982.

⁹ Decision of the Commissioner dated June 9, 2004.

¹⁰ However, the individual parent members of Bristol-Warren Save Our Schools had, subsequent to the filing of the group's petition, also filed individual letters of appeal with the Commissioner in which they sought to proceed on individualized claims not consistent with the claims asserted by the group. For this reason, the appeal of Save Our Schools was dismissed without prejudice.

¹¹ Exhibit 11, affidavit of Melissa Pattavina.

¹² Exhibit 13, Affidavit of Helene Grosvenor, A.I.A.

provided in Ms. Grosvenor's affidavit leads to the conclusion that sufficient adverse impact to students is alleged to confer legal standing on this group. The finding with respect to legal standing is very close, and is based on the general assertion that there are educational deficiencies in the design adopted by the School Committee, together with the inference that this design will impair the delivery of a sound educational program to students. The exact nature of any deficiencies and their precise impact on the educational program to be delivered to students at the Pell School have not been established.

The second ground for dismissal that the School Committee advances is that the Commissioner lacks jurisdiction over this dispute. Generally stated, the Commissioner has jurisdiction to adjudicate disputes that "arise under" a law or regulation relating to schools or education and authority to intervene in matters in which statewide education policy is at stake. The petitioners cite certain violations of the School Construction Regulations as the basis for their request that the Commissioner provide relief. Because of the resources that both parties will expend in presentation of their respective cases, each of these issues is analyzed in as much depth as possible at this preliminary stage of this appeal, in the hope that it will be helpful to both parties.

According to their memorandum, the petitioners contend that certain provisions of the School Construction Regulations were violated. The sections of the Regulations cited by the petitioners in their brief require that members of the school building committee of a district attend meetings scheduled by RIDE. The Regulations also require that members of a school building committee be prepared to answer questions posed by RIDE staff. If it is true, as the petitioners allege, that these meetings did not occur, then the inference to be drawn is not that the Newport School Committee committed a regulatory violation. The scheduling of such meetings would appear to be under the control of RIDE and it appears more likely that RIDE simply did not follow the letter of its own Regulations. If the purpose of such meetings is to ensure that school construction projects meet all regulatory standards and if the plans for the Pell School were nonetheless determined by RIDE to comply with all applicable standards, the mere fact that these meetings were not held would not be sufficient reason to invalidate RIDE/ Board of Regents' approval of this project.

RIDE's School Construction Regulations go into great detail on the composition of school building committees, but the Regulations do not describe the role such committees have in decisions on school design or construction. The Regulations state that school building committees shall be "formed in accordance with the provisions of the district's local charter and/or by-laws" (Section 1.08-1 (2)). This reference could result in the grant of powers and authority to school building committees, such as the Ad Hoc School Building Committee, that support the petitioners' case. The Regulations themselves, however, are silent as to powers or authorities of school building committees. There is no language in the Regulations that constrains school committees or districts to follow the guidance, or even to receive the recommendations, that a school building committee may develop with respect to school construction projects. Moreover, based on

the provisions of R.I.G.L. 16-2-9, which sets forth the powers and duties of school committees, the Newport School Committee had the authority and responsibility to make all decisions with respect to design and construction of the district's new elementary school.

Although the School Committee created the Ad Hoc School Building Committee in compliance with RIDE's Regulations¹³ and charged that it "[r]ecommend to the School Committee a plan for elementary school construction,"¹⁴ the Ad Hoc Committee's role was clearly advisory in nature. If, as described in the submissions of the petitioners, the School Committee decided in April of 2010 to change the design it had included in its Stage 2 Application after it was submitted to RIDE, the Committee had the authority to make this decision. The School Committee retained the prerogative to accept the recommendation RIDE had made after its review of the Stage 2 Application and to depart from the "airplane" design with its projected cost of thirty-nine million dollars. Stated another way, the decision to modify the school building project so as to make it less costly¹⁵ was within the discretion of the Newport School Committee. The Committee had the responsibility to gauge all of the factors that affected the successful construction of its new elementary school, including the need to secure reimbursement under the state's school housing aid program.

It may be, as the petitioners have argued, that the School Committee would have made a better-informed decision if it had heard the recommendation of the Ad Hoc Committee prior to changing from the "airplane" to the "T" design. It may also be that a public engagement process preceding the selection of a general design for the school would have increased the community's involvement in its schools and its support for its educational programs. However, even if public input into the selection of a design was not as extensive as the petitioners would have liked,¹⁶ this does not prove that the School Committee violated a law or regulation relating to schools or education. The submissions to date would indicate that the School Committee did in fact receive public comment prior to its February 15, 2011 vote to approve the Pell Building Committee's design recommendation. Public comment was received both at the meeting and in other communications to members of the Committee. R.I.G.L. 16-2-9.1 requires that the public have opportunity to be heard prior to action being taken by a school committee. It is the limited nature of public involvement in the design selection process about which the petitioners complain - not that they had no opportunity to be heard at all. The law simply does not require the extensive public engagement process that the petitioners have requested.

¹³ And perhaps also in compliance with local ordinance

¹⁴ Petitioners' Ex. 12, affidavit of Drew Carey.

¹⁵ According to the documentation submitted at this juncture, there is a projected cost savings of nine million dollars with a "T" design.

¹⁶ The petitioners seek to invalidate the February 15, 2011 decision of the School Committee to accept the recommendation of the Pell Building Committee for a "T" design for the Pell School.

As a practical matter, once the members of the School Committee entered into a Memorandum of Agreement with the Board of Regents setting forth a \$30 million dollar authorization for the project, which was followed by a bond referendum in November of 2010 authorizing issuance of this same amount in municipal bonds and/or notes, the Committee's consideration of different, potentially more costly, design proposals was constrained. The petitioners contend that subsequent to the \$30 million dollar bond referendum, the School Committee has been receptive only to suggestions that do not alter the basic "footprint" for the school. They challenge the School Committee's refusal to consider a basic redesign of the project at this point in time. The Committee's action in this regard, however, would appear to be entirely reasonable, given that it was the footprint of the "T" design that apparently formed the basis for the projected cost of this building project, the budget agreement with the Board of Regents, and the level of debt authorized by Newport voters. As indicated in past decisions,¹⁷ the Commissioner exercises independent judgment in these matters with restraint, overturning the decision of a local school committee only when the committee's decision is not reasonable or is contrary to state law, regulation, or statewide educational policy. At this juncture, it does not appear that the petitioners' claims would warrant the intervention of the Commissioner in the decision making process of the Newport School Committee.

The Motion to Dismiss is denied because the petitioners have standing to raise the violations of the School Construction Regulations that they cite in their brief. Despite the foregoing analysis of the lack of likelihood of success on the claims they seek to make, if the petitioners nonetheless decide to proceed, their counsel must notify the hearing officer of this decision no later than June 3, 2011. Both parties should be prepared for an expedited hearing process if the matter goes forward.

For the Commissioner,

Kathleen S. Murray

Deborah A. Gist

May 26, 2011

Date

¹⁷ See Spohn v. Newport School Committee, decision dated October 7, 1998; Lusignan et al. v. East Providence School Committee, decision dated June 17, 1999.