STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: November 7, 2018]

MEGAWATT ENERGY SOLUTIONS LLC; GLENN G. GRESKO	:	
VS.	:	**C.A. No. PC-2017-5888**
TOWN OF SMITHFIELD ZONING BOARD OF REVIEW, by and through its members in their official capacities; ANTONIO S. FONSECA; S. JAMES BUSAM; EDWARD CIVITO; LINDA MARCELLO; JOHN HUNT	:	

DECISION

LANPHEAR, J. Megawatt Energy Solutions LLC and Glenn G. Gresko (collectively, Appellants) appeal a decision (Decision) of the Town of Smithfield Zoning Board of Review (Board), denying a special use permit that would have allowed a ground-mounted solar array on property located in an R-200 zoning district. Jurisdiction is pursuant to G.L. 1956 §§ 45-24-69 and 45-24-69.1; G.L. 1956 §§ 42-92-1, *et seq*.

I

Facts and Travel

Glenn Gresko owns property located at 432 Log Road, Smithfield, Rhode Island, otherwise known as Assessor's Plat 50, Lot 27E (Property). (Compl. ¶ 1.) A single-family dwelling and accessory ground-mounted solar array already exist on the Property. (*Id*. ¶ 9.) In August 2017, Megawatt applied to the Board for a special use permit to install a 250kW ground-mounted solar array which would supply energy to National Grid. (*Id*. ¶ 7; Decision ¶ 1.) At the

time, there was no use code for a solar array in the Smithfield Zoning Ordinance (Ordinance). (Compl. ¶ 10.) Before Megawatt filed the application, the Town's Zoning department informed Appellants that the proposed project would be considered "Utilities, Public or Private" and would require a special use permit in the R-200 Zone. (*Id.* ¶ 10; Answer ¶ 5.)

At the September 27, 2017 hearing on Megawatt's application for a special use permit (Application), Appellants explained that the project would be part of the Rhode Island Renewable Energy Growth Program. (Compl. ¶ 13.) Mr. Gresko would lease a portion of his property to Megawatt, who in turn would sell the energy to National Grid. Hr'g Tr. 8, Sept. 27, 2017. Counsel for the Appellants explained that the project met the general standards for a special use permit in addition to those "specific to special use permit for utilities." *Id.* at 11. At the hearing the Board also read into the record a letter in opposition to the Application. *Id.* at 4-7. Appellants also presented Stuart Clarke, P.E., an engineer for Megawatt, to answer questions regarding engineering and other technical matters. *Id.* at 12-17. Walter Mahla, Megawatt's managing partner an expert in solar development, discussed previous projects, vegetation, maintenance, and why this site is well suited for a solar array. *Id.* at 18-31. Mr. Mahla further discussed the specifics of the lease for the project, the Renewable Energy Growth Program, noise, odor, pollution, safety, and visibility concerns. *Id.* at 67-88. Glenn Gresko, the owner of the property, testified regarding the existing solar panels on his property and that he wanted to install the solar project. *Id.* at 34-39. Next, Brian Coutcher, an abutter to the Property, testified in favor of the Project. *Id*. at 39-42.

Three neighbors spoke against the Application. Generally, they expressed concern regarding the impact of the Project on the view from their properties, the effect that the Project might have on the neighborhood's character, the environmental ramifications, and the possibility

that it could decrease property values in the area. *Id.* at 50-65. Lastly, Board Member Hunt and Chair Fonseca, noting the lack of a bond and decommissioning plan associated with the project, asked Appellants to provide that information at the following hearing. *Id.* at 87-89.

At the November 2, 2017 hearing, Appellants provided revised plans for the project. (Decision ¶ 2.) Appellants did not address bonds or decommissioning of the project. (Decision ¶ 3.)

For the Appellant, expert Stuart Clarke discussed the revised plans for the Project. Hr'g Tr. 5-13, Nov. 2, 2017. These plans showed where berms and arborvitaes—to screen the project from neighbors' and the public's view—would be installed and planted. (Decision ¶ 2.) They also demonstrated that Appellants re-routed the service road that would provide access to the project to preserve more trees, and that the project's footprint would need to be increased by 1300 square feet to account for 320 watt panels, (instead of 345 watt panels), in order to keep the kilowatt output the same. (Decision ¶ 2.) Expert witness Edward Avizinis, wetland biologist, provided expert testimony on behalf of Appellants that the Project would neither negatively impact wetlands in the area nor harm the environment. Hr'g Tr. 13-17, Nov. 2, 2017. William Sturm, Megawatt's business director, related that the local fire district did not have concerns about the project with respect to fire safety, provided details about his communications with National Grid about the Project, and described various photographs of the site. *Id.* at 18-32. Nathan Godfrey, a certified appraiser and real estate expert, opined that the Town "embraced solar" and that general character and property values would not be impacted by the project. *Id.* at 33-57.

With respect to whether the project was an accessory use or a second primary use on the property, Counsel for the Appellants argued: "I can't build two homes on one lot. But that's the

only prohibition. You do not prohibit more than one use on a lot. As long as each of the uses is otherwise permitted in the ordinance, you can have it." *Id.* at 61:18-22. Mr. Roman countered that two principal uses were not, by his interpretation of the Ordinance, allowed in an R200 zone, "[b]ecause you have a mixed use zone already permitting multiple primary uses. This is an R200 zone which is not obviously a mixed use zone. It's not otherwise specifically permitted by the code. It would be my opinion that it's appropriate as stated in the code." *Id.* at 62:22-63:1-2.

The Chair stated that neighbors and abutters to the property submitted another letter in opposition to the Project to the Board and then invited public comment. *Id.* at 66-68. Mr. and Mrs. Parkhurst opposed the project out of concern that it could decrease property values, change the character of the neighborhood, impact the view from their land, and out of concern for possible environmental issues. Therefore, the Parkhursts asked the Board to reject the Application. *Id.* at 68-76.

During deliberations, Mr. Hunt noted that the Appellants did not present anything on a decommissioning plan or a bond for the project, as discussed at the September meeting. *Id.* at 81-87. The Board also discussed the issue of allowing two primary uses on one R200 lot, and thus "having a multi-use piece of property." *Id.* at 89. The Board, in a 3 to 2 vote, denied the Application. (Compl. ¶¶ 15-16.) The instant appeal followed.

II

Standard of Review

Section 45-24-69(a) of the Rhode Island General Laws grants the Superior Court jurisdiction to review decisions from local zoning boards. Such review is governed by § 45-24-69(d), which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of

> fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
> "(1) In violation of constitutional, statutory, or ordinance provisions;
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 45-24-69(d).

In other words, the Rhode Island Superior Court "reviews the decisions of a plan commission or board of review under the 'traditional judicial review' standard applicable to administrative agency actions." *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I. 1998). The Court is "limited to a search of the record to determine if there is *any competent evidence* upon which the agency's decision rests. If there is such evidence, the decision will stand." *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 280, 373 A.2d 496, 501 (1977). (Emphasis added.) The Court may not substitute its judgment for that of the zoning board's with respect to the weight of evidence, questions of fact, or credibility of the witnesses. *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986). However, this Court conducts a *de novo* review of cases that involve questions of law. *Tanner v. Town Council of E. Greenwich*, 880 A.2d 784, 791 (R.I. 2005). Additionally, the burden is on the applicant "seeking relief before a zoning board of review to prove the existence of the conditions precedent to a grant of relief." *DiIorio v. Zoning Bd. of Review of City of E. Providence*, 105 R.I. 357, 359, 252 A.2d 350, 353 (1969).

The Court must consider "the entire record to determine whether 'substantial' evidence exists to support the board's findings." *Salve Regina Coll. v. Zoning Bd. of Review of City of*

Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Bd. of Review of City of Warwick*, 122 R.I. 241, 247, 405 A.2d 1167, 1170 (1979)). "Substantial evidence" is defined as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981).

III

Analysis

A special use is defined as "[a] regulated use that is permitted pursuant to . . . § 45-24-42." Sec. 45-24-31(62). In granting a special use permit, the Board must find that the applicant showed that the "'proposed use will not result in conditions that will be inimical to the public health, safety, morals and welfare."' *Salve Regina Coll.*, 594 A.2d at 880, (quoting *Nani v. Zoning Bd. of Review of Smithfield*, 104 R.I. 150, 156, 242 A.2d 403, 406 (1968)); *see also* § 45-24-42.

The Appellants contend in their memorandum that the Board denied the Application based on "pretextual reasons," and thus, that the Board did not have substantial evidence to support that denial.[1] Appellants point to the Chair's line of questions about whether the Project would be allowed as an accessory use, and—if it were not considered an accessory use—whether the Project would be allowed as a second principal use on the Property. Appellants maintain that the Project is a principal use that would be allowed as a second principal use "because nothing in the Ordinance prohibits it." Further, Appellants assert that finding of fact #3 which states that decommissioning and bonding were not discussed at the November 2, 2017 meeting as requested

[1] Specifically, Appellants argue that the Board's reasons behind denying the Application "could plausibly explain (although not legally validate) the Board's decision." Appellants' Mem. 15.

at the previous meeting, is not an adequate reason to deny the Application because decommissioning and bonding are not standards of approval for a special use permit.

Appellees counter that it does not matter whether Appellants presented sufficient evidence for the Board to grant a special use permit because the two "nay" votes are supported by the record, and the Project is an unpermitted second principal use on the property. Appellees, relying on *Empire Equip. Eng'g Co., Inc. v. Sullivan*, also state that even if there were pretextual reasons for the votes, if this Court finds the result was correct, this Court still must uphold the Board's decision "notwithstanding the faulty reasoning upon which it rests." 565 A.2d 527, 529 (R.I. 1989). Lastly, Appellees contend that Chairman Fonseca and Member Hunt both stated their reasons for voting against the Application during deliberations: Fonseca had concerns about the legality of two primary uses on one parcel of land and Hunt took issue with the lack of a decommissioning plan and bond.

In its decision, the Board found that the Project would be classified under Use § 4.3.D-15 as Utilities, Public or Private, since Smithfield does not have a specific use category for solar power generation in the Ordinance. (Decision 3, Nov. 2, 2017.) The Board also stated that, if the special use permit were granted, it would not "alter the general character of the surrounding area or impair the intent or purpose" of the Ordinance or the town plan. *Id.* The Board found that the Application met all of the required criteria set forth in the Ordinance for the special use permit requested. *Id.* However, the Decision also articulates that decommissioning was not addressed by Appellants, despite the Board's request, and that the Project would be an additional use to the existing primary use. *Id.* ¶¶ 3, 4. Since the Board needed four votes in favor, the split vote (three in favor and two opposed), constituted a denial of the Application. *Id.*at 4.

In considering the whole record, this Court finds that there is substantial evidence to support the Board's decision to deny the Application. Firstly, Chair Fonseca voiced his concerns that the project would result in two primary uses on one plot of land. Hr'g Tr. 54-64; 89:23-25, Nov. 2, 2017. Secondly, Member Hunt requested a decommissioning plan and bond for the Project, and in deliberations he expressed his distress over the lack thereof. Hr'g Tr. 72-73; 87-88, Sept. 27, 2017; Hr'g Tr. 81:4-85:8, Nov. 2, 2017. Each of these will be taken up in turn.

Chair Fonseca's major concern was that the project would result in two primary uses of a single plot of land, which Appellees contend is not permitted by the Ordinance. The Rhode Island Supreme Court has stated that "in this jurisdiction that the rules of statutory construction apply equally to the construction of an ordinance." *Mongony v. Bevilacqua,* 432 A.2d 661, 663 (R.I. 1981); *see also Town of Warren v. Frost*, 111 R.I. 217, 221, 301 A.2d 572, 573 (1973); *Nunes v. Town of Bristol,* 102 R.I. 729, 732, 232 A.2d 775, 780 (1967).

Pursuant to § 2.2 (153) of the Ordinance, principal use is defined as "[t]he primary or predominate use of any lot." The fact that the Town chose to use the singular article "the" in defining the term "principal use" is indicative of the legislative intent that there only be one principal use per lot. Further, the Town would not have needed to include or define an accessory use if they intended to allow for more than one primary use.

Along the same line, Smithfield's Zoning Ordinance provides for a means of applying for multiple uses on a single lot—the Land Development Project. *See* Ordinance § 2.2 (88); *see also* Ordinance § 6.1.4. The Ordinance explicitly directs applicants with a proposed development that meets the definition of a Land Development Project according to § 2.2 (88) of the Ordinance, to submit their application to the Planning Board for "review and approval by the Planning Board in accordance with the Smithfield Land Development and Subdivision Review Regulations."

Ordinance § 6.1.4. The application was filed with the wrong Board. *See* § 45-24-47 - (b). The mechanism for applying to the Planning Board for a Land Development Project would be rendered redundant if more than one primary use could be allowed via a special use permit.

Thus, there appears to be "a clear legislative directive" that only one primary use may be allotted per plot of land, and that multiple uses must be approved as a land development project by the Planning Board. *E. Grossman & Sons, Inc.,* 118 R.I. at 285, 373 A.2d at 501. As such, this Court finds that there was "competent evidence upon which the agency's decision rests" with respect to Chair Fonseca's vote in opposition of the Application. Further, Appellants did not provide enough evidence to lead to the conclusion that two principal uses are allowed—and that is their burden. *See DiIorio,* 105 R.I. at 361, 252 A.2d at 353. The Board is still left with the question as to whether the Ordinance allows for two principal uses by special use permit, as it was not sufficiently resolved.

Member Hunt's vote in opposition to the Application is also supported by substantial evidence. During the hearing on September 27, 2017, Hunt took issue with Appellant's lack of a decommissioning plan (for the end of the Project's life or in the case of abandonment) and inquired whether the Applicant would post a bond. He requested more information and the Appellants agreed to discuss the issue at the hearing in November. Hr'g Tr. 72:12-73:10; 87:25-88:3, Sept. 27, 2017. During deliberations, Member Hunt noted that Appellants did not present the information requested. Hr'g Tr. 81:4-85:8, Nov. 2, 2017. In voting against the Application, Member Hunt expressed his personal concerns about the lack of a decommissioning plan and bond, and he also articulated that he "understand[s] the neighbors' complaints." *Id.* This was a reasonable issue to be raised. When the Appellants did not address a decommissioning plan and bond at the November hearing as requested, it was reasonable for Member Hunt to vote "nay."

As stated previously, the burden is on the applicant "seeking relief before a zoning board of review to prove the existence of the conditions precedent to a grant of relief." *DiIorio*, 105 R.I. at 362, 252 A.2d at 353. Here, Appellants did not present any evidence or information about a bond or decommissioning plan on the record. *See Mill Realty Assocs. v. Crowe*, 841 A.2d 668, 672 (R.I. 2004). This Court must consider the record as it appeared before the Board when the decision was made. *See Apostolou v. Genovesi*, 120 R.I. 501, 388 A.2d 821, 825 (1978). Appellants claim that they "would have agreed to any reasonable conditions that the Board saw fit to impose," yet they did not provide the Board with the requested information before the Board made its decision. As such, it is clear that Member Hunt's vote in opposition to the Application was neither in violation of statutory nor ordinance provisions, nor was it arbitrary.

IV

Conclusion

After careful review of the entire record, this Court finds that the Chair Fonseca and Member Hunt's "nay" votes are supported by substantial evidence. Therefore, the Board's 3-2 decision denying the Application is not clearly erroneous, in violation of statutory or ordinance provisions, or arbitrary. Substantial rights of Appellants have not been prejudiced. As such, Appellants' request for attorneys' fees is also denied.

Counsel may submit an appropriate order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Megawatt Energy Solutions LLC; Glenn G. Gresko v. Town of Smithfield Zoning Board of Review, et al.
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COURT:	Providence County Superior Court
DATE DECISION FILED:	November 7, 2018
JUSTICE/MAGISTRATE:	Lanphear, J.
ATTORNEYS:	
For Plaintiff:	Amy H. Goins, Esq.; Andrew M. Teitz, Esq.
For Defendant:	Todd J. Romano, Esq.