“C”

Correspondence

Planning Commission
November 20, 2019

NAPA COUNTY
FARM BUREAU

February 12, 2019

Board of Supervisors
County of Napa
1195 Third Street, 3rd Floor
Napa, CA 94559

Dear Board of Supervisors:

A number of community groups have asked my office what our position is on renewable energy and I have informed them that our position on renewable energy is as follows:

We encourage both private and publicly funded research in new methods of generating power or storing power for use at a more convenient time.

We encourage the voluntary development of renewable energy such as hydroelectric, solar, wind, geothermal and biomass on public and private lands that is cost-effective to rate payers. Local land-use decision-making should not be usurped in the determination of suitable siting of renewable generation facilities. In the decision-making process for solar-energy projects on public land, priority should be given to those projects located on marginally productive or nonproductive land. Solar projects located on private agriculturally productive lands should be subordinate to the agricultural operation and should not permanently impede or reduce the productive agricultural capacity of the land for future uses. The Napa County Farm Bureau Board of Directors reserves the right to modify this policy based on individual cases.

If there are any questions about this policy position, please let me know.

Thank you.

Sincerely,

RYAN P. KLOBAS
Chief Executive Officer
Napa County Farm Bureau &
Napa County Farm Bureau Foundation

CC: Minh Tran
David Morrison

811 Jefferson St, Napa, CA 94559 | p. 707.224.5403 | f. 707.224.7836 | info@napafarmbureau.org | napafarmbureau.org

From:	Laura Tinthoff
To:	Gregory, Ryan
Cc:	Tran, Minh; Morrison, David; ClerkoftheBoard; McDowell, John
Subject:	Solar Legal Activity
Date:	Wednesday, April 24, 2019 1:13:26 PM
Attachments:	Solar Legal.pdf Fontaine v. Edwards.pdf Megawatt Energy Sols. LLC v. Town of Smithfield Zoning Bd. of Review.pdf

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Dear Board of Supervisors, Planners and Staff,

I am providing more information on the Rhode Island case of which I spoke at yesterday's, April 23, BOS meeting. I first read about it in this article here. In addition, I would like to offer yet another Rhode Island case which appears that no appeal was enacted when the solar company lost.

I am not an attorney and have not engaged a personal attorney. Please be aware that I am not making any sort of claim and, most certainly, not making a threat of legal action. I simply feel that is important to understand the possible future implications for our County.

Thank you for the time and attention that you are devoting to this matter.

Sincerely,

Laura Tinthoff
707.339.1481
www.lauratinthoff.com

April 24, 2019

Dear Board of Supervisors, Planners and Staff,

I am providing more information on the Rhode Island case of which I spoke at yesterday's, April 23, BOS meeting. I first read about it in this article here. In addition, I would like to offer yet another Rhode Island case which appears that no appeal was enacted when the solar company lost.

I am not an attorney and have not engaged a personal attorney. Please be aware that I am not making any sort of claim and, most certainly, not making a threat of legal action. I simply feel that is important to understand the possible future implications for our County.

1. Portsmouth Solar LLC (Fontaine v. Edwards)

Since the original article was published, I have been informed that:

The case was appealed to the Rhode Island Supreme Court after the Fontaines (neighbors of the proposed project) obtained a favorable opinion in the Rhode Island appeals court. The Supreme Court's docket shows that all briefing appears to have been completed. The next step would be either a notice from the court to the parties that the court intends to decide the case without oral argument or notice of a hearing date. Nothing is scheduled now according to the docket (attached).

Appeals Court Decision:

ROGER FONTAINE and JANE FONTAINE
v.
JAMES EDWARDS, JAMES HALL, JOHN BORDEN, ERIC RAPOSA, BENJAMIN FURIEL and KATHLEEN PAVLAKIS, in their capacity as Members of the PORTSMOUTH ZONING BOARD OF REVIEW, PORTSMOUTH SOLAR, LLC, and SEABURY APARTMENTS, LLC

C.A. NO. NC-2017-0261

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS NEWPORT, SC. SUPERIOR COURT

July 27, 2018

DECISION

VAN COUYGHEN, J. Before this Court is a zoning appeal pursuant to G.L. 1956 § 45-24-69. Roger and Jane Fontaine (Appellants) appeal a decision (decision) of the Portsmouth Zoning Board of Review (Board),

granting a special use permit to Portsmouth Solar, LLC (Portsmouth Solar), to install a solar photovoltaic facility on property located in an R-30 District.

I
Facts and Travel

Seabury Apartments, LLC owns the property located at 259 Jepson Lane, Portsmouth, Rhode Island and otherwise known as Lot 3 on Tax Assessor's Map 60 (Property). (Compl. ¶ 4.) The Property consists of 29.7 acres of vacant land, with the exception of a barn. (Pet. 1; Ex. 7 to Pet.) On December 16, 2016, Portsmouth Solar filed a Petition for a Special Use Permit to install a 2.9 Mega Watt (DC) solar photovoltaic facility (solar farm) on the Property pursuant to

Article V(B)(5) and Article VII(A)(1)(b) of the Portsmouth Zoning Ordinance (Ordinance). (Pet. 1.)

The Zoning Ordinance for the Town of Portsmouth (Ordinance) does not provide for solar farms in any of the Town's districts.

The Board conducted duly noticed hearings on March 30, 2017 (Tr. I), and May 4, 2017 (Tr. II). As an initial matter, the Board addressed whether a solar farm would be permissible under the Ordinance considering that a solar farm is not specifically mentioned.

Article V, Section 1 of the Ordinance provides:

> Except as otherwise provided in this Ordinance, in each district no building, structure, or land shall be used or occupied except for the purposes permitted as set forth in the accompanying Table of Use Regulations, Section B.
>
> Proposed uses not so listed may be presented to the Zoning Board of Review by the property owner. Such uses shall be evaluated by the Zoning Board of Review according to the most similar use(s) that is (are) listed, as well as the purposes and uses generally permitted in the subject use district. The Zoning Board of Review may approve the proposed use as permitted, or deny the proposed use as not permitted, or allow the proposed use subject to a Special Use Permit. (Art. V, Sec. 1 of the Ordinance.)

Portsmouth Solar asserted that because a solar farm is similar to a public utility, which is permitted in an R-30 district, then a solar farm also is permitted under the Ordinance in an R-30 district based upon Art. V, Sec. 1. The Appellants disagreed and, instead, likened a solar farm to "a nonregulated power producer . . . engaged in the business of producing, manufacturing, or generating electricity for sale to the public[,]" and that as such, they contend that it is a prohibited use in an R-30 district. (Tr. I at 14.)

After hearing arguments on the subject, a Board Member moved as follows:

> that the solar farms' Petitioner be allowed to move forward based on Article V, 1, 2. This Board has the right to choose the most

> similar use under the zoning ordinance, and I believe that the most similar use is a public utility and personally, based on the testimony do not buy the argument that this is a manufacturing use. In my opinion, this is a passive use that does not involve the

> manufacturing of goods and services. It is more of a passive use, and I would move that the Board move forward with this petition. (Tr. I at 26.)

Thereafter, the Board unanimously voted to consider the solar farm as if it were a public utility and proceeded to consider the petition for a special use permit. (Tr. I at 26-27.)

At the hearing, the principal of Portsmouth Solar, Jamie Fordyce, testified that "solar is a passive use" and that each panel is approximately "3 by 5 feet" with the larger capacity panels being "6 feet long." *Id.* at 29, 30. He described the solar farm as follows:

> So there's a racking structure, which is driven posts into the ground in most cases. This - in this case we have a racking system. The panels are angled on a 25 degree tilt. They rest roughly 1.5 feet off the grade and reach up approximately 8 feet. They're arrayed in portrait one over another and along in an array. *Id.* at 31.

The project would be surrounded by a six-foot high vinyl chain-link fence, and there would be landscaping to screen the solar farm from neighbors. *Id.* at 38, 39. The project was certified as "a Distributed Generation Project" by the Public Utilities Commission, which would permit it "to generate electricity for sale to National Grid to be distributed to the public." *Id.* at 55. Thus, it is clear that this proposal would be a commercial operation. *See* Black's Law Dictionary 325 (10th ed. 2014) (defining "commercial" as "[o]f, relating to, or involving the buying and selling of goods").

Professional Engineer Alan Benevides testified next. (Tr. I at 65-92; Tr. II at 282-285.) He testified that the property had been surveyed and that because it is a relatively flat site, there would be few changes in the topography, and that they have made provisions for storm-water quality and quantity. *Id.* at 67; 71-72. He stated that the proposed solar panels would absorb

sunlight and that an antireflective coating on the panels would prevent glare. *Id.* at 74. In addition, he noted the project would not emit any noise or odors, and it would not use any chemicals, and it would not generate noticeable traffic. *Id.* at 76, 82.

Landscape Architect Joshua Wheeler then testified. *Id.* at 96-117. He stated that he drew up plans to screen the project from view with staggered plantings that would better hide it from the neighbors. *Id.* at 98, 100. The plants would be native to the area, and the larger trees would be eight feet in height at the time of planting. *Id.* at 105-06.

Nathan Godfrey, a Real Estate Appraiser and Consultant, appeared next. *Id.* at 118-147; Tr. II at 286-290. He testified that he had received a letter from the Rhode Island Historical and Preservation and Heritage Commission, stating that the proposed screening of the project would minimize the effect of the solar array and that it would not have an adverse effect on historical properties. *Id.* at 123-24. He testified that the project would not generate any noise, glare, odor, and would not pose any traffic concerns. *Id.* at 126-27. He stated that the solar farm "is as passive as it gets[,]" that [t]here's simply no element here that would impact an abutting use." *Id.* at 136-37.

Lay witness Robert King (Tr. I 153-162; Tr. II at 275-280) objected to the petition, contending that the project would create solar glare. (Tr. I at 156-57.) He also contended that the solar panels are known to entrap various hazardous chemicals. *Id.* at 159-60. Another lay witness, John Reed, also expressed concern about solar glare. (Tr. II at 169.) He then questioned whether the transformers would emit noise or create blind spots for pilots approaching nearby Newport Airport. *Id.* at 173, 175.

Real Estate Expert James Houle testified against the project. (Tr. II at 184-263.) He testified that cracked solar panels create a danger of shock and/or electrocution, and that any

chemicals used in the production of the panels could leach out into the soil. *Id.* at 186, 189. Mr. Houle opined that solar farms are not harmonious to a residential use and likely would diminish surrounding property values by about ten to fifteen percent. *Id.* at 195-96, 213. He testified that solar farms are more appropriate for either an industrial or a commercial district. *Id.* at 200. He opined that if the project was approved, then "there's a strong risk the area will take on the feel of an entire industrial zone[,]" especially considering that National Grid is planning on expanding a nearby substation. *Id.* at 203. Mr. Houle also opined that the proposed buffering around the site was insufficient. *Id.* at 204. He testified that in his opinion, the project was not compatible with the Comprehensive Plan, and that "[w]hen you have a use that's really not harmonious with a residential neighborhood, you're creating friction within that neighborhood, and that ultimately goes against the Comprehensive Community Plan, which is to have an orderly growth." *Id.* at 217-18.

Lay witness and abutter Thomas Settle testified in favor of the Petition. *Id.* at 263-268. He testified that although his preference would be for the Property never to be developed, his second choice would be for a solar farm, as he believes "that would be the least amount of impact that development on that property would have." *Id.* at 264-65. He stated that in the past, a solar farm was installed near a house that he was building in Middletown, and that at the time, he feared it would depreciate the value of the house; however, the solar farm had no effect on the sale price of that property. *Id.* at 267.

Lay witness Rachel Charrier, who is one of the owners of the neighboring Seabury Apartments, next testified in favor of the Petition. *Id.* at 268-270. She stated that she believed "that this project is a great way for us to use the land but at the same time not impact the neighborhood in any way." *Id.* at 269. She further testified that "if we actually thought that it

would do anything to harm the property values, we would be shooting ourselves in the foot because our property [Seabury Apartments] abuts it too." *Id.* at 269-70.

Mrs. Charrier's husband, James, testified next. *Id.* at 270-274. Mr. Charrier testified that he owns a real estate development company and that by his calculations, the Property is large enough to accommodate twelve to fifteen residences. *Id.* at 271. He posited that if each of those houses was built to the maximum height of thirty-five feet and each roof contained solar panels, then the solar panels would be much more visible than the proposed solar farm. *Id.* He stated his belief that while the project may not be the best use for the Property, it nevertheless would provide "the lowest impact to the community." *Id.* at 272.

Cyrus Gibson was the last lay witness to testify. *Id.* at 274-75. He testified that while he agreed with Mr. Settle's testimony, his "biggest concern" was that "should this get approved, it sets a very dangerous precedent." *Id.* at 274. In other words, he feared that the owners of farmland would point to any such approval as the basis for seeking similar approval on their farms. *Id.* at 275.

At that point in the hearing, lay witness Mr. King returned to the stand to outline an agreement that he and his neighbor had reached with Portsmouth Solar regarding the planting of additional trees should solar glare become a problem. *Id.* at 279. Apparently, Portsmouth Solar agreed to place money in an escrow account for two years in the event that additional plantings might be necessary. *Id.* at 279-80.

At the conclusion of the hearing, the Board voted by a vote of four-to-one to approve the Petition. On June 1, 2017, the Board issued a written decision. (Decision, June 1, 2017.)

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II
Standard of Review

Section 45-24-69(a) grants the Superior Court jurisdiction to review a local zoning board's decision. 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).

Our Supreme Court requires this Court to "review[] the decisions of a . . . 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). Accordingly, the Court '"lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level."' *Id.* at 666 (quoting *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986)). In performing this review, the Court "may 'not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.'" *Curran v. Church Cmty. Housing Corp.*, 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)). However, the applicant always bears the burden to demonstrate why the requested relief should be granted. *See DiIorio v. Zoning Bd. of Review of City of E. Providence*, 105 R.I. 357, 362, 252

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A.2d 350, 353 (1969) (requiring "an applicant seeking relief before a zoning board of review to prove the existence of the conditions precedent to a grant of relief").

In reviewing a zoning decision, the Court '"must examine 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, 245, 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."' *Lischio v. Zoning Bd. of Review of Town of N. Kingstown*, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981)). If the Court '"can conscientiously find that the board's decision was supported by substantial evidence in the whole record,"' it must uphold that decision. *Mill Realty Assocs. v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 509, 388

A.2d 821, 825 (1978)). However, in cases that involve questions of law, this Court conducts a *de novo* review. *Tanner v. Town Council of E. Greenwich*, 880 A.2d 784, 791 (R.I. 2005).

III
Analysis

The Appellants contend that the Board exceeded its authority by altering the terms of the Ordinance to add a special use. They further contend that even if the Board did have the authority to alter the Table of Use Regulations, the Board erroneously found that a photovoltaic facility is similar to a public utility.

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The first issue for the Court to determine is whether the Board acted in excess of its statutory authority. A special use "is a conditionally permitted use[.]" *Bernstein v. Zoning Bd. of Review of City of E. Providence*, 99 R.I. 494, 497, 209 A.2d 52, 54 (1965). It is

> not an exception to a zoning ordinance, but rather it is a use to which the applicant is entitled if it meets the objective standards in the zoning ordinance for special exception approval. The allowance of a special exception use in a particular zoning district indicates legislative acceptance that the use is consistent with the municipality's zoning plan and that the special exception use, if the applicable objective standards are met, does not adversely affect the public interest of health, safety, and welfare. 8 McQuillin, *Law of Municipal Corporations* § 25:170.60 (3d ed. 2010).

A special use is defined as "[a] regulated use that is permitted pursuant to the special-use permit issued by the authorized governmental entity, *pursuant to § 45-24-42*." Sec. 45-24-31(62) (emphasis added). Section 45-24-57(1)(v) permits zoning boards "[t]o authorize, upon application, in specific cases, special-use permits, *pursuant to § 45-24-42*, where the zoning board of review is designated as a permit authority for special-use permits[.]" Sec. 45-24-57(1)(v) (emphasis added).

Our Supreme Court has declared that a petitioner for a special use permit first "must establish that the relief sought is reasonably necessary for the convenience and welfare of the public." *Toohey v. Kilday*, 415 A.2d 732, 735 (R.I. 1980). In doing so, the petitioner "need show only that 'neither the proposed use nor its location on the site would have a detrimental effect upon public health, safety, welfare and morals.'" *Id.* (quoting *Hester v. Timothy*, 108 R.I. 376, 385-86, 275 A.2d 637, 642 (1971)); *see also Salve Regina Coll.*, 594 A.2d at 880 ('"The rule, [is] that satisfaction of a 'public convenience and welfare' pre-condition will hinge on a showing that a proposed use will not result in conditions that will be inimical to the public

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health, safety, morals and welfare.'") (quoting *Nani v. Zoning Bd. of Review of Town of Smithfield*, 104 R.I. 150, 156, 242 A. 2d 403, 406 (1968)).

Section 45-24-42 provides in pertinent part:

> (a) A zoning ordinance shall provide for the issuance of special-use permits approved by the zoning board of review . . .
> (b) *The ordinance shall*:
>
> > (1) *Specify the uses requiring special-use permits in each district*;
> > (2) Describe the conditions and procedures under which special-use permits, of each or the various categories of special-use permits established in the zoning

> ordinance, may be issued;
> (3) Establish criteria for the issuance of each category of special-use permit that shall be in conformance with the purposes and intent of the comprehensive plan and the zoning ordinance of the city or town[.] Sec. 45-24-42 (emphases added).

It is well-settled that "[w]hen confronted with a clear and unambiguous statute, [the Court's] task is straightforward: [it is] bound to ascribe the plain and ordinary meaning of the words of the statute and [the] inquiry is at an end." *Gerald P. Zarrella Tr. v. Town of Exeter*, 176 A.3d 467, 470 (R.I. 2018) (quoting *Town of Warren v. Bristol Warren Reg'l Sch. Dist.*, 159 A.3d 1029, 1039 (R.I. 2017)) (internal quotations omitted). Our Supreme Court has declared that "[u]nless the context otherwise indicates, use of the word 'shall' * * * indicates a mandatory intent." *Shine v. Moreau*, 119 A.3d 1, 13 (R.I. 2015) (quoting 1A Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory Construction* § 25:4 at 589 (7th ed. 2009)).

Section 45-24-42(b) not only contains the mandatory word "shall," it also immediately is followed by the word "Specify[.]" Sec. 45-24-42(b). Specify is defined as "1. To state explicitly or in detail . . . 2. To include in a specification . . . 3. To determine or bring about (a specific result)[.]" *The American Heritage Dictionary of the English Language* 1682 (5th ed. 2011).

The Court concludes that the clear and unambiguous language of § 45-24-42(b) requires

an ordinance to explicitly state "the uses requiring special-use permits in each district[.]" Sec. 45-24-42(b)(1). In reaching this conclusion, the Court looks to our Supreme Court's interpretation of § 45-24-13, the predecessor statute to § 45-24-42, for guidance.

Section 45-24-13 (1988 Codification) provided:

> The city council of any city or the town council of any town shall provide for the selection and organization of a board of review, and in the regulations and restrictions adopted pursuant to the authority of this chapter shall provide that the board of review may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained, or where the exception is reasonably necessary for the convenience or welfare of the public. Sec. 45-24-13.

Rather than requiring an ordinance to *specify* "the uses requiring special-use permits in each district[,]" (§ 45-24-42(b)(1)), § 45-24-13 merely provided that a "board of review may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance . . . ." Sec. 45-24-13 (emphasis added). Thus, the language of § 45-24-13 was less stringent than that contained in § 45-24-42(b).

Even with the less stringent standard, our Supreme Court stated that "[w]hen the general assembly enacted § 45-24-13, it permitted the local legislative bodies of the various municipalities of this state to provide a board of review with the authority to make special exceptions to the terms of the zoning ordinance."[1] *McNalley v. Zoning Bd. of Review of City of Cranston*, 102 R.I. 417, 418, 230 A.2d 880, 881 (1967). In *McNalley*, the Cranston Zoning Board decided that a horse-riding ring would be desirable in a residential district, despite the fact that it did not have specific authority to grant such a permit. *Id.* at 418, 230 A.2d at 882. The

court stated that "[h]owever desirable the board believes a horse-riding ring may be, if its use is not authorized by the city council by way of a special permit, the board has no authority to permit its operation." *Id.* It then declared that "[i]f a horse-riding ring is to be allowed in a residential section under the circumstances of the instant cause, provision for such an activity as a permitted use by way of a special exception must be made by the legislative branch of the municipality and not by a quasi-judicial fiat of an administrative agency as the respondent board." *Id.*at 419, 230 A.2d at 882.

In *Monopoli v. Zoning Bd. of Review of City of Cranston*, 102 R.I. 576, 232 A.2d 355 (1967), the zoning board permitted a restaurant to construct a parking lot in a residential district for its customers. Citing to*McNalley*, the court expressed concern because it could "find no legislative basis for the board's approval of the instant application which allows a commercial endeavor to intrude upon a residential area of the city of Cranston." *Id.* at 578, 232 A.2d at 356. It then declared: "The power of a zoning board of review to make exceptions to the ordinance is controlled by the pertinent provisions thereof. If the ordinance does not supply this power, it cannot be exercised." *Id.*

Article V, Section 1 of the Portsmouth Ordinance provides:

> Except as otherwise provided in this Ordinance, in each district no building, structure, or land shall be used or occupied except for the purpose permitted as set forth in the accompanying Table of Use Regulations, Section B.
>
> Proposed uses not so listed may be presented to the Zoning Board of Review by the property owner. Such uses shall be evaluated by the Zoning Board of Review according to the most similar use(s) that is (are) listed, as well as the purposes and uses generally permitted in the subject use district. The Zoning Board of Review may approve the proposed use as permitted, or deny the proposed use as not permitted, or allow the proposed use subject to a Special Use Permit. (Art. V, Sec. 1 of the Ordinance.)

It is undisputed that the Ordinance at issue in this case does not provide for photovoltaic systems in its Table of Use Regulations. Relying upon Article V, Section 1, the Board nevertheless determined that it is a permitted use because photovoltaic systems are similar in use to public utilities. However, while it is unclear what the Town Council intended when it used the term "most similar use(s)[,]" it clearly could not have intended for the Board to add additional uses to the Table of Use Regulations. *See Bernstein*, 99 R.I. at 497, 209 A.2d at 54 (stating "the power to establish what exceptions will be available for said purposes is vested in the local legislature and cannot be delegated by it to a board of review"); *Goelet v. Bd. of Review of City of Newport*, 99 R.I. 23, 27, 205 A.2d 135, 137 (1964) ('"The power of a zoning board of review to make exceptions to the terms of a zoning ordinance is controlled by the pertinent provisions thereof"') (quoting *Cole v. Zoning Bd. of Review of City of E. Providence*, 94 R.I. 265, 269, 179 A.2d 846, 848 (1962)); *Bailey v. Zoning Bd. of Review of City of Warwick*, 94 R.I. 168, 170, 179 A.2d 316, 317 (1962) ("the legislature never intended to permit the [zoning] board to be clothed with blanket authority to exercise the legislative power which had been delegated to the council by the enabling act").

In § 45-24-42(b), the general assembly specifically delegated to the Town Council the power to specify what special uses would be available for each district. As previously stated, the Town Council does not have the authority to delegate that power to the Board. Thus, regardless of the actual meaning of the second paragraph of Article V, Section 1, it cannot mean that the Town Council gave the Board the power to add a

new, unspecified use to the Table of Use Regulations. That authority lies with the Town Council and only with the Town Council.

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Consequently, the Court concludes that the Board exceeded its statutory authority when it declared that a solar photovoltaic facility was a permissible use under the Ordinance.[2]

Even assuming, *arguendo*, that the Board did not act in excess of its statutory authority in determining whether a use not specified in the Table of Use Regulations was similar to one that was specified such that it would be a permissible use, it erroneously determined that a solar photovoltaic facility was a permissible use.

In *DePasquale v. Cwiek*, 129 A.3d 72 (R.I. 2016), our Supreme Court determined that a wind turbine was exempt from taxation because it met the definition of manufacturing equipment under G.L. 1956 § 44-3-3(20). The rationale in that opinion provides this Court with useful guidance. Though *DePasquale* involved a wind turbine and taxation, and not a solar farm, the court recognized the definition of manufacturing in its opinion therein.

In *DePasquale*, the property owners allowed the construction of a wind turbine on their property. *Id.* at 74. Like the proposed solar farm, the purpose of the wind turbine was to produce electricity for sale to National Grid rather than directly to members of the public. *Id.* The town in which the wind turbine was located assessed it for purposes of taxation and sent the owners a tax bill. *Id.* The owners challenged the tax bill, asserting that the wind turbine was exempt from tax because it constituted manufacturing equipment. *Id.*

For an individual or entity to qualify for a tax exemption as a manufacturer, "machinery and equipment must be 'used exclusively in the actual manufacture or conversion of raw

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materials or goods in the process of manufacture by a manufacturer[,] * * * [or] used exclusively by a manufacturer for research and development or for quality assurance of its manufactured products[.]'" *Id.* (quoting § 44-3-3(22)). An individual

> is deemed to be a manufacturer . . . if that person uses any premises, room, or place in it primarily for the purpose of transforming raw materials into a finished product for trade through any or all of the following operations: adapting, altering, finishing, making, and ornamenting; provided, that public utilities; non-regulated power producers commencing commercial operation by selling electricity at retail or taking title to generating facilities on or after July 1, 1997[,] * * * are excluded from this definition[.] Sec. 44-3-3(20)(i).

The court determined that the owners of the wind turbine met the definition of a manufacturer under § 44-3-3(20)(i) because "the wind turbine is used exclusively for the purpose of transforming raw materials—namely, wind—into a finished product—namely, electricity." *DePasquale*, 129 A.3d at 75.

Thus, even though the Board found that the proposed solar farm was similar to a public utility, it would be, in fact, a manufacturing facility because it would transform sunlight into electricity. As stated above, manufacturing is expressly prohibited in residential zones under the Ordinance. As a result, the granting of a special use permit for a manufacturing facility—the solar farm—was clearly erroneous.

IV
Conclusion

After carefully reviewing the entire record, this Court finds that the Board's granting of the special use permit was in excess of its statutory authority and in violation of ordinance provisions. The Zoning Board's decision also was affected by error of law and was

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characterized by an abuse of discretion and clearly erroneous. Substantial rights of the Appellants have been prejudiced. Accordingly, this Court reverses the Zoning Board's decision.

Counsel shall submit an appropriate order consistent with this opinion.

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ATTORNEYS:

For Plaintiff:

Jeremiah C. Lynch III, Esq.

For Defendant:

Kevin P. Gavin, Esq.; Jennifer Reid Cervenka, Esq.; Randall T. Weeks, Jr., Esq.

Footnotes:

[1.] The terms "special permits" and "special exceptions" may be used interchangeably. *McNalley v. Zoning Bd. of Review of City of Cranston*, 102 R.I. 417, 418, 230 A.2d 880, 881 (1967).

[2.] The Court observes that "[w]indmills and other wind power generating devices, whether commercial or otherwise" are permissible as an accessory use by way of a special use permit in all districts except the town center. Art. V, Sec. I(12.) This evidences an awareness by the Town Council of at least one renewable energy source. However, the Town Council apparently chose not to allow wind farms in any district. *See, e.g., State v. Milne*, 95 R.I. 315, 321, 187 A.2d 136, 140 (1962) ("It is well settled that in enacting statutes the legislature is presumed to know the law and the effect thereof on its enactments.")

2. Megawatt Energy Solutions LLC (Megawatt Energy Solutions v. Town of Smithfield Zoning Board of Review)

Here is another Rhode Island solar case. It appears that no appeal was taken from the superior court judgment which the solar company lost.

MEGAWATT ENERGY SOLUTIONS LLC; GLENN G. GRESKO
v.
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

C.A. No. PC-2017-5888

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS PROVIDENCE, SC. SUPERIOR COURT

November 7, 2018

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

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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.

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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."

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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."

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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.

ATTORNEYS:

For Plaintiff: Amy H. Goins, Esq.; Andrew M. Teitz, Esq.

For Defendant: Todd J. Romano, Esq.

Footnotes:

[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.

Thank you very much for your time and consideration.

Sincerely,

Laura Tinthoff

707.339.1481

ROGER FONTAINE and JANE FONTAINE
v.
JAMES EDWARDS, JAMES HALL, JOHN BORDEN, ERIC RAPOSA, BENJAMIN FURIEL and KATHLEEN PAVLAKIS, in their capacity as Members of the PORTSMOUTH ZONING BOARD OF REVIEW, PORTSMOUTH SOLAR, LLC, and SEABURY APARTMENTS, LLC

C.A. NO. NC-2017-0261

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
NEWPORT, SC. SUPERIOR COURT

July 27, 2018

DECISION

VAN COUYGHEN, J. Before this Court is a zoning appeal pursuant to G.L. 1956 § 45-24-69. Roger and Jane Fontaine (Appellants) appeal a decision (decision) of the Portsmouth Zoning Board of Review (Board), granting a special use permit to Portsmouth Solar, LLC (Portsmouth Solar), to install a solar photovoltaic facility on property located in an R-30 District.

I
Facts and Travel

Seabury Apartments, LLC owns the property located at 259 Jepson Lane, Portsmouth, Rhode Island and otherwise known as Lot 3 on Tax Assessor's Map 60 (Property). (Compl. ¶ 4.) The Property consists of 29.7 acres of vacant land, with the exception of a barn. (Pet. 1; Ex. 7 to Pet.) On December 16, 2016, Portsmouth Solar filed a Petition for a Special Use Permit to install a 2.9 Mega Watt (DC) solar photovoltaic facility (solar farm) on the Property pursuant to Article V(B)(5) and Article VII(A)(1)(b) of the Portsmouth Zoning Ordinance (Ordinance). (Pet. 1.)

The Zoning Ordinance for the Town of Portsmouth (Ordinance) does not provide for solar farms in any of the Town's districts.

The Board conducted duly noticed hearings on March 30, 2017 (Tr. I), and May 4, 2017 (Tr. II). As an initial matter, the Board addressed whether a solar farm would be permissible under the Ordinance considering that a solar farm is not specifically mentioned.

Article V, Section 1 of the Ordinance provides:

> Except as otherwise provided in this Ordinance, in each district no building, structure, or land shall be used or occupied except for the purposes permitted as set forth in the accompanying Table of Use Regulations, Section B.
>
> Proposed uses not so listed may be presented to the Zoning Board of Review by the property owner. Such uses shall be evaluated by the Zoning Board of Review according to the most similar use(s) that is (are) listed, as well as the purposes and uses generally permitted in the subject use district. The Zoning Board of Review may approve the proposed use as permitted, or deny the proposed use as not permitted, or allow the proposed use subject to a Special Use Permit. (Art. V, Sec. 1 of the Ordinance.)

Portsmouth Solar asserted that because a solar farm is similar to a public utility, which is permitted in an R-30 district, then a solar

farm also is permitted under the Ordinance in an R-30 district based upon Art. V, Sec. 1. The Appellants disagreed and, instead, likened a solar farm to "a nonregulated power producer . . . engaged in the business of producing, manufacturing, or generating electricity for sale to the public[,]" and that as such, they contend that it is a prohibited use in an R-30 district. (Tr. I at 14.)

After hearing arguments on the subject, a Board Member moved as follows:

> that the solar farms' Petitioner be allowed to move forward based on Article V, 1, 2. This Board has the right to choose the most

Page 3

> similar use under the zoning ordinance, and I believe that the most similar use is a public utility and personally, based on the testimony do not buy the argument that this is a manufacturing use. In my opinion, this is a passive use that does not involve the manufacturing of goods and services. It is more of a passive use, and I would move that the Board move forward with this petition. (Tr. I at 26.)

Thereafter, the Board unanimously voted to consider the solar farm as if it were a public utility and proceeded to consider the petition for a special use permit. (Tr. I at 26-27.)

At the hearing, the principal of Portsmouth Solar, Jamie Fordyce, testified that "solar is a passive use" and that each panel is approximately "3 by 5 feet" with the larger capacity panels being "6 feet long." *Id.* at 29, 30. He described the solar farm as follows:

> So there's a racking structure, which is driven posts into the ground in most cases. This - in this case we have a racking system. The panels are angled on a 25 degree tilt. They rest roughly 1.5 feet off the grade and reach up approximately 8 feet. They're arrayed in portrait one over another and along in an array. *Id.* at 31.

The project would be surrounded by a six-foot high vinyl chain-link fence, and there would be landscaping to screen the solar farm from neighbors. *Id.* at 38, 39. The project was certified as "a Distributed Generation Project" by the Public Utilities Commission, which would permit it "to generate electricity for sale to National Grid to be distributed to the public." *Id.* at 55. Thus, it is clear that this proposal would be a commercial operation. *See* Black's Law Dictionary 325 (10th ed. 2014) (defining "commercial" as "[o]f, relating to, or involving the buying and selling of goods").

Professional Engineer Alan Benevides testified next. (Tr. I at 65-92; Tr. II at 282-285.) He testified that the property had been surveyed and that because it is a relatively flat site, there would be few changes in the topography, and that they have made provisions for storm-water quality and quantity. *Id.* at 67; 71-72. He stated that the proposed solar panels would absorb

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sunlight and that an antireflective coating on the panels would prevent glare. *Id.* at 74. In addition, he noted the project would not emit any noise or odors, and it would not use any chemicals, and it would not generate noticeable traffic. *Id.* at 76, 82.

Landscape Architect Joshua Wheeler then testified. *Id.* at 96-117. He stated that he drew up plans to screen the project from view

with staggered plantings that would better hide it from the neighbors. *Id*. at 98, 100. The plants would be native to the area, and the larger trees would be eight feet in height at the time of planting. *Id*. at 105-06.

Nathan Godfrey, a Real Estate Appraiser and Consultant, appeared next. *Id*. at 118-147; Tr. II at 286-290. He testified that he had received a letter from the Rhode Island Historical and Preservation and Heritage Commission, stating that the proposed screening of the project would minimize the effect of the solar array and that it would not have an adverse effect on historical properties. *Id*. at 123-24. He testified that the project would not generate any noise, glare, odor, and would not pose any traffic concerns. *Id*. at 126-27. He stated that the solar farm "is as passive as it gets[,]" that [t]here's simply no element here that would impact an abutting use." *Id*. at 136-37.

Lay witness Robert King (Tr. I 153-162; Tr. II at 275-280) objected to the petition, contending that the project would create solar glare. (Tr. I at 156-57.) He also contended that the solar panels are known to entrap various hazardous chemicals. *Id*. at 159-60. Another lay witness, John Reed, also expressed concern about solar glare. (Tr. II at 169.) He then questioned whether the transformers would emit noise or create blind spots for pilots approaching nearby Newport Airport. *Id*. at 173, 175.

Real Estate Expert James Houle testified against the project. (Tr. II at 184-263.) He testified that cracked solar panels create a danger of shock and/or electrocution, and that any

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chemicals used in the production of the panels could leach out into the soil. *Id*. at 186, 189. Mr. Houle opined that solar farms are not harmonious to a residential use and likely would diminish surrounding property values by about ten to fifteen percent. *Id*. at 195-96, 213. He testified that solar farms are more appropriate for either an industrial or a commercial district. *Id*. at 200. He opined that if the project was approved, then "there's a strong risk the area will take on the feel of an entire industrial zone[,]" especially considering that National Grid is planning on expanding a nearby substation. *Id*. at 203. Mr. Houle also opined that the proposed buffering around the site was insufficient. *Id*. at 204. He testified that in his opinion, the project was not compatible with the Comprehensive Plan, and that "[w]hen you have a use that's really not harmonious with a residential neighborhood, you're creating friction within that neighborhood, and that ultimately goes against the Comprehensive Community Plan, which is to have an orderly growth." *Id*. at 217-18.

Lay witness and abutter Thomas Settle testified in favor of the Petition. *Id*. at 263-268. He testified that although his preference would be for the Property never to be developed, his second choice would be for a solar farm, as he believes "that would be the least amount of impact that development on that property would have." *Id*. at 264-65. He stated that in the past, a solar farm was installed near a house that he was building in Middletown, and that at the time, he feared it would depreciate the value of the house; however, the solar farm had no effect on the sale price of that property. *Id*. at 267.

Lay witness Rachel Charrier, who is one of the owners of the neighboring Seabury Apartments, next testified in favor of the Petition. *Id*. at 268-270. She stated that she believed "that this project is a great way for us to use the land but at the same time not impact the neighborhood in any way." *Id*. at 269. She further testified that "if we actually thought that it

Page 6

would do anything to harm the property values, we would be shooting ourselves in the foot because our property [Seabury Apartments] abuts it too." *Id*. at 269-70.

Mrs. Charrier's husband, James, testified next. *Id*. at 270-274. Mr. Charrier testified that he owns a real estate development company and that by his calculations, the Property is large enough to accommodate twelve to fifteen residences. *Id*. at 271. He posited that if each of those houses was built to the maximum height of thirty-five feet and each roof contained solar panels, then the solar panels would be much more visible than the proposed solar farm. *Id*. He stated his belief that while the project may not be the best use for the Property, it nevertheless would provide "the lowest impact to the community." *Id*. at 272.

Cyrus Gibson was the last lay witness to testify. *Id*. at 274-75. He testified that while he agreed with Mr. Settle's testimony, his "biggest concern" was that "should this get approved, it sets a very dangerous precedent." *Id*. at 274. In other words, he feared that the owners of farmland would point to any such approval as the basis for seeking similar approval on their farms. *Id*. at 275.

At that point in the hearing, lay witness Mr. King returned to the stand to outline an agreement that he and his neighbor had reached with Portsmouth Solar regarding the planting of additional trees should solar glare become a problem. *Id*. at 279. Apparently, Portsmouth Solar agreed to place money in an escrow account for two years in the event that additional plantings might be necessary. *Id*. at 279-80.

At the conclusion of the hearing, the Board voted by a vote of four-to-one to approve the Petition. On June 1, 2017, the Board issued a written decision. (Decision, June 1, 2017.)

II
Standard of Review

Section 45-24-69(a) grants the Superior Court jurisdiction to review a local zoning board's decision. 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).

Our Supreme Court requires this Court to "review[] the decisions of a . . . 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). Accordingly, the Court '"lacks

[the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level.'" *Id*. at 666 (quoting *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986)). In performing this review, the Court "may 'not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.'" *Curran v. Church Cmty. Housing Corp*., 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)). However, the applicant always bears the burden to demonstrate why the requested relief should be granted. *See DiIorio v. Zoning Bd. of Review of City of E. Providence*, 105 R.I. 357, 362, 252

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A.2d 350, 353 (1969) (requiring "an applicant seeking relief before a zoning board of review to prove the existence of the conditions precedent to a grant of relief").

In reviewing a zoning decision, the Court '"must examine 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, 245, 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.'" *Lischio v. Zoning Bd. of Review of Town of N. Kingstown*, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting *Caswell v. George Sherman Sand & Gravel Co., Inc*., 424 A.2d 646, 647 (R.I. 1981)). If the Court '"can conscientiously find that the board's decision was supported by substantial evidence in the whole record,'" it must uphold that decision. *Mill Realty Assocs. v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). However, in cases that involve questions of law, this Court conducts a *de novo* review. *Tanner v. Town Council of E. Greenwich*, 880 A.2d 784, 791 (R.I. 2005).

III
Analysis

The Appellants contend that the Board exceeded its authority by altering the terms of the Ordinance to add a special use. They further contend that even if the Board did have the authority to alter the Table of Use Regulations, the Board erroneously found that a photovoltaic facility is similar to a public utility.

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The first issue for the Court to determine is whether the Board acted in excess of its statutory authority. A special use "is a conditionally permitted use[.]" *Bernstein v. Zoning Bd. of Review of City of E. Providence*, 99 R.I. 494, 497, 209 A.2d 52, 54 (1965). It is

> not an exception to a zoning ordinance, but rather it is a use to which the applicant is entitled if it meets the objective standards in the zoning ordinance for special exception approval. The allowance of a special exception use in a particular zoning district indicates legislative acceptance that the use is consistent with the municipality's zoning plan and that the special exception use, if the applicable objective standards are met, does not adversely affect the public interest of health, safety, and welfare. 8 McQuillin, *Law of Municipal Corporations* § 25:170.60 (3d ed. 2010).

A special use is defined as "[a] regulated use that is permitted pursuant to the special-use

permit issued by the authorized governmental entity, *pursuant to § 45-24-42*." Sec. 45-24-31(62) (emphasis added). Section 45-24-57(1)(v) permits zoning boards "[t]o authorize, upon application, in specific cases, special-use permits, *pursuant to § 45-24-42*, where the zoning board of review is designated as a permit authority for special-use permits[.]" Sec. 45-24-57(1)(v) (emphasis added).

Our Supreme Court has declared that a petitioner for a special use permit first "must establish that the relief sought is reasonably necessary for the convenience and welfare of the public." *Toohey v. Kilday*, 415 A.2d 732, 735 (R.I. 1980). In doing so, the petitioner "need show only that 'neither the proposed use nor its location on the site would have a detrimental effect upon public health, safety, welfare and morals.'" *Id.* (quoting *Hester v. Timothy*, 108 R.I. 376, 385-86, 275 A.2d 637, 642 (1971)); *see also Salve Regina Coll.*, 594 A.2d at 880 ('"The rule, [is] that satisfaction of a 'public convenience and welfare' pre-condition will hinge on a showing that a proposed use will not result in conditions that will be inimical to the public

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health, safety, morals and welfare.'") (quoting *Nani v. Zoning Bd. of Review of Town of Smithfield*, 104 R.I. 150, 156, 242 A. 2d 403, 406 (1968)).

Section 45-24-42 provides in pertinent part:

> (a) A zoning ordinance shall provide for the issuance of special-use permits approved by the zoning board of review . . .
> (b) *The ordinance shall*:
>
> > (1) *Specify the uses requiring special-use permits in each district*;
> > (2) Describe the conditions and procedures under which special-use permits, of each or the various categories of special-use permits established in the zoning ordinance, may be issued;
> > (3) Establish criteria for the issuance of each category of special-use permit that shall be in conformance with the purposes and intent of the comprehensive plan and the zoning ordinance of the city or town[.] Sec. 45-24-42 (emphases added).

It is well-settled that "[w]hen confronted with a clear and unambiguous statute, [the Court's] task is straightforward: [it is] bound to ascribe the plain and ordinary meaning of the words of the statute and [the] inquiry is at an end." *Gerald P. Zarrella Tr. v. Town of Exeter*, 176 A.3d 467, 470 (R.I. 2018) (quoting *Town of Warren v. Bristol Warren Reg'l Sch. Dist.*, 159 A.3d 1029, 1039 (R.I. 2017)) (internal quotations omitted). Our Supreme Court has declared that "[u]nless the context otherwise indicates, use of the word 'shall' * * * indicates a mandatory intent." *Shine v. Moreau*, 119 A.3d 1, 13 (R.I. 2015) (quoting 1A Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory Construction* § 25:4 at 589 (7th ed. 2009)).

Section 45-24-42(b) not only contains the mandatory word "shall," it also immediately is followed by the word "Specify[.]" Sec. 45-24-42(b). Specify is defined as "1. To state explicitly or in detail . . . 2. To include in a specification . . . 3. To determine or bring about (a specific result)[.]" *The American Heritage Dictionary of the English Language* 1682 (5th ed. 2011).

The Court concludes that the clear and unambiguous language of § 45-24-42(b) requires

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an ordinance to explicitly state "the uses requiring special-use permits in each district[.]" Sec. 45-24-42(b)(1). In reaching this conclusion, the Court looks to our Supreme Court's interpretation of § 45-24-13, the predecessor statute to § 45-24-42, for guidance.

Section 45-24-13 (1988 Codification) provided:

> The city council of any city or the town council of any town shall provide for the selection and organization of a board of review, and in the regulations and restrictions adopted pursuant to the authority of this chapter shall provide that the board of review may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained, or where the exception is reasonably necessary for the convenience or welfare of the public. Sec. 45-24-13.

Rather than requiring an ordinance to *specify* "the uses requiring special-use permits in each district[,]" (§ 45-24-42(b)(1)), § 45-24-13 merely provided that a "board of review may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance . . . ." Sec. 45-24-13 (emphasis added). Thus, the language of § 45-24-13 was less stringent than that contained in § 45-24-42(b).

Even with the less stringent standard, our Supreme Court stated that "[w]hen the general assembly enacted § 45-24-13, it permitted the local legislative bodies of the various municipalities of this state to provide a board of review with the authority to make special exceptions to the terms of the zoning ordinance."[1] *McNalley v. Zoning Bd. of Review of City of Cranston*, 102 R.I. 417, 418, 230 A.2d 880, 881 (1967). In *McNalley*, the Cranston Zoning Board decided that a horse-riding ring would be desirable in a residential district, despite the fact that it did not have specific authority to grant such a permit. *Id.* at 418, 230 A.2d at 882. The

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court stated that "[h]owever desirable the board believes a horse-riding ring may be, if its use is not authorized by the city council by way of a special permit, the board has no authority to permit its operation." *Id.* It then declared that "[i]f a horse-riding ring is to be allowed in a residential section under the circumstances of the instant cause, provision for such an activity as a permitted use by way of a special exception must be made by the legislative branch of the municipality and not by a quasi-judicial fiat of an administrative agency as the respondent board." *Id.*at 419, 230 A.2d at 882.

In *Monopoli v. Zoning Bd. of Review of City of Cranston*, 102 R.I. 576, 232 A.2d 355 (1967), the zoning board permitted a restaurant to construct a parking lot in a

residential district for its customers. Citing to *McNalley*, the court expressed concern because it could "find no legislative basis for the board's approval of the instant application which allows a commercial endeavor to intrude upon a residential area of the city of Cranston." *Id*. at 578, 232 A.2d at 356. It then declared: "The power of a zoning board of review to make exceptions to the ordinance is controlled by the pertinent provisions thereof. If the ordinance does not supply this power, it cannot be exercised." *Id*.

Article V, Section 1 of the Portsmouth Ordinance provides:

> Except as otherwise provided in this Ordinance, in each district no building, structure, or land shall be used or occupied except for the purpose permitted as set forth in the accompanying Table of Use Regulations, Section B.
>
> Proposed uses not so listed may be presented to the Zoning Board of Review by the property owner. Such uses shall be evaluated by the Zoning Board of Review according to the most similar use(s) that is (are) listed, as well as the purposes and uses generally permitted in the subject use district. The Zoning Board of Review may approve the proposed use as permitted, or deny the proposed use as not permitted, or allow the proposed use subject to a Special Use Permit. (Art. V, Sec. 1 of the Ordinance.)

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It is undisputed that the Ordinance at issue in this case does not provide for photovoltaic systems in its Table of Use Regulations. Relying upon Article V, Section 1, the Board nevertheless determined that it is a permitted use because photovoltaic systems are similar in use to public utilities. However, while it is unclear what the Town Council intended when it used the term "most similar use(s)[,]" it clearly could not have intended for the Board to add additional uses to the Table of Use Regulations. *See Bernstein*, 99 R.I. at 497, 209 A.2d at 54 (stating "the power to establish what exceptions will be available for said purposes is vested in the local legislature and cannot be delegated by it to a board of review"); *Goelet v. Bd. of Review of City of Newport*, 99 R.I. 23, 27, 205 A.2d 135, 137 (1964) ("'The power of a zoning board of review to make exceptions to the terms of a zoning ordinance is controlled by the pertinent provisions thereof'") (quoting *Cole v. Zoning Bd. of Review of City of E. Providence*, 94 R.I. 265, 269, 179 A.2d 846, 848 (1962)); *Bailey v. Zoning Bd. of Review of City of Warwick*, 94 R.I. 168, 170, 179 A.2d 316, 317 (1962) ("the legislature never intended to permit the [zoning] board to be clothed with blanket authority to exercise the legislative power which had been delegated to the council by the enabling act").

In § 45-24-42(b), the general assembly specifically delegated to the Town Council the power to specify what special uses would be available for each district. As previously stated, the Town Council does not have the authority to delegate that power to the Board. Thus, regardless of the actual meaning of the second paragraph of Article V, Section 1, it cannot mean that the Town Council gave the Board the power to add a new, unspecified use to the Table of Use Regulations. That authority lies with the Town Council and only with the Town Council.

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Consequently, the Court concludes that the Board exceeded its statutory authority when it declared that a solar photovoltaic facility was a permissible use under the Ordinance.[2]

Even assuming, *arguendo*, that the Board did not act in excess of its statutory authority in determining whether a use not specified in the Table of Use Regulations was similar to one that was specified such that it would be a permissible use, it erroneously determined that a solar photovoltaic facility was a permissible use.

In *DePasquale v. Cwiek*, 129 A.3d 72 (R.I. 2016), our Supreme Court determined that a wind turbine was exempt from taxation because it met the definition of manufacturing equipment under G.L. 1956 § 44-3-3(20). The rationale in that opinion provides this Court with useful guidance. Though *DePasquale* involved a wind turbine and taxation, and not a solar farm, the court recognized the definition of manufacturing in its opinion therein.

In *DePasquale*, the property owners allowed the construction of a wind turbine on their property. *Id*. at 74. Like the proposed solar farm, the purpose of the wind turbine was to produce electricity for sale to National Grid rather than directly to members of the public. *Id*. The town in which the wind turbine was located assessed it for purposes of taxation and sent the owners a tax bill. *Id*. The owners challenged the tax bill, asserting that the wind turbine was exempt from tax because it constituted manufacturing equipment. *Id*.

For an individual or entity to qualify for a tax exemption as a manufacturer, "machinery and equipment must be 'used exclusively in the actual manufacture or conversion of raw

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materials or goods in the process of manufacture by a manufacturer[,] * * * [or] used exclusively by a manufacturer for research and development or for quality assurance of its manufactured products[.]'" *Id*. (quoting § 44-3-3(22)). An individual

> is deemed to be a manufacturer . . . if that person uses any premises, room, or place in it primarily for the purpose of transforming raw materials into a finished product for trade through any or all of the following operations: adapting, altering, finishing, making, and ornamenting; provided, that public utilities; non-regulated power producers commencing commercial operation by selling electricity at retail or taking title to generating facilities on or after July 1, 1997[,] * * * are excluded from this definition[.] Sec. 44-3-3(20)(i).

The court determined that the owners of the wind turbine met the definition of a manufacturer under § 44-3-3(20)(i) because "the wind turbine is used exclusively for the purpose of transforming raw materials—namely, wind—into a finished product—namely, electricity." *DePasquale*, 129 A.3d at 75.

Thus, even though the Board found that the proposed solar farm was similar to a public utility, it would be, in fact, a manufacturing facility because it would transform sunlight into electricity. As stated above, manufacturing is expressly prohibited in residential zones under the Ordinance. As a result, the granting of a special use permit for a manufacturing facility—the solar farm—was clearly erroneous.

IV
Conclusion

After carefully reviewing the entire record, this Court finds that the Board's granting of the special use permit was in excess of its statutory authority and in violation of ordinance provisions. The Zoning Board's decision also was affected by error of law and was

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characterized by an abuse of discretion and clearly erroneous. Substantial rights of the Appellants have been prejudiced. Accordingly, this Court reverses the Zoning Board's decision.

Counsel shall submit an appropriate order consistent with this opinion.

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ATTORNEYS:

For Plaintiff:

Jeremiah C. Lynch III, Esq.

For Defendant:

Kevin P. Gavin, Esq.; Jennifer Reid Cervenka, Esq.; Randall T. Weeks, Jr., Esq.

Footnotes:

[1.] The terms "special permits" and "special exceptions" may be used interchangeably. *McNalley v. Zoning Bd. of Review of City of Cranston*, 102 R.I. 417, 418, 230 A.2d 880, 881 (1967).

[2.] The Court observes that "[w]indmills and other wind power generating devices, whether commercial or otherwise" are permissible as an accessory use by way of a special use permit in all districts except the town center. Art. V, Sec. I(12.) This evidences an awareness by the Town Council of at least one renewable energy source. However, the Town Council apparently chose not to allow wind farms in any district. *See*, *e.g.*, *State v. Milne*, 95 R.I. 315, 321, 187 A.2d 136, 140 (1962) ("It is well settled that in enacting statutes the legislature is presumed to know the law and the effect thereof on its enactments.")

MEGAWATT ENERGY SOLUTIONS LLC; GLENN G. GRESKO
v.
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

C.A. No. PC-2017-5888

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC. SUPERIOR COURT

November 7, 2018

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

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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

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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

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> 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*

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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

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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.

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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."

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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."

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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.

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ATTORNEYS:

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For Defendant: Todd J. Romano, Esq.

Footnotes:

[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.
