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# Correspondence

**From:** McDowell, John
**To:** PlanningCommissionClerk
**Subject:** FW: Renewable Energy Ordinance
**Date:** Tuesday, December 3, 2019 1:58:19 PM
**Attachments:** 12-3-19 Comments Napa draft solar ordinance-signed.pdf

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## Correspondence for Item 7B

**From:** Rachel Mansfield-Howlett <rhowlettlaw@gmail.com>
**Sent:** Tuesday, December 3, 2019 1:48 PM
**To:** McDowell, John <John.McDowell@countyofnapa.org>; PlanningCommissionClerk <planningcommissionclerk@countyofnapa.org>
**Subject:** Renewable Energy Ordinance

Dear Mr. McDowell and Clerk for the Planning Commission:

Please accept these comments on the renewable energy ordinance under consideration at tomorrow's Planning Commission hearing.

Thank you,
Rachel

Rachel Mansfield-Howlett
Provencher & Flatt, LLP
823 Sonoma Ave.
Santa Rosa CA 95404

Phone: 707/284.2378
Fax: 707/284.2387
Cell: 707/291.6585
Rhowlettlaw@gmail.com

PROVENCHER & FLATT, LLP
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Rhowlettlaw@gmail.com

ATTORNEYS AT LAW
Douglas B. Provencher
Gail F. Flatt

OF COUNSEL
Rachel Mansfield-Howlett
Roz Bateman Smith

December 3, 2019

Napa County Planning, Building and Environmental Services Department
John McDowell john.mcdowell@countyofnapa.org
Napa County Planning Commission
1195 Third Street, Suite 305 Napa, CA
planningcommissionclerk@countyofnapa.org

Re: December 4, 2019 Planning Commission hearing on Renewable Energy Draft Ordinance

*Via email*

Dear Mr. McDowell and Planning Commissioners:

On behalf of Napa County area residents, thank you for accepting these comments on Napa County's proposed renewable energy ordinance.

In terms of the proposed ordinance's provisions for the location of commercial energy projects, the County's December 4, 2019 staff report states:

> *Commercial facilities are excluded from residential and agricultural zoning districts. Facilities are directed to industrial, commercial, public facility zoning districts.*

Consistently, the summary the County provided in late October by John McDowell verified that all commercial energy facilities will be disallowed in agricultural and residential zoning districts. (Copy of email included below.)

We fully support these limitations on the locations for commercial energy facilities but note that the language of the ordinance does not clearly provide for the claimed restrictions. The proposed ordinance identifying the County's renewable energy policies makes a distinction between commercial energy facilities and commercial bioenergy facilities and treats the location of these facilities differently. Commercial bioenergy facilities are clearly limited to industrial

and commercial areas, whereas, the commercial energy facilities (solar) locations are not indicated and therefore appear to be allowed in any zoning use designation.

We urge the County to include provisions in the proposed ordinance that would clarify the requirement that all commercial energy facilities (solar and bio) are limited to industrial, commercial, and public facility zoning districts and prohibit their use in agricultural and residential zoning districts.

We also request that the County provide additional safeguards against foreseeable aesthetic and privacy impacts by prohibiting all energy projects from facing inhabited residential structures and be fully screened.

Another reason to support the location restrictions regards CEQA review. The County's reliance on categorical exemptions to CEQA for the adoption of the renewable energy ordinance is only appropriate if commercial renewable energy projects are limited as described – allowing their use in agricultural and residential areas cannot be supported under a categorical exemption due to the applicability of the environmental impact exception. Without these limitations in place, environmental review would be required to be conducted for the changes the County proposes to its land use plans. Allowing commercial energy projects to be developed in residential and agricultural areas would be an "unusual circumstance" that could result in a "fair argument" of environmental impacts thus prompting environmental review to be conducted prior to further consideration of the ordinance.

We don't have any comments as to the ordinance's by-right ministerial provisions for private "accessory uses", as long as the limitations regarding generating energy is kept to 125% of permitted on-site uses and the enumerated situations where these accessory uses would be prohibited are retained.

Sincerely,

Rachel Mansfield-Howlett

Encl: Email from John McDowell

**Sent:** Tuesday, October 29, 2019 9:00 AM
**To:** McDowell, John <John.McDowell@countyofnapa.org>
**Subject:** Renewable Energy - Draft Ordinance

Dear Napa County Stakeholder,

Attached for your review and comment is a draft ordinance updating Napa County's development regulations for renewable energy systems. Notable components are:

- Codifies County's current practices of allowing 'accessory renewable energy systems' such as small solar systems as a matter of right, but limits the system to meeting on-site power needs of private residences, business, and agricultural uses. Applies ministerial development standards consistent with other allowed accessory uses.

- Establishes regulations for 'commercial renewable energy facilities' for power generation facilities that provide feed-in tariff power to the public utility grid.

    - **These uses are excluded from agricultural and residential zoning districts, and allowed with a Planning Commission Use Permit in industrial, commercial, and public facility districts.**

    - Establishes comprehensive development standards for such uses

- Codifies County's current practices of allowing emergency power generators for use during power outages. Generators limited in size to meet on-site power needs only.

- Repeals antiquated 'small wind energy' code requirements that expired in 2017.

Please direct comments or questions to John McDowell at john.mcdowell@countyofnapa.org or (707) 299-1354. A public hearing before the Planning Commission is tentatively set for November 20, 2019. Upon conclusion of the Planning Commission's recommendation, the draft ordinance will be scheduled for a public hearing before the Board of Supervisors.

Sincerely,

John McDowell

Napa County Planning, Building and Environmental Services Department

(707) 299-1354

| | |
|---|---|
| **From:** | McDowell, John |
| **To:** | PlanningCommissionClerk |
| **Subject:** | FW: Napa County Renewable Energy Ordinance - Public Comment - Renewable Properties |
| **Date:** | Tuesday, December 3, 2019 1:58:43 PM |
| **Attachments:** | RP Napa Renewable Energy Ordinance Response Letter rev5 AH 191202.pdf<br>image001.png |
| **Importance:** | High |

## Correspondence for Item 7B

**From:** Aaron Halimi <aaron@renewprop.com>
**Sent:** Monday, December 2, 2019 5:27 PM
**To:** McDowell, John <John.McDowell@countyofnapa.org>; Morrison, David <David.Morrison@countyofnapa.org>; Whitmer, David <Dave.Whitmer@countyofnapa.org>; Joelle Gallagher <joellegpc@gmail.com>; Jeri Gill <JeriGillPC@outlook.com>; andrewmazotti@gmail.com; anne.cottrell@lucene.com
**Cc:** Wagenknecht, Brad <BRAD.WAGENKNECHT@countyofnapa.org>; Ramos, Belia <Belia.Ramos@countyofnapa.org>; Alfredo Pedroza <alfredo@apedroza.com>; Gregory, Ryan <Ryan.Gregory@countyofnapa.org>; Dillon, Diane <Diane.DILLON@countyofnapa.org>; Stephanie Loucas <stephanie@renewprop.com>; Dodd, Jeff <jdodd@coblentzlaw.com>
**Subject:** Napa County Renewable Energy Ordinance - Public Comment - Renewable Properties
**Importance:** High

Director Morrison –

Please see the attached correspondence related to needed improvements to the draft renewable energy ordinance. As someone who has worked to entitle and deliver the only utility solar project to Napa County, I ask that you review and consider the attached closely.

Thank you for your time and consideration.

Best –

Aaron

Aaron Halimi
President
RENEWABLE PROPERTIES
(M) 530-518-7669
aaron@renewprop.com | renewprop.com

**Renewable Properties, LLC**
655 Montgomery Street, Suite 1430
San Francisco, CA 94111
www.renewprop.com

December 2, 2019

David Morrison, Director
Napa County Planning, Building & Environmental Services
1195 Third Street, Suite 201
Napa, CA 94559

Dear David,

**RE: Napa County Draft Renewable Energy Systems Ordinance**

I am writing to voice my concerns about the proposed Renewable Energy Systems Ordinance (as revised Dec. 4, 2019). When the Board of Supervisors requested attention to renewable energy regulations in the County, it asked that any future ordinance incentivize the adoption of local renewables to decrease the nation's dependence on fossil fuels and reduce GHG emissions. As an active solar market participant, local land and project owner, I believe the proposed ordinance achieves the opposite of its planned purpose – it limits renewable energy development rather than incentivizes the creation of it.

Please see some of our concerns below:

1. In general, the ordinance doesn't incentive renewables in any specific locations by providing expedited reviews and/or other incentives to developers. Rather, the ordinance limits development to only a few zoning districts and prohibits it from land use designations that are more likely to be economically viable for solar.

2. The ordinance limits solar to commercial and industrial zones, which is economically prohibitive and would essentially kill additional solar development throughout the County. To further put this into context, our project on American Canyon Road was zoned "Agricultural Watershed" and was deemed the "perfect site" for solar by many public officials. Also, it prohibits renewables on County land zoned as "Agriculture Watershed", that would be ideally suited for solar development (i.e., Landfills, airport buffer land, Napa sanitation district, Napa unified school district, etc.).

3. Subdivision (8) of Section 18.117.030 relating to "Accessory renewable energy systems development standards" unnecessarily restrictive to ground mounted solar systems and limits on-site production of renewable energy.

4. Renewables within the "built environment" (i.e., rooftop, parking lots, etc.) should go through a streamlined approval process and be approved through a ministerial process regardless of whether the power is being used for onsite consumption or sold back onto the grid. The Board specifically asked for this type of incentive.

5. Preventing solar development on parcels that fall in the Airport Land Use Compatibility Zone B is unnecessary. The primary concerns with airport land use compatibility are noise,

hazard to flights, safety on the ground and overflights. Renewables projects are not densely populated and thereby negates any concerns of noise, lights, and safety of people on the ground. As it specifically relates to solar panels, they are manufactured to absorb light, not reflect it and cause less glare than standard home window glass, snow and white concrete. Solar panels are commonplace in Zone Bs (or their equivalent) for small to large airports in throughout the country. With this in mind, allowing solar in this zone seems like one of the few truly compatible uses for these areas.

6. Subdivision (15) of Section 18.117.040 relating to "Commercial renewable energy production facilities development standards" requires the removal of graveled areas and access roads, which doesn't properly address that these roads may have existed prior to the development of the project. Additionally, the requirement for a maintenance agreement over a period of three (3) years for all revegetated areas seems overly excessive for this low impact use that is already subjected to a decommissioning plan.

7. Subdivision (2) of Section 18.117.040.C relating to "Commercial renewable energy production facilities development standards" requires electrical distribution lines on the project site to be undergrounded but waived by the decision-making body if the undergrounding is determined to be an undue burden. How will this be determined? It is an undue burden for commercial solar projects to underground existing and newly ran distribution lines.

8. The definition of "Commercial renewable energy production facility" has a typo in subsection (2), as it currently says onsite use instead of offsite use. We believe the intent the definition is specific to offsite use and should be revised accordingly.

In conclusion, we find the proposed Renewable Energy Systems Ordinance overly restrictive with regards to the zoning districts that renewables will be allowed. If Napa is truly committed to reducing their reliance on fossil fuels, they must reconsider their ordinance as currently written. We recommend a more balanced approach where each project is considered on its own merits. Please note we are supportive of the ordinance's development standards in Section 18.117.040 of the proposed ordinance.

Climate change is a global problem that requires local solutions. It is our hope that Napa County is willing to be part of the solution. Thank you for your time and consideration with this matter.

Sincerely,

**RENEWABLE PROPERTIES**

Aaron Halimi
President
530-518-7669

**From:** McDowell, John
**To:** PlanningCommissionClerk
**Subject:** FW: Renewable Energy Ordinance
**Date:** Tuesday, December 3, 2019 2:00:48 PM
**Attachments:** Blank 4.pdf

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## Correspondence for Item 7B

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**From:** Eileen Pereira <eileen@aston.com>
**Date:** Saturday, Nov 30, 2019, 9:34 PM
**To:** Gregory, Ryan <Ryan.Gregory@countyofnapa.org>, Ramos, Belia <Belia.Ramos@countyofnapa.org>, Dillon, Diane <Diane.DILLON@countyofnapa.org>, Wagenknecht, Brad <BRAD.WAGENKNECHT@countyofnapa.org>, Pedroza, Alfredo <Alfredo.Pedroza@countyofnapa.org>, Morrison, David <David.Morrison@countyofnapa.org>
**Cc:** Aston Pereira <aston@aston.com>, Laura Tinthoff <lauratinthoff@gmail.com>, David Mering <davidmeringnapa@gmail.com>
**Subject:** Renewable Energy Ordinance

Sent from my iPad

MEMORANDUM

TO: Chair, Supervisor Ryan Gregory, Supervisor Belia Ramos, Supervisor Diane Dillon, Supervisor Brad Wagenknecht, Supervisor Alfredo Pedroza

FROM: Eileen Pereira
In behalf of Napa Valley Citizens for Smart Planning

RE: Commercial Renewable Energy Ordinance

Thank you in advance for your time and thoughtful consideration.

The Citizens of our Community in Napa are hugely appreciative of your direction to Napa County Planning Staff to develop the Commercial Renewable Energy Ordinance that is currently before you.

We live in and share a very special place in this Valley. It may even seem crazy that we find ourselves, together, working so hard to protect the beauty we live with. However, such is our world today. Technology, financial incentive, climate emergency, social media, all converge to imperil what we have been given, what we have inherited...or what remains of it. It is up to us to appreciate and protect what we love so deeply.

We believe, under your direction, and with a Community approach, that Planning Staff have drafted an Ordinance that will take a huge step towards directing the location of future Commercial Renewable Energy Projects to sites that are appropriate, commercial and industrial areas, instead of impacting our beautiful AG Watershed, AG Preserve and residential neighborhoods.

Every technology has its growing pains and obsolescence is always around the corner. This Commercial Renewable Energy Ordinance will help our County manage and negotiate the intricacies of Commercial Renewable Energy technology projects to optimize their benefit while protecting our community from the fallout as newer technologies come on board.

We are deeply invested in our Valley, as you are, and thank you for supporting this Renewable Energy Ordinance. We look forward to your review on December 17, 2019.

| | |
|---|---|
| **From:** | Joelle Gallagher |
| **To:** | Anderson, Laura; Bordona, Brian; Gallina, Charlene; McDowell, John |
| **Subject:** | Fwd: Napa County Renewable Energy Ordinance - Request to Speak |
| **Date:** | Wednesday, November 20, 2019 10:58:51 AM |
| **Attachments:** | image001.png |

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---------- Forwarded message ---------
From: **Aaron Halimi** <aaron@renewprop.com>
Date: Tue, Nov 19, 2019 at 10:41 AM
Subject: Napa County Renewable Energy Ordinance - Request to Speak
To: joellegPC@gmail.com <joellegPC@gmail.com>
CC: Stephanie Loucas <stephanie@renewprop.com>

Dear Planning Commissioner Gallagher –

I have serious concerns regarding the recently proposed Renewable Energy Ordinance. As an active solar market participant, local land and project owner, I am concerned that this ordinance prevents renewable energy development as opposed to providing incentives (as the Board of Supervisors sought for such an ordinance) for it. Accelerating the adoption of local renewables helps to decrease the nations' dependence on fossil fuels.

More specifically, please see some of our high level concerns below. Notably, the proposed draft ordinance:

- Limits solar to commercial and industrial zones, which is economically prohibitive and would essentially kill any prospects of additional solar development throughout the county. Keep in mind, our Renewable Properties' project on American Canyon Road was zoned "Agricultural Watershed" and was deemed the "perfect site" for solar by many public officials.
- Requires any Feed in Tariff Power Purchase Agreement and/or Community Choice Aggregator (MCE for example) project to go through a Use Permit process. This would be overly burdensome to a project that's within the "built environment" (i.e., rooftop, or parking lots, etc.).
- Requires projects to minimize views from public roads and adjacent residential areas. While renewables can be sited to minimize views from residences, it's not realistic for it to be not viewed from public roads. Preservation of public vistas instead of all roads should be the focus.
- Doesn't incentive renewables in any specific locations by providing expedited reviews and/or other incentives to developers. Rather, the ordinance limits development to only a few zoning districts and prohibits it from land use designations that are more likely to be economically viable for solar.

Unclearly defines the ground coverage ratio and how it's measured. It would be prohibitive to larger behind the meter projects and/or projects for onsite energy use. Again, prohibiting access to renewables.

- Prohibits renewables on County owned land that is otherwise underutilized solely due to the zoning district (i.e., Landfills, airport buffer land, etc.).

In short, we find the proposed renewable energy ordinance to be unnecessarily restrictive with regards to the zoning districts that renewables will be allowed . We recommend a more balanced and case by case approach to renewables. While we have serious concerns around how the ordinance prohibits renewables from certain zoning districts, we are supportive of the ordinance's development standards in Section 18.117.040 of the proposed ordinance.

Please let me know if you have any availability to discuss our concerns about the ordinance and proposed solutions. Climate change is a global problem that requires local solutions. It is our hope that Napa County is willing to be part of the solution.

Thank you for your time and consideration.

Best –

Aaron

Aaron Halimi

President

RENEWABLE PROPERTIES

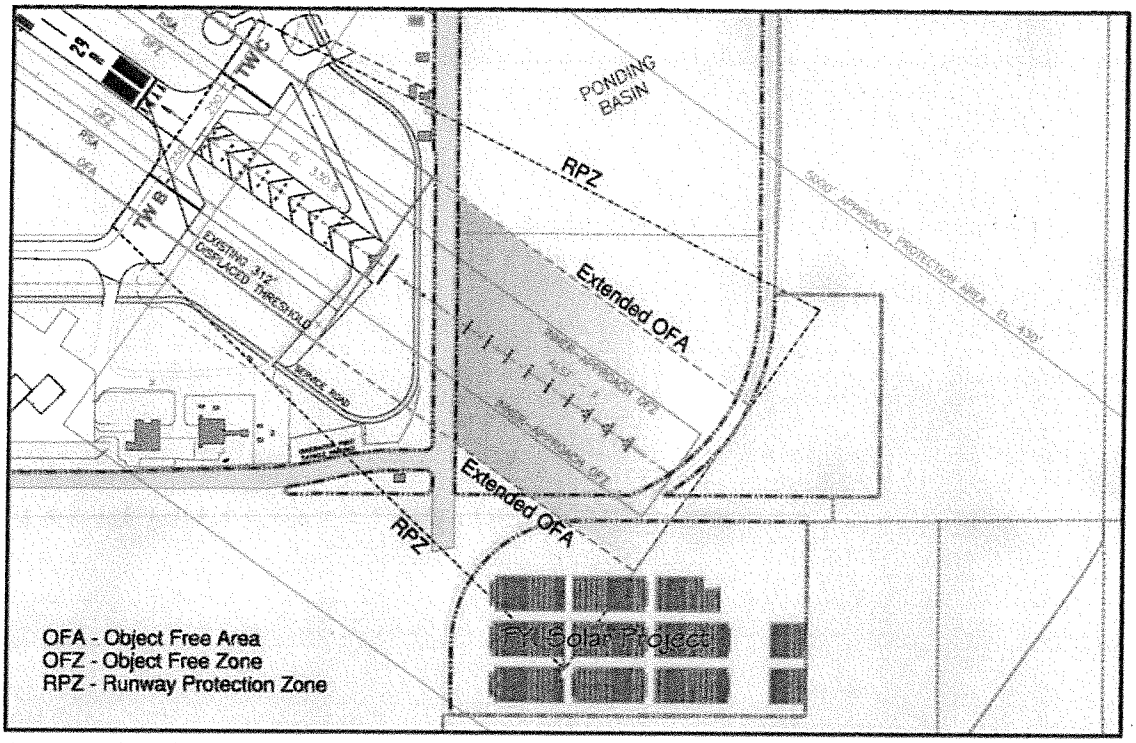
(M) 530-518-7669

aaron@renewprop.com | renewprop.com

ALUC
NOV 20 201
Agenda Item E

# Case Study #2 – A Unique Siting Example

## Fresno Yosemite International Airport (FYI) – California




Source: City of Fresno

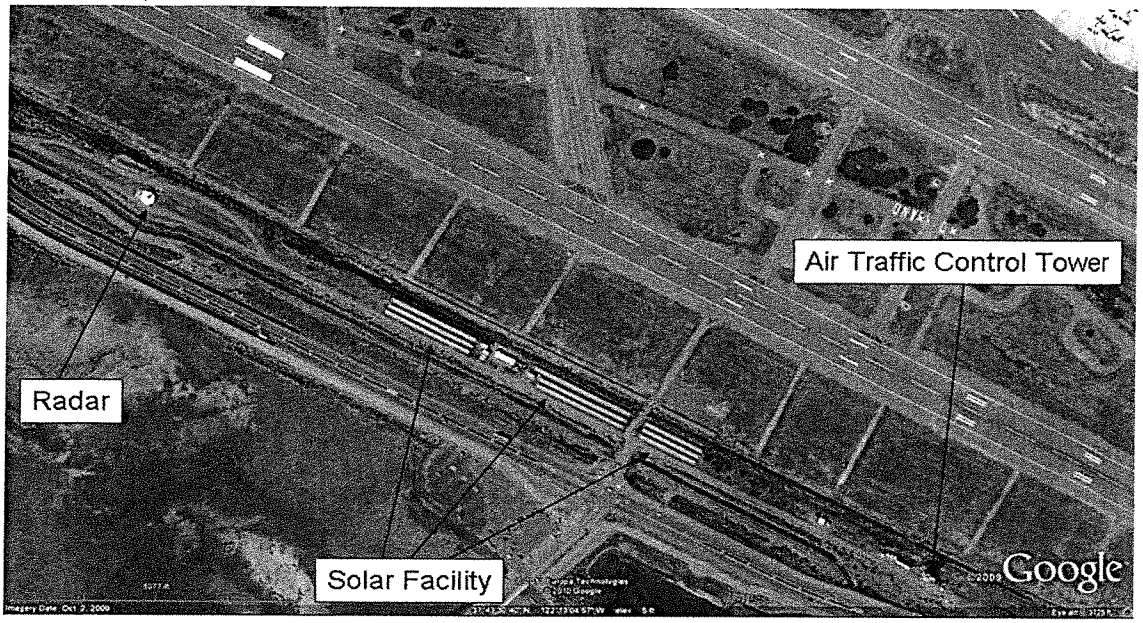
The City of Fresno constructed a 2.4 MW ground-mounted solar generation system in June 2008. The project consists of 11,700 Sharp solar panels on a single axis tracking system. The project was financed through a Power Purchase Agreement (PPA) with a private developer, and received state support in the form of rebates and utility long-term contract purchase requirements. The panels produce enough electricity to serve approximately 58% of the airport's annual average electricity load.

The airport discussed several different sites with the private developer and ultimately agreed to locate the project near the end of Runway 29 and adjacent to the Object Free Area but inside a portion of the Runway Protection Zone. This area, due to its location relative to air traffic, was unusable for any land uses requiring regular presence by people. In addition, unmanned structures were constrained to only low profile ones that did not penetrate into the approach zone. For those reasons, the land had little value which made it a very suitable location for a solar project.

Because leases must be reviewed by the FAA and the price of the lease must reflect a fair market value standard, leases of land potentially valuable for other development results in higher solar electricity prices. Locating solar on land with less value keeps the solar electricity price down making PPA prices both cost competitive for the airports and profitable for the private developer. As a result, land that would otherwise provide no value becomes a new revenue source to the airport. In general, the FAA does not recommend that airports locate solar projects in the RPZ. However, the FAA will review specific airport proposals like the one presented by Fresno on a case-by-case basis.

# Case Study #3 – Evaluating Airspace Issues

## Metropolitan Oakland International Airport – California




Oakland International's General Aviation Airport is host to a 756 kW ground-mounted system owned and operated by a private company, which sells power back to the Port of Oakland at a discount. The project consists of 4,000 fixed solar panels.

While the private developer was responsible as project applicant to file a 7460 Notice of Construction or Alteration with the FAA for airspace review, it was critical that airport personnel play an active role in assessing siting issues to ensure that the project would not produce a negative impact on airspace or aviation activities. The airport is knowledgeable about FAA airport design standards and flight operations, and works on a daily basis with FAA personnel in the Air Traffic Control Tower and ADO.

The three issues that Oakland evaluated during project siting were airspace penetration, radar interference, and glare. Because it was exploring a location along a service road near the GA runway, consideration of the imaginary surface extending out from the edge of Runway 6/27 was a critical consideration even with low profile panels. As a result, the panels were located approximately 400 feet from the runway avoiding any penetration of the imaginary surface of airspace. Second, the siting had to consider the location of the panels relative to Navaids. A radar system is located to the west of the proposed site. After consultation with the FAA, it was decided to preserve a 500-foot buffer from the radar to protect against any interference. Third, the airport discussed the potential for glare to impact the air traffic control tower. The FAA determined that, based on the available information, that glare would not cause a negative impact. However, to ensure that it could address any unforeseen problem, the FAA indicated that it would preserve the right to remove the project if a significant impact were to occur.

The project has been operational since November 2007 and there have been no reports of airspace impacts from radar or glare on the air traffic control tower or on pilots. One of the keys to a smooth approval process was close coordination between the airport, the solar developer, and the FAA from the earliest phases of the project.

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<br>Fontaine v. Edwards.pdf<br>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.

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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.

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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

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> 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

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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.

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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.")

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**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:**

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

For Defendant: Todd J. Romano, Esq.

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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.

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