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2018 APR 19 P 5:01

ISLAND GROVE SOLAR, LLC,
GREGORY GOINS and EVELYN
GOINS,
ROBESON CO., C.S.C.

BY *ahp*
Petitioners,

v.

ROBESON COUNTY,
Respondent.

ORDER

THIS MATTER comes before the undersigned upon an appeal by the Petitioners, Island Grove Solar, LLC, Gregory Goins and Evelyn Goins, of an Order of Denial ("Denial") adopted by Respondent Robeson County through its Board of Commissioners ("Board") by an order dated November 6, 2017 after conduct of a quasi-judicial hearing. This matter is before the Court by way of certiorari pursuant to N.C. Gen. Stat. § 160A-393.

Petitioners sought certiorari on February 8, 2018, and a Writ of Certiorari was issued on February 13, 2018. The Record on Appeal was filed on March 2, 2018, and amended on March 7, 2018. The parties appeared before the undersigned, represented by their counsel, during the April 16, 2018 session of the Superior Court for Robeson County, and presented arguments in support of their positions.

Based upon the Record, memoranda of law and arguments offered by the parties, the Court makes the following Findings of Fact:

1. Petitioner Island Grove Solar, LLC ("Island Grove") was an applicant for a conditional use permit to authorize the construction and installation of a solar energy generating

facility (“Solar Farm”) on land owned by Petitioners Gregory and Evelyn Goins (the “Goins”) -- identified by Robeson County Tax Parcel Number 150801004 (the “Property”) -- and in which Island Grove has a leasehold interest.

2. Petitioners have standing pursuant to N.C. Gen. Stat. § 160A-393(d)(1)(a) and (c). Island Grove was an applicant before the Board for the matter being appealed and has a leasehold interest in the Property that is the subject of the decision being appealed. The Goins are parties with an ownership interest in the Property that is the subject of the decision being appealed.

3. Island Grove filed an Application for Conditional Use Permit (the “Application”) -- denoted by the county as Application No. 2017-125834 -- seeking authority to construct and install the Solar Farm within the county’s jurisdiction at a site located on a 22.53 acre tract off NC Hwy 710 in Pembroke, North Carolina.

4. On October 9, 2017, the Robeson County Planning Board held a hearing to consider Island Grove’s Application. The Planning Board entertained a presentation from Island Grove, including three expert and professional witnesses who appeared on its behalf, as well as the testimony of at least three lay witnesses in opposition to the Solar Farm.

5. The Planning Board, based on “evidence and arguments presented at the hearing,” made formal “Findings of Facts” regarding Island Grove’s application and unanimously concluded that Island Grove satisfied each of the required criteria in Ordinance Section 30, which are as follows:

A. That ... the conditional use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare;

B. That the conditional use will no[t] be injurious to the use and enjoyment of other property in the immediate vicinity for the

purposes already permitted nor substantially diminish and impair property values within the neighborhood;

C. That ... the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district;

D. That the exterior architectural appeal and functional plan of any proposed structure will not be so at variance with the exterior architectural appeal and functional plan of the structures ... in the immediate neighborhood or with the character of the application district as to cause a substantial depreciation in the property values with[in] the neighborhood;

E. That adequate utilities, access roads, drainage and/or other necessary facilities have been or are being provided;

F. That adequate measures have been or will be taken to provide ingress and egress to minimize traffic in the public streets;

G. That the conditional use shall, in all other respects, conform to the applicable regulations of the district in which it is located....

6. The Planning Board also exercised its authority under Ordinance Section 31 to recommend to the Board that, as part of approving the permit, Island Grove comply with a series of 13 conditions that are reflected in the "Resolution to Grant Island Grove Solar LLC a Conditional Use Permit to Establish a Solar Farm Philadelphus Township" which was approved by the Planning Board on October 9, 2017. Island Grove affirmed to the Board at the November 6, 2017 quasi-judicial hearing that it would comply with all such conditions.

7. The Board conducted a quasi-judicial hearing on November 6, 2017, during which it received sworn expert and fact testimony, affidavits, and documents on behalf of Island Grove. Live and affidavit testimony on behalf of the Petitioners included that from Steve Evans, an employee of Cypress Creek Renewables; Chris Sandifer, a licensed professional engineer and an electrical contractor with an unlimited classification in North Carolina; and Damen

Bidencope, a North Carolina certified general appraiser with experience in valuation issues related to solar farm developments. The Board also received sworn and written testimony from lay witnesses: Ursula Sampson Freeman, who lives in Cary but owns nearby property; Donnie Chavis; Laura Katz Taylor; and Gwenivera Ramos, a member of the Goins family. The Board closed the public hearing on November 6, 2017.

8. After a motion was put forth by Commissioner Raymond Cummings to deny the permit based on an issue related to “joint heir ownership that has not been resolved,” the Board voted unanimously against the Application at the November 6, 2017 hearing. The Board’s chairperson, and the County Clerk, later executed the Denial, which bore the date of the initial hearing – November 6, 2017. The Denial was first supplied to any of the Petitioners by a January 26, 2018 email from Amber B. Davis, a Zoning Technician with the Robeson County Planning Department, to Phillip Martin of Cypress Creek Renewables, the interest owner of Island Grove. Subsequently, Island Grove received, on February 1, 2018, a copy of the Order that was sent to Island Grove by Ms. Davis via the United States Postal Service.

9. The Denial finds that “the Board heard testimony from several neighbors who argued that the requested use would”:

- be injurious to the use and enjoyment of other property in the immediate vicinity;
- impede the normal and orderly development and improvement of the surrounding property;
- substantially diminish or impair property valued within the neighborhood; and
- increase traffic congestion in the public streets.

10. Based on its stated fact findings, the Board concluded in the Denial that Island Grove’s requested conditional use permit would:

- be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted;
- impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district;
- affect property values within the immediate neighborhood; and
- not be in harmony with the area in which it is to be located.

Based upon the Foregoing Findings of Fact, the Court adopts the following Conclusions of Law:

1. The Petition for Writ of Certiorari was timely filed by the Petitioners on February 8, 2018 pursuant to N.C. Gen. Stat. § 160A-388(e2).

2. Petitioners have proper standing to bring this action pursuant to N.C. Gen. Stat. § 160A-393(d)(1)(a) and (c) as they include an applicant for the conditional use permit denied by the Board, and parties with an ownership interest in the property that is the subject of the decision being appealed, and with a leasehold interest in such property.

3. Under the controlling standard of *Innovative 55, LLC and FLS Energy, Inc. v. Robeson County*, 801 S.E.2d 671, 676 (N.C. Ct. App. 2017), the Petitioners had a burden of production to show *prima facie* compliance with the requirements and conditions of the County's applicable ordinance provisions. Upon that showing, a decision to deny the permit must "be based upon findings which are supported by competent, material and substantial evidence appearing in the record." *Id.* at 677.

4. The Denial does not state, nor did Respondent on brief or in argument contend, that Island Grove failed to meet its burden of production to show compliance with the County's applicable Ordinance provisions. Nonetheless, on a "whole record" analysis of the entire Record, the Court finds that Island Grove met its burden of production with regard to compliance

with Ordinance sections 17.3(C) and 30. Both at the Planning Board and before the Board of Commissioners at the quasi-judicial hearing, Island Grove presented competent, material and substantial evidence in the form of sworn expert and fact testimony, affidavits, and documents (including a detailed Site Plan) which demonstrated the applicant met its burden of production with regard to the County's ordinance.

5. Thus, under *Innovative 55* the Board could only deny the conditional use permit request based upon "competent, material and substantial evidence appearing in the record." Yet, as in *Innovative 55*, the Record shows "[t]he opposition was not based upon any specific or supported testimony, or substantial and material evidence, facts, or data." *Id.* at 679. *Innovative 55* sets forth that a permit denial "based solely upon the generalized objections and concerns of neighboring community members" cannot be affirmed. *Id.* The Denial states that "the Board heard testimony from several neighbors" who raised concerns that included being able to see solar panels once the project is constructed, displacing traditional agricultural uses and "possible long term effects" which might be caused by the Solar Farm.

6. The Denial does not set forth any basis for declining to issue the conditional use permit other than the citizen lay testimony. The County did not submit a brief in this matter, nor did its counsel contend at hearing that any other evidence supported the Board's action. Indeed, the County's counsel contended at the hearing that in order to properly serve the public interest the Board should be free to weigh such lay evidence in a manner that allowed declining permits as here, in the Denial. *Innovative 55* requires otherwise, rejecting reliance on citizen opposition that is "speculative, sentimental, personal, vague, or . . . merely an excuse to prohibit the requested use." *Id.* See also *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d

221, 228 (2002) (“denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible.”)

7. The Denial’s reliance on lay witness testimony is also contrary to statutory measures which declare it is not “competent evidence” to support particular opposition positions. First, such lay testimony cannot be used to support an alleged effect on the value of other property or that increased traffic from a proposed development would endanger the public safety. N.C. Gen. Stat. § 160A-393(k)(3)(a)-(b) (2015); *Innovative 55*, 801 S.E.2d at 678. Second, the statutes bar lay witness testimony regarding “[m]atters about which only expert testimony would generally be admissible under the rules of evidence,” such as the safety or technical composition of solar farms. N.C. Gen. Stat. § 160A-393(k)(3)(c).

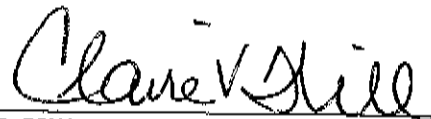
8. The Denial also states that it is based on a conclusion that the Solar Farm would not be in harmony with the area in which it is to be located. That conclusion is impermissible as a ground to deny a conditional use permit because it is not found in either sections 17.3(C) or 30 of the Ordinance. *Mann Media, Inv. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002). Moreover, the county’s inclusion of solar farms as a permitted conditional use in its Ordinance is “equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district.” *Innovative 55*, 801 S.E.2d at 679 (citations omitted).

9. The Court finds that, pursuant to N.C. Gen. Stat. §160A-393, the Denial (i) is not supported by competent, material and substantial evidence based on consideration of the “whole record;” (ii) is arbitrary and capricious based on consideration of the “whole record;” and (iii) relies on errors of law in its reliance upon lay testimony considered incompetent by statute.

IT IS THEREFORE, ORDERED ADJUDGED AND DECREED THAT:

1. The Board's decision – as reflected in its November 6, 2017 Order of Denial – to reject the conditional use permit request of Petitioner Island Grove is reversed. This Order constitutes the Final Order and Judgment of the Court on this appeal.
2. This matter is remanded to the Robeson County Board of Commissioners, pursuant to N.C. Gen. Stat. § 160A-393(1)(3)(a), and the Board is ordered to enter and/or approve such measures or resolutions as may be necessary to approve Petitioner Island Grove's request for a conditional use permit.
3. The costs of this action, including the costs of transcript and record production, shall be taxed against the County.

This the ____ day of April, 2018.



Claire V. Hill
Superior Court Judge Presiding