STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHOHARIE

BLISS SOLAR 1, LLC,

Petitioner,

JUDGMENT
Index No.: 2021-320

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

TOWN OF SCHOHARIE TOWN BOARD,

Respondent.

(Supreme Court, Albany County, All-Purpose Term)

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HON. JAMES H. FERREIRA, Acting Justice:

Petitioner is the lessee of real property located at 117 Bliss Road in the Town of Schoharie, Schoharie County, New York (hereinafter the property). In this CPLR article 78 proceeding, petitioner challenges respondent's denial of its application for a special use permit for the

construction of a solar energy system on the property. Respondent filed an answer to the petition and petitioner submitted a reply. By Decision and Order dated September 20, 2021, the Court granted the motion of Margaret and Leonard Berdan, owners of the property, for leave to file an amicus curiae brief in support of the petition.

FACTS

Petitioner is a wholly-owned subsidiary of Borrego Solar Systems, Inc., a nationwide developer of renewable energy infrastructure. In June 2019, petitioner, through a professional engineering firm, filed a Special Use Permit Application seeking approval of the installation of a 5-megawatt (hereinafter MW) solar energy system on the eastern side of the property and a 2-MW solar energy system on the western side of the property, encompassing a fenced area of approximately 41.55 acres of land. The subject property is located just outside the Village of Schoharie (hereinafter the Village)[1] and off of State Route 30 in a district zoned rural-agricultural (see R 146-148).[2] Petitioner submitted various documents in support of its application, including a site use plan and a stormwater pollution prevention plan (hereinafter SWPPP). The Town Board (hereinafter respondent or the Board) engaged the services of an engineering firm, Lamont Engineers (hereinafter Lamont), to review the application. In response to comments made by Lamont, petitioner submitted additional materials in support of its application. Lamont, upon review, determined that the application was complete.[3]

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[1] In its application, petitioner affirmed that the project would be located within 500 feet of a Town or Village boundary (R 151).

[2] References preceded by "R" are to the four-volume, consecutively paginated, administrative record submitted by respondent.

[3] The Court notes that the application was thereafter referred to the Schoharie County Planning Commission as required by Section 6.3-5 of the Zoning Law of the Town of Schoharie. By letter dated August 9, 2019, the Planning Commission voted to approve the Special Use Permit. The letter states that such approval "means the

The Board discussed the application at numerous Board meetings, and the minutes of the meetings reflect that the Board received a number of letters from the public concerning the application and that a number of residents voiced their opposition to the application. At the September 11, 2019 Board meeting, the Board adopted a resolution declaring itself the Lead Agency for an environmental review pursuant to the New York State Environmental Quality Review Act (hereinafter SEQRA). Lamont thereafter provided additional comments with respect to the application. Among other things, Lamont noted that the comments from the public had included claims that (1) the project was inconsistent with several aspects of the Comprehensive Plan, including "historic character, scenic beauty, Karst/limestone formations, steep slopes, small scale development with minimal impact, etc." (2) "[v]isual resources are severely impacted by the project, and there are no possible mitigations for many of the impacts" and (3) concerns about impact to water resources due to Karst geology (R 799-800). A public hearing on the application was held on October 9, 2019; at the conclusion, the Town Supervisor indicated that he would keep the hearing open. In November 2019, petitioner submitted additional documents in support of its application. In response, Lamont recommended, among other things, that petitioner acknowledge, in its environmental assessment form, that the Town's Comprehensive Plan "has several components that may be inconsistent with the proposed development at the Project Site" (R 919).

Petitioner thereafter made changes to its application and plans which eliminated the 2-MW solar energy system from the proposal and shifted the location of the proposed access road and solar energy system to mitigate visibility. The updated application was for the installation of a 5-MW

Board can approve or disapprove by a simple majority vote," "should not be construed as a recommendation that the referring agency approve the referral in question" and does not indicate that the Planning Commission has reviewed all local concerns, evaluation of which is "the responsibility of the referring agency" (R 609).

ground-mounted solar energy system that would encompass approximately 11.32 acres on the western side of the property and 13.01 acres on the eastern side, with access off State Route 30 onto a 20-foot gravel access road (R 1644). Petitioner also provided a three-page written response to the assertion that the project is not consistent with the Town's Comprehensive Plan (see R 940-942). At the December 9, 2020 Board meeting, the Board heard comments from a number of residents in opposition to the application; the public comment period with respect to the amended application ended on December 31, 2020. At the conclusion of a special meeting held on March 31, 2021, three Board members voted to deny the application and two voted to grant it, and the Town's counsel was asked to draft a denial decision. At a meeting held on May 12, 2021, the Board approved the decision denying the Special Use Permit.

Respondent's Determination

In an 18-page written Decision on Application, the Board first addressed the SEQRA Full Environmental Assessment Form (hereinafter FEAF) submitted by petitioner and found, among other things, that the project would have a negative impact on the land, such that the conversion of 24.3 acres of land from its natural state to that of a built environment could, despite the mitigation proposed in the SWPPP, "still increase groundwater recharge, particularly in extreme weather and flooding events" (R 5). The Board also found that the project would have an impact on geological features, specifically karst features, areas of land "typified by sinkholes and interconnecting caves and underground hydraulic connectivity due to the dissolution of soluble rock over time" (R 5), as well as on groundwater. The Board found:

> "While some on the Town Board agreed that a condition of approval would be a viable way to address Karst features, the majority of the Town Board remains concerned that due to the difficulty in identifying the location of all of the Karst features across a 24+ acre project site, there would remain a pathway for surface water runoff from the Project to enter the groundwater regime" (R 5).

The Board stated that it had not received enough information as to the nature and content of the solar panels for it to determine that they would not have any impact upon the groundwater regime. The Board stated that a majority of the Board "finds that the materials submitted do no substantiate that there will be no impacts to groundwater if the Project is approved" (R 6). The Board also found that the project would have an impact on aesthetic resources, stating:

> "In addition to the above concerns on geological features and ground water, the crux of this matter is its impact on Aesthetic Resources and its inconsistency with and impact on Community Character. The Project is located just outside the Village of Schoharie in the Town on NYS Route 30. The initial Project was for a 2.0 MW solar field and a 5.0 MW solar field. Through the review process, the Applicant decided to eliminate the significantly visible 2.0 MW portion of the Project. The 2.0 MW solar field was the furthest west portion of the system and closest to Route 30. Based upon the viewshed mapping that was prepared and comments received from the Planning Board, the Applicant reconfigured the panel arrangement a final time, keeping the western most set of panels (and the panels that are most visible) in the same location and reconfiguring the easterly panel location (See Sheet C-3.0 last revised July 25, 2020). This plan set was further revised to adjust the panel location based upon additional Karst features that were located (See Sheet C-3.0 last revised September 22, 2020). Even with the various Project changes, the solar panels are still visible at various distances, specifically the western most set of arrays. The visibility is from various locations and has impacts on businesses that rely on tourism, agriculture and community character to survive. Even one of the Town Board members who is in favor of the overall project offered the opinion that the western array was visible and should be modified" (R 6-7).

The Board further found that the "scale, location and nature of the Project is inconsistent with the Community Character of the Town, including existing development patterns and the built environment" (R 9). The Board explained:

> "While there are some small free-standing solar panels elsewhere in the community, they are much smaller in scale and were deployed to offset the energy use for specific farms/locations rather than for utility scale production of energy. In evaluating the consistency with community character, the Town Board is troubled by the Project's location immediately adjacent to the main route in and out of the historic downtown of the Village of Schoharie and the development patterns that surround the location which are characterized by residential development, agricultural operations and businesses that rely on the beauty of the surrounding community. As noted in the . . . Comprehensive Plan, the residents of the community value the rural-agricultural

> nature of the Town. The proposed Project is in deep contrast to those patterns of existing development. . . . The Town Board has determined that the proposed Project falls into the category of projects that by their nature, size, proposed location and physical attributes are simply inconsistent with the existing community character rendering them foreign, unusual and out of place when compared with what exists in the built and natural environment and what the residents of the Town of Schoharie expect for development to be approved under its land use laws and review process" (R 10).

The Board also determined that the Project does not comply with the Town law concerning solar energy systems and special permits. The Board found that putting a solar energy system in the proposed location would be inconsistent with the stated purpose of the Solar Energy Systems law because it is inconsistent with the Comprehensive Plan and would have an adverse impact on the environment and aesthetic qualities and community character of the Town. The Board explained:

> "[T]he particular location of this facility along a gateway to the Village and in an area of agritourism operations with visibility from across the valley makes the particular location inappropriate for a large solar system when it cannot be fully screened and where the existing physical and environmental attributes made an industrial scale solar facility foreign, out of scale and inconsistent with current development and land use patterns. Accordingly, the project site is not at a location sought to be advanced by the Town Board when it adopted the regulations governing solar installations" (R 11).

The Board further determined that the project does not meet specific requirements set forth in the Solar Energy Systems Law, including the requirement that screening be provided to protect adjoining lots from visual impact and the requirement that the development and operation of the system not have a significant adverse impact on fish, wildlife or plans or the critical habitats. The Board also found that the project did not comply with other, more general, aspects of the Town's zoning law.

The Board also analyzed the project under the Special Use Permit criteria set forth in its zoning law and found that several criteria were not met, including compliance with the Comprehensive Plan, adequacy of the visual buffer, protection against unsightliness and that the proposed use be reasonably necessary or convenient to public health. With respect to the latter, the

Board found: "While fashioned as a community solar project, there is no compelling need for the community to approve of a Project in this specific location. The Town has evaluated the economic benefits of the Project and found them to be lacking and/or so insubstantial as to not overcome the impacts to nearby properties and businesses" (R 16). The Board also found that the project did not comply with a number of provisions of the Comprehensive Plan, including (1) the goal of maintaining and enhancing the rural, small town character of the Town and Village; (2) the objective of maintaining the residential qualities of the Town and Village; (3) the objective of providing for the protection of rural farmland for agriculture; (4) the objective of ensuring that new commercial development is appropriate in scale and design with existing structures and community character; (5) the goal of seeking to increase job opportunities; (6) the objective of encouraging commercial development that provides well-paying career opportunities; and (7) the objective of providing for the long-range protection of water resources for water quality.

ANALYSIS

Where, as here, a petitioner challenges an administrative determination made where a hearing is not required, judicial review is limited to the issues of whether the challenged determination is rationally based, and whether it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Ward v City of Long Beach, 20 NY3d 1042, 1043 [2013]; Matter of Bais Sarah Sch. for Girls v New York State Educ. Dept., 99 AD3d 1148, 1150 [3d Dept 2012], lv denied 20 NY3d 857 [2013]). "[A] court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (Matter of Arrocha v Board of Educ. of City of N.Y., 93 NY2d 361, 363-364 [1999] [internal citations and quotations

omitted]; see Matter of Boatman v New York State Dept. of Educ., 72 AD3d 1467, 1468 [3d Dept 2010]).

"[W]hen a zoning law enumerates a use as allowable by a special use permit, it is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood" (Matter of Troy Sand & Gravel Co. v Fleming, 156 AD3d 1295, 1299 [3d Dept 2017], lv denied 31 NY3d 913 [2018] [internal citations and quotation marks omitted]; see Matter of Blanchfield v Town of Hoosick, 149 AD3d 1380, 1383 [3d Dept 2017]). "That said, the applicant still must show compliance with any legislatively imposed conditions upon the permitted use[, and a] municipality retains some discretion to evaluate each application for a special use permit, to determine whether applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted" (Matter of Biggs v Eden Renewables LLC, 188 AD3d 1544, 1546 [3d Dept 2020] [internal citations and quotation marks omitted]; see Matter of Blanchfield v. Town of Hoosick, 149 AD3d at 1383). "Failure to satisfy even one legislative condition will provide a rational basis for the denial of a special use permit application" (Matter of Troy Sand & Gravel Co. v Fleming, 156 AD3d at 1299; see Matter of PDH Props. v Planning Bd. Of Town of Milton, 298 AD2d 684, 686 [3d Dept 2002]). However, "[t]he local board charged with reviewing special use applications, while not divested of all discretion, must nevertheless base a denial upon proof pertinent to the legislative conditions and not merely upon generalized community objections" (Matter of PDH Props. v Planning Bd. Of Town of Milton, 298 AD2d at 686), and a zoning board's denial of an application for a special use permit on the ground that it failed to comply with a legislative condition must be supported by substantial evidence (Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, 98 NY2d 190, 196 [2002]; Matter of Biggs v Eden Renewables LLC, 188 AD3d at 1548; Matter of McDonald

v City of Ogdensburg Zoning Bd. of Appeals, 101 AD2d 900, 901 [3d Dept 1984]).

Pursuant to Local Law No. 1, entitled Regulating Solar Energy Systems, adopted by the Town in March 2019, a Level 4 Solar Energy System such as the one proposed by petitioner[4] is a permitted use in all zoning districts in the Town except for the Hamlet district "upon approval of a Special Use Permit by the Town Board, on a case-by-case basis" (R 23). The stated purpose and intent of the law is

> "to promote the effective and efficient use of solar energy resources; set provisions for the placement, design, construction, and operation of such systems to be consistent with the Town of Schoharie Comprehensive Plan; to uphold and protect the public health, safety, and welfare; and to ensure that such systems will not have a significant adverse impact on the environment, and on the aesthetic qualities and character of the Town" (R 26).

The law provides specific requirements for Level 1, Level 2 and Level 3 applications. As for Level 4 applications, the law states: "Applications for approval of any and all Level 4 solar energy systems shall be received and voted upon by the Schoharie Town Board as a Special Use Permit. . . . All Level 4 applications shall address with due diligence any and all sections of this Local Law and of the Town of Schoharie Comprehensive Plan" and that the Board "at its sole discretion, may add further requirements for review and/or approval of Level 4 applications on a case by case basis" (R 34).[5] In turn, the Zoning Law of the Town of Schoharie provides a number of criteria for the Board to consider in determining whether to grant or deny a Special Use Permit, including, among other

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[4] A Level 4 Solar Energy System is one that has a capacity of over 200kW and/or encompasses more than 15 acres (R 25).

[5] While petitioner's application was pending, on November 11, 2020, the Town Board adopted amendments to the regulations for Solar Energy Systems which, among other things, eliminated Level 4 solar energy systems as a permissible use in all zoning districts (R 42-47). The law provided that "[a]ny application for a Level 3 or Level 4 Solar Energy System that has been received by the Town of Schoharie on or before July 1, 2020 shall be entitled to be processed under the solar regulations in place as of the date of the application" (R 47).

things: (1) "[f]ull conformance of the permit request with the provisions of this Local Law and the Comprehensive Plan;" (2) "[a]dequacy, type and arrangement of trees, shrubs and other landscaping constituting a visual and or noise deterring buffer between the project and adjoining properties;" (3) [p]rotection of adjacent properties against noise, glare, unsightliness or other objectionable features; and (4) "[t]he character of the neighborhood and values of surrounding property are reasonably safeguarded" (Zoning Law of the Town of Schoharie § 6.3-8).

In the petition, petitioner argues that the denial of its application was arbitrary and capricious and unsupported by substantial evidence because it was based upon generalized community pressure, unsubstantiated conclusions, speculation and errors of fact and not because the application failed to meet the applicable criteria. Petitioner argues that its application, in fact, met all criteria set forth in the Town's land use law to be entitled to a special use permit. Petitioner argues that the Board's finding that the project could increase stormwater discharge is contrary to the final SWPPP submitted by petitioner and unsupported. Petitioner also argues that the issue of whether the project will negatively impact groundwater is an issue for the New York State Department of Environmental Conservation and not a burden that petitioner is required to meet with respect to its submission to the Board. Petitioner also argues that the Board's finding with respect to the impact on Karst features and groundwater quality is without an objective factual basis and is contrary to the reports of its experts and the review of the Town's engineer. Petitioner further contends that the Board's findings with respect to the negative visual impact of its project is belied by its visual impact assessment which it submitted with its application which concluded that the project would not be visible from any of the historic buildings in the Village. Petitioner also urges that the Board's finding that the project's inconsistency with the Comprehensive Plan required denial of the application was inappropriate and erroneous, where Town has already determined that the project

complies with the Comprehensive Plan by enacting the Solar Energy Systems law approving of such use upon issuance of a Special Use Permit.

Upon careful review, the Court denies the petition. Initially, the Court notes that where, as here, the legislative body has reserved to itself the authority to grant or deny a Special Use Permit, "it need set forth no standards for the exercise of its discretion, and even if the ordinance sets forth standards, it has not divested itself of the power of further regulation, unless the standards expressed purport to be so complete or exclusive as to preclude the Board from considering other factors without amendment of the zoning ordinance" (Cummings v Town Bd. of N. Castle, 62 NY2d 833, 834-835 [1984] [internal citations omitted]). "Except in the latter situation, grant or denial of the permit is left to the 'untrammeled, but of course not capricious discretion' of the Board with which the courts may interfere only when it is clear that the Board has acted 'solely upon grounds which as matter of law may not control the discretion of the Board" (id. at 835 [internal citations and quotation marks omitted]). Here, the Town's Solar Energy Systems law reserves to the Board the discretion to grant or deny a Special Use Permit for a Level 4 solar energy system and does not limit the Board to consideration of certain factors but specifically provides that the Board "at its sole discretion, may add further requirements for review and/or approval of Level 4 applications on a case by case basis" (R 34). Under these circumstances, this Court's review of the Board's determination is quite deferential (see Matter of Liska NY, Inc. v City Council of City of N.Y., 134 AD3d 461, 462 [1st Dept 2015], lv denied 27 NY3d 912 [2016]).

Upon review, the Court cannot find that the Board abused its considerable discretion in denying the permit application. Irrespective of the other reasons provided by the Board for the denial, the record firmly supports the Board's finding that the location, size and character of the proposed construction was inconsistent with the Comprehensive Plan. Preliminarily, the Court is

not persuaded by petitioner's argument that the Board erred by considering whether the project was consistent with the Comprehensive Plan. Petitioner's contention that the Town has already determined that the project complies with the Comprehensive Plan by enacting the Solar Energy Systems law is belied by the terms of that law and the Town's general zoning law. The Solar Energy Systems law specifically requires that an application for a Level 4 system address the Comprehensive Plan. Moreover, one of the criteria for the granting of a Special Use Permit is "[f]ull conformance of the permit request with . . . the Comprehensive Plan" (Zoning Law of the Town of Schoharie § 6.3-8). In addition, as noted above, the Board retained discretion to add requirements for review and/or approval of Level 4 applications. As such, the Court finds that it was entirely appropriate for the Town to address and consider whether the proposed project is consistent with the Comprehensive Plan.

The Court also finds that the evidence supports the finding that the project is not consistent with the Comprehensive Plan. Of note, with respect to Land Use, the Town and Village of Schoharie Comprehensive Plan (hereinafter the Comprehensive Plan), adopted in 1997, states:

> "Residents highly value the area's scenic, historic, and rural/small town character. . . . Residents fear that new development will damage these. Many in the community feel that growth is needed. Others feel that there should be a small amount of growth, or none at all. Overwhelmingly however, residents desire that new growth be in keeping with the character of the area" (Comprehensive Plan, at 52).

The stated goal of the Comprehensive Plan is to "[m]aintain the rural, small town character of the Town and Village" (id.). Among the stated objectives are to "[p]rovide for the protection of farmland for agriculture" and to "[e]nsure that new commercial development is appropriate in scale and design with existing structures and community character" (id. at 56-57). In addition, the Comprehensive Plan emphasizes the scenic beauty of the Town, including its agricultural landscape, and specifically identifies "Route 30 outside the Village towards Middleburgh" – where the proposed

project would be located – as an important scenic location (id. at 19).[6] Here, the proposed project is located just outside the Village boundary in an agricultural area which has been identified as an important scenic location. The project would entail cutting trees and using agricultural land for the installation of two fields of solar panels on approximately 24 acres of land. Although petitioner submitted proof that the solar energy systems would not be visible from the historic district, the Board's finding that the solar panels would be visible from some locations, even with the implementation of mitigation efforts, is supported by evidence in the record (see e.g. R 940, 1207-1214). Under these circumstances, the Court discerns no error in the Board's finding that this new, large-scale commercial development would be out of place and inconsistent with the character of the area where it is proposed to be located, and therefore inconsistent with the Comprehensive Plan. Although inconsistency with the Comprehensive Plan was among the issues raised by the public with respect to the application, the Court does not find this fact establishes that the Board was unduly influenced by, or relied entirely on, community pressure, where consistency with the Comprehensive Plan is an appropriate consideration for the Board and the findings with respect to such are supported by substantial evidence.

Accordingly, based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that the petition is in all respects denied.

The foregoing constitutes the Judgment of the Court.

[6] The Court notes that Middleburgh, New York is south of the Village on State Route 30.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
February 2, 2022

James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

1. Notice of Petition, dated June 11, 2021;
2. Petition, verified June 11, 2021, with attached exhibit;
3. Administrative Record, filed July 23, 2021;
4. Exhibit to Administrative Record, filed August 20, 2021;
5. Affirmation in Support of Petition by Jacqueline Phillips Murray, Esq., dated August 23, 2021;
6. Memorandum of Law in Support by Jacqueline Phillips Murray, Esq., dated August 23, 2021, with Appendix;
7. Answer, verified October 1, 2021;
8. Affirmation in Opposition by David C. Brennan, Esq., dated October 1, 2021, with attached exhibit;
9. Memorandum of Law in Opposition by David C. Brennan, Esq., dated October 1, 2021;
10. Memorandum of Law in Reply by Jacqueline Phillips Murray, Esq., dated October 29, 2021; and
11. Amicus Brief by Michael B. Gerrard, Esq., dated August 25, 2021.