

RHODE ISLAND LAWYERS WEEKLY

Special permit for solar farm annulled

By: Tom Egan August 9, 2018



The Portsmouth Zoning Board could not grant a special permit for a solar farm because the town's zoning ordinance did not list photovoltaic systems in its table of use regulations, a Superior Court judge has ruled.

"[T]he Court concludes that the Board exceeded its statutory authority when it declared that a solar photovoltaic facility was a permissible use under the Ordinance," Judge Brian Van Couyghen wrote.

The 17-page decision is *Fontaine, et al. v. Edwards, et al.*, Lawyers Weekly No. 61-065-18. The full text [can be found here](#).

Designation of uses

Middletown attorney Jeremiah C. Lynch III represented the plaintiffs, who opposed the proposed facility. Randall T. Weeks Jr. of New Bedford, Massachusetts, represented the owner of the land that was the proposed site of the solar installation. Both lawyers declined to comment.

The zoning board was represented by Portsmouth attorney Kevin P. Gavin, who did not respond to a request for comment.

Jennifer Reid Cervenka of Providence, counsel for the special permit applicant, said she disagreed with the decision's analysis and conclusion.

Cervenka said her client, Portsmouth Solar, is considering a petition to the Rhode Island Supreme Court, either alone or in conjunction with the town.

Providence attorney John Boehnert, who was not involved in the litigation, pointed out that G.L. §45-24-42 requires municipal ordinances to specify what uses are subject to special use permits. "The court held that [the statute] prevents a local ordinance from empowering a zoning board to designate a new special use," Boehnert said.

“In this case, the zoning board sought to create a new special use category under the guise of deciding that an unspecified use was close enough to a specified use to be issued a special use permit,” he added. “The zoning board said a solar farm, which is not a listed special use, was close enough to a public utility, a listed special use, to be considered a special use.”

Boehnert said the judge found that a legislative body — the Town Council — and not a quasi-judicial administrative body must designate uses subject to special use permits.

“This is appropriate, as legislative actions focus on policy and are subject to hearings and broad citizen input before decisions are made. Zoning board hearings on special use permits are much more narrowly focused on the specific relief sought,” he said. “If you believe that legislative bodies should make the law, and quasi-judicial administrative bodies should interpret it, this was a good decision.”

Board approval

Defendant Portsmouth Solar, LLC, filed a petition for a special use permit to install a 2.9 Mega Watt solar photovoltaic facility in an R-30 district pursuant to Article V(B)(5) and Article VII(A)(1)(b) of the Portsmouth zoning ordinance.

“The Zoning Ordinance for the Town of Portsmouth does not provide for solar farms in any of the Town’s districts,” Van Couyghen noted.

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 on Article V, §1.

The appellants, Roger and Jane Fontaine, 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.”

The zoning 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. At the conclusion of a hearing, the board voted 4-1 to approve the petition.

Zoning board’s authority

The appellants contended that the board exceeded its authority by altering the terms of the ordinance to add a special use. They further contended 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.

Van Couyghen said the first issue he had to determine was whether the board acted in excess of its statutory authority.

Under §45-24-42, a zoning ordinance providing for the issuance of special use permits approved by the zoning board of review “shall specify” the uses requiring such permits.

“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,’” Van Couyghen stated.

Under the Portsmouth zoning ordinance (Article V, §1), “[N]o building, structure, or land shall be used or occupied except for the purpose permitted as set forth in the accompanying Table of Use Regulations.” The ordinance also states: “Proposed uses not so listed ... shall be evaluated by the Zoning Board of Review according to the most similar use(s) that is (are) listed.”

The judge pointed out that the ordinance does not provide for photovoltaic systems in its table of use regulations. The zoning board nevertheless determined that the proposed solar farm constituted 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,” the judge said.

Van Couyghen pointed out that in §45-24-42(b), the Rhode Island General Assembly specifically delegated to the Portsmouth Town Council the power to specify what special uses would be available for each district. The Town Council did not have the authority to delegate that power to the board, he said.

“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,” Van Couyghen said.

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, the judge found that the board erroneously determined that a solar photovoltaic facility was a permissible use.

“[E]ven 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,” Van Couyghen said, pointing out that 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,” the judge concluded.

CASE: *Fontaine, et al. v. Edwards, et al.*, [Lawyers Weekly No. 61-065-18](#)

COURT: Superior Court

ISSUE: Could the Portsmouth Zoning Board grant a special permit for a solar photovoltaic facility?

DECISION: No

Share this: