



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

| | | |
|------------------------|---|----------------|
| RENEWABLE |) | |
| REDEVELOPMENT, LLC, |) | |
| |) | |
| Petitioner, |) | |
| v. |) | |
| |) | C.A. No. _____ |
| SUSSEX COUNTY COUNCIL, |) | |
| |) | |
| Respondent. |) | |

**Petition for Writ of Certiorari
and Appeal Denying Conditional Use Approval**

By writ of certiorari, Petitioner Renewable Redevelopment, LLC (“Petitioner”), by and through its undersigned counsel, hereby seeks reversal of the decision by Sussex County Council (the “Council”) denying conditional use approval for an electric substation (the “Proposed Substation”) on ground zoned HI-1 (Heavy Industrial) adjacent to the existing Indian River Power Plant, and directly abutting an existing electric substation operated by Delmarva Power & Light (“Delmarva” or the “Delmarva Substation,” as the context indicates), and in support thereof states as follows:

Introductory Statement

1. Petitioner is the owner of a certain 140.25 acre property located in Dagsboro Hundred, Sussex County, Delaware being Tax Parcel 233-2.00-2.01. (the “Property”). The Property is zoned HI-1 (Heavy Industrial). It is adjacent to the Indian River Power plant and substation. Under the Sussex County Zoning

Code, electric substations are a permitted use in some districts, a conditional use in others (such as HI-1), and neither a permitted nor a conditional use in still others. Petitioner seeks conditional use approval to construct the Proposed Substation on its Property (the “Application”). The Proposed Substation is intended to facilitate the transmission of power from wind turbines to be constructed by an affiliate of the Petitioner which are to be located on lands leased from the federal government in the Atlantic Ocean off the shore of Delaware and Maryland (the “Offshore Wind Project”), and intended to interconnect at the proposed substation’s location with facilities that transmit such power onto the public “grid.” Among other benefits, the Proposed Substation will strengthen Delaware’s own “grid.” The Sussex County Planning & Zoning Commission (the “Commission”) voted unanimously to recommend in favor of the conditional use application, but on December 17, 2024, the Council voted 4-1 to deny the use (the “Decision”). In so doing, the Councilmembers voting to deny did not utter one word addressing the propriety of the substation use at the proposed location. They did not discuss the zoning. They did not discuss the uses adjoining the Proposed Substation (i.e., the Indian River Power Plant and Delmarva Substation). They did not discuss or even mention the Commission’s unanimous recommendation in favor of the Application. Rather, the Councilmembers voting “no” all expressed animosity toward the Offshore Wind Project – a matter not within their regulatory purview. Their sole basis for

denial was their conclusion that the Offshore Wind Project (and thus, presumably the Proposed Substation) would not benefit Sussex County (this latter reason not being a factor listed in the County Code as a reason to grant or deny a conditional use request). Petitioner now brings this Petition for Certiorari Review on the basis that the Council's decision is irregular, arbitrary, capricious, not supported by substantial evidence, and erroneous as a matter of law for the reasons set forth here, and as will be further supported in the briefing on this matter.

Jurisdiction

2. Under Delaware law, this Court has the common law authority to issue a writ of certiorari to review a lower tribunal's decision. *See, e.g., 10 Del.C. §562; Dover Historical Society v. City of Dover Planning Comm'n*, 2004 WL 1790164 (Del.Super.); *Christiana Town Center, LLC, v. New Castle County*, 865 A.2d 521 (Del., 2004) (Table) (text available in Westlaw).

Facts

3. Petitioner is the owner of the Property which has historically been a part of the Indian River Power Plant complex and is immediately adjacent to the Delmarva Substation.

4. Petitioner seeks conditional use approval for the construction of an electric substation (the "Conditional Use") in accordance with Chapter 115, Article

XXIV of the County Code entitled “Conditional Use,” which, in section 115-171, titled “Purpose,” states as follows:

The purpose of this article is to provide for certain uses which cannot be well adjusted to their environment in particular locations with full protection offered to surrounding properties by rigid application of the district regulations. These uses are generally of a public or semipublic character and are essential and desirable for the general convenience and welfare but, because of the nature of the use, the importance of the relationship to the Comprehensive Plan and possible impact not only on neighboring properties but on a large section of the county, require the exercise of planning judgment on location and site plan.

(emphasis added). Here, as already noted above, the Property is zoned HI-1 (as are the hundreds of acres surrounding it). There is an existing electric substation already operating on the adjoining property, and, as will be further discussed below, the Commission has found (and Council did not dispute) that: “The construction and use of an electrical substation on this site will not adversely affect neighboring properties or roadways.”

5. The Commission conducted a public hearing on Petitioner’s application (the “Application”) for conditional use approval on June 26, 2024.

6. At its July 10, 2024 meeting, the Commission unanimously recommended approval of Petitioner’s application. Among its reasons, the Commission set forth a number of specific factual findings, including:

- “This conditional use is appropriate in the HI-1 District.”
- “This conditional use is a reasonable and appropriate extension of the long-established land use at this location.”

- “The proposed facility will not result in any significant increase in traffic on area roadways.”
- “The proposed site is located a considerable distance from other properties and residences and the facility will be buffered by a significant natural barrier of existing mature trees.”
- “The construction and use of an electrical substation on this site will not adversely affect neighboring properties or roadways.”

See July 10, 2024 Commission Minutes at 9, ¶¶ 1,3,4,5,6 (available online at <https://sussexcountyde.gov/sites/default/files/minutes/PZ-7-10-24.pdf>).

7. On July 30, 2024, Council conducted a public hearing on Petitioner’s Application. Petitioner submitted testimony and evidence in support of its Application.

8. At the July 30, 2024 hearing, 14 persons also spoke in opposition to the conditional use. None discussed (or even mentioned) the appropriateness or inappropriateness of a substation at the proposed location; rather, all criticized the proposed wind turbine project and the use of wind turbines to generate power offshore.

9. None of the speakers in opposition mentioned the adjoining Delmarva Power Substation.

10. None of the speakers questioned the suitability of the proposed location for a substation.

11. None of the speakers took issue with the findings set forth in the Commission’s recommendation, including: (i) “This conditional use is appropriate

in the HI-1 District” and (ii) “The construction and use of an electrical substation on this site will not adversely affect neighboring properties or roadways.”

12. At the conclusion of the July 30, 2024 public hearing, Council closed the record on the Petitioner’s pending Application.

13. At its business meeting on December 17, 2024, Council voted 4-1 to deny Petitioner’s Application.

14. Like the opponents who spoke on July 30, none of the Councilmembers who voted against the Application questioned or took issue with the findings of the Commission.

15. For example, none of the Councilmembers took issue with the Commission’s findings, including: “This conditional use is appropriate in the HI-1 District” and “The construction and use of an electrical substation on this site will not adversely affect neighboring properties or roadways.”

16. Rather, the Councilmembers voting in opposition expressed their belief that the Application would not be of benefit to the residents of Sussex County – citing the “Purpose” section of the County Zoning Code, §115-3, a factor not identified in the Code as a consideration for conditional use approval or denial. Moreover, these Councilmembers are wrong. There will be benefits to Delaware. The project will provide approximately 1,750 MW of reliable, renewable energy electricity to the entire PJM “grid.” Delaware ratepayers, particularly those closest

to the point of interconnection in Sussex County, would receive the benefit of lower locational marginal prices without bearing any of the cost to subsidize the capital build-out of the project, since that cost is being borne entirely by Maryland ratepayers. While Maryland receives the energy attributes, such as renewable energy credits, those benefits serve only to offset some of the substantial subsidy that Maryland ratepayers will provide. Accordingly, Delaware ratepayers, including the residents of Sussex County, receive much of the same upside of the new renewable energy generation facility, but at a small fraction of the cost.

17. The Councilmember (the Council President) who supported the grant of the conditional use Application noted, among other issues, that the bulk of electric power used by Delaware residents is generated out of state. He further expressed concern over the poor precedent of the decision and that there was not a basis in the law to deny the Application. This Councilman had it exactly right.

18. Indeed, the Council's attempt, for all intents and purposes, to stop an interstate power project that has been subject to exhaustive state and federal reviews and has successfully secured permits from the relevant state and federal agencies not only constitutes error of law for failure to comply with Delaware law and the Sussex County Code, but runs afoul of the Dormant Commerce Clause, violates principles of preemption, and raises constitutional takings concerns.

19. Moreover, under Delaware law, the Council's focus must be on the proposed use at the proposed location; as one court has explained:

ultimately the County Council's reasoning in denying a conditional use must be articulated, and must relate to the statutory mandates. Where the objection of the community does not rationally advance the public health, safety or welfare, but rather simply seeks to deny one property owner the right to do what others in the area are already doing, that opposition does not justify the denial of a conditional use application.

Gibson v. Sussex County Council, 877 A.2d 54, 78 (Del.Ch. 2005) (citations omitted).

20. Accordingly, Petitioner prays that this Court issue a writ of certiorari to Sussex County Council, reverse the Council's December 17, 2024 denial of Petitioner's Application, and a direct Council to grant the conditional use for the Proposed Substation to the Petitioner.

WHEREFORE, for all the reasons set forth herein, and as will be further developed in briefing on this Petition once the County files the record with this Court, Petitioner prays that this Court:

- a) issue a writ of certiorari to the Council directing the Council to send up the record in this matter for the Court's review;
- b) upon completion of said review, reverse the decision of Council for the reasons aforesaid and as will be further supported in subsequent briefing,

and direct that the Council approve Petitioner's Application and grant the Conditional Use; and

c) award such other relief as the Court deems appropriate.

Respectfully submitted,

SAUL EWING LLP

/s/ Richard A. Forsten

Richard A. Forsten, Esq. (#2543)

Wendie C. Stabler, Esq. (#2220)

Jennifer M. Becnel-Guzzo, Esq. (#4492)

Mackenzie Peet, Esq. (#6692)

1201 Market Street, Suite 2300

Wilmington, DE 19801

(302) 421-6800

Richard.Forsten@Saul.com

Wendie.Stabler@Saul.com

Jennifer.Becnel-Guzzo@Saul.com

Mackenzie.Peet@saul.com

Attorneys for Petitioner

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