Circuit Court for Allegany County
Case No. 01-C-17-045032

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2510

September Term, 2017

IN THE MATTER OF
DR. HOMER LEE TWIGG, JR.

Arthur,
Beachley,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: March 26, 2019

Appellant Dr. Homer Lee Twigg, Jr. challenges the grant of a special exception to develop a community solar project in Western Maryland.[1] Because we conclude there was substantial evidence in the record as a whole to support the zoning board's findings and conclusions that the special exception was justified, we affirm the decision of the Circuit Court for Allegany County upholding the Board.

BACKGROUND & PROCEDURAL HISTORY

Earth and Air Technologies, LLC ("Appellee") sought a special exception from the Allegany County Board of Zoning Appeals ("the Board") to operate an 8,000-panel solar energy system in an Agricultural Zoning District in Flintstone, Maryland.[2] At a hearing held on January 4, 2017, the Board heard testimony and considered exhibits before voting unanimously to approve the special exception. (Earlier, on December 30, 2016, the Board had conducted a field inspection of the subject property to familiarize its members with the site layout.). Before voting to grant the special exception, the Board members discussed on the record their individual reasoning for arriving at their votes.

The Board further explained its findings and conclusions in a written opinion dated January 17, 2017. The Board's specific findings included: (1) a solar energy system is a special exception use within the "A" Agricultural Zoning District in question; (2) the

[1] At oral argument, Appellee's counsel stated that because the proposed solar farm is a community solar project, Public Service Commission approval is not required. Appellant has not challenged this claim or suggested otherwise.

[2] The property in question is under lease to Earth and Air Technologies. Though Earth and Air Technologies has a leasehold interest in 20 acres of the property, the photovoltaic solar array will only take up about ten acres of land.

solar panels will cover approximately ten acres on the property, and the site's remaining land "may be returned back to agricultural use"; (3) the solar array will have little to no noise, vibration, glare, fumes, odors, electrical interference, or increased traffic appropriate for the neighborhood; (4) screening and fencing will be placed around the property in accordance with the Allegany County Zoning Code; (5) all power lines and connections to the electric grid will be underground; and (6) the project meets all special setback and height requirements found in the Zoning Code.

The Board's opinion then discussed certain site-specific concerns that had been raised at the hearing by Michael Twigg (Appellant's son): (1) that the proposed project would be "wedged" between historical areas, and (2) the proposal was contrary to the Allegany County Comprehensive Plan's express goal of preserving prime agricultural land. The Board was not persuaded by these concerns. Addressing them in reverse order, the Board first reasoned that because a solar energy system is a permitted special exception use within the Agricultural Zone, allowing for such a special exception is consistent with the County's Comprehensive Plan.[3] The Board then determined that any impact on historical areas "would be minimal at best and did not rise to the level necessary to warrant a denial of the requested special exception." Accordingly, the Board concluded that the proposed special exception use will comply with the Zoning Code and will not cause a unique adverse effect upon adjoining and surrounding properties.

[3] As the Board put it: "[t]he County would have had to take the Comprehensive Plan into consideration when [the relevant Code section allowing for such special exceptions] was implemented."

The Circuit Court for Allegany County affirmed the Board's decision to grant the special exception. This appeal followed.

DISCUSSION

"In an appeal from judicial review of an agency action, we review the agency's decision directly and not the decision of the Circuit Court . . . ." *Hollingsworth v. Severstal Sparrows Point, LLC*, 448 Md. 648, 654 (2016). In doing so, our review is narrow: we are "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Cosby v. Dep't of Human Res.*, 425 Md. 629, 638 (2012) (Citation omitted). "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *McClure v. Montgomery County Planning Bd.*, 220 Md. App. 369, 380 (2014) (Citation omitted). Under this standard, we must "defer to the agency's fact-finding and drawing of inferences if they are supported by the record" and "review the agency's decision in the light most favorable to it." *Motor Vehicle Admin. v. Carpenter*, 424 Md. 401, 413 (2012); *see also Md. Dep't of Env't v. Anacostia Riverkeeper*, 447 Md. 88, 120 (2016) ("We should accord deference to the agency's fact-finding and drawing of inferences when the record supports them"). (Internal quotation marks and citation omitted). Nor do we substitute our judgment "on the question [of] whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness." *Anacostia Riverkeeper*, 447

Md. at 120 (quoting *Mayor & Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399 (1979)). Nevertheless, we do not defer to agency conclusions "based upon errors of law." *State Ethics Comm'n v. Antonetti*, 365 Md. 428, 447 (2001).

I. The Board Could Reasonably Conclude That the Solar Farm Was Consistent with the Comprehensive Plan.

Dr. Twigg contends that granting a special exception for the solar project is inconsistent with the County's Comprehensive Plan, in that allocating ten acres to be covered by solar panels will contradict the Plan's goals of "promot[ing] continuing agricultural uses on Prime Agricultural Land" and "minimiz[ing] the amount of prime agricultural land converted from agricultural use[.]"

"The special exception use is a part of the comprehensive zoning plan . . . which the legislature has determined to be permissible absent any fact or circumstance negating the presumption." *Schultz v. Pritts*, 291 Md. 1, 11 (1981). That is to say, by designating a certain use as a special exception use, a County has determined that the use is conceptually compatible in the particular zone, provided that "adduced evidence does not convince the [body granting an individual special exception] that actual incompatibility would occur." *People's Counsel for Balt. County v. Loyola Coll. in Md*., 406 Md. 54, 106 (2008). When a County's zoning code does not specify a stricter standard for evaluating special exception applications than the *Schultz* test, "*Schultz v. Pritts* applies." *Mills v. Godlove*, 200 Md. App. 213, 234 (2011) (quoting *Montgomery County v. Butler*, 417 Md. 271, 303 (2010)). The General Assembly has also set forth that a Board of Appeals must determine that a special exception will be "consistent with" a Comprehensive Plan—

which means that it will "further, and not be contrary to" the Plan. Md. Code (2012, 2018 Cum. Supp.), Land Use Article, §§ 1-101(p), 1-301—1-303; *see Friends of Frederick County v. Town of New Market*, 224 Md. App. 185, 200-01 (2015) (discussing how the General Assembly amended the Land Use Article's "consistency" standard, including the standard for special exceptions, in response to the Court of Appeals's decision in *Trail v. Terrapin Run*, 403 Md. 523 (2008)).

Here, the Board's written opinion evinces the reasonable conclusion that the solar project will in fact be consistent with the County's Comprehensive Plan. As the Board's opinion recognized, the fact that the County Code allows for solar farms as a special exception use within the Agricultural Zone generally shows that solar farms have been integrated into the County's Comprehensive Plan.[4] Indeed, were it categorically inconsistent with the County's Plan to allow for *any* non-agricultural use within the Agricultural Zoning District, the Code would never permit any non-agricultural use (let alone a solar farm) as a special exception.[5] Furthermore, the Board's opinion specifically found that the solar array in question will only cover about ten acres of land, and the property's remaining 30 acres "may be returned back to agricultural use." Given that the

[4] The Part of the Code that allows for solar farms as special exceptions states that one of its purposes is to "ensure that these uses are consistent with the policies and recommendations of the Allegany County Comprehensive Plan . . . ." Allegany County Code, § 360-58.

[5] Moreover, as Appellee points out, allowing for some land to be used for non-agricultural purposes is not fundamentally at odds with the goals of "promoting" agricultural uses or "minimizing" the conversion of agricultural land. Mere "promotion" or "minimization" does not require a total, blanket ban on non-agricultural use.

40-acre property was not being farmed at the time of the Board hearing, agricultural use could actually increase at the site.[6] (We also note that the Board heard testimony that there was no reason to expect that the property would not be able to be farmed once the solar farm was decommissioned, and that Allegany County still had 5,000 acres of open crop land.). In short, there was substantial evidence for the Board to reasonably conclude that granting the special exception was consistent with the Comprehensive Plan.

II. The Board Could Reasonably Conclude That the Solar Farm Will Not Result in Site-Specific Adverse Effects.

Under the *Schultz* test, zoning boards must also ask whether a particular special exception "would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone." 291 Md. at 22-23.[7] Dr. Twigg maintains that the approved solar project will create these sort of unique adverse effects because the solar farm will be "wedged" between historic

[6] Indeed, given that the subject property was not being farmed at the time of the hearing, it is not even clear that, at this property, there is a "continuing" agricultural use to promote, or a "conversion" from agricultural use to minimize.

[7] Dr. Twigg faults the Board's opinion for citing *Brandywine Enters. v. County Council for Prince George's County*, 117 Md. App. 525 (1997), for this point, rather than *Schultz*. As noted by both the Appellee and the Circuit Court, the portion of *Brandywine* cited by the Board makes the same exact point as *Schultz*. Additionally, in its on the record discussion at the hearing, the Board explicitly invoked *Schultz* ("As you well know, you've done this many times, *Schultz* [sets] the test. It's, you know, did it meet all those criteria of the Code otherwise and then is there site specific adverse impact?").

districts.[8] The Board concluded otherwise, determining in its written opinion that "any impact on the historical areas . . . would be minimal at best and d[oes] not rise to the level necessary to warrant a denial of the requested special exception."

As noted in the Board's written findings, the Board drew upon the field inspection it had earlier conducted of the subject property (to gain familiarity with the site layout), along with the exhibits presented at the hearing. *See Critical Area Comm'n for the Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 134 (2011) ("[W]hen the Board of Appeals refers to evidence in the record in support of its findings, meaningful judicial review is possible . . . [in such situations] [t]hat evidence, intellectually and logically, can be viewed only as bearing on what persuaded the Board to conclude as it did"). And as the Board further found: (1) the solar farm will result in little to no noise, vibration, glare, fumes, odors, electrical interference, or increased traffic; (2) the power lines connecting the project to the electric grid will be underground; and (3) the project will meet all of the County's special setback and height requirements.[9] Based on this evidence, the Board could reasonably determine that the project would not disturb the adjoining historic districts or impair natural beauty.

[8] Dr. Twigg notes that the solar project will be adjacent to Twiggtown, one of two bicentennial farms in Allegany County; the Breakneck Road historic district, a National Register site; a graveyard dating back to the 1700's; and one of the largest natural caves in Allegany County.

[9] The Board heard at the hearing from Earth and Air Technologies's representative that the solar panels' maximum height would be about seven feet, and that the project will have a buffer of (at least) 50 feet on all sides.

In sum, there was substantial evidence in the record as a whole for the Board to reasonably conclude that the special exception was consistent with the Comprehensive Plan, that the project's impact on historic areas "would be minimal at best," and that any adverse effects would not be uniquely different from any other inherent effects were the project developed elsewhere within the zone.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.