

Superior Court of New Jersey

CHAMBERS OF
JUDGE MARLENE LYNCH FORD
ASSIGNMENT JUDGE



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June 19, 2017

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RE: Clean Water Action, et al. v. Jackson Township Council, et al.
OCN-L-1251-15 PW

Dear Counsel:

Clean Water Action, et al. v. Jackson Township Council, et al.
OCN-L-1251-15 PW

This matter came before the Court for trial on Plaintiffs', Clean Water Action, et al.'s ("Plaintiffs") complaint in lieu of prerogative writs on January 5, 2017 and on March 23, 2017.

The parties were offered the opportunity to submit written summations after the hearing. All parties submitted their written summations on or about May 11, 2017. The parties have also stipulated to the introduction into evidence as P-46 a copy of the transcript of the Planning Board hearing on January 12, 2015, when the Board considered Ordinance 01-15 for consistency with the Township Master Plan.

The Court has considered the written submissions of the parties, the testimony of witnesses, and the documents marked into evidence.

Plaintiffs are private environmental organizations that represent the public interest of their members and constituencies. Plaintiffs are interested parties affected by the development plan of a 135-acre parcel of property designated as Block 3103, Lot 30, Block 3201, Lot 15, and portions of Block 3101, Lot 11 on the Tax Map of the Township of Jackson ("Property").

Plaintiff, Clean Water Action, is the New Jersey branch of a national organization that is dedicated to protecting the environment, health, economic well-being and community quality of life with an emphasis on protecting water resources. Plaintiff, Crosswicks-Doctors Creek Watershed Association Inc., is a 501(c)(3) nonprofit corporation with responsibility to protect the watershed basin for the subject property. Plaintiff, New Jersey Conservation Foundation, is a private, not-for-profit organization that holds a conservation easement over the adjacent property of Black Night Bowbenders known as Block 32.01, Lots 5 and 16 on the Tax Map. Plaintiff, Save Barnegat Bay, is a nonprofit entity whose mission is to restore and protect Barnegat Bay and its ecosystem. Plaintiff, Environment New Jersey, is a statewide, citizen-based environmental advocacy organization. Plaintiff, Sierra Club New Jersey Chapter, a branch of the national Sierra Club, is a nonprofit whose mission is to promote the responsible use of the environment.

Defendant, the Jackson Township Council (“Council”) is the governing body of the municipality. It is responsible for adoption of land use ordinances.

The Defendant, Jackson Township Council is the governing body of the Township and is responsible for the adoption of land use ordinance. Defendant, Jackson Township Planning Board, is a municipal agency established according to the Municipal Land Use Law (MLUL) and has the jurisdiction to hear applications for development for uses not permitted in the zone. Defendant, Six Flags Theme Parks, Inc. (“Six Flags”), is the owner of property known as Block 3101, Lot 30, Block 3201, Lot 15, and portions of Block 3101, Lot 11, located in the Township of Jackson, Ocean County, New Jersey. Defendant, KDC Solar PR1, LLC (“KDC”), has principal offices located at 1544 US Highway 206, Suite 100, Bedminster, New Jersey, 07291. Defendant, Six Flags, and Defendant, KDC, are co-applicants to the Planning Board for conditional use approval, design waivers, and preliminary and final site plan for the installation of a solar facility on the Property.

Plaintiffs allege that certain adopted and/or amended land use ordinances promulgated by the Jackson Township Council with the approval of the Jackson Township Planning Board, to the benefit of Six Flags and KDC, conflict with the purpose and intent of the MLUL, the Township’s Master Plan and are otherwise inconsistent with sound planning principles.

Defendants deny these allegations of the Plaintiffs.

This matter came before the Court for trial on the sole issue of the validity of the ordinances in question. The issue set forth at trial was whether the municipal ordinances that permit solar arrays on property owned by Six Flags are consistent with the Jackson Township Master Plan.

BACKGROUND

The Jackson Township Planning Board (“Board”) adopted the current Master Plan on July 22, 2009, of which the Land Use Element includes as one of its goals “...the protection of natural resources.” The Land Use Element recommends adoption of a Highway Commercial Planning District along Monmouth Road adjacent to Six Flags for commercial development. It also recommends the retention of a wooded buffer area along the rear of this commercial corridor. The Land Use Element recommended creation of the CR-1 and CR-2 Zones to provide for the development of commercial recreation facilities. The CR-1 district allows for commercial development options that would complement the recreational activity at Great Adventure, such as hotels and convention halls. The CR-2 district provides for less intensive commercial recreation development, which includes activities that involve the natural use of the land. The examples included golf courses and campgrounds. Great Adventure proposes to construct a solar power facility within the DR-2 portion of its property.

The Master Plan also includes the Conservation Plan Element, which contains an inventory of the natural resources including an inventory of forested land.

After it adopted the Master Plan, Jackson Township adopted certain ordinance designed to further this planning strategy to protect environmentally sensitive lands, including Ordinances 28-10 and 34-10 adopted November 9, 2010. These Ordinances created the Conservation Planning District and the CR-2 Commercial Recreation Zone 2. The Township adopted the Conservation Zone Overlay provisions in Section 244-45, which recognized the various natural waterways in Jackson Township, some of which serve as habitats for many threatened and endangered species, and Jackson Township’s commitment to preserve and protect the environmentally critical lands. This Conservation Overlay zone required all applications for major site plan or major subdivision

approval submit a NJDEP letter of interpretation or permit which delineates freshwater wetlands, transition areas and buffer areas on the property.

The Township also adopted a Tree Removal Ordinance that requires the submission of detailed information about proposed destruction, removal and cutting of trees affected by the site plan proposal. The Township recognized the interrelationship between the Township's water resources, air quality, environmental quality and indiscriminate cutting of trees associated with a land use application for development. The Tree Removal Ordinance requires applications for Planning or Zoning Board approval have tree preservation and removal plans as part of the submittal.

On August 12, 2014, the Jackson Township Council adopted Ordinance 13-14, which amended the Land Use Development Ordinance, adding Section 244-133-1 to allow solar energy facilities as a conditional use in certain districts. The facilities must meet certain standards including restrictions on clearing. The ordinance provides: "...ii) Clearing to construct the infrastructure necessary to accommodate the facility shall be limited to that which is necessary to accommodate the use..."

The Township correctly notes that solar energy generating facilities which rely upon renewable energy are inherently beneficial uses.

Section 244-59 of the Jackson Township Land Use Ordinance implements the Master Plan and lists the permitted and conditional uses in the CR-2 zone, including golf courses, campgrounds, horse farms, trails and passive recreational parks and facilities.

On January 27, 2015, Jackson Township adopted an ordinance that amended Section 244-59 to allowed solar facilities as a conditional use in the HC, CR-1 and CR-2 Zones. After its introduction, the ordinance was referred to and approved by the Jackson Township Planning

Board, which found it to be consistent with the Township Master Plan. The Township adopted Ordinance 01-15 after the governing body received the approval of the Board. The amended ordinance supplemented the conditions set forth in Section 2244.133.1 to add additional conditions relative to solar power facilities, including: A fifty-foot setback from adjacent properties unless the properties are under the same ownership; a twelve-foot maximum height for the panels; net metered usage only; major site plan approval; roads to accommodate emergency service vehicles; installation by qualified electricians; landscaped vegetation; exclusion of solar panels from the calculation of impervious surface; and a requirement that the area beneath the panels be planted with native shade tolerant species to prevent erosion and to promote diverse habitat.

Section 244-59 was amended again in August 2015 by Ordinance 20-15, which would allow solar facilities on elevated carports. This revision was made to allow Defendants to construct elevated panels on carports above a Six Flags employee parking lot.

On January 6, 2015 Six Flags and KDC filed an application with the Jackson Township Planning Board for conditional use approval for a solar facility on a 90 acre tract owned by Great Adventure in the CR-2 zone. (The Board ultimately approved that application on March 16, 2016, including the removal of about 18,000 mature trees. The Planning Board waived compliance with the Tree Removal Ordinance.)

On May 4, 2015, Plaintiffs filed a complaint against Defendants seeking the invalidation of Ordinance 01-15 based upon the following allegations:

- (1) That the Ordinance was inconsistent with the Master Plan;
- (2) That the Ordinance was not “drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage them most appropriate use of land;” and

(3) That the public notice provided by the Township was defective.

(The complaint also alleged a violation of the Open Public Records Act but the claim was later abandoned by Plaintiffs.) (footnoted)

On August 11, 2015, the Council introduced Ordinance 20-15, the purpose of which was to amend Ordinance 01-15 in order to modify the conditions applicable to solar energy facilities in the affected zoning districts. The revisions permitted solar panels in the affected zones to be attached to open-sided carports located in parking areas. The Ordinance was considered by the Board on August 17, 2015 and found to be consistent with the Master Plan. The Ordinance was then adopted upon second reading by the Township Council on August 25, 2015. Six Flags and KDC filed an application for approval based on Ordinance 20-15, the application reflecting that some solar arrays were relocated to the parking lot, but retaining the majority of the arrays on the forested portion of the Great Adventure Property.

On February 23, 2016, the Council introduced Ordinance 05-16, the purpose of which was to permit the use of non-native grasses when revegetating areas beneath ground-mounted solar panels. Ordinance 05-16 stated that the Council had been advised with respect to development within the Pinelands that the New Jersey State Soils Committee, the Ocean Country Soil Conservation District, the US Department of Agriculture's Natural Resource Conservation Service and the New Jersey Pinelands Commission all allow the use of non-native grasses when revegetating areas beneath ground-mounted solar panels. Ordinance 05-16 was referred to the Board and discussed at their March 7, 2016 meeting. The Board found, based upon the opinion and testimony of the Township Planner, that the ordinance was consistent with their Master Plan. Ordinance 05-16 was adopted upon second reading by the Council on March 8, 2016.

The issue of the validity of the ordinances was bifurcated from the challenges to the approvals for this solar panel project. Therefore, the trial in this was limited to the challenge by the Plaintiffs to the validity of a series of land use ordinances adopted by the Township, with the approval of the Planning Board, that would allow Great Adventure to construct a solar panel array in its property located in the CR-2 zone.

DISCUSSION

Six Flags owns a 135-acre parcel of land on which it has received approvals from the Jackson Township Planning Board to construct a 21 megawatt solar array on 67 of the 135 acres. The remaining property will be left undisturbed. The property is located in the CR-2 commercial recreation zone. The solar array will meet substantially all of Six Flag's energy needs, and will reduce reliance upon carbon emitting sources of electric power.

The Master Plan describes the CR-2 zone as follows:

The CR-2 Planning District refers to the less intensive commercial recreation development in the Township including the referenced golf courses and the portion of the Six Flags Great Adventure amusement Park that is not within a sewer service area. The CR-2 Planning district encompasses 1,848 acres and is to be committed to recreation activities that involve the natural use of the land (golf courses; campgrounds). This District would be regulated based on use and coverage intensity.

There are two issues before the Court:

First, whether the ordinances which allow the installation of solar arrays in the CR-2 zone are substantially consistent with the Master Plan requirement that the proposed use be related to and supportive of the principle recreation activities (i.e. six Flags Theme Park; and

Second, whether the ordinances are consistent with the 'natural use of the land'.

Standard of Review

The court's role in reviewing the validity of municipal ordinances is narrow. There is a strong presumption of validity that attaches to all municipal ordinance and the burden is on the Plaintiff to show that the ordinances being challenged conflict with the Township Master Plan. Municipal ordinances are presumptively valid unless the Court finds there is "no discernable reason" to justify their enactment. Manalapan Realty, L.P. v. Twp. Comm. of Twp. Of Manalapan, 140 N.J. 366, 385 (1995).

Governing bodies of municipalities are authorized to adopt or amend zoning ordinances "[...] relating to the nature and extent of the uses of land and of buildings and structures thereon. [...]" N.J.S.A. 40:55D-62. These ordinances are required to be substantially consistent with the land use plan element and the housing plan element of a municipality's master plan. However, governing bodies may adopt ordinances inconsistent therewith. Inconsistency between zoning amendment and master plan is not fatal to zoning amendments, but triggers two requirements: (1) a majority vote of full, authorized membership of a governing body and (2) a statement of reasons. Willoughby v. Planning Bd. of Twp. of Deptford, 326 N.J. Super. 158 (App. Div. 1999).

Prior to the final adoption of a zoning ordinance, a municipal planning board is required to make and transmit to the governing body a report on the ordinance, including the identification of any provisions which are "... *inconsistent* with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate." N.J.S.A. 40:55D-26. [emphasis supplied by the Court.]

In determining what constitutes "substantial consistency," the Supreme Court has determined that some inconsistency is permitted provided the ordinance "[...] does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan." Manalapan Realty v. Township Committee, 149 N.J. 366, 382 (1995). When a municipal

planning board has determined that a zoning ordinance is consistent with the municipality's master plan, the determination is entitled so "[...] deference and great weight." Id.

There is a strong presumption of validity that attaches to all municipal ordinances, and Plaintiff has the burden of demonstrating that the ordinances being challenged are inconsistent with the Township Master Plan. *See Cox & Koenig, New Jersey Zoning and Land Use Administration*, (Gann 2016), hereinafter "Cox & Koenig" at 841 (citing New Jersey Shore Builders Association v. Jackson, 199 N.J. 38 (2009) and Riggs v. Long Beach Township, 109 N.J. 601 (1988)). The presumption of validity that attaches to a zoning ordinance may be overcome only if the challenge to the ordinance establishes that the same is "[...] clearly arbitrary, capricious or unreasonable, plainly contrary to fundamental principles of zoning [...]." Manalapan Realty v. Township Committee of the Twp. of Manalapan, 140 N.J. 366, 380 (citing Bow and Arrow Manor Inc. v. Town of West Orange, 63 N.J. 335, 343 (1973); accord Zilinsky v. Zoning Board of Adj. of Verona, 105 N.J. 363, 368.

Plaintiff argues that the challenged ordinances constitute special legislation and spot zoning designed to accommodate Six Flags and KDC. Plaintiffs further argue that the amended and adopted ordinances will cause destruction of mature forest acreage for solar arrays without limitation and without any effort to protect the natural openness of the land, its aquifer recharge characteristics and its critical habitat value.

Defendant Township claims that the Council properly relied upon the findings made by the Board on each ordinance's consistency with the Master Plan, as it is entitled by the MLUL. The Board found in each instance that the ordinances were consistent with the Master Plan. The Board's determination is entitled to deference and enjoys a presumption of validity. Therefore, the

governing body was not required to set forth reasons for departure from the requirements of the Master Plan because the revisions were substantially consistent with the Township Master Plan.

Plaintiffs argue §244-59 of the Township Land Use Ordinance as amended by Ordinances 01-15, 20-15, and 05-16 is inconsistent with the Master Plan, and that, as a consequence, compliance with the enhanced notice and adoption procedures set forth in N.J.S.A. 40:55D-62(a) was required. This provision of the MLUL requires that the adoption of amendment of a zoning ordinance be substantially consistent with the Land Use Plan Element and the Housing Plan Element of the Master Plan, and requires that all ordinances that are not “substantially consistent” be subject to enhanced notice and adoption procedures.

The phrase “substantially consistent” is not defined in the MLUL, but has been addressed by the Supreme Court in the Manalapan Realty decision. The Court held the following:

The Legislature has not defined what is meant by “substantially consistent” with a master plan. “When construing legislation, in the absence of a specific definition, we give words their ordinary and well-understood meanings.” Great Atl. & Pac. Tea Co. v. Borough of Point Pleasant, 137 N.J. 136, 143-44 (1994); Levin v. Township of Parsippany-Troy Hills, 82 N.J. 174, 182 (1980).

The only interpretation of “substantially consistent” that will not defeat the objective of the MLUL is to give these words their plain meaning. Substantial means “[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real,” *The Compact Oxford English Dictionary 1947* (2d ed. 1993), or, “having real existence, not imaginary [;] firmly based, a substantial argument.” *The New Lexicon Webster’s Dictionary of the English Language* 987 (1987). Thus, the concept of “substantially consistent” permits some inconsistency, provided it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan.

Manalapan Realty at 384. See also Cox & Koenig at 851.

The question before the Court is whether the ordinances allowing the installation of solar arrays in the CR-2 Zone are: (i) substantially consistent with the Master Plan requirement that they be related to a supportive of the principle recreational activity (i.e. Six Flags Theme Park);

and (ii) that the ordinances involve a “natural use of the land” which expressly includes golf courses and campgrounds.

“Substantially Consistent”

This Court finds that the ordinances which authorized as a conditional use the installation of solar facilities within the CR-2 zone are substantially consistent with the objectives and the goals of the Jackson Township Master Plan. The Court’s role in reviewing the legitimacy of a municipal ordinance is not to substitute its judgment as to the wisdom of the ordinance but rather to a determination whether or not the ordinance is an unreasonable exercise of legislative action by the governing body and constitutes an arbitrary unreasonable and capricious action by the governing body.

The Plaintiffs in this matter have set forth a compelling argument opposed to the wisdom of the installation of solar arrays in the zones affected by these ordinances, including the CR-2 zone which includes the site of the Great Adventure solar arrays. At the same time, the Township has weighed the need for energy independence and the reduction of carbon emissions as legitimate objectives of zoning. Given the strong presumption of validity as to the legislative action, and notwithstanding the valid concerns of the Plaintiffs, in the absence of any evidence of arbitrary or unreasonable conduct by the governing body, this balance must tip in favor of the validity of legislative action. That both sides articulate legitimate environmental perspectives does not overcome the presumption of validity of these ordinances under the circumstances of this case.

The ordinances in question were referred to the Planning Board for a determination under the statute that the proposed legislation was not inconsistent with the Township’s Master Plan. The Planning Board found that the ordinances were in each respect consistent with the goals and purposes of the Township’s Master Plan. The Planning Board relied upon the review by its

planner, and acted accordingly. The Planning Board's determination is entitled to deference and was accepted by the Township Committee. The governing body did not have an obligation to conduct further review for Master Plan Compliance. This Court finds that the Township Committee acted appropriately in relying upon the decision of the Planning Board.

Furthermore, the Court finds that the use of solar energy is an inherently beneficial use, which is of value to the community, serves a public good, and promotes general welfare. The Plaintiffs have challenged in effect the wisdom of that judgment exercised by the governing body in adopting the solar ordinances. Even if, as suggested by the Plaintiff's expert witnesses, the competing environmental benefits of not permitting solar facilities in this zone are equal to or outweigh the benefits of solar energy production, the decision to elect one option over the other is not inherently unreasonable. The action of the Township Committee in adopting the series of solar energy ordinances is entitled to extreme deference and certainly promotes an inherently beneficial use. N.J.S.A. 40:55D-7 provides that solar energy facilities serve the purpose of supplying electrical energy from solar power, a use that may be a principal or an accessory use or structure. To that extent, promotion of solar facilities serves the public good and advances a legitimate purpose of zoning.

"Natural Use of Land"

Plaintiffs focus on the reference in the Master Plan to activities that involve the "natural use of the land."

Defendants submit that the Master Plan expressly allows golf courses as an encouraged use in the CR District. Defendants claim that golf courses, by their very nature, require the wholesale removal of trees. Plaintiffs' expert, Dr. Emile DeVito, an ecologist who appeared on behalf of the Plaintiffs at the January 11, 2016 meeting of the Board, testified as follows:

Q [by Mr. Yoskin]: So tomorrow, Six Flags or somebody else could apply for a permit, site plan approval to construct a golf course here. And if a golf course—you're nodding yes?

A [by Mr. DeVito]: Yes.

Q: And if a golf course were constructed it would have the same impacts as this project would have, is that correct, but with none of the benefits, it would not have the solar field on it?

A: It might even—a golf course would take up far more than 60 acres. It would probably have worse impacts.

[Transcript of Testimony, January 11, 2016]

Defendants argue that the removal of trees to construct a solar array will have impacts that are no different than those that would result from the removal of trees to install a golf course, without any corresponding environmental benefit. Defendant argues that once the array is installed and the land beneath it is revegetated, the land will remain as “natural” as it would be if a golf course or campground was built instead. In addition, the Defendants argue that the ancillary uses attached to a golf course—a club house, dining facilities, a pro shop and parking lots—are clearly more intensive uses when contrasted to the construction and maintenance of solar panel arrays once constructed and revegetation is completed.

The proposed project consists of solar panels installed on a rack 36 inches above the ground, two stormwater basins and several small electronic cabinets, all surrounded by a fence. There will be no parking lots and no habitable buildings. The energy generated by the facility will be utilized exclusively by Six Flags and will therefore be supportive of the principle recreational activity that takes place within the park perimeters. Defendants claim that the ordinances in question, when viewed in this context, are consistent with the language of the Master Plan.

Defendants further claim that the proposed project promotes reliance upon renewable energy which is a legitimate objective of zoning.

Defendants distinguish the case law relied upon by Plaintiff.

In Riggs v. Long Beach Township, 109 N.J. 601 (1988), a property was down zoned by the Township for the purpose of reducing its fair-market value for acquisition purposes. The Court in Riggs focused on whether that was a valid purpose rather than whether the rezoning ordinance was substantially consistent with the Master Plan. The Court did observe that the requirements of N.J.S.A. 40:55D-62(a) should be “strictly enforced”, Id. a 621, but went on to note that because the ordinance at issue rezoned land as open space that was to be devoted to residential use, it was patently inconsistent with the Master Plan. Id. at 621-22. The Court agrees that the Riggs decision is distinguishable on its facts.

Plaintiffs also rely upon East Mill Associates v. Township Council of East Brunswick, 241 N.J. Super. 403 (App. Div. 1990). The East Mill decision involved the rezoning of a property from multi-family residential, with a maximum density of nine units per acre, to single-family detached dwellings with a maximum density of three units per acre. The Court found this change in the zoning was inconsistent with the Master Plan and therefore triggered the heightened procedural requirements of N.J.S.A. 40:55D-62(a). East Mill Associates at 406. The use in this case, i.e. solar power facilities, was added as a permissible conditional use in a zoning district which already accepted as a use golf courses and camp grounds, both of which are expressly authorized by the Master Plan. The Court agrees that under the facts of this case, the East Mill Associates case is inapplicable.

Finally, in Route 15 Associates v. Jefferson Township, 187 N.J. Super. 481 (App. Div. 1982), the court found a clear conflict between the provisions of the Township Master Plan and

the ordinance under challenge. Because of this clear conflict, the Court found that the heightened procedural requirements were imposed upon the governing body to set forth reasons for the deviation from the Master Plan. In this case, the conditional uses under the ordinances are arguably consistent with the Master Plan. Even if it is debatable whether substantial consistency exists, the presumption of validity favors consistency.

The Court takes into consideration the express language of the ordinances and finds that there is substantial consistency with the Master Plan, and that the proposed use of the land is within the common language interpretation of the natural use of land. This Court further finds that the proposed use as a field for solar arrays, and subject to the revegetation requirements of the ordinance are consistent with a “natural use of the land”. Further it is within the prerogative of the legislative body to consider the environmental advantage of renewable solar energy and to balance that against other environmental impacts caused by this proposed use. In weighing these considerations, the governing body and within a proper exercise of its discretion placed additional weight upon the energy conservation benefits of the solar use. Even if this Court disagreed with that judgment, it is clearly consistent with a reasonable exercise of legislative judgment to tip the scales in favor of the advancement of solar energy uses.

Tree Removal Ordinance, Chapter 405 of the Township Code

The Township Tree Removal Ordinance, Chapter 405 of the Township Code, requires a permit for the removal of any tree with a diameter of six inches or more from the Shade Tree Commission. The Tree Removal Ordinance requires the protection of trees during construction and imposes a requirement for replacement of certain trees. The Tree Removal Ordinance does not bind the governing body to adopt new ordinances, nor does it impose any limitations upon the governing body’s power to zone.

The “Environmental Impact Ordinance” referred to by Plaintiffs, refers to the environmental impact statement required by §244-189. The ordinance requires the preparation of a comprehensive analysis of “[...] the variety of problems that may result and the measure that can be taken to minimize the adverse impacts [...]” of development projects on the environment. The requirement comprises part of a submission to the applicable planning or zoning board for certain types of development projects. The requirement may be waived by the Planning Board, should the Board find sufficient evidence submitted to support a conclusion that the proposed development will have negligible environmental impact. §244-189(D). The obligation to address the environmental impact on a site plan application does not limit the governing body’s legislative power to zone and to permit as a conditional use in a particular zone, in this case the CR-2 zone, solar energy facility or structure.

Plaintiffs argue the Township knew when it adopted the Ordinance a solar facility could not be constructed in a forest without significant destruction of the trees in that forest. The Plaintiffs allege the governing body therefore contemplated a significant violation of the Tree Removal Ordinance because the solar facility would unavoidably require significant destruction of mature trees. Again, this argument while compelling cannot overcome the presumption of validity of the ordinance, and that the Council weighed the conflicting environmental benefits and costs of this proposal.

Native Grasses Ordinance

As to Ordinance 05-16, (the revised vegetation ordinance) the Court agrees this is a site plan specific issue as to this application, and does not implicate the power of the Township Council to adopt an ordinance, consistent with the direction of other environmental protection agencies,

that would allow a mix of native and non-native plants to be used in the process of revegetation. Therefore, Ordinance 05-16 is not germane to this challenge.

Plaintiff's witness, Dr. Rebozo, testified that the survival of native grasses is compromised due to the inevitable compaction of the soil under the solar panels. In addition, there is more shade under the panels, thereby limiting sunlight to the area. The Ordinance was revised to allow a mix of native and non-native grasses, primarily it appears to address the compaction issue and to increase the likelihood of survival. There is nothing inherently arbitrary, capricious or unreasonable about the decision of the township committee to adopt this revised ordinance.

CONCLUSION

For the reasons set forth herein, this Court concludes:

1. That the action of the governing body in adopting a series of ordinances which would advance and authorize the use of solar energy generating facilities within certain zones in the Township, including the CR-2 zone, is not voidable by reason of any arbitrary, unreasonable or capricious action of the Township.
2. That the ordinances were "substantially consistent" with the Master Plan and that any deviation was not substantial and did not trigger the alternate procedural requirements of the statute;
3. That the Jackson Township Council properly referred these ordinances to the Jackson Township Planning Board, which determined that the ordinances were not inconsistent with the Master Plan, and the governing body properly relied upon that determination.
4. That the ordinances in question carry a strong presumption of validity, and the Plaintiffs have not overcome that presumption.

5. Therefore, the complaint challenging the validity of the zoning ordinances in question is dismissed.

6. An order to that effect is included with this written letter opinion.

Respectfully submitted,


MARLENE LYNCH FORD, A.J.S.C.

MLF/jc