832 S.E.2d 172
Court of Appeals of North Carolina.

Gary DELLINGER, Virginia Dellinger and Timothy S. Dellinger, Petitioners,
v.
LINCOLN COUNTY, Lincoln County Board of Commissioners and Strata Solar, LLC, Respondents,
and
Mark Morgan, Bridgette Morgan, Timothy Mooney, Nadine Mooney, Andrew Schott, Wendy Schott, Robert Bonner, Michelle Bonner, Jeffrey Deluca, Lisa Deluca, Martha McLean, Charleen Montgomery, Robert Montgomery, David Ward, Intervenor Respondents.

No. COA18-1080
|
Filed: July 16, 2019

**Synopsis**

**Background:** Property owners petitioned for certiorari review of decision of county board of commissioners denying tenant's application for conditional use permit to install solar energy facility. The Superior Court, Lincoln County, reversed and remanded. On remand, the Board again denied application. Owners petitioned for review. The Superior Court, Lincoln County, Yvonne Mims Evans, J., affirmed. Petitioners appealed and the Court of Appeals reversed and remanded. The Board denied owners' application for the use permit and application to recuse a commissioner, and the Superior Court, Lincoln County, Karen Eady-Williams, J., affirmed the denial. Owners appealed.

**Holdings:** The Court of Appeals, Tyson, J., held that:

Court of Appeals had subject matter jurisdiction over owners' action seeking the conditional use permit;

member of county board of commissioners was biased, as required to be disqualified;

bias of the county board of commissioners member, and his refusal to recuse himself in determination of the conditional use permit, was harmful error; and

intervening property owners failed to produce sufficient evidence to rebut prima facie showing of entitlement to the permit.

Reversed and remanded.

Berger, J., concurred in separate opinion.

**Procedural Posture(s):** On Appeal; Review of Administrative Decision.

***175** Appeal by petitioners from order entered 21 May 2018 by Judge Karen Eady-Williams in Lincoln County Superior Court. Heard in the Court of Appeals 23 April 2019. Lincoln County, No. 17 CVS 788

**Attorneys and Law Firms**

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., Hickory, by Jason White, for petitioner-appellants.

The Deaton Law Firm, PLLC, by Wesley L. Deaton, Megan H. Gilbert and Jacob R. Glass, for respondent-appellee Lincoln County and Lincoln County Board of Commissioners.

Scarbrough & Scarbrough, PLLC, Concord, by James E. Scarbrough and Sean A. McLeod, for intervenor respondent-appellees.

**Opinion**

TYSON, Judge.

Gary Dellinger, Virginia Dellinger, and Timothy S. Dellinger ("Petitioners") appeal from an order affirming the quasi-judicial decision of the Lincoln County Board of ***176** Commissioners ("the Board") to deny the issuance of a conditional use permit. We reverse and remand.

  

## I. Background

This case returns to this Court a second time. *Dellinger v. Lincoln Cty.*, 248 N.C. App. 317, 789 S.E.2d 21, *disc. review denied*, 369 N.C. 190, 794 S.E.2d 324 (2016). A more detailed recitation of the facts of this matter can be found in this Court's opinion from the first appeal. *Id.* at 318-21, 789 S.E.2d at 24-25.

Petitioners own approximately fifty-four acres of real property located in Lincoln County, North Carolina. In 2013, Petitioners contracted with Strata Solar, LLC ("Strata") to lease a portion of the property for the installation of a solar farm. Strata applied for a conditional use permit, which the Board denied. On appeal, the superior court concluded the Board did not make sufficient findings of fact concerning the impact of the proposed solar farm on surrounding property values, and remanded the matter to the Board to make additional findings. After remand, the superior court affirmed the Board's decision, which had concluded Strata had failed to provide substantial, material, and competent evidence that the proposed solar farm would not substantially injure the value of adjoining or abutting property.

On appeal, this Court concluded Petitioner had "produced substantial, material, and competent evidence to establish its *prima facie* case of entitlement for issuance of the conditional use permit." *Id.* at 327, 789 S.E.2d at 29. This Court also concluded the Board had "incorrectly implemented a 'burden of persuasion' upon Strata Solar after ... it presented a *prima facie* case, rather than shifting the burden to the Intervenors-Respondents to produce rebuttal evidence contra to overcome Strata Solar's entitlement to the conditional use permit." *Id.* at 330, 789 S.E.2d at 30. This Court unanimously reversed the superior court's order and remanded the matter for further proceedings. *Id.* at 330-31, 789 S.E.2d at 31. The Intervenors filed a petition for discretionary review with the Supreme Court, which was denied. *Dellinger v. Lincoln Cty.*, 369 N.C. 190, 794 S.E.2d 324 (2016).

Upon remand, the Intervenors filed a motion to dismiss for lack of subject matter jurisdiction, due to Strata exiting from the solar farm project on Petitioners' land. Strata had sent notice of its intention to withdraw its application for the conditional use permit in February 2017. The superior court denied Intervenors' motion and remanded the matter to the Board, in accordance with this Court's opinion. Intervenors filed another motion to dismiss before the Board, which was also denied.

The Intervenors filed a motion to recuse Commissioner Mitchem. Petitioners filed a motion to recuse Commissioner Permenter. The Board denied both of the motions. The Board concluded Petitioners had established a *prima facie* case of entitlement to a conditional use permit, but the Intervenors had produced sufficient evidence *contra* to overcome it. By a 4-1 vote, the Board denied the application for the conditional use permit.

Petitioners appealed to the superior court. The superior court affirmed the Board's denial of Petitioners' motion to recuse Commissioner Permenter. The superior court concluded the Intervenors had presented competent, material, and substantial evidence to rebut Petitioner's *prima facie* case and the Board's decision to deny the application for the conditional use permit was not arbitrary and capricious. The superior court affirmed the Board's decision. Petitioners appeal.

## II. Jurisdiction

Intervenors argue this matter should be dismissed for lack of subject matter jurisdiction, as Strata's withdrawal of its application renders this matter moot. This issue was raised before and denied by both the superior court and the Board. Intervenors failed to appeal the Board's denial of their motion to dismiss when this matter again returned to the superior court. Intervenors filed neither a motion to dismiss, a cross-appeal, nor a petition for writ of certiorari in this Court. However, "a party may present for review the question of subject matter jurisdiction by raising the issue in his brief." ***177** *Carter v. N.C. State Bd. for Prof'l Eng'rs*, 86 N.C. App. 308, 310, 357 S.E.2d 705, 706 (1987) (citing N.C. R. App. P. 10(a)).

N.C. Gen. Stat. § 160A-388, applied to counties under § 153A-345.1(a), provides that "[e]very quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2017). This statute includes judicial review for the grant or denial of conditional use permits. *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 623, 265 S.E.2d 379, 381 (1980).

  

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Cook v. Union Cty. Zoning Bd. of Adjustment*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (citation omitted). N.C. Gen. Stat. § 160A-393 grants standing to "any person" who "[h]as an ownership interest in the property that is the subject of the decision being appealed" as well as "an applicant before the decision-making board whose decision is being appealed." N.C. Gen. Stat. § 160A-393(d)(1) (2017).

"Additionally, it is the general rule that once jurisdiction attaches, it will not be ousted by subsequent events." *Finks v. Middleton*, 251 N.C. App. 401, 408, 795 S.E.2d 789, 795 (2016) (citation and internal quotation marks omitted). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778-79 (2009) (citation omitted).

Both Strata and Petitioners had standing to appeal the quasi-judicial decision of the Board. N.C. Gen. Stat. § 160A-393(d)(1). Because Petitioners, as owners of the property, continue to seek appellate review and issuance of a conditional use permit for their property, this Court retains subject matter jurisdiction, and this matter is not moot. *See Finks*, 251 N.C. App. at 408, 795 S.E.2d at 795.

The order from the superior court is a final judgment and provides Petitioners with an appeal of right to this Court. N.C. Gen. Stat. § 7A-27(b) (2017).

## III. Issues

Petitioners argue: (1) the denial of Petitioners' motion to recuse Commissioner Permenter deprived Petitioners of their constitutional right to a quasi-judicial proceeding before a fair and impartial decision-maker; and, (2) the Intervenors failed to produce competent, material, and substantial evidence *contra* to overcome Petitioners' *prima facie* showing of an entitlement to a conditional use permit.

## IV. Standard of Review

"A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body." *Sun Suites Holdings, LLC v. Bd. of Aldermen*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000) (citation omitted). Its decisions are reviewable by the superior court sitting "as an appellate court, and not as a trier of facts." *Id.* (citations omitted).

"When a party alleges an error of law in the [Board's] decision, the reviewing court examines the record *de novo*, considering the matter anew." *Humane Soc'y of Moore Cty. v. Town of S. Pines*, 161 N.C. App. 625, 629, 589 S.E.2d 162, 165 (2003) (citations omitted). Whether competent, material, and substantial evidence was presented is a question of law, which is reviewed *de novo*. *Blair Invs., LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013). "The [county's] ultimate decision about how to weigh that evidence is subject to whole record review." *Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 641, 731 S.E.2d 698, 701 (2012).

"This Court's task on review of the superior court's order is twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 23, 539 S.E.2d 18, 20 (2000) (citations and internal quotation marks omitted).

## ***178** V. Analysis

### *A. Due Process Rights*

Petitioners assert the superior court erred by holding Petitioners' due process rights to an impartial hearing were not prejudiced by the participation, advocacy, and vote by Commissioner Permenter. We agree.

  

> A member of any board exercising quasi-judicial functions ... shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision-maker. Impermissible violations of due process include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter.

N.C. Gen. Stat. § 160A-388(e)(2) (2017).

"Governing bodies sitting in a quasi-judicial capacity are performing as judges and must be neutral, impartial, and base their decisions solely upon the evidence submitted." *PHG Asheville, LLC v. City of Asheville*, —— N.C. App. ––, ——, 822 S.E.2d 79, 85 (2018) (citation omitted). Board members acting in a quasi-judicial capacity are held to a high standard: "[n]eutrality and the appearance of neutrality are equally critical in maintaining the integrity of our judicial and quasi-judicial processes." *Handy v. PPG Indus.*, 154 N.C. App. 311, 321, 571 S.E.2d 853, 860 (2002).

A party who asserts a board member is biased against them may move for recusal. The burden is on the moving party to prove that, objectively, the grounds for disqualification exist. *See JWL Invs., Inc. v. Guilford Cty. Bd. of Adjustment*, 133 N.C. App. 426, 430, 515 S.E.2d 715, 718 (1999); *In re Ezzell*, 113 N.C. App. 388, 394, 438 S.E.2d 482, 485 (1994).

There is a "presumption of honesty and integrity in those serving as adjudicators on a quasi-judicial tribunal," but that presumption does not preclude a showing of demonstrated bias, mandating recusal. *In re N. Wilkesboro Speedway, Inc.*, 158 N.C. App. 669, 675, 582 S.E.2d 39, 43 (2003) (citations and internal quotation marks omitted).

> Bias has been defined as a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination. However, in order to prove bias, it must be shown that the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way.

*Id.* at 676, 582 S.E.2d at 43 (citing *Smith v. Richmond Cty. Bd. of Educ.*, 150 N.C. App. 291, 299, 563 S.E.2d 258, 265-66 (2002), *overruled on other grounds*, *N.C. Dept. of Env't and Nat. Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004)).

"[E]xposure to rumors is not, in and of itself, cause to believe that Board members have been biased" *Evers v. Pender Cty. Bd. of Educ.*, 104 N.C. App. 1, 16, 407 S.E.2d 879, 887 (1991). Also, "mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of Board members at a later adversary hearing." *Id.* at 18, 407 S.E.2d at 888 (citation omitted).

Richard Permenter was elected to the Board in November 2016. At the 5 June 2017 Board meeting, in response to Petitioner's challenge, he asserted, "I believe I absolutely can make a decision based on the evidence and I do not have nor do I approach this with a closed mind."

However, he also admitted that:

> During the initial application several years back and the later appeal, perhaps as recently as two years ago *I assisted in opposing the solar farm. I contributed financially. I expressed my opinion to others* and had discussions with both those in favor and those opposed to the matter. All of these

  

> actions took place while I was a private citizen. (Emphasis supplied).

Appellees argue Permenter had not demonstrated any bias *since becoming a commissioner*. However, the existence of bias alone can be disqualifying. The question ***179** is whether or not Permenter was able to set aside his previous "knowledge and preconceptions" regarding the case. *See Smith*, 150 N.C. App. at 299, 563 S.E.2d at 266.

Petitioners clearly demonstrated Permenter's bias based upon his actively opposing this specific conditional use application and appeal in the past, committing money to the cause of preventing them from obtaining the conditional use permit, and openly communicating his opposition to others. Permenter's bias is not based upon his general discussion of or attitude toward solar farms or conditional use permits, but his position, contributions, and activities involving the grant or denial of *this* conditional use permit for Petitioner's proposed solar farm. Permenter's activities and positions proved he had a "commitment" to "decide the case in a particular way" or had a "financial interest in the outcome of the matter," mandating recusal. *See id.* at 299, 563 S.E.2d at 265-66; N.C. Gen. Stat. § 160A-388(e)(2).

The Intervenors assert Permenter's bias, and his refusal to recuse in light of a filed motion, is harmless error due to the Board's vote being 4-1 to deny the Dellingers' petition. We disagree.

During the 5 June 2017 Board meeting and while sitting on the Board hearing the matter, Permenter advocated and presented ten pages worth of his "condensed evidence" in an attempt to rebut Petitioners' *prima facie* case. This submission was made after another commissioner had already made a motion to deny the conditional use permit and had read the proposed order on the record. The "condensed evidence" advocated and presented by Permenter was biased, one-sided, and incomplete. "In quasi-judicial proceedings, no board or council member should appear to be an advocate for nor adopt an adversarial position to a party, bring in extraneous or incompetent evidence, or rely upon *ex parte* communications when making their decision." *PHG Asheville,* —— N.C. App. at ——, 822 S.E.2d at 85.

As outlined below, a review of the whole record reveals insufficient evidence *contra* was presented to rebut Petitioners' *prima facie* showing. Permenter's biased recitation of his "condensed evidence" could have influenced the votes of the two other commissioners who also voted against issuing the permit after his presentation.

Permenter's bias and commitment to deny Petitioners' request for a conditional use permit is sufficient basis to reverse and remand. The error to allow his continued advocacy and involvement in sitting and ruling as a judge in the quasi-judicial process is compounded by the insufficient rebuttal evidence from Intervenors.

*B. Failure to Rebut Prima Facie Case*

The Lincoln County Unified Development Ordinance requires an applicant to meet four conditions to be issued a conditional use permit:

> (1) The use will not materially endanger the public health or safety if located where proposed and developed according to the plan;
>
> (2) The use meets all required conditions and specifications;
>
> (3) The use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity; and
>
> (4) The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will be in general conformity with the approved Land Development Plan for the area in question.

*Dellinger*, 248 N.C. App. at 319, 789 S.E.2d at 24.

As stipulated and noted in the prior opinion, Petitioner's compliance with conditions (1), (2), and (4) are not disputed. In the prior appeal, this Court also concluded Petitioners had met their *prima facie* showing on condition (3) to warrant entitlement to a conditional use permit. *Id.* at 327, 789 S.E.2d at 29. Both the Board and the superior court acknowledged Petitioners had carried their burden to warrant issuance of the permit.

  

The remaining question is whether the Intervenors produced sufficient evidence *contra* to rebut Petitioners' *prima facie* showing.

"[G]overnmental restrictions on the use of land are construed strictly in favor ***180** of the free use of real property." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

*Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

"Material evidence has been recognized by this Court to mean [e]vidence having some logical connection with the facts of consequence or issues. Substantial evidence has been defined to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *PHG Asheville*, —— N.C. App. at ——, 822 S.E.2d at 84 (quoting *Innovative 55, LLC v. Robeson Cty.*, —— N.C. App. ——, ——, 801 S.E.2d 671, 676 (2017)) (internal quotation marks omitted).

In concluding the Intervenors presented and carried their burden of sufficient evidence to rebut Petitioners' *prima facie* showing of entitlement to issuance, and that the proposed solar farm would materially and substantially injure the value of adjoining or abutting property, the Board relied upon the following evidence, which had been introduced at the previous hearing.

Geoffrey Zawtocki, a certified real estate appraiser, presented written and testimonial evidence of 42 other solar energy sites in North Carolina. He compared the average median housing values, housing density, and household income within a one-mile radius of those 42 solar farms to those values within a one-mile radius of the proposed site. Zawtocki stated the proposed project was "not typical" to the comparables because of the higher median housing values, housing density, and household income in the area surrounding the proposed site.

Zawtocki presented evidence of Tusquittee Trace, a 15-lot subdivision in Clay County, North Carolina. Sales of the lots were slow, due to the 2008 housing crash and following financial crisis, but three lots were sold between 2009 and 2010. In 2011, a solar farm was constructed and no further lots were sold. The solar farm can be seen on the road leading up to the subdivision, and is visible from some of the lots. Zawtocki testified the potential buyers wanted unimpaired views.

Zawtocki presented evidence of reduced property tax assessments in Clay County. In 2011, when residents voiced their concerns over the effect of adjoining or abutting solar farms, the Board of Equalization reduced the proposed assessments on nineteen properties by approximately 30%. Twelve of these nineteen addresses were located in Tusquittee Trace.

Zawtocki also provided evidence of a residential community located in Elgin, South Carolina, which has median home values comparable to the communities surrounding the proposed site. In 2010, Verizon built a call center facility along the road leading to the community. Using a matched pair sales analysis, of the sales that occurred prior to the call center being built, all had experienced appreciation, ranging between 9.6 to 27.5%. Of the five matched sales occurring after the call center was built, all had experienced depreciation, ranging from 10.7 to 23%. Zawtocki concluded the only change affecting the housing values, other than overall market or competitive forces, was the addition of the call center.

Martha McLean testified that she owned property on Burton Lane, which would adjoin the proposed solar farm. Prior to Petitioner's application for a conditional use permit, McLean and her husband had entered into a contract to sell the property for $200,000.00. When the purchasers were informed of the proposed solar farm, they terminated their contract to purchase the property. McLean has not had any subsequent interest in the property.

The superior court reviewed the Board's conclusion under the "whole record test." Petitioners assert the opponents

  

failed to present competent, material, and substantial ***181** evidence, which would necessitate a *de novo* review. Respondents assert N.C. Gen. Stat. § 160A-393(k)(3), applicable to counties through N.C. Gen. Stat. § 153A-349, provides that competent evidence "shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) the evidence was admitted without objection[.]" N.C. Gen. Stat. § 160A-393(k)(3) (2017). Petitioners did not object to the evidence above.

Even if the evidence presented is deemed competent, Intervenors failed to present substantial evidence *contra* to carry their burden to rebut Petitioners' *prima facie* showing of entitlement to a conditional use permit. "[T]he superior court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Little River, LLC v. Lee Cty.*, ––– N.C. App. ––––, ––––, 809 S.E.2d 42, 50 (2017) (citing *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). The Board and the superior court wholly and erroneously ignored competent, material, and substantial evidence that challenged and contradicted the Intervenors' rebuttal burden.

The written reports produced for the Intervenors negate a conclusion that they carried their burden and presented substantial and material evidence to rebut Petitioner's *prima facie* case. Concerning the solar farm in Clay County, it is undisputed that no zoning, setback, landscaping, or other restrictions existed to regulate the appearance of solar farms at the time of its construction.

Half of the interviewed real estate agents in Clay County opined that a properly buffered and concealed solar farm would not affect the property values. In their opinion, value would only be impacted by a view impaired by, and not by the mere presence of, a solar farm.

Zawtocki, in an effort to analogize the proposed solar farm to the one in Clay County, provided renderings of the proposed solar farm in which it, and the chain-link fence surrounding it, were extremely visible. These renderings wholly ignored the proposed landscaping and buffering Petitioners had included in their application. Commissioner Mitchem referred to these non-landscaped chain-link fence renderings as "misleading."

Concerning the use of Clay County property tax records to support a decline in valuation, "[o]ur Supreme Court has held that *ad valorem* tax records are not competent to establish the market value of real property." *Edwards v. Edwards*, 251 N.C. App. 549, 551, 795 S.E.2d 823, 825 (2017) (citing *Star Mfg. Co. v. Atlantic Coast Line R.R.*, 222 N.C. 330, 332-33, 23 S.E.2d 32, 36 (1942); *Bunn v. Harris*, 216 N.C. 366, 373, 5 S.E.2d 149, 153 (1939); *Hamilton v. Seaboard*, 150 N.C. 193, 194, 63 S.E. 730, 730 (1909); *Cardwell v. Mebane*, 68 N.C. 485, 487 (1873)).

The admitted opinions and reports of the expert appraisers were also misconstrued or ignored. The appraisers for Petitioners and for Intervenors all concluded in their written reports that the presence of a solar farm does not affect the value of homes valued in the range of $220,000.00 to $240,000.00. This unanimous market data refutes Ms. McLean's testimony concerning the effect of the proposed solar farm on the sale of her property, as her home is valued in or near that range. Petitioners' expert testified that single market transactions are insufficient to establish market values. Ms. McLean's testimony of a single market transaction is insufficient to rebut the otherwise unanimous market data.

Fred Beck, a certified real estate appraiser, opined the proposed solar farm would impact property values. When questioned about his and other appraisers' previous, opposing assertions, he responded:

> We can match pairs. I can prove anything. Mr. Kirkland can prove anything. Damon can prove anything that you want to.
>
> Logic would tell you that this is going to hurt these people's value.
>
> ...
>
> And my common sense tells me, after being in this business for 30 years, my ***182** heart and my common sense tells me that this is going to hurt these people, and it's going to hurt them badly.

Though Mr. Beck qualifies as an expert on real estate valuation, his "mere expression of [personal] opinion" is insufficient to impeach or rebut the quantitative analysis contained in the written reports, one of which he produced. *See Cumulus Broad., LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C. App. 424, 430, 638 S.E.2d 12, 17 (2006).

"Speculative opinions that merely assert generalized fears

  

about the effects of granting a conditional use permit for development are not considered substantial evidence to support the findings [to deny the permit]." *Humane Soc'y of Moore Cty.*, 161 N.C. App. at 631, 589 S.E.2d at 167. "Without specific, competent evidence to support [Mr. Beck's] generalized fears, this evidence does not rebut Petitioner's *prima facie* showing." *Little River, LLC*, ––– N.C. App. at ––––, 809 S.E.2d at 50.

The evidence presented by the Intervenors and relied upon by the Board in denying Petitioners' conditional use permit under condition (3), "[t]he use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity" is insufficient to rebut Petitioners' *prima facie* showing of entitlement to issuance of the permit. *Id.*

## VI. Conclusion

Petitioners clearly demonstrated Commissioner Permenter's bias to mandate recusal based upon his actively opposing the application, committing money to the cause of defeating the application for this solar farm, and openly communicating his fixed opposition on this application to others. Permenter assumed the role of an advocate at the quasi-judicial hearing by presenting ten pages worth of "condensed evidence" in an attempt to rebut Petitioners' *prima facie* case while also sitting, discussing, and voting on Petitioners' application.

The evidence presented by the Intervenors failed to rebut Petitioners' *prima facie* showing of entitlement to a conditional use permit. Because the superior court and Board concluded Petitioners have made a *prima facie* showing on all four conditions, as set forth in the ordinance, we reverse the trial court's order and remand for issuance of Petitioners' conditional use permit. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER concurs with separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority but write separately concerning Commissioner Permenter's pre-oath activity.

The majority rightly focused on the actions of Commissioner Permenter *during the hearing* that support a finding of bias in this case. However, the majority additionally concluded that Commissioner Permenter's conduct prior to joining the Board was also disqualifying.

I do not agree that the actions of a candidate or private citizen, prior to taking office, could alone establish bias and disqualify him from performing his duties as an elected official. Civic engagement has long been a hallmark of our country. Exchange of information in the marketplace of ideas is critical to fostering discussion and shaping the future. A candidate's expression of a particular viewpoint made prior to taking office should not prohibit him as an elected official from discharging his duty to thoughtfully consider matters that come before him after taking an oath of office.

An opinion voiced in an unofficial capacity, however forceful or persuasive, does not in itself hamstring one's ability to be impartial. In response to the Majority Opinion, the prudent candidate for commissioner will hide behind the phrase, "I am sorry, but I am not permitted to discuss my position on the issues or matters, which may come before me in a quasi-judicial setting." Commissioner races will become as boring as judicial races.

Every elected official was at one point a candidate, and every candidate was once a private citizen with beliefs about what is best for his community. Candidates should be encouraged ***183** to state their positions on issues of public importance, and this Court should not preclude candidates from sharing their ideas in the public square.

> [T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. Debate on the qualifications of candidates is at the core of our

  

> electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.

*Republican Party of Minn. v. White*, 536 U.S. 765, 781-82, 122 S.Ct. 2528, 153 L.Ed.2d 694, (2002) (citations and quotation marks omitted).

Citizens should be knowledgeable about issues that have or will affect their community, and they should be encouraged to share that knowledge. Labeling an elected official as biased based upon communications made before taking office curtails public involvement and threatens free speech.

**All Citations**

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