



Agenda Date: 6/18/12
Agenda Item: 8A

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF PABLO AND DARCI BIANCHI's)
REQUEST FOR EXEMPTION FROM SMART)
GROWTH GUIDELINES GOVERNING FINANCIAL)
INCENTIVES ELIGIBILITY UNDER THE NEW JERSEY)
CLEAN ENERGY PROGRAM)

ORDER

DOCKET NO. EW11100649V

Parties of Record:

Pablo and Darci Bianchi, Petitioners

BY THE BOARD:

This matter concerns a petition by Pablo and Darci Bianchi ("Petitioners") seeking a waiver of eligibility requirements for receiving a monetary incentive through the New Jersey Clean Energy Program's ("NJCEP's") Residential New Homes Program, also known as the Energy Star Homes Program ("Program"). Petitioners constructed a home in an area not designated for growth in the State's Development and Redevelopment Plan ("Smart Growth Plan"). New construction must be located in an area designated for growth in order to receive financial incentives under the Program. Petitioners argue their home qualifies for a waiver of this requirement because it would otherwise qualify for incentives from the Program.

BACKGROUND

On February 9, 1999, the New Jersey Electric Discount and Energy Competition Act ("EDECA"), N.J.S.A. 48:3-49 et seq., was enacted. L. 1999, c. 23, § 66. EDECA established requirements to advance renewable energy and energy efficiency goals in New Jersey, funded by ratepayers through its Societal Benefits Charge ("SBC") at N.J.S.A. 48:3-60(a)(3). N.J.S.A. 48:3-60(a)(3), required that the Board of Public Utilities ("Board") undertake a "comprehensive resource analysis" ("CRA") of existing energy efficiency policies and programs. The CRA was to include, but not be limited to, "an assessment of existing market barriers to the implementation of energy efficiency and renewable technologies that are not or cannot be delivered to customers through a competitive marketplace." N.J.S.A. 48:3-51.

This directive led to the creation, consideration, and assessment of a myriad of programs and technologies, including the Program. The Program was designed to maximize participation as well as increase the energy efficiency and environmental performance of residential new

construction in New Jersey. The Program includes a tiered incentive structure, offering higher incentives for higher levels of energy efficiency.

By Order dated March 4, 2003, the Board adopted a variety of program guidelines, consistent with the State's policy initiative to support development and redevelopment in "smart growth" areas. I/M/O the New Jersey Clean Energy Program, Dkt. No. EO02120955, (March 4, 2003) ("March 4 Order"). The March 4 Order limited rebate incentives for new construction, including those offered under the Program to buildings constructed in a state-designated smart growth area, defined as Planning Areas I and II and the Designated Centers using the "Policy Map of the New Jersey State Development and Redevelopment Plan."¹ Under this policy, new construction in an area not designated for smart growth was not eligible for the Program's financial incentives. However, the Program still provided design support, pre-drywall inspection, final inspection and certification services to Program-registered homes/buildings located anywhere in the State.

By Order dated December 27, 2007, the Board modified the March 4 Order so that applicants constructing new buildings in areas not designated for growth could be eligible for financial incentives if they demonstrated that they meet the criteria set forth in N.J.A.C. 14:3-8.8(h) for projects that result in a "significant public good" or the criteria set forth in N.J.A.C. 14:3-8.8(i) for projects that result in an "extraordinary hardship" exemption. I/M/O Comprehensive Energy Efficiency and Renewable Energy Resource Analysis for 2005-2008: 2007 Programs and Budgets: Compliance Filings, Dkt. No. EX04040276, (December 27, 2007) ("December 27 Order").

Petitioners purchased their property in Mullica Hill, Washington Township, Gloucester County on April 28, 2007. In 2010, they commenced construction of a detached single-family home and applied to the Program. On or about March 12, 2010, the Program Administrator, McGrann Associates, sent Petitioners an "Upgrade Package," which included, among other things, a "Builder Acknowledgement" form. The Upgrade Package Letter stated "rebate incentives are subject to change and are currently available for projects in Smart Growth areas only Please consult with your Account Manager for applicable incentive levels and eligibility." Similarly, the Builder Acknowledgement form stated that to be eligible for financial incentives, "the project must be located in a State designated 'Smart Growth' area." The Builder Acknowledgement form also indicated at the top of the page, in bold typeface, that Petitioners' property was not in a smart growth area. On September 7, 2010, the Director of the Office of Clean Energy ("OCE") sent Petitioners a letter stating that the Program included exemptions to the prohibition on incentives in areas not designated for growth and, if Petitioners felt that they met the criteria, they had the option of filing a petition for an exemption with the Board.

On December 16, 2010, after Petitioners completed construction of their home, they received an Energy Star Home verification stating that the home meets or exceeds the Environmental Protection Agency's ("EPA's") requirements for an ENERGY STAR (Tier 2) Home.

On October 18, 2011, Petitioners formally petitioned the Board for an exemption on the ground that the home constituted a significant public good by reason of its highly energy-efficient

¹ The State Development and Redevelopment Plan is currently under review, but any modifications made as a result of this process will not be relevant, since decisions pertaining to this matter were based upon Board policies relating to the Plan as it existed at that time of Petitioners' application.

nature.² The petition listed the specific energy efficiency measures incorporated in the Petitioners' home and stated that the home would substantially reduce Petitioners' carbon footprint. Petitioners attached their Energy Star Home Verification Summary ("Verification") documenting the energy efficiency of Petitioners' home. Based on these facts, Petitioners argue that their home "provide[s] significant good to the public by reducing the utilization of fossil fuels and lessens the energy strain on the utility system." Petitioners further note that their home is .2 miles from an area designated for growth.

Pursuant to the criteria of N.J.A.C. 14:3-8.8(h)(2), Staff consulted with the Office for Planning Advocacy, the successor agency to the Office of Smart Growth ("OSG"). On April 25, 2012, Karl Hartkopf, Director of Planning for the Office for Planning Advocacy, advised that Petitioners' residence is calculated to be 0.33 miles away from the nearest smart growth planning area, rather than .2 miles, as stated by Petitioner. Further, Hartkopf advised if the boundaries were to be revised, the smart growth area boundary line would be moved to the closest "sewer service area," which would increase the distance to 2,900 feet or approximately .54 miles away. Moreover, Hartkopf noted that, based on the reasonable accuracy of the business map aerial placement provided by Petitioners, their property is located at the far end of a group of large houses on large lots, furthest from the smart growth area boundary.

DISCUSSION AND FINDINGS

The Board has previously recognized that there may be instances where new development, as opposed to the expansion of existing development, in an "area not designated for growth," as defined in N.J.A.C. 14:3-8.2, could be consistent with the Program's goals to increase the energy efficiency and environmental performance of residential new construction in New Jersey. See December 27 Order. In this matter, review of the application shows Petitioners' home is outside of an area designated for growth. However, Petitioners have requested waiver of this requirement based on the "significant public good" exemption provided by the December 27 Order.

To qualify for a significant public good exemption, an applicant must demonstrate to the Board that the following criteria are met:

1. The project or activity would provide a significant benefit to the public or to the environment;
2. That the project described above is consistent with smart growth, or that the benefit of the project outweighs the benefits of smart growth. In making this determination, the Board will consult with the Office of Smart Growth and other State Agencies; and
3. There is no practicable alternative means of providing the benefit while still complying with this subchapter. This shall include a showing of why it is not possible or practicable to build the project in an area designated for growth.

² Previously, in a letter dated October 24, 2010, Petitioners informally requested a significant public good exemption on significantly similar grounds through a letter directed to the "[OCE Director] and Board of Public Utilities." However, no formal action was taken by the Board at that time. See generally N.J.A.C. 14:1-5.13(i) (requiring parties seeking a decision or order from the Board to comply with the Board's Rules of Practice).

Petitioners argue that their home qualifies for an exemption as a significant public good because it "meets and exceeds the smart growth rules," and will substantially reduce their carbon footprint. Petitioners also argue that these features of their home will help the public "by reducing utilization of fossil fuels and lessen[ing] the energy strain on the utility system."

In considering Petitioners' claim for NJCEP financial incentives, the Board looks for guidance in its prior decisions analyzing analogous claims for exemption from its main extension rules. In 2009, Andrew and Lauren Kaiser sought an exemption for a single-family residence on a parcel of land in an Environmentally Sensitive Planning Area adjacent to a private school owned by them. The Kaisers argued that the proposed location of the residence qualified for a significant public good exemption under N.J.A.C. 14:3-8.8(b)(1)³ because: (1) the residence would provide a significant public benefit because it would allow them to oversee the premises of the school; (2) the residence was consistent with smart growth because the residence would have a minimal impact upon the habitat and they had placed a conservation easement across a portion of the property to ensure protection of the area; and (3) that there was no practicable means of providing the benefit because the location immediately adjacent to the school would allow the owners to oversee the premises. The OSG disagreed and stated that the benefits of the residence did not outweigh the benefits of smart growth.

After reviewing the record and considering the statement of the OSG, the Board denied the Kaisers' petition for exemption. Specifically, the Board determined that the residence would not constitute a significant benefit to the public or environment, because the numerous benefits provided to the public by the school were distinct and separate from the any perceived benefit of the residence. Also, the Board found the residence inconsistent with smart growth, since the residence was placed in an environmentally sensitive area, and that the benefits of the project did not outweigh the benefits of smart growth, because the conservation easement placed on the property by the Kaisers did not overcome the potential environmental disturbance of building the residential home and the benefit of the project accrued mainly to the owners, not to the public.⁴ Further, the Board found there were other practicable alternatives because the municipality contained large areas designated for growth. I/M/O Andrew and Lauren Kaiser – Petition for an Exemption from Main Extension Rules at N.J.A.C. 14:3-8.8(h)(1), Dkt. No. AO08030152, (August 9, 2009). See also I/M/O Somerset Hills Learning Institute – Exemption from Smart Growth Regulations at N.J.A.C. 14:3-8.8(a)(6), Non-Docketed Matter (August 27, 2007) (finding non-profit school for autistic children that built a new facility in an area not designated for growth did not provide a significant public good outweighing the benefits of smart growth despite claim that the school would save taxpayers millions of dollars in training special education teachers and that no practicable alternative existed because the site had been donated).⁵

By contrast, the Board has found the requirements for a significant public good exemption to be met in petitions involving existing buildings or direct benefits to the public. For example, the

³ N.J.A.C. 14:3-8.8(b)(1) permits an exemption from cost of extension requirements in an area not designated for growth under the Main Extension Rules based on the project providing a significant public good. N.J.A.C. 14:3-8.8(h) describes the criteria that a petition for exemption must demonstrate.

⁴ The Board found no evidence that a residence immediately adjacent to the school was necessary, as attendees did not board there and the Kaisers had operated the school for sixty years without an adjacent residence.

⁵ On May 19, 2008, the significant public good exemption, under N.J.A.C. 14:3-8.8(a)(6), was recodified as N.J.A.C. 14:3-8.8(b)(1) without change. 40 N.J.R. 2524(a) (May 19, 2008).

Board approved a petition for exemption from a non-profit organization that constructed a recreation building on the grounds of an existing year-round camp so that those using the camp would have a place for activities during rainy or inclement weather. See I/M/O Happiness is Camping, Inc. Petition for an Exemption from Main Extension Rules at N.J.A.C. 14:3-8.8(b)(1), Dkt. No. EO09030215, (July 31, 2009). The Board found that the building would be consistent with smart growth by preserving and enhancing open space and recreational value and that no alternative location designated for growth was within a reasonable distance of the site. Ibid. See also I/M/O Oxford Township Petition for an Exemption from Main Extension Rules at N.J.A.C. 14:3-8.8(b)(1), Dkt. No. WO08110962 (July 1, 2009) (finding a significant public good when the extension of a water line to existing homes would replace private wells severely contaminated with arsenic.)

In this case, Petitioners argue that their residence provides a significant public good based upon their claim that their home is highly energy efficient. This claim is supported by the Verification which states that "[t]his home meets or exceeds the EPA's requirements for an Energy Star Home." Petitioners also assert that their home is "consistent with smart growth and more than surpasses the requirements of [a] Energy Star Tier Two [home]. . . ." However, in the light of the previous Board Orders reviewing petitions for exemptions to the smart growth rules, the high energy efficiency of the residence, by itself, does not satisfy the criteria for a significant public good exemption.

Rather, Petitioners' request for exemption has not met any of the three criteria for a significant public good. While the Board is cognizant of the benefits of energy-efficient construction, the indirect and de minimus benefits afforded to the public by a single-family residence — no matter how energy efficient — are not analogous to the types of significant public benefit previously recognized by the Board, for example, the construction of a recreation building for public use in an area already dedicated to recreational use or the provision of potable water to existing homes.⁶ The Board also notes that, as stated in Andrew and Lauren Kaiser – Petition for an Exemption, supra, the benefit of a single-family residence accrues largely to homeowners. It follows, therefore, that the benefits of Petitioners' energy efficient residence do not outweigh the benefits of smart growth. Last, Petitioners have not shown that practicable alternatives to the construction of their home in an area not designated for growth did not exist. Instead, Petitioners reference the fact that an area designated for growth is less than one mile away. Further, the record also shows Petitioners were aware that their single-family residence was not in a smart growth area before construction began and still chose to build at that location as well as seek financial incentives through the Program.

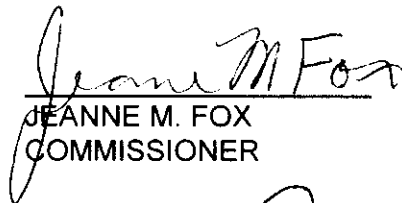
⁶ In Oxford Township, supra, the Board explicitly declined to extend the exemption to two lots on the same street which did not have existing homes. Id. at 4.


The Board **FINDS** that Petitioners have not met the criteria for a significant public good exemption. Specifically, the Board **FINDS** that Petitioners' residence does not constitute a significant public good. The Board **FINDS** that the energy efficient characteristics of Petitioners' detached single-family home do not outweigh the benefits smart growth. The Board **FINDS** that Petitioners fail to demonstrate that they were without practicable alternatives to construction in an area not designated for growth. The Board further **FINDS** that Petitioners were properly deemed ineligible for an incentive under the Residential New Homes program. The Board **HEREBY DENIES** the petition.

DATED: 6/18/12

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

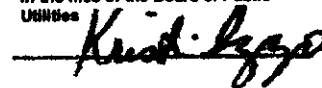

NICHOLAS ASSELTA
COMMISSIONER


MARY-ANNA HOLDEN
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
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Utilities



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FROM SMART GROWTH GUIDELINES GOVERNING FINANCIAL INCENTIVES ELIGIBILITY
UNDER THE NEW JERSEY CLEAN ENERGY PROGRAM

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SERVICE LIST

Pablo and Darci Bianchi
400 Bishop Road
Mullica Hill, NJ 08062

Joe Genello
Honeywell, Inc.
145 Route 46 West
Wayne, NJ 07470

David Wand, DAG
Division of Law
Dept. of Law & Public Safety
124 Halsey Street
P.O. Box 45029
Newark, NJ 07102

Rachel Boylan
Counsel's Office
Board of Public Utilities
P.O. Box 350
Trenton, NJ 08625-0350

Kristi Izzo, Secretary
Board of Public Utilities
44 South Clinton Avenue
P.O. Box 350
Trenton, NJ 08625-0350

Michael Winka
Office of Clean Energy
Board of Public Utilities
P.O. Box 350
Trenton, NJ 08625-0350

Mona Mosser
Office of Clean Energy
Board of Public Utilities
P.O. Box 350
Trenton, NJ 08625-0350

Allison E. Mitchell
Office of Clean Energy
Board of Public Utilities
P.O. Box 350
Trenton, NJ 08625-0350