

NOTICE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 10-3408-C

JOHN CARROLL & others¹

vs.

MASSACHUSETTS BOARD OF STATE EXAMINERS OF ELECTRICIANS²

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

Notice sent

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INTRODUCTION

This case arises out of the assertion of authority over certain aspects of the renewable energy business by the Massachusetts State Board of Examiners of Electricians (BSEE, or Board). Plaintiffs are general contractors in the business of providing for the installation of rooftop Solar Photovoltaic Systems (PV Systems). The Board is the governmental agency with jurisdiction to license the performance of electrical work and to seek enforcement against unlicensed persons performing electrical work. Plaintiffs contend that the Board's sanctions against general contractors who advertise and contract for the installation of PV Systems is in excess of its statutory authority (Count I). Plaintiffs also allege that the Board failed to follow proper rule-making procedures (Count II). The case is before the court on Plaintiffs' motion for summary judgment seeking declaratory relief. Defendants oppose Plaintiffs' motion and ask the court to grant summary judgment in their favor. For the reasons stated below, Plaintiffs' motion is **ALLOWED** in part, and **DENIED** in part, and Defendants' motion is **DENIED**.

¹ Conrad Geyser (of Cotuit Solar, LLC), Christopher Kilfoyle (of Berkshire Photovoltaic Services), Lawrence Jamie Leef (of S&H Construction, Inc.), Steven Strong (of Solar Design Associates, LLC), and Thomas Wright (of Bask Power, LLC). Plaintiff John Carroll is the owner and operator of Moss Hollow Solar, LLC.

² The National Electrical Contractors Association of Greater Boston (NECA), Massachusetts Electrical Contractors Association (MECA), and International Brotherhood of Electrical Workers, Local 103 (IBEW Local 103) were permitted to intervene as defendants.

BACKGROUND

The following facts are taken from the Complaint and the parties' Rule 9A(b)(5) Joint Statement of Undisputed Facts.

Plaintiffs are six individuals who are in the business of installing rooftop PV Systems. A PV System refers to "the total components and sub-systems that, in combination, convert solar energy into electric energy suitable for connection to a utilization load." National Electrical Code Art. 690.2 (NEC) (Ex. 50)³. PV Systems come in a variety of forms and can be installed in a variety of places. See BSEE May 1, 2009, Memorandum to Wire Inspectors (Ex. 1). In general, a PV System consists of panels comprised of numerous modules that are each comprised of multiple solar cells. NEC Art. 690.1, Figure 690.1(A) (Ex. 50). The panels are linked together to form arrays that operate to absorb solar energy. *Id.* The panels are then connected, via fuses, to the source circuits and transform solar energy into electrical energy. *Id.*

Plaintiffs have, collectively, performed hundreds of PV System installations within the Commonwealth over the last twenty-seven years. All but one⁴ of Plaintiffs hold Construction Supervisor Licenses (CSLs) issued by the Board of Building Regulations and Standards (BBRS). A Construction Supervisor is a person who is deemed qualified by the BBRS to "directly supervise persons engaged" in the construction, reconstruction, alteration, repair, removal, or demolition of a variety of types of construction projects. See 780 Code Mass. Regs. § 110.R5 (2010) (Ex. 56). Construction Supervisors take responsibility for coordinating all aspects of the job, including subcontracting out particular aspects of the job to the specialized trade persons to which they pertain. In the context of rooftop PV System installations, a Construction Supervisor may evaluate Building Code-related matters pertaining to the structural integrity of the roof and

³ "Ex. _" refers to the Exhibits submitted by the parties in conjunction with the Summary Judgment motions.

⁴ Plaintiff Conrad Geysor, although not personally licensed as a Construction Supervisor, is a principal of a company with employees who do hold CSLs.

the building. See DPS/BBRS Staff Interpretation Relating to the Installation of Solar Collectors, Including Solar Thermal Collectors and Photovoltaic Panels (BBRS Staff Interpretation) (Ex. 31). In 2009, the BBRS issued a Staff Interpretation stating that “a Construction Supervisor License is required to install photovoltaic panels on buildings” because “the bulk of roof equipment considerations can be tied to Building Code-regulated matters.” *Id.* (Emphasis removed).

Here, Plaintiffs’ businesses consist of providing “turnkey” services for the installation of rooftop PV Systems. The provision of “turnkey” services includes advertising and contracting for PV System installations, arranging for and overseeing PV System installations, and consulting with customers regarding renewable energy options. Plaintiffs do not dispute that a licensed electrician is required to perform the “wiring” involved in PV System installations and maintain that their customary practice is to subcontract with licensed electricians to perform the wiring.

On November 24, 2008, the Board voted to adopt the position that a licensed journeyman electrician (or a properly supervised apprentice) is the only person qualified to install, repair, or maintain PV panels and their associated hardware and appliances. BSEE Meeting Minutes, Nov. 24, 2008 (Ex. 17). On January 30, 2009, the Board, via its then-Executive Director Richard Fredette, reiterated its position that an electrician’s license is required to install PV Systems in a letter to IBEW Local 103 Business Manager Michael Monahan (the “Monahan Letter”) (Ex. 20). Thereafter, the Board formed a subcommittee to discuss the licensure requirements regarding PV System installations and eventually affirmed the position taken in the Monahan Letter as its official position. BSEE Meeting Minutes, April 27, 2009 (Ex. 23). The Board then issued a memorandum to local wire inspectors that informed them of the Board’s official position that

only a licensed electrician can install PV Systems (the "May 1 Memorandum").⁵ BSEE May 1, 2009, Memorandum to Local Wire Inspectors (Ex. 1).

Between 1980 and 2009, local wire inspectors issued electrical permits for PV System installations arranged by licensed Construction Supervisors and certified that the work had been done properly. Prior to 2009, the Board had not charged a non-electrician with unlicensed practice on the ground that he advertised or contracted to oversee or perform PV System installations. Since the May 1 Memorandum, the Board has investigated at least thirteen claims of unlicensed practice relating to PV System installations. See Letter from Kirk Hanson to Shaun Goho, February 22, 2012 (Ex. 4). Specifically, the Board initiated proceedings against Plaintiff Wright in 2009 for unlicensed practice of electrical work. See Order to Show Cause, *In the Matter of Thomas Wright* (Ex. 24). On May 22, 2012, the Board granted Summary Decision against Plaintiff Wright on the basis that giving a cost estimate for a PV System constituted unlicensed practice. See BSEE Ruling on Respondent's Motion for Summary Decision and Motion to Dismiss, *In the Matter of Thomas Wright* (Suppl. Ex. 1). The Board also charged Plaintiff Leef, in 2010, with unlicensed practice for advertising and contracting to perform PV System installations. See First Amended Order to Show Cause, *In the Matter of Jamie Leef* (Ex. 25). On May 22, 2010, the Board issued a Summary Decision against Plaintiff Leef. See BSEE Ruling on Summary Decision Motions, *In the Matter of Jamie Leef* (Suppl. Ex. 2).

The Board's position regarding the extent to which a PV System installation must be performed by a licensed electrician has significantly evolved over the course of the present litigation. Plaintiffs commenced this action in August, 2010, and filed a motion for summary

⁵ The Memorandum incorporates the Monahan Letter, which states, in pertinent part, that "the physical installation of...photovoltaic modules or the linking of the individual modules together to form photovoltaic arrays, including its hardware, mounting brackets [*sic*] was reasonably understood as engaging in the occupation of installing apparatus, devices, fixtures, or other appliances which requires licensure."

judgment on November 8, 2011. During oral argument, the Board was unable to identify what specific tasks involved in a PV System installation it claimed must be performed by an electrician and which may be performed by a non-electrician. Similarly, the Board's counsel stated that the Board had not yet taken a final position as to whether or not a non-electrician can advertise for PV System installations. In response, the court (Kaplan, J.) ordered the Board to produce a Rule 30(b)(6) deponent to clarify its position.

The Board's final position is that, because a PV System constitutes an electrical system, the "installation and interconnection of all PV System components, along with the grounding and bonding of all normally non-current carrying metal parts, constitutes electrical work" and thus requires licensure. See BSEE's Written Responses to Deposition Questions at 4 (Ex. 5). The Board recognized, however, that the installation of a PV System requires both electrical and non-electrical work. The Board concedes that the following tasks associated with PV System installations do not require an electrician's license: conducting energy audits, applying for tax credits, consulting with customers about renewable energy options, analysis of roof condition, analysis of roof strength, analysis of wind effect and weight load, physical piercing and waterproofing of the roof, reinforcement of the roof, installation of the "footers" for a PV System, purchase of PV panels, and the transport of PV panels from the warehouse up to the roof. See Joint Statement of Undisputed Facts, par. 5. The Board's position is that a non-electrician, such as a general contractor, can advertise and contract for the installation of a PV System only if "the overall project is not electrical in nature." See Errata Sheet to Palmieri Deposition at 1-2 (Ex. 8). The Board has not defined or deliberated on a general rule to determine whether an overall project is or is not electrical in nature, see *id.*, but has stated broadly that a person, firm, or corporation engages in electrical work "if [they] hold themselves

out to the general public...as specifically being in the business of installing PV Systems.” See BSEE’s Written Responses to Deposition Questions at 5 (Ex. 5).

Plaintiffs allege that the position taken by the Board has compelled them to refrain from taking on PV projects out of fear of prosecution. Plaintiffs claim that the Board’s failure to identify its position with specificity, combined with the slow pace of the administrative proceedings against Plaintiffs Leef and Wright⁶, warrants declaratory relief. Specifically, Plaintiffs seek a declaratory judgment that they, as Construction Supervisors, are beyond the jurisdiction of the Board, at least with respect to their ability to advertise for, contract with, and perform the non-electrical work associated with PV System installations, so long as the electrical work is subcontracted to licensed electricians.

On April 4, 2012, the court granted motions to intervene as defendants by the National Electrical Contractors Association of Greater Boston (NECA), the Massachusetts Electrical Contractors Association (MECA), and the International Brotherhood of Electrical Workers, Local 103 (IBEW Local 103). Defendant-intervenors represent electricians and electrical contractors who have a direct stake in the outcome of the litigation. Because Defendant-intervenors raise a question of law in common with the underlying action, they were permitted to intervene.

⁶ The administrative proceedings against Plaintiffs Leef and Wright are still pending. At the earlier Motion for Summary Judgment Hearing, the court (Kaplan, J.) noted that the administrative proceedings against Leef and Wright “have not moved with sufficient alacrity.” See Tr. of Summary Judgment Hearing, Nov. 19, 2011 at I-3 (Ex. 3). Although the Board recently issued Summary Decisions against both plaintiffs, the decision is not final and the plaintiffs have not yet exhausted their administrative remedies. See BSEE Ruling on Respondent’s Motion for Summary Decision and Motion to Dismiss, *In the Matter of Thomas Wright* (Suppl. Ex. 1); BSEE Ruling on Respondent’s Motion for Summary Decision and Motion to Dismiss, *In the Matter of Jamie Leef* (Suppl. Ex. 2).

DISCUSSION

I. Jurisdiction

In order for a court to provide declaratory relief an actual controversy must exist. See *Town of Hingham v. Dep't of Hous. & Cmty. Dev.*, 451 Mass. 501, 505 (2008) (requiring a “controversy appropriate for judicial resolution” in order to provide declaratory relief). The “purpose of declaratory judgment is to afford relief from uncertainty and insecurity with respect to rights, duties, status and other legal relations.” *Id.* (citing *Mass. Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Comm'r of Ins.*, 373 Mass. 290, 291 (1977)); see also G.L. c. 231A, § 9 (2008 ed.). Accordingly, the Massachusetts declaratory judgment statute is to be construed and applied liberally to afford relief from uncertainty with respect to rights in issue. *Raytheon Co. v. Continental Cas. Co.*, 123 F. Supp. 2d 22, 30 (D. Mass. 2000).

As a general rule, “there is no actual controversy between a party and an administrative agency until the agency issues a final decision.” *Town of Hingham*, 451 Mass. at 506. When an administrative remedy is inadequate, however, the courts have fashioned various exceptions to the general exhaustion requirement. *Id.* at 509 (exhaustion of administrative remedies is not required “when important novel, or recurrent issues are at stake, when the decision has public significance, or when the case reduces to a question of law”) (quoting *Luchini v. Comm'r of Revenue*, 436 Mass. 403, 405 (2002)); *Norfolk Elec., Inc. v. Fall River Hous. Auth.*, 417 Mass. 207, 210 (court may exercise jurisdiction despite plaintiff’s failure to exhaust administrative remedies “[i]n cases where resort to an administrative agency obviously would be futile”).

The controversy in this case falls comfortably within the exceptions to the general exhaustion requirement. First, the underlying issue is a question of law – whether the Board has the statutory authority to sanction general contractors when they advertise and contract for a PV

System installation and subcontract for the electrical work. See *Kelleher v. Personnel Adm'r of the Dep't of Personnel Admin.*, 421 Mass. 382, 385 (1995) (court may “excuse the failure to exhaust administrative remedies if the case presents a purely legal question of wide public significance”). Secondly, the level of deference accorded to an administrative agency is reduced where the “case does not involve a contemporaneous and consistent administrative interpretation of the statute.” *Simon v. State Exam'rs of Electricians*, 395 Mass. 238, 245 (1985). As mentioned *supra*, prior to 2009, the Board had not charged a non-electrician with unlicensed practice on the basis that he advertised or contracted for the installation of a PV System even though PV Systems have been around since then 1980s. See *Simon*, 395 Mass. at 245-246 (noting that “the examiners never attempted to regulate alarm systems installers until 1969, when they were becoming less, not more, dangerous” in support of the court’s decision to rule against the Board). As late as November, 2011, the Board had not decided whether advertising for PV System installations, by itself, constituted unlicensed practice. See *Simon*, 395 Mass. at 245 (explaining that “the examiners themselves were unsure of the extent of their mandate” in finding against them). Finally, the issue here is one of public significance because it affects the ability of all general contractors, such as Plaintiffs, to earn a livelihood with respect to performing PV System installations. See *Norfolk Elec.*, 436 Mass. at 211 (finding the question of whether competitive bidding laws apply to public construction projects funded by the federal government a matter of public interest because it “affects the rights of subcontractors beyond those involved in the present controversy”). Accordingly, the court’s exercise of jurisdiction is appropriate.

II. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56(c); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). The moving party bears the burden of affirmatively showing that there is no triable issue of fact. See *Kourouvacilis*, 410 Mass. at 738. The burden on a moving party who does not have the burden of proof at trial may be discharged by showing that there is an absence of evidence to support the non-moving party's case. *Id.* at 711. The moving party can meet its burden by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of its claim. *Id.* at 715-716.

In this case, there is no genuine dispute of material fact. The ultimate issue is whether the Board exceeded its statutory authority when it concluded that only a licensed electrician can advertise or contract for rooftop PV System installations. Plaintiffs and the Board agree that summary judgment is appropriate.⁷

III. Analysis

A. The Statute

General Laws c. 141, §1A (2008 ed.) (the statute) governs the licensure of electricians.⁸ That section has two paragraphs. The first paragraph of the statute provides, in pertinent part, that "[n]o person, firm, or corporation shall enter into, engage in, or work at the business or occupation of installing wires, conduits, apparatus, devices, fixtures, or other appliances for

⁷ Defendant-intervenors MECA and NECA argue that there are material facts still in dispute, but all of their proposed disputed facts are actually questions of law. See MECA/NECA Opp. Memo at 6-7 (claiming that, e.g., whether "the installation of solar photovoltaic systems require[s] an electrician's license" is a disputed issue of fact).

⁸ The Board has the power to enforce the provisions of the statute. See G.L. c. 141, § 5 (2008 ed.).

carrying or using electricity for light, heat, power, fire warning, or security system purposes, unless such person, firm, or corporation shall be licensed by the state examiners of electricians in accordance with this chapter.” *Id.* The second paragraph of § 1A states, however, that “[t]his chapter shall not apply to: a person not engaged in the business described in this section who employs or contracts for the services of a person, firm, or corporation engaged in such business.” *Id.*

1. Licensure Requirement

The Board argues, based upon the first paragraph, that the statute grants it authority over the installation of PV Systems because PV Systems are “wires, conduits, apparatus, devices, fixtures, or other appliances for carrying or using electricity for light, heat, [or] power...purposes” within the meaning of the statute.⁹ The Board further argues that the phrase “enter into, engage in, or work at” means more than simply doing the physical electrical work, if the words are to be given independent meaning. Accordingly, the Board reads this language broadly as authorizing it to prohibit advertising and contracting relating to PV System installations by non-licensed persons. In short, the Board contends that because the installation of PV Systems is fundamentally electrical in nature, no unlicensed person may engage in the business of PV System installations.

The first issue this court must determine is whether some or all of PV System installation constitutes the type of work that requires licensure under the first paragraph of § 1A. The Supreme Judicial Court’s analysis in *Simon v. State Exam’rs of Electricians*, 395 Mass. 238 (1985) is helpful here. In *Simon*, the court held that burglar and fire alarm systems, which were

⁹ The regulations define electrical work similarly to the statute. See 237 Code Mass. Regs. § 12.01 (2012) (defining “electrical work” as “the installation, testing, repair, or maintenance of conductors, cables, raceways, apparatus, devices, fixtures, or other appliances used for heat, light, or power functions, or for fire warning, security, or signaling, or comparable power limited functions where such wiring is permanently connected to a source of electricity or that is permanently controlled through the use of electrical signals, including optical fiber cables”).

connected to a power supply mostly by means of a plug-in transformer, did not carry or use electricity for light, heat, or power purposes within the meaning of G.L. c. 141, § 1A. 395 Mass. at 248-249. In so deciding, the court distinguished between products which carry and use electricity as a source and those which carry and use electricity as a product. *Id.* at 243. The court examined the legislative history of the statute and concluded that “the Legislature intended to grant power to the examiners only over companies in the business of installing wires which carry or use electricity *as a product*, for light, heat, or power purposes, but not over the infinitely broader spectrum of companies in the business of supplying other products that merely use electricity *as a source*, for light, heat, or power.” *Id.* at 243 (Emphasis in original).

In this case, unlike in *Simon*, a PV System is not merely a device that uses or carries electricity from a source. See *Simon*, 395 Mass. at 243 (the statute is meant to apply to products “supplying electricity which is consumed by other products on the premises of the end user”). Typically, the purpose of installing a PV System is to provide the customer with a renewable energy source that converts solar energy into electrical energy, with the goal that such a device provide electricity at a cheaper price to the customer and to the environment. See *id.* (concluding that “the Legislature intended that the *purposes* for which wires carrying electricity are used must be considered before it can be determined whether the examiners have the authority to regulate that use”) (emphasis in original). A PV System is generally installed to provide electricity and is, thus, more “electrical” in nature than the burglar and fire alarms at issue in *Simon*. Compare *Simon*, 395 Mass. at 243 (“[a]larm system installers do not install wires to carry electricity; they install wires to provide alarm systems”) with NEC Art. 690.2 (Ex. 50) (defining a PV System as a system that “convert[s] solar energy into electrical energy suitable for connection to a utilization load”). Consequently, the delivery by a PV System of electricity,

and the installation appurtenant to that delivery, falls within the business that must be licensed pursuant to the first paragraph of the statute.

2. Exception to Licensure Requirement

The fact that a PV System is a device for delivering electricity within the meaning of the first paragraph of G.L. c. 141, § 1A does not end the analysis, however, because the second paragraph contains an important exception. If a person is not “engaged in the business” of the electrical work described in the first paragraph of § 1A, the licensure requirement does not apply so long as the person employs or contracts for the electrical work described in the first paragraph. Here, the parties stipulate that licensed electricians must perform all of the “hard-wiring” – essentially, connecting the live wires that function to convert solar energy into electrical energy and ensuring the system’s safety – involved in PV System installations. Similarly, it is not disputed that the Board has the authority to regulate such “hard-wiring.” See *Simon*, 395 Mass. at 248 (“[s]ince ‘hard-wiring’ involves installing wires that carry and supply electricity as an end product, it is well within the examiners’ power to regulate”). As a result, Plaintiffs argue that, as Construction Supervisors responsible for overseeing and coordinating the multi-task project of installing PV Systems, they are not “engaged in the business” of being licensed electricians and therefore qualify for the exception in the second paragraph of the statute. The Board, on the other hand, contends that a person is “engaged in the business” of being an electrician, within the meaning of the second paragraph, if he advertises or contracts for a PV System installation because the system is fundamentally electrical.

The analysis begins with the language of the statute. See *Simon*, 395 Mass. at 242 (quoting *Commonwealth v. Lightfoot*, 391 Mass. 718, 720 (1984)). In interpreting a statute, every word is to be given independent meaning, and none rendered superfluous, “so that the

enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature.” *Flemings v. Contributory Ret. Appeal Bd.*, 431 Mass. 374, 375 (2000) (quoting *Commonwealth v. Woods Hole, Martha’s Vineyard & Nantucket S.S. Auth.*, 352 Mass. 617, 618 (1967)). “If a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results.” *Id.* at 375-376 (citing *Manning v. Boston Redevelopment Auth.*, 400 Mass. 444, 453 (1987)). Administrative interpretations of a statute are entitled to a certain degree of weight, but they are not conclusive. See *Simon*, 395 Mass. at 247 (quoting *Russo v. Director of the Div. of Employment Sec.*, 377 Mass. 645, 649 (1979)).

In interpreting a similar plumbing licensure statute¹⁰, the Supreme Judicial Court held that “one becomes *engaged in the business* of a master plumber only when he ‘performs plumbing work’ either with his own hands or by the hands of journeymen who are under his control.” *Attorney General v. Union Plumbing Co.*, 301 Mass. 86, 89 (1938) (emphasis added).¹¹ This interpretation suggests that the electrician licensing statute is to be construed, logically, to require licensure of electrical work performed by a licensee “with his own hands” and not, more broadly, to all of the related, non-electrical tasks involved in the project. The existence of the second paragraph demonstrates that the Legislature recognized that there are building projects that include many more tasks than installing electrical wires. For example, a home builder constructs the entire house but contracts with a licensed electrician to install the

¹⁰ The statute, G.L. c. 142, § 3, as written at the time of the case, stated, in pertinent part: “No person shall engage in the business of a master plumber or work as a journeyman unless he is lawfully registered, or has been licensed by the examiners as provided in this chapter.”

¹¹ Although the Board claims that the plumbing statute is inapposite because it did not contain what it contends is broader language in the electrician statute - - “enter into, engage in, or work at” - - the purpose of the two statutes is the same.

wiring. The second paragraph of § 1A provides an exception from the licensure requirement to the home builder.¹²

Although a PV System is a device that delivers electricity for light, heat, or power purposes under the first paragraph of the statute, the installation of a PV System involves much more. Within the context of rooftop PV System installations, the Board concedes that non-electricians such as Plaintiffs may, and do, perform a significant amount of tasks associated with the installation, including the following: conducting energy audits; applying for tax credits; consulting with customers about renewable energy options; analysis of roof conditions; analysis of roof strength; analysis of wind effect and weight load; physical piercing and waterproofing of the roof; reinforcement of the roof; installation of footers; purchase of PV panels; and transport of PV panels from the warehouse to the roof. See Joint Statement of Undisputed Facts, par. 5. The Massachusetts Building Code requires, according to a staff interpretation, licensed Construction Supervisors, like Plaintiffs, to install PV panels on buildings. See BBRs Staff Interpretation (Ex. 31). The performance of this plenary set of tasks for rooftop PV System installations means that Plaintiff are not “in the business” of delivering electricity but, instead, are providing comprehensive energy conservation and building expertise. The second paragraph of the statute, if it is to be given any meaning, must apply to persons engaged in comprehensive projects, where some of the work is “electrical” and some of it is not. See *Flemings*, 374 Mass. at 375-376 (courts will not construe a statute to make a nullity of pertinent provisions). Accordingly, Plaintiffs qualify for the exception in the second paragraph of the statute.

When Plaintiffs advertise or contract for a PV System installation, they are engaged in the business of being a general contractor (or a Construction Supervisor), and not in the business

¹² The Board concedes that unlicensed persons may advertise and contract to perform PV System installations when the installation is “but one part” of a larger overall project, such as building construction. See BSEE Opp. at 7.

of being an electrician. This position is supported by the fact that Plaintiffs perform numerous tasks associated with PV System installations that the Board concedes do not require an electrician's license. The Board's jurisdiction does not depend on whether the "overall project" is "electrical in nature." BSEE Opp. at 6-7. The statute does not provide for the application of any quantitative measure and provides no basis for distinguishing between projects that are overall electrical in nature and projects in which electrical work is but one part. See G.L.c. 141, § 1A. Accordingly, the Board's interpretation must be rejected because it "is not supported by the language of the statute, the context from which it arose, any consistent administrative interpretation, or the legislative policy on which the statute was based." *Simon*, 395 Mass. at 249 ("[t]here is nothing to suggest that the Legislature intended to grant electricians such a legal monopoly").

By this decision the court is not attempting to define what specific tasks involved in PV System installations must be performed by a licensed electrician. Rather, "[t]he duty of this court is to interpret the statute according to the intent of the Legislature and common sense." *Id.* The exact point at which general contractors must subcontract with a licensed electrician should be decided on a case-by-case basis and may be enforced through individual proceedings. This court holds only that the Board, in sanctioning general contractors who advertise and contract for PV System installations, when the Board concedes that there are numerous non-electrical tasks involved in such installations, and where a licensed electrician is hired to perform the electrical work, exceeds its statutory authority under G.L.c. 141, § 1A.

B. The May 1 Memorandum and the Board's Advisory Letters

Plaintiffs also allege that the May 1 Memorandum constituted a de facto regulation, as opposed to an advisory opinion, because the letter stated rules of general application and future

effect that constituted a material change in policy. See *Massachusetts General Hosp. v. Rate Setting Comm'n*, 371 Mass. 705, 707 (1977). Because the Board did not follow the notice and comment rule-making procedures before it sent the May 1 Memorandum, Plaintiffs ask the court to declare the letters null and void.¹³ The May 1 Memorandum itself, however, is unremarkable. It simply states, by incorporating the Monahan Letter, the Board's position that "the physical installation of...photovoltaic modules or the linking of the individual modules together to form photovoltaic arrays, including its hardware, mounting brackets [sic] was reasonably understood as engaging in the occupation of installing apparatus, devices, fixtures, or other appliances which requires licensure." Plaintiffs acknowledge that only a licensed electrician can perform the "hard-wiring" involved in PV System installations, and the May 1 Memorandum does nothing more than reiterate this position. The letter does not discuss, for example, whether general contractors may advertise or contract for PV System installations.¹⁴ Therefore, the court declines to declare the May 1 Memorandum null or void.

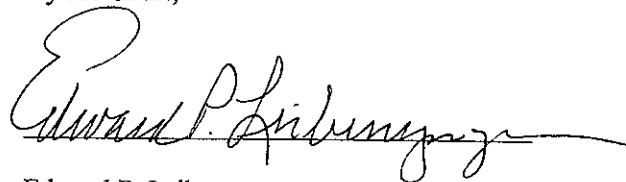
¹³ See G.L. c. 30A, § 2 (discussing notice and comment rule-making procedure).

¹⁴ In fact, the Monahan Letter implicitly acknowledges that there may be role for Construction Supervisors in PV System installations. See Monahan Letter at 2 (Ex. 20) ("[a]fter discussing this issue with regulatory agencies some aspects of solar panel installations may require the involvement of building officials as far as the structural integrity of the building or structure").

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment regarding Count I is **ALLOWED**, and it is **ORDERED** that a declaration enter, declaring that Plaintiffs may advertise and contract for PV System installations and subcontract with licensed electricians under G.L. c. 141, § 1A. Plaintiffs' motion for summary judgment regarding Count II is **DENIED**, and Defendants' motion for summary judgment is **DENIED**.

By the Court, -



Edward P. Leibensperger
Justice of the Superior Court

Date: July 18, 2012

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