**COMMONWEALTH OF MASSACHUSETTS**

**SUPREME JUDICIAL COURT**

Suffolk County, ss.

---

PLH LLC, Appellant

V.

TOWN OF WARE, Appellee

Appeals Court No. 2022-P-0347

---

On Appeal From the Land Court

Case No. 18 MISC 000648

---

APPLICATION FOR DIRECT APPELLATE REVIEW PURSUANT TO MASSACHUSETTS RULE OF APPELLATE PROCEDURE 11

---

Date: April 15, 2022

Thomas Melone
BBO No. 569232
Allco Renewable Energy Limited
157 Church St., 19th floor
New Haven, CT 06510
Thomas.Melone@AllcoUS.com
212-681-1120

## REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. App. P. 11, PLH LLC ("PLH") respectfully requests the Supreme Judicial Court grant direct review of a final judgment of the Land Court (Piper, C.J.) entered in PLH LLC v. Town of Ware, 18 MISC 000648 (January 21, 2022).

This case involves the authority of municipalities to regulate solar energy systems under G. L. c. 40A, § 3, ninth par. ("Section 3"). This Court is currently considering the extent of municipal powers to regulate solar energy systems in Tracer Lane II Realty, LLC, v. City of Waltham, SJC-13195. This case raises an important and related issue to those in Tracer Lane as the Commonwealth seeks to transition away from fossil fuel generation. The issue presented here has resulted in a split in the Land Court.

Section 3 precludes zoning ordinances or by-laws that "prohibit or unreasonably regulate the installation of solar energy systems" (except to protect public health, safety or welfare). The Town of Ware ("Ware" or the "Town") has a detailed regulation of solar uses under the non-discretionary site plan process in its bylaws that applies to PLH's proposed solar projects. The bylaws also require a special permit but that special

permit is unnecessary because every legitimate concern is already covered in the Town's comprehensive site plan review process. The additional requirement of a special permit does not advance any legitimate municipal concern and only exists to allow the Town the ability to decide on whether to permit the use itself (i.e., prohibit it), which is incompatible with the Section 3 protection of solar uses. The Land Court (Piper, C.J.) upheld the Ware special permit requirement, although the court (like the Town) was unable to articulate one item of municipal concern that is not already addressed by the comprehensive site plan bylaw. There is a split in the Land Court. In ASD Three Rivers MA Solar, LLC v. Planning Bd. of the Town of Wilbraham, 29 LCR 124, 141-142 (Land Ct. 2021) (Rubin, J.), the court found the opposite from what the Land Court held here, i.e., such a special permit requirement violated Section 3.

## STATEMENT OF PRIOR PROCEEDINGS

On December 5, 2018, PLH filed a complaint against the Town of Ware under M.G.L. ch. 240, sec. 14A, seeking to have the Town's requirement for a special permit for PLH's solar use declared invalid. On October 31, 2019, PLH filed a motion for summary judgment with respect to Count I of the complaint (which was the only count

remaining). On December 12, 2019, the Court held a hearing on plaintiff's motion for summary judgment as to Count I of the complaint, and denied plaintiff's motion and granted summary judgment to the Town. On May 19, 2020, PLH filed a motion for reconsideration. On June 12, 2020, the Town filed its opposition. On January 21, 2022, the Land Court (Piper, C.J.) denied PLH's motion for reconsideration and entered final judgment. On January 24, 2022, PLH filed a notice of appeal. On March 25, 2022, the Land Court sent the Notice of Assembly of Record on Appeal to all counsel of record, which was received by PLH's counsel on March 30, 2022. On April 13, 2022, the appeal was docketed with the Appeals Court as case 2022-P-0347.

## SHORT STATEMENT OF FACTS

PLH has proposed two four-megawatt ("MW") ground-mounted solar energy systems—a Section 3 protected use—on a 57-acre portion of a 140-acre parcel that it owns in the Rural Residential ("RR") zone in the Town of Ware. For any ground-mounted solar energy system larger than 100 kilowatts ("kWs") located in RR zone, the Town's bylaws require both a comprehensive site plan review *and* a special permit from the Ware Planning Board. Comprehensive site plan review is the only requirement

for such a solar use in the Town's Highway Commercial (HC), Commercial Industrial (CI), and Industrial (I) districts, which are the only zones in which the Ware bylaw permits such a solar use "by-right".

Non-discretionary site plan review is governed by Ware bylaw sections 4.8.3 and 7.4. A project needs to satisfy each element the conditions in section 4.8.3 and the second layer of conditions in 7.4. Sections 4.8.3 and 7.4 comprehensively address all legitimate municipal concerns with a ground-mounted solar energy use, including those that relate to health, safety and welfare.

The first time the plaintiff applied for site plan approval and a special permit for its two projects, the planning board approved the site plan but denied the special permit, because the vote was 3 in favor and 1 against, which failed the super-majority requirement for a discretionary special permit.

Even though three members voted in favor of the proposal, the planning board, using its discretionary power under the special permit section of the bylaw (section 7.2.5), treated PLH's proposal as a bill going through Congress—a Christmas tree to which members could attach their pet conditions like ornaments. Thus, the

special permit the board voted on required the taking of 20% of PLH's Property (by requiring a conservation dedication wholly unrelated to the proposed use of the land) and the revocation of a subdivision that the Town previously approved for parcels that would have no solar sited on them. PLH appealed the denial of the special permit and the case was remanded to the planning board by the Land Court. On remand, under the watchful eye of the Land Court, the Town approved the special permit (and withdrew is conditions related to the conservation dedication and the subdivision), but the damage was already done. The Department of Energy Resources rejected the applications for contracts under its SMART solar program due to the lack of a special permit. Although PLH re-applied to the SMART program, the contracts it received were at a lower rate than they otherwise would have been.

## ISSUE PRESENTED

The question presented is the following:

> *Is a special permit requirement for a section 3 solar use valid when the special permit requirement adds no material gain for legitimate municipal concerns over and above what is already addressed in the bylaws' comprehensive site plan review regulation*?

PLH respectfully argues that the answer is no. This

issue was raised and preserved before the Land Court.

## BRIEF ARGUMENT

### I. A special permit requirement for a Section 3 solar use is invalid when the special permit requirement adds no material gain for legitimate municipal concerns over and above what is already addressed in the bylaws' comprehensive site plan review regulation.

G. L. c. 40A, § 3, ninth par., imposes two constraints on municipal land use regulation:

1. A municipality may not prohibit the installation of solar energy systems (except to protect public health, safety or welfare), and

2. A municipality may not unreasonably regulate the installation of solar energy systems (except to protect public health, safety or welfare).

Section 3 generally known as the "Dover Amendment is intended to encourage 'a degree of accommodation between the protected use … and matters of *critical municipal concern*.'" Trustees of Tufts College v. Medford, 415 Mass. 753, 760 (1993) ("Tufts") (internal citations omitted) (emphasis added).

The common theme in the Tufts and Rogers v. Town of Norfolk, 432 Mass. 374, 380 (2000) ("Rogers") is that each specific aspect of a town's regulation of a Section 3 use must be related to a legitimate municipal concern

(other than allowing the use itself), its application must bear a rational relationship to the perceived concern, and it must appreciably advance that legitimate concern without imposing excessive cost sufficient to justify it. The Town of Ware's requirement for a special permit in some zones but not others adds no gain in terms of legitimate municipal concern on the current factual record because everything that is of legitimate municipal concern is already covered in the bylaws' comprehensive site plan regulation.

The factual record established that the Town has a detailed and comprehensive set of rules and regulations for ground-mounted solar uses in the site plan review section of its bylaws. Through the uncontroverted testimony offered PLH, PLH established that:

- the Town's special permit requirement does not result in any material gain in terms of legitimate municipal concerns,
- Ware's special permit requirement adds unnecessary and unjustified additional cost and delay, which harms the public health, safety and welfare by increasing the cost of the solar use, and
- All valid municipal concerns with PLH's

proposed projects (including their operation and construction) are addressed in the Town's comprehensive site plan review under bylaws sections 4.8.3 and 7.4.

Tellingly, the Town did not offer any evidence showing any legitimate and permissible municipal concern that necessitates a discretionary special permit requirement for a Section 3 solar use on top of the Town's already comprehensive non-discretionary site plan regulation. The Land Court could not identify any either.

*a.* Tufts.

In Tufts, this Court invalidated a special permit requirement not only for the specific project in the case but all unspecified projects on the Tufts campus. Tufts at 765. In Tufts this Court stated that a "local zoning law that improperly restricts an educational use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances." Id. at 765. That is what the Ware bylaw does. The Tufts court also focused on the specific facts and noted that "[t]he central question is whether application of the requirements to a specific project in a particular setting furthers legitimate municipal concerns to a

sufficient extent" to justify it. Id. at 764. That is a standard that is failed by the Ware special permit requirement.

The undisputed facts showed that the requirement of a special permit adds nothing in terms of gain for the Town other than the discretion to deny the use itself, which the Town did the first time around, costing plaintiff hundreds of thousands of dollars at a minimum. The uncontroverted facts established that Ware bylaw sections 4.8.3 (dealing specifically with solar facilities) and 7.4 (dealing with site plan review) comprehensively address (in the non-discretionary site plan review context) any and all legitimate municipal concerns with the solar energy systems proposed by plaintiff. The addition of a special permit requirement for plaintiff's solar use adds nothing in terms of addressing legitimate municipal concerns. The special permit adds only an excessive additional cost, unnecessary delay and the *discretionary power to deny the use*, as the Town did on the first go-around for plaintiff's projects, thanks to the supermajority requirement of a special permit.

b. Rogers.

Rogers discussed two tests that the Ware bylaw

fails. *First*, this Court stated that a provision regulating a Section 3 use must be "shown to be related to a legitimate municipal concern, and [that] its application bears a rational relationship to the perceived concern." Rogers at 378. Here, all the legitimate municipal concerns are addressed in Ware's comprehensive non-discretionary site plan review. Here, Ware did not, and could not, identify a single specific legitimate concern that was not addressed in the comprehensive solar specific bylaw provisions. Neither could the Land Court. Requiring a special permit on top of site plan review is not related to a legitimate municipal concern because the record evidence establishes that all legitimate concerns with larger solar energy systems are comprehensively addressed in site plan regulation.

*Second*, the Town's requirement of a special permit on top of site plan review violates the second Rogers rule that a requirement is invalid if it imposes an "[e]xcessive cost of compliance . . . without significant gain in terms of municipal concerns," Rogers at 383-384 (emphasis added). Here, all the legitimate municipal concerns are addressed in Ware's comprehensive site plan review. Requiring a special permit on top of

site plan review increases the cost of compliance significantly and imposes the costs of delaying the projects, as it did here, all without *any* gain in terms of legitimate municipal concerns.

Tellingly, the Town did not offer any evidence to show any specific legitimate and permissible municipal concern (much less one that is *significantly* advanced) that necessitates a discretionary special permit requirement for a Section 3 solar use on top of the Town's already comprehensive non-discretionary site plan regulation.

Given the Town's detailed regulation of solar uses under the non-discretionary site plan regulation of bylaws sections 4.8.3 and 7.4, the special permit is unnecessary, does not appreciably advance a legitimate municipal concern sufficient to justify it and only exists to allow the Town the ability to decide on whether *to permit the use itself* (*i.e., prohibit it*), which is incompatible with the Section 3 protection of the solar use. Its sole "gain" is to provide the discretion to deny the use, which is a result forbidden by Section 3, which makes it a *per se* unreasonable regulation of the use itself.

The Land Court is split as to whether a municipality can layer a special permit on top of comprehensive site plan review criteria for solar facilities. In such a case, the special permit requirement only functions as a means to deny the use, which a municipality cannot do under Section 3. In ASD Three Rivers MA Solar, LLC v. Planning Bd. of the Town of Wilbraham, 29 LCR 124, 141-142 (Land Ct. 2021) (Rubin, J.), the court found (among a number of other defects) that a town bylaw which required a solar energy facility to satisfy the bylaw's generalized special permit standard violated Section 3 where it already subjected such facilities to numerous solar-specific design standards and requirements. The court concluded that "the Solar Bylaw was intended to be a comprehensive provision governing all aspects of ground mounted solar energy systems," and that "[c]onsideration of the special permit criteria after concluding the requirements of the Solar Bylaw were satisfied was particularly problematic because the special permit criteria overlap with the standards in the Solar Bylaw to considerable degree (for instance, as to dimensional requirements and screening)."

In this case, however, the Land Court (Piper, C.J.) reached the opposite conclusion.

**REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE**

The most recent warnings from the United Nations Intergovernmental Panel on Climate Change have underscored the dire situation we collectively face.[1] The State of Massachusetts has made it a priority to switch to clean energy generation as quickly as possible. The deployment of solar energy in Massachusetts benefits the health of Massachusetts' residents—cleaner air, less asthma, less toxic pollutants that rain down on Massachusetts residents from fossil fuel generation.

This Court is currently considering the reach of Section 3 in Tracer Lane. It would serve judicial efficiency for this Court to consider this case now, rather than after an Appeals Court decision that would find its way to this Court. A decision from this Court is necessary in order to provide the clarity needed for the timely development of solar energy that is a top priority for the Commonwealth. Whether Section 3 permits municipalities to obstruct the development of solar energy systems through a special permit

[1] The full report is available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf (last visited February 3, 2022).

requirement is a question that this Court must ultimately answer.

## CONCLUSION

For the reasons stated above, direct appellate review should be granted.

Respectfully submitted,

*/s/Thomas Melone*
Thomas Melone, BBO No. 569232
Allco Renewable Energy Limited
157 Church St., 19th floor
New Haven, CT 06510
Thomas.Melone@AllcoUS.com
212-681-1120
Attorney for PLH LLC

Date: April 15, 2022

**CERTIFICATE OF COMPLIANCE**

**Pursuant to Rule 11(b) of the Massachusetts Rules of Appellate Procedure**

I, Thomas Melone, hereby certify that the foregoing application complies with the requirements of Mass. R. A. P. 20(a).

I further certify that the foregoing application complies with the applicable length limitation in Mass. R. A. P. 11(b)(5) because it is produced in the monospaced font Courier New at size 12, and there are no more than 10, total non-excluded pages of argument.

*/s/Thomas Melone*
Thomas Melone
BBO No. 569232
Allco Renewable Energy Limited
157 Church St., 19th floor
New Haven, CT 06510
Thomas.Melone@AllcoUS.com
212-681-1120

**CERTIFICATE OF SERVICE**

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on April 15, 2022, I have made service of this application upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by email and by the Electronic Filing System on:

John Davis
Pierce Davis & Perritano LLP
10 Post Office Square, Suite 1100N
Boston, MA 02109
617-350-0950
jdavis@piercedavis.com

*/s/Thomas Melone*
Thomas Melone
BBO No. 569232
Allco Renewable Energy Limited
157 Church St., 19th floor
New Haven, CT 06510
Thomas.Melone@AllcoUS.com
212-681-1120

# 18 MISC 000648 PLH LLC v. Town of Ware PIPER

- Case Type:
- Miscellaneous
- Case Status:
- Closed
- File Date
- 12/05/2018
- DCM Track:
-
- Initiating Action:
- ZJA - Validity of Zoning, G. L. Chapter 240, Sec. 14A and Chapter 185, § 1(j 1/2)
- Status Date:
- 04/17/2019
- Case Judge:
- Piper, Hon. Gordon H.
- Next Event:
-

**Property Information**

Ware

All Information | Party | Event | Docket | Financial | Receipt | Disposition

## Docket Information

| Docket Date | *Docket Text* | Amount Owed | *Image Avail.* |
|---|---|---|---|
| 12/05/2018 | Complaint filed. | | Image |
| 12/05/2018 | Case assigned to the Average Track per Land Court Standing Order 1:04. | | |
| 12/05/2018 | Land Court miscellaneous filing fee Receipt: 396527 Date: 12/05/2018 | $240.00 | |
| 12/05/2018 | Land Court surcharge Receipt: 396527 Date: 12/05/2018 | $15.00 | |
| 12/05/2018 | Land Court summons Receipt: 396527 Date: 12/05/2018 | $5.00 | |
| 12/05/2018 | Uniform Counsel Certificate for Civil Cases filed by Plaintiff. | | |
| 12/05/2018 | Appearance of Thomas Michael Melone, Esq. for PLH LLC, filed | | |
| 12/12/2018 | The case has been assigned to the A Track. Notice sent. | | |
| 12/12/2018 | Event Scheduled<br>Judge: Piper, Hon. Gordon H.<br>Event: Case Management Conference<br>Date: 01/17/2019 Time: 10:05 AM<br>Notice to: Attorney Thomas Melone | | |
| 12/24/2018 | Summons returned to Court with service on Town of Ware filed.<br>Served on December 12, 2018 by certified mail to the Town Manager, Stuart Beckley, Town Hall, Suite J, 126 Main Street, Ware, MA 01082. | | |
| 01/04/2019 | Notice of Filing Notice of Removal, filed. | | |
| 01/04/2019 | Event Resulted: Case Management Conference scheduled on:<br>01/17/2019 10:05 AM has been resulted:<br>Canceled - Case Removed to Federal Court.<br>Hon. Gordon H. Piper, Presiding | | |
| 01/04/2019 | Case Disposed by Removal to the U.S. District Court for the District of Massachusetts. | | |
| 04/16/2019 | Notice of Removal to the United States District Court 28 U.S.C. § 1441(a), filed. | | |
| 04/16/2019 | Appearance of John J Davis, Esq. for Town of Ware, filed | | |
| 04/16/2019 | Certification Pursuant to Local Rule 83.5.3(f), filed. | | |
| 04/16/2019 | Appearance of Thomas Michael Melone, Esq. for PLH LLC, filed | | |
| 04/16/2019 | Fed. R. Civ. P. 7.1 Disclosure Statement, filed. | | |
| 04/16/2019 | Motion of Defendant, Town of Ware, to Extend Time to Respond to Plaintiff's Verified Complaint- Assented-to, filed. | | |
| 04/16/2019 | Land Court Record, filed. | | |
| 04/16/2019 | Answer and Jury Demand, filed. | | |
| 04/16/2019 | Notice of Scheduling Conference, filed. | | |

| Docket Date | Docket Text | Amount Owed | Image Avail. |
|---|---|---|---|
| 04/16/2019 | Motion of Defendant, Town of Ware, to Continue Initial Scheduling Conference- Assented to, filed. | | |
| 04/16/2019 | Joint Motion to Remand Action, filed. | | |
| 04/16/2019 | Order of Remand, filed. Mastroianni, D.J.<br><br>Pursuant to the court's electronic order dated April 8, 2019 ordering that this case be remanded to the Land Court Department of the Commonwealth of Massachusetts, it is hereby ordered that this case be closed. It is so ordered. | | |
| 04/16/2019 | United States District Court for the District of Massachusetts (Springfield) Civil Docket for Case #: 3:19-cv-30001-MGM, filed. | | |
| 04/17/2019 | Judgment entered. | | |
| 09/05/2019 | September 5, 2019. Status Conference held. Attorneys Thomas Melone and John Davis appeared by telephone. Parties reported that, following the court's May 9, 2019 Remand Order, the board issued a decision granting the plaintiff's requested special permit, and that the appeal period has now lapsed with no appeal having been filed with the town clerk. Plaintiff has not filed any motion (as required by remand order) to challenge the board's decision on remand. As plaintiff now has received the relief sought in its appeal pursuant to G. L. c. 40A, § 17, parties agreed with the court's determination that Case No. 18 MISC 000670 properly should be dismissed as moot. Parties promptly to file stipulation of dismissal in that case. Plaintiff also indicated that, though it has filed an action in the Superior Court concerning the availability to plaintiff of funds under the Commonwealth's SMART program, plaintiff nonetheless intends to continue pursuing its action for declaratory judgment pursuant to G. L. c. 240, § 14A in Land Court Case No. 18 MISC 000648. The requested judgment would be limited to the issue of whether the zoning bylaw's apparent requirement to obtain a special permit for plaintiff's proposed solar facility is or is not valid under the penultimate paragraph of G. L. c 40A, § 3. All other issues, including concerning the timing an availability to plaintiff of SMART program funds, will be addressed not in the Land Court, but in the Superior Court. Plaintiff to file motion for summary judgment in Case No. 18 MISC 000648 on or before October 31, 2019. Land Court Rule 4 to govern the content of that filing and the timing and content of subsequent filings. (Piper, C.J.)<br><br>(Notice of Docket Entry sent to Attorneys Thomas Melone and John Davis)<br><br>Judge: Piper, Hon. Gordon H. | | |
| 10/31/2019 | Plaintiff's Motion for Summary Judgment as to Count I of the Complaint, filed. | | Image |
| 10/31/2019 | Brief in Support of Plaintiff's Motion for Summary Judgment as to Count I of the Complaint, filed. | | Image |
| 10/31/2019 | Plaintiff's Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment as to Count I of the Complaint, filed. | | Image |
| 10/31/2019 | Declaration of Steve Broyer in Support of Plaintiff's Motion for Summary Judgment, filed. | | Image |
| 10/31/2019 | Declaration of Christopher Little in Support of Plaintiff's Motion for Summary Judgment, filed. | | Image |
| 10/31/2019 | Declaration of Thomas Melone and Request for Judicial Notice in Support of Plaintiff's Motion for Summary Judgment, filed. | | Image |
| 11/12/2019 | Scheduled<br>Judge: Piper, Hon. Gordon H.<br>Event: Summary Judgment Hearing<br>Date: 12/12/2019 Time: 09:45 AM<br>Notice to: Attorneys Thomas Melone and John Davis | | |
| 11/14/2019 | Defendant's Motion to Extend Time to File Opposition to Plaintiff's Motion for Summary Judgment (Assented-to), filed (by email; original received on November 15, 2019) and ALLOWED. Defendant to file an opposition to plaintiff's motion for summary judgment on or before December 2, 2019. (Piper, C.J.)<br><br>Judge: Piper, Hon. Gordon H. | | Image |
| 12/03/2019 | Memorandum of Defendant, Town of Ware, in Opposition to Plaintiff's Motion for Summary Judgment as to Count 1 of Complaint, filed. | | Image |
| 12/03/2019 | Defendant, Town of Ware's, Response to Plaintiff's Statement of Material Facts and Statement of Additional Material Facts, filed. | | Image |
| 12/03/2019 | Affidavit of Rebekah L. DeCourcey, filed. | | Image |
| 12/09/2019 | Reply Brief in Support of Plaintiff's Motion for Summary Judgment as to Count I of the Complaint, filed. | | Image |
| 12/12/2019 | Event Resulted: Summary Judgment Hearing scheduled on:<br>12/12/2019 09:45 AM<br>December 12, 2019. Hearing held on plaintiff's motion for summary judgment. Attorneys Melone and Davis appeared and argued. Following argument, pursuant to Mass. R. Civ. P. 56, giving every reasonable inference to the party opposing summary judgment, based on the summary judgment record, there being no material facts in dispute, the court DENIED plaintiff's motion for summary judgment and GRANTED summary judgment in favor of defendant, for the reasons laid upon the record from the bench following argument, which are to be summarized in a written order. Order to issue. (Piper, C.J.)<br><br>(Notice of Docket Entry sent to Attorneys Thomas Melone and John Davis) | | |
| 12/24/2019 | Order Denying Plaintiff's Motion for Summary Judgment and Granting Summary Judgment in Favor of Defendant, issued.<br><br>(Copies sent to Attorneys John Davis and Thomas Melone) | | Image |

| Docket Date | Docket Text | Amount Owed | Image Avail. |
|---|---|---|---|
| 12/30/2019 | Plaintiff's Proposed Final Judgment, filed. | | Image |
| 01/21/2020 | Memorandum in Support of Defendant's Proposed Final Judgment, filed. | | Image |
| 01/21/2020 | Defendant's Proposed Final Judgment, filed. | | Image |
| 05/19/2020 | Plaintiff's Motion for Reconsideration, filed. | | Image |
| 06/02/2020 | Defendant's assented-to request for an extension of time to file an opposition to plaintiff's motion for reconsideration, received by email and ALLOWED. Defendant to file an opposition by June 12, 2020. (Piper, C.J.)<br><br>Judge: Piper, Hon. Gordon H. | | |
| 06/12/2020 | Memorandum of Defendant, Town of Ware, in Opposition to Plaintiff's Motion for Reconsideration, filed (by email). | | Image |
| 06/16/2020 | Plaintiff's Reply to the Defendant's Opposition to Plaintiff's Motion for Reconsideration, filed (by email). | | Image |
| 01/21/2022 | January 21, 2022. Plaintiff's Motion for Reconsideration, which requests that the court revisit its December 24, 2019 order on plaintiff's motion summary judgment, is DENIED. Plaintiff contends that applying the zoning bylaw's general special permit standard to a solar energy facility use is per se an unreasonable regulation that violates the protections of G. L. c. 40A, § 3, ninth par. The essence of plaintiff's argument as renewed in its motion is that any implementation of that generalized special permit standard becomes unreasonable where the project already is required to progress through the site plan review process, which contains a separate set of criteria the Planning Board must consider before issuing a site plan approval. Plaintiff's motion urges the court to look to the holdings of Trustees of Tufts Coll. v. Medford, 415 Mass. 753 (1993), Trustees of Boston College v. Board of Aldermen of Newton, 58 Mass. App. Ct. 794 (2003), and Rogers v. Norfolk, 432 Mass. 374 (2000) as supplying a bar for reasonableness that the special permit requirement here cannot meet. The court does not agree, however, that the principles underpinning those cases dictate any fundamental unreasonableness in the application of a bylaw's general special permit requirement to a solar energy use. Before turning to plaintiffs' arguments, it is necessary first to acknowledge the defendant and Board's contentions that site plan approval is not, in fact, required by the Bylaw for a solar use and that this indeed was the reason no further site plan review process took place in conjunction with the Board's renewed consideration of the special permit request. The provisions of the Bylaw do appear somewhat contradictory on this point: Section 7.4.2 of the Bylaw appears to expressly exempt solar uses from site plan review, while § 4.8.3.C states that solar uses do require site plan approval. For the purposes of the motion, the court assumes arguendo that plaintiff is correct in its assertion that both a special permit and site plan approval here would be mandatory.<br><br>The first case to which plaintiff points is Trustees of Tufts College v. Medford, 415 Mass. 753, 758 (1993) (which it incorrectly describes as following after Prime v. Zoning Bd. of Appeals of Norwell, 42 Mass. App. Ct. 796, 802-803 (1997), the case cited principally in this court's summary judgment order), where the Supreme Judicial Court noted that a provision may validly regulate an educational use protected under § 3 when "it is shown to be related to a legitimate municipal concern, and its application bears a rational relationship to the perceived concern." The legitimate purposes which such a bylaw may seek to promote include those "promoting public health or safety, preserving the character of an adjacent neighborhood, or one of the other purposes sought to be achieved by local zoning as enunciated in St.1975, c. 808, § 2A." Id. The court further emphasized the as-applied nature of the challenge before it: the applicant bore the burden of showing that "the local requirements are unreasonable as applied to its proposed project," and in the same vein, the court "reject[ed] the suggestion that only local zoning requirements drafted specifically for application to educational uses are reasonable within the scope of the Dover Amendment. Nothing in that statute mandates the adoption of local zoning laws which are tailored specifically to educational uses." Id. at 759. Rogers largely stands for the same principle: that a regulation of an educational use protected under § 3 must advance a "legitimate municipal interest." Rogers v. Norfolk, 432 Mass. 374, 379 (2000).<br><br>In Boston College, the Appeals Court rejected the proposition that application of the town's G. L. c. 40A, § 6 special permit procedure to the protected educational use was a per se violation of the protections afforded by G. L. c. 40A, § 3. While the plaintiff there had argued that the level of discretion and standard of review granted to the board by the § 6 special permit requirement ran afoul of the protections of § 3, and contended that the statute would "prevent the board from exercising the sort of latitude it otherwise would have under § 6 to deny a special permit," the Appeals Court did not agree. It noted that "the special permit procedure, in itself, cannot be declared invalid in all circumstances involving educational institutions," and likewise emphasized once more that the reasonableness of a local requirement depends on its application in the context of the particular facts of a given project. In that case, the trial court had found that imposing the floor area ratio (FAR) requirement would not, in that particular circumstance, result in advancement of legitimate zoning concerns, as the property both could accommodate additional development and had a pressing need to replace outdated facilities; in affirming the trial court's decision, the Appeals Court went on to conclude that, because "the FAR regulation prohibits any development on the Middle Campus without a special permit upon a § 6 finding, the judge properly concluded that the regulation, as applied to the Middle Campus generally, is invalid under the Dover Amendment." Boston College, 58 Mass. App. Ct. at 802.<br><br>The court first observes that the framework of analysis in these cases-looking to whether a particular requirement is both related to legitimate municipal or zoning concerns, and is rationally applied to address them-does not map so cleanly onto an argument like that presented here involving neither a discrete requirement like FAR, nor a challenge to the manner in which it actually was applied to a particular project. Even so, the court remains confident that plaintiff here has not shown the utilization of a general special permit requirement for solar energy uses in certain zones is unrelated to legitimate municipal concerns simply because a project will also be subject to site plan review. Plaintiff's reasoning is that the general special permit procedure is simply "unnecessary" in light of the non-discretionary site plan approval procedure undertaken by the Planning Board, and that any special permit requirement implemented alongside site plan review must be particularized to solar uses. The court does not agree. The factors to be considered under the site plan review process provided in Section 7.4.7 of the bylaw are limited and specific. While there may be some degree of overlap in subject area, the general special permit standard utilizes a different set of criteria that call for considerations not implicated by site plan review-and these separate considerations themselves are, while broad in sweep, plainly grounded in the legitimate purposes of zoning and designed to empower the Board to address legitimate municipal concerns. The court sees little difference here from the special permit applied in an aquifer district in Prime v. Zoning Bd. of Appeals of Norwell, 42 Mass. App. Ct. 796, 802 (1997) that was upheld because "the protection of an aquifer is a valid public interest." It is reasonable to empower the Board to consider a broader universe of valid local concerns in some districts where any effect of a large-scale facility may be felt more keenly, and to omit the same | | |

| Docket Date | Docket Text | Amount Owed | Image Avail. |
|---|---|---|---|
| | special permit requirement in other, more industrial districts (as the Bylaw here does) inherently suited to accommodate such facilities.<br><br>Indeed, as the Board here in fact has granted plaintiff's special permit (and plaintiff does not object to the conditions attached), the posture of plaintiff's per se challenge prevents any effective examination of whether the special permit regulation's "application bears a rational relationship to the perceived concern" justifying its use. Tufts, 415 Mass. at 758. Given the facial legitimacy of zoning concerns underpinning the special permit standard, there is no error in deferring the court's more focused evaluation of the standard's propriety until it actually has been applied by the Board to the specific facts of a proposal, with reasoning and justifications, to either deny it or impose objectionable conditions. As recognized in its prior order, this court has no doubt that, in its particular application of the standard, the Board might rely on factors, reasoning, or conditions not necessary in that particular instance for the protection of public health, safety, and welfare; such an implementation certainly would be prohibited by § 3, and could be challenged by plaintiff. The court sees this to be the principle embodied by the Appeals Court's holding in Prime, where the court noted that "the special permit may not be imposed unreasonably and in a manner designed to prohibit the operation of the farm stand, nor may the permit be denied merely because the board would prefer a different use of the locus, or no use." Prime, 42 Mass. App. Ct. at 802-803. But where, as here, the Board's review of the Ware special permit requirements has been carried out, and has resulted in issuance of a permit not objected to by the applicant, the declaration the court will make is simply to recognize that a properly conducted special permit process is not per se invalid whenever applied to a solar energy system, though the review must be carried out in a manner respectful of the applicable protective provisions of G.L. c. 40A, § 3's penultimate paragraph.<br><br>The court also acknowledges the recent decision by another justice of this court, issued subsequent to the filing of the motion for reconsideration, which takes a differing view on a similar issue. In ASD Three Rivers MA Solar, LLC v. Planning Bd. of the Town of Wilbraham, 29 LCR 124, 141-142 (2021) (Rubin, J.), the court found (amongst a number of other defects) that a town bylaw which required a solar energy facility to satisfy the bylaw's generalized special permit standard violated § 3 where it already subjected such facilities to numerous solar-specific design standards and requirements. The court concluded that "the Solar Bylaw was intended to be a comprehensive provision governing all aspects of ground mounted solar energy systems," and that "[c]onsideration of the special permit criteria after concluding the requirements of the Solar Bylaw were satisfied was particularly problematic because the special permit criteria overlap with the standards in the Solar Bylaw to considerable degree (for instance, as to dimensional requirements and screening)." This court is not convinced, however, that, as the court in ASD Three Rivers appeared to conclude, even substantial overlap between the generalized special permit standard and more specifically-defined requirements in other applicable portions of the bylaw (whether in the site plan review process, or Ware's own solar bylaw) is sufficient to render all applications of that more general standard per se unreasonable. The key is not how many reviews and permits are required in the municipality, but whether the standards applied in each of the municipal reviews that are conducted to decide whether and how to issue each permit are, both as written and as applied, in keeping with the limitations imposed by § 3.<br><br>Finally, to the extent that plaintiff now suggests that the language of Boston College (which repeated the trial court's conclusion that "requiring a special permit for the educational use itself ¿ offends the spirit, if not the letter, of the Dover Amendment") strictly prohibits a bylaw from imposing a special permit requirement directly on a protected solar use, this court finds the circumstances of that case to be distinguished from those here. Boston College, 58 Mass. App. Ct. at 801. First, this court finds significance in the fact that the need for a special permit in Boston College flowed from an FAR requirement itself found by the trial court to advance no legitimate zoning concern as applied to the project; moreover, the G. L. c. 40A, § 6 standard applied was not one crafted generally to address legitimate zoning concerns, but instead was a creature of statute targeted solely at addressing the effects of violating that particular dimensional requirement. Furthermore, it is worth observing that the language of the protection under G. L. c. 40A, § 3 for educational uses differs notably from that protecting solar uses. The former expressly prohibits all regulations except those reasonable ones concerning "bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements"; the language of the protection afforded to solar uses is not so limited, and simply requires that a use be subject only to reasonable regulations necessary to protect health, safety, and welfare. While the express limitations of the former might be interpreted more easily as prohibiting the direct association of a special permit with the educational use itself, the language of the solar provision can be read to impute a wider field of permissible regulatory categories.<br><br>After careful consideration, the court's ruling on summary judgment is to stand, and judgment is to issue accordingly. (Piper, C.J.)<br><br>Judge: Piper, Hon. Gordon H.<br><br>Notice sent by email to attorneys: John J. Davis, Esq. and Thomas Michael Melone, Esq. | | |
| 01/21/2022 | Judgment.<br><br>Judge: Piper, Hon. Gordon H.<br><br>Judgment sent by email to attorneys: John J. Davis, Esq. and Thomas Michael Melone, Esq. | | Image |
| 01/24/2022 | Notice of Appeal by PLH LLC to the Appeals Court filed. | | Image |
| 01/25/2022 | Notice of Service of Notice of Appeal sent to John J Davis, Esq.<br>Notice sent by email to Counsel on record on January 25, 2022. | | |
| 02/28/2022 | Notice, filed (by email). | | Image |
| 03/25/2022 | Notice of Assembly of Record on Appeal sent to the Clerk of the Appeals Court. | | |
| 03/25/2022 | Notice of Assembly of Record on Appeal sent to all counsel of record. | | |

D

**COMMONWEALTH OF MASSACHUSETTS**

**LAND COURT**

**DEPARTMENT OF THE TRIAL COURT**

HAMPSHIRE, ss.

MISCELLANEOUS CASE
No. 18 MISC 000648 (GHP)

PLH LLC,

Plaintiff,

v.

TOWN OF WARE,

Defendant.

**ORDER**
**DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
**and**
**GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT**

On December 5, 2018, plaintiff PLH LLC ("Plaintiff") initiated this action by filing a four-count complaint pursuant to G. L. c. 240, § 14A claiming, among other things, that the special permit requirement imposed by defendant Town of Ware ("Town" or "Defendant") on plaintiff's proposed ground-mounted solar energy project violated both G. L. c. 40A, § 3 and the public trust doctrine. On December 17, 2018, plaintiff filed in this court a separate action[1] pursuant to G. L. c. 40A, § 17 appealing a decision issued by the Town of Ware Planning Board ("Board") denying plaintiff's application for a special permit. On January 4, 2019, defendant removed the G. L. c. 240, § 14A action to the United States District Court for the District of

[1] 18 MISC 000670, *PLH LLC v. Town of Ware Planning Bd.*

Massachusetts. On April 8, 2019, upon the joint motion of the parties, the United States District Court ordered that this case be remanded to the Land Court, after which it was consolidated with plaintiff's c. 40A, §17 zoning appeal. On May 9, 2019, the court issued an order in plaintiff's § 17 appeal, remanding the zoning decision to the Board. The Board subsequently granted plaintiff's requested special permit; with that appeal now moot, the parties filed on September 26, 2019 a stipulation of dismissal of the § 17 appeal. Following dismissal of that case, the only remaining dispute before this court is the plaintiff's claim, in the pending case pursuant to G. L. c. 240, § 14A, that requiring plaintiff to obtain a special permit for its proposed solar energy installation was improper.

Plaintiff filed a motion for summary judgment on October 31, 2019, and defendant filed its opposition on December 3, 2019. A hearing was held on plaintiff's motion on December 12, 2019, at which Attorney Thomas Melone appeared for plaintiff, and Attorney John Davis appeared for defendant. Following argument, pursuant to Mass. R. Civ. P. 56, giving every reasonable inference to the party opposing summary judgment, based on the summary judgment record, there being no material facts in dispute, the court DENIED plaintiff's motion for summary judgment and GRANTED summary judgment in favor of defendant, for the reasons laid upon the record from the bench following argument, and for substantially those reasons set forth in the opposing papers, and which are summarized as follows in this Order:

**********

The court concludes that the motion for summary judgment brought by the plaintiff is to be denied, and that judgment is to enter in favor of the municipality on the sole issue before the court in this action brought pursuant to G. L. c. 240, § 14A.

The preliminary question that must be addressed is that of justiciability, and whether, even under the liberal standards of § 14A, this case properly is before the court. This is a close question. The court is aware of the long history of § 14A, the purposes for which it was enacted, and the expansive manner in which courts have determined it is to be applied, allowing cases to proceed under § 14A which might not be justiciable under G. L. c. 231A, see *Hansen & Donahue, Inc. v. Norwood*, 61 Mass. App. Ct. 292 (2004). This case sits right at the cusp of being appropriate for decision by the Land Court under G. L. c. 240, § 14A. This is not an instance where there is before the court any pending or prospective municipal zoning permitting or approvals–approvals which might be the basis for future development, depending on the court's application of the zoning bylaw to the particular piece of property owned by the plaintiff. To the contrary, here, following favorable Board action on remand, plaintiff already is in possession of the municipal approvals which will allow it to move forward with its solar project. This is certainly far from the classic case, one in which either the owner of the land who wishes to develop it, or a neighbor whose land is directly affected by someone else's planned land development, needs instruction from the court about the validity and interpretation under G. L. c. 240, § 14A of the bylaw provisions that are in doubt before the development can proceed.

Even so, the analysis here tips ever so slightly in favor of allowing the court to reach the question put before it by the plaintiff. Colloquy between counsel and the court at the start of the hearing showed there to be some possibility that the ultimate ability of the plaintiff to carry out its project may turn – for financial, rather than regulatory, licensing, or land use permitting reasons – on the interpretation that is given to the bylaw. The interpretive questions posed in this case possibly may guide plaintiff's litigation result in the pending Superior Court case, in which

plaintiff is seeking redress for alleged wrongful denial of full SMART Program funding. Plaintiff contends in that suit that the municipality's insistence on its special permit requirement, and the resulting delay, cost plaintiff a favorable position in the advantageous government financing program which plaintiff otherwise would have received. Given that there is some possibility that the question whether plaintiff ever was subject to a valid municipal requirement to get a special permit at all, may have a meaningful impact on the plaintiff to proceed with this project, given the financial consequences of that requirement, the court will err on the side of exercising its jurisdiction under G. L. c. 240, § 14A and reaching the question that has been put before it.

It is worth noting that even with a successful outcome in the current case, plaintiff still needs to knit together a number of arguments and steps to establish effectively that, but for the town's handling of plaintiff's permit requests under the town's reading of the bylaw, plaintiff would hold an advanced and more favorable position in the SMART Program queue, and therefore a more advantageous funding position with the Department of Energy and Resources. The ultimate resolution of those issues properly and respectfully is left for the Superior Court to decide in the related action pending before it.

This leads the court to the principal question raised by the summary judgment motion, which is whether it is appropriate or not for the town to apply the special permit provision in its bylaw to a use protected under the penultimate paragraph of G. L. c. 40A, § 3. That paragraph states: "No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare." In contrast with many of the other protected use paragraphs that are found in § 3, the solar provision is succinct. It does

not include some of the other apparatus that was included by the legislature in the provisions dealing with religious, educational, agricultural, and childcare issues. Notably, there is no express statutory treatment of the question of special permit requirements for solar uses, and that is something which is found in certain other paragraphs of G. L. c. 40A, § 3 protecting different "sibling" § 3 uses. This legislative omission is highly significant.

The purpose of the inclusion of solar use in this section of Chapter 40A is clear: there is no doubt that it is to be protective and encouraging of these kinds of uses, and the court acknowledges the urgency of some of the reasons why the legislature has given favored treatment to this category of use. The question before the court is, when crafting § 3, just how far did the legislature go in restraining the hand of municipalities in the way in that they enact, interpret, and carry out their bylaw provisions, as they are applied to this particular favored solar use?

The court is unaware of any case, either at the trial court level or certainly at the appellate level, holding that a special permit requirement is *per se* invalid for uses that fall under the solar energy protection provisions of § 3. The court certainly acknowledges that there is strong dictum in some earlier cases having to do with other provisions of § 3 (principally the so-called Dover Amendment paragraph dealing with educational and religious uses) suggesting that the requirement of a special permit could not lawfully be imposed. However, the court finds far more relevant the holding in *Prime v. Zoning Bd. of Appeals of Norwell*, 42 Mass. App. Ct. 796 (1997), in which the panel was confronted with a proposed farmstand to be constructed on land that was determined to be entitled to agricultural use protection under § 3. Mindful that the agricultural use provision of § 3 included some explicit legislative prohibition on the requirement of a special permit for certain aspects of a protected agricultural use, the *Prime* court was very

clear in deciding that special permits are not something which are categorically prohibited or intrinsically unavailable for an agricultural use protected under § 3. In that case, the board had required that the construction of a farmstand on the locus be subject to two special permits, and the Land Court judge (Kilborn, J.) nullified the special permit requirements for that particular use. The Appeals Court did not adopt that view of the law. It "conclude[d] that the board may require that Simons obtain special permits for the farm stand, but only upon reasonable conditions ... ." *Id.* at 800. The substance of the Appeals Court's holding is that the special permit requirement was not *per se* or intrinsically unavailable or legally invalid, and the Land Court's judgment invalidating that requirement for the agricultural use under review there was incorrect and needed to be reversed.

The Appeals Court did not leave it there, and its opinion clarifies the answer to the question now before this court. The bottom line of the *Prime* holding was that the board may not apply the special permit requirement in a way that is tantamount to an arbitrary denial or an unwillingness to allow the protected use. The Appeals Court said that unless there is some pretext about whether the use qualifies for § 3 protection – which certainly was not the case in *Prime*, and is not the case here – then "bona fide proposals for new structures may be reasonably regulated, and a special permit may be required. The provision of § 3 precluding a requirement of a special permit for existing agricultural structures remains intact ... . Essentially the same reasoning applies, and the same conclusions obtain," with respect to any manner of special permit. *Id.* at 802. Thus, a special permit cannot unreasonably regulate, cannot impose conditions that go beyond statutory limits provided under § 3, cannot be used either directly or pretextually as a way to prohibit or ban the use, and cannot be used to allow the board any measure of

discretion on whether the protected use can take place in the district, because to do so would be at odds with the penumbral protections that are provided under § 3. As the Appeals Court said, "the special permit may not be imposed unreasonably and in a manner designed to prohibit the operation of the farm stand, nor may the permit be denied merely because the board would prefer a different use of the locus, or no use." *Id.* at 802-803.

That is the correct outcome here, and as noted in colloquy with counsel for both sides, there are policy reasons which support this outcome. To conclude otherwise, first of all, would result in the invalidation of a special permit provision of the bylaw as applied to an entire category of protected use under § 3. This would leave solar energy use in the Town without any effective regulation, at least as an interim matter, until there was some municipal legislative solution that supplied a more tailored special permit provision. This is an issue that applies not just to this one project, but would carry over to all similar solar uses in the Town. If the court now decided that no special permit could be required in any case in any district for a proposed solar use, it would leave all those projects outside this traditional method of municipal review. It is not the right approach to invalidate categorically the Ware zoning law's special permit provision (and to do so in effect retroactively) for all solar energy projects, leaving this aspect of municipal zoning in the Town unregulated until corrective legislative action were to occur.

Secondly, there is no good support in the cases or in the court's experience for an absolute legal requirement that a municipality--which wishes to regulate by special permit a § 3 protected use--may do so only by the enactment of a particularly drafted special permit bylaw provision which is focused just on the specific use protected under a particular paragraph of § 3. Plaintiff suggested in argument that, at most, a municipality could require a special permit for a §

3 use only if the municipality had enacted a special permit provision limited to that particular use, and which applies only the amount of regulation proper under that one paragraph of § 3, with use-specific standards, conditions, and restrictions. There is no basis for such an assertion in the decisional law or the language of § 3. The difficulty, of course, is that every paragraph of § 3 speaks to its own particular use, and the particular provisions which in that paragraph benefit a given § 3 use are different than the provisions for all the other uses. The legislature obviously had its reasons for singling out one type of protected § 3 use for one particular manner of regulation as opposed to the rules set up for another § 3 protected use. The legislature did not intend a framework where, if there is to be any special permit requirement at all (particularly, as here, for a use as to which there is no statutory prohibition on special permit regulation), there can only be a hand-crafted version that is tailored just to that one § 3 use.

The proper result in this case is the issuance of a declaration consistent with the above language from the *Prime* decision. The court will issue a judgment declaring that the bylaw's requirement of a special permit in this district is not invalid, but that the review of the municipality conducted under the bylaw's special permit provisions must be limited and narrowly applied in a way that is not unreasonable, is not designed or employed to prohibit the use or the operation of the protected use, and exists where necessary to protect the health, safety or welfare. Operating within that ambit, it is appropriate for a special permit granting authority to receive and act upon a special permit for a solar energy use in a district where required, and indeed, in an appropriate case within that narrow ambit, to issue a denial of a special permit, but only where the project presents intractable problems, such as those that jeopardize public health, safety, and welfare. Requirements of a special permit granting authority, including conditions

imposed on a special permit, which are too far outside the limited, narrow scope of regulation allowed by the solar energy provisions of § 3, would be improper.

Counsel for the parties are to collaborate in drafting a joint proposed form of judgment, and are to file a joint proposed form of judgment by January 17, 2020. If no agreement is reached on the form of judgment that is to issue, the parties each are to file by that date a proposed form of judgment, with short memorandum explaining why the court should adopt the proposed approach. The court will proceed to settle the form of judgment without further hearing unless otherwise ordered.

So Ordered.

By the Court. (Piper, C.J.)

Attest:

Deborah J. Patterson

Deborah J. Patterson
Recorder

Dated: December 24, 2019