

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. FAR _____

Appeals Court Docket No. 2024-P-0018

Land Court Docket No. 21 MISC 000626

SUNPIN ENERGY SERVICES, LLC, et al.,

Plaintiffs-Appellants

v.

**DONALD J. O'NEIL, MEMBER OF THE PETERSHAM ZONING BOARD OF
APPEALS, et al.**

Defendants-Appellees

DEFENDANTS-APPELLEES' APPLICATION FOR
FURTHER APPELLATE REVIEW

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Dated: July 30, 2025

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**I. REQUEST FOR LEAVE TO OBTAIN
FURTHER APPELLATE REVIEW**

In accordance with G. L. c. 211A, § 11, and Mass. R. A. P. 27.1, Defendants-Appellees, members of the Zoning Board of Appeals of Petersham ("Board") respectfully request that this Court grant leave for further appellate review of the July 9, 2025, decision of the Appeals Court which: (1) vacated the summary judgment entered for the Board; (2) remanded to the Land Court for entry of an order remanding the case to the Board to expeditiously issue the special permit after considering whether imposition of reasonable conditions is warranted; and (3) ordered that, on remand, the Board will not have the power to deny the special permit ("Appeals Court opinion"). A copy of the Appeals Court's rescript and decision is attached. Addendum, 23-40. A copy of the Land Court's Memorandum of Decision and Order granting the Board summary judgment ("Land Court opinion") is attached. Add. 41-53.

This Court should grant further appellate review for substantial reasons affecting the public interest and the interests of justice because the Appeals Court opinion vacating the objective, impartial, and

rational denial of a special permit tilts the balance struck by the statutory scheme of special permitting, and this Court's precedents, so far against local control as to risk nullifying it.

Case law clarifying the scope of local authorities' discretion to reasonably regulate the scale and placement of solar energy systems – and the permissible content of their rationales – would equally serve developers navigating the special permit process, and the Commonwealth's 352 zoning jurisdictions tasked with applying it.

As it stands now, the Appeals Court opinion reduces local boards to a rubber stamp for any special permit application not expressly prohibited. This construction upends the statutory framework, which envisions local zoning boards not as passive approvers, but as deliberative bodies empowered to engender local acceptance by granting permits that have earned genuine local approval.

II. STATEMENT OF PRIOR PROCEEDINGS

On December 17, 2021, Sunpin Energy Services, LLC, and Ralph Lapinkas (collectively "Sunpin") filed a complaint in the Land Court, pursuant to G. L. c.

40A, § 17, appealing a decision of the Board which denied Sunpin's application for a special permit to construct and operate a solar energy system.

Sunpin filed a motion for summary judgment on March 31, 2023, and the Board filed a memorandum in opposition to the motion and in support of entry of summary judgment for the Board on June 26, 2023. A hearing on the motion was held on July 19, 2023. By Memorandum of Decision dated August 8, 2023, the Land Court denied Sunpin's motion and directed the entry of summary judgment in the Board's favor dismissing the complaint.

Sunpin filed an appeal on January 8, 2024. Briefing was completed on August 30, 2024. Solar Energy Industries Association and Alliance for Climate Transition filed an amicus brief on December 23, 2024. Oral argument was held before a panel of the Appeals Court (Vuono, J., Hershfang, J., Tan, J.) on January 14, 2025. The Board filed a letter pursuant to Mass. R. A. P. 16(1) on January 17, 2025. The decision, a full opinion, was entered on July 9, 2025.

No party is seeking a reconsideration or modification in the Appeals Court.

III. STATEMENT OF FACTS RELEVANT TO THE APPEAL

The Land Court opinion correctly and succinctly stated all the undisputed facts and thus they are not repeated here. Add. 42-44, ¶¶ 1-34. The Appeals Court's "recitation is drawn from the parties' joint statement of facts, the board's decision, and other documents submitted in connection with the cross motions for summary judgment" (Add. 26 n. 4), though many of the undisputed facts from which inferences favorable to the Board could have been drawn went unmentioned, as discussed *infra*.

The Appeals Court included at least one disputed fact, namely that "[h]ere, the town admits there were no issues affecting the public health, safety, or welfare..." Add. 40. This alleged admission is not otherwise present in the record, and it is contradicted by the Statement of Reasons quoted in the Land Court opinion: "the purpose of the [zoning by-law] is to promote the health, safety and general welfare of the inhabitants of Petersham" (Add. 49).

IV. STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

- A. Did the Appeals Court misapply the summary judgment standard when it drew unfavorable

factual inferences that a board member had an improper "subjective belief" or "preference" on the matter she was deciding, where the undisputed facts indicated that her opinion was objectively based; and that the "town admit[ted] that there were no issues affecting the public health, safety, or welfare" (Add. 40)?

- B. Did the Appeals Court misconstrue the scope of municipal discretion to regulate the "magnitude and placement" of solar energy systems "where necessary to protect the public health, safety, or welfare" under G. L. c. 40A, § 3, ninth par., recognized by this Court in Tracer Lane II Realty, LLC v. Waltham, 489 Mass. 775 (2022) (Tracer Lane)?
- C. Did the Appeals Court misapply the town by-law regarding solar energy systems, and err in giving no deference to the Board's interpretation?
- D. Did the Appeals Court err in ordering specific relief, rather than a remand?

V. WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

A. The Appeals Court Misapplied the Summary Judgment Standard

In this case, because both parties moved for summary judgment, the evidence is viewed "in the light most favorable to the party against whom judgment is to enter." Eaton v. Federal Nat'l Mtge. Ass'n, 93 Mass. App. Ct. 216, 218 (2018). Because the Appeals Court judgment was to enter against the Board, the Board was entitled to "all permissible inferences favorable to the nonmoving party ... resolv[ing] any disputes or conflicts in the summary judgment materials in their favor." Carey v. New England Organ Bank, 446 Mass. 270, 273-274 (2006).

The Appeals Court opinion relied heavily on its inference that the Board harbored "its own preference that large-scale solar energy systems not be placed in wooded areas" (Add. 34-35); and that the Board decision "rested primarily on the subjective beliefs of one board member." Add. 26.

The presence or absence of a "preference" or "subjective belief" held by a specific person at a specific time is a question of fact not suitable for summary judgment. "In cases where motive, intent, or

other state of mind questions are at issue, summary judgment is often inappropriate." Flesner v. Technical Communications Corp., 410 Mass. 805 at 809 (1991).

Given that the Appeals Court's summary judgment standard required it to draw reasonable inferences in favor of the Board, it was error to draw the negative factual inference that the dissenting Board member had a particular "preference" or "subjective belief" when nothing in the undisputed facts indicated this.

The inference was particularly unfavorable, fostering "tunnel vision" that prejudged the vote improper. It was also particularly ill-founded because the Board member carefully cited the source of the principle, which was not a personal, aesthetic, whimsical, arbitrary, or capricious belief, but rather Legislature-authorized state guidance intended to aid local decision makers on the siting of solar energy systems – in other words, an objective and on-point source. The guidance "strongly discourages" siting solar energy systems in forests. Add. 42, ¶ 7.

G. L. c. 25A, § 10 required the Department of Environmental Resources ("DOER") to assist municipalities by providing technical assistance for

the development of renewable and alternative energy resources. In 2015, DOER issued the guidance in question, not based on any personal preferences, but on the role of forests in storing carbon. Add. 42-43, ¶ 9. In effect, the guidance informed municipalities that siting solar energy systems by cutting down forests is two steps forward, one step back for the Commonwealth's energy goals - not a tradeoff to encourage. The guidance was submitted to the Board during its public hearing on Sunpin's application, not initially raised by any Board member. G. L. c. 30, § 61 requires "[a]ll agencies, departments, boards, commissions, and authorities of the commonwealth" to "review, evaluate, and determine the impact on the natural environment of all works" they undertake. "[A]ll statutes shall be interpreted and administered so as to minimize and prevent damage to the environment." Id.

Further, this was just one of many sources cited as objective rationales for the Board member's vote. Others included that the Sunpin site was in a growing residential area, with "fourteen single-family residential properties abut[ting] or ... located in the vicinity." Add. 43, ¶ 13. Harvard Forest, where

public access is allowed for recreation, hiking, dog-walking, fishing, and hunting, is another abutter. Add. 14, ¶ 14. These facts support the inference that the Board rationale included preservation of the residential character of the neighborhood and general welfare of inhabitants, both legitimate town interests. See Tracer Lane, 489 Mass. at 781. See also Gulf Oil Corp. v. Bd. of Appeals of Framingham, 355 Mass. 275, 278 (1969) (upholding a board decision as not arbitrary and capricious when it considered "possible future development in [the] area," and affirming that overturning a board decision "whenever the board ... could have granted a permit would eliminate the board's intended discretion.")

The Appeals Court drew a further unfavorable factual inference in asserting that "the town admits there were no issues affecting the public health, safety, or welfare..." Add. 40. This admission is missing from the parties' undisputed facts. Add. 42-44, ¶¶ 1-34. Instead, the dissenting Board opinion quotes its purpose as connected to "the general welfare of the [town] inhabitants." Add. 49. The Appeals Court could have narrowly analyzed it and decided whether its rationale was unrelated or

tangential to "welfare," but instead it assumed a stipulation that the Board did not make.

As the Land Court opinion noted, "Board members can have competing and equally well-grounded positions. That one prevails over another does not render the ultimate decision arbitrary." Add. 53. Similarly, a permit claimant's disagreement with a board's rationale does not make it "subjective."

B. The Appeals Court Misconstrued the Scope of Municipal Discretion to Regulate the Magnitude and Placement of Solar Energy Systems

Municipalities have authority to "reasonably restrict the magnitude and placement of solar energy systems." Tracer Lane, 489 Mass. at 780 (2022). The Appeals Court relied on Tracer Lane, which found that the city's prohibition of solar energy systems in all but one or two percent of its land area was not grounded in health, safety, or welfare and therefore violated G.L. c. 40A, § 3, ninth par. Tracer Lane at 781.

Tracer Lane strikes a balance between local control and the need for solar energy systems. The decision is narrow and distinguishable from the present case. Petersham, one of the Commonwealth's

most rural and forested towns with no industrial or commercial zones, is dissimilar to the city of Waltham. The solar energy system at issue here is more than four times the magnitude of the "one-megawatt solar energy system" at issue in Tracer Lane. Add. 43, ¶ 22; Tracer Lane, 489 Mass. at 777. The "stringent limitation" in Waltham's zoning code found in Tracer Lane (489 Mass. at 781) is dissimilar to the scheme in Petersham, where ground-mounted solar energy systems are allowed as of right in its Solar Electric Overlay District (Add. 43, ¶ 19). Other large-scale ground-mounted solar energy systems are permitted by special permit with the present case being the only example of a denial (Add. 43, ¶ 20, 23). The town had issued over sixty building permits for ground-mounted and building-mounted solar energy systems (Add. 42, ¶ 4).

These systems meet the statutory definition of "solar energy system", which is "a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating." G. L. c.

40A, § 1.

The plain language of the special permits statute is that "a special permit shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board." G. L. c. 40A, § 9. The statutory framework requiring board super-majorities or unanimity manifests legislative intent that special permits reflect clear and deliberate local consensus. The Legislature did not attempt to create absolute use protection for solar energy systems. The statutory language around solar energy systems provides municipalities with "more flexibility in restricting solar energy systems than they do, for instance, in the context of education, religion, or child care" ... "which allow only for reasonable regulations on such matters as bulk and height." Tracer Lane, 489 Mass. at 780-781.

Therefore, the Appeals Court's constricted view of the role of municipalities warrants clarification by this Court.

C. The Appeals Court Misapplied the Town By-law

A use requiring a special permit, in contrast with a use as of right, "concerns a use thought under

the zoning code to be potentially acceptable in a zoning district[.]" Perry v. Bd. of Appeal of Boston, 100 Mass. App. Ct. 138, 140 n.4 (2021). The Appeals Court opinion instead claims that the town by-law "allows the '[c]learing of natural vegetation ... limited to what is necessary for the construction, operation and maintenance of the [solar energy] installation" (Add. 36). The Court continues that because "there is no suggestion that Sunpin will clear more natural vegetation than is necessary," the denial of a special permit is capricious or arbitrary. Id.

A more reasonable interpretation of the by-law is that a special permit could potentially be denied if it interfered with general welfare because of its magnitude or placement under G. L. c. 40A, but that all special permits issuing would be subject to the condition that clearing of trees shall be limited to what is necessary. In other words, the by-law does not require Board approval of an application that promised to clear only the necessary trees.

The Appeals Court cites Mellendick v. Zoning Bd. of Appeals of Edgartown for the proposition that "[m]ore specific direction in the by-law is necessary to require such specialized review" by a board. But

that case upholds a board decision against the objection of abutting landowners. It is unhelpful to the Appeals Court because it affirms board discretion, rather than restricting it. "We conclude that the board reasonably interpreted its by-law in the instant case." 69 Mass. App. Ct. 852, 857 (2007).

The Appeals Court uncritically accepted the solar industry's claim that local boards are owed little to no deference in special permit decisions, and that any exercise of discretion constitutes impermissible regulation based on subjective, arbitrary, or capricious preferences.

D. The Appeals Court Erred in Ordering Specific Relief Rather Than a Remand

Consistent with the legislative framework of special permitting discussed above, the Appeals Court should have remanded the case for further proceedings consistent with their opinion, including guidance on the permissible content of board rationales. Only in rare cases would "an order of particular relief [be] appropriate where remand is futile or would postpone an inevitable result." Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Bd. of Appeal of Billerica, 454 Mass. 374, 382-383 (2009).

The present case presents no such extraordinary

circumstances. The Board has not obstructed, unnecessarily delayed, or disregarded judicial guidance. The current case is the only example of the Board denying a special permit of this kind. Therefore, the normal procedure of remand should be followed.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that its application for further appellate review be granted.

Defendants-Appellees
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By their attorney,

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CERTIFICATE OF COMPLIANCE

I, Michael E. Shamgochian, hereby certify that the foregoing brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including, but not limited to, Rules 16, 20, and 27.1. Compliance with applicable rules was ascertained by preparing the brief in Microsoft Word ver. 16.99.1 using 1.5 inch margins on the left and right sides and 1 inch margins on the top of bottom of each page; 12 point Courier New monospaced font with ten characters per inch; double spacing; and no more than 10 pages setting out why further appellate review is appropriate.

Dated: July 30, 2025

/s/ Michael E. Shamgochian

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(e), I, Michael E. Shamgochian, hereby certify, under the penalties of perjury, that on July 30, 2025 I have made service of this brief and addendum on the attorney of record for each party, by causing a copy to be sent by electronic mail, and by the electronic filing system to:

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24-P-18

Appeals Court

SUNPIN ENERGY SERVICES, LLC, & another¹ vs. ZONING BOARD OF
APPEALS OF PETERSHAM.

No. 24-P-18.

Suffolk. January 14, 2025. – July 9, 2025.

Present: Vuono, Hershsfang, & Tan, JJ.

Public Utilities, Energy company, Electric company, Electrical transmission line, Sale of electric power. Electric Company. Electricity. Renewable Energy. Zoning, Special permit, Permitted use, By-law. Practice, Civil, Summary judgment.

Civil action commenced in the Land Court Department on December 17, 2021.

The case was heard by Jennifer S.D. Roberts, J., on motions for summary judgment.

James F. Martin for the plaintiffs.
David J. Doneski for the defendant.
Thaddeus Heuer, Zachary Gerson, & Kevin Chen, for Solar Energy Industries Association & another, amici curiae, submitted a brief.

¹ Ralph P. Lapinkas, Jr.

VUONO, J. This case pits two laudable environmental goals against one another: the promotion of alternative renewable energy and the need to preserve forests to promote natural ecosystems. The plaintiffs, Sunpin Energy Services, LLC (Sunpin), a California limited liability company, and Ralph P. Lapinkas, Jr., seek to build and operate a large-scale ground-mounted solar energy system (project) on rural private property owned by Lapinkas in Petersham (town). The purpose of the project is to create electricity for sale directly to National Grid for distribution to its customers. Installation of the project will entail extensive clearing of vegetation and trees on approximately fourteen acres of a twenty-four-acre parcel. Due to the location of the project, Sunpin was required to obtain a special permit and site plan review from the zoning board of appeals (board), the town's special permitting authority. Because the board has three members, a unanimous vote is required to grant a special permit. See G. L. c. 40A, § 9. Two members voted in favor of granting Sunpin's special permit application, and one voted against it; therefore, the application was denied.

The plaintiffs then commenced this action in the Land Court, challenging the board's decision by filing a complaint pursuant to G. L. c. 40A, § 17. As we discuss in more detail later, the dissenting board member acknowledged that the

proposed project is not prohibited by statute or the town's zoning bylaw (bylaw), but she nonetheless voted against granting a special permit because, among other reasons, she determined that the development of the solar energy system involving extensive tree removal was incompatible with the "general welfare of the inhabitants of [the town]," and the State's diversified energy policy, which "strongly discourages" siting such projects in a forest. On cross motions for summary judgment, the judge concluded that the dissenting member properly relied on the standards articulated in the bylaw and that this case was not one of "those rarely encountered points where no rational view of the facts . . . supports the board's conclusion," quoting Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 383 (2009) (Wendy's). Accordingly, the judge granted summary judgment in favor of the board.

We reach a different conclusion. Where, as here (and as the two other board members found), the Legislature has protected the proposed use pursuant to G. L. c. 40A, § 3, ninth par.; the proposed use is allowed within the town with a special permit; the project as described in the application complies with all relevant local zoning requirements, including those specifically adopted to address tree removal for solar electric

installations;² and the town has not adopted any regulations prohibiting projects that require tree removal, the board's decision exceeded its "discretionary power of denial." Wendy's, 454 Mass. at 383, quoting Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 74 (2003). The denial of the application in the circumstances presented here was contrary to the legislative goal of promoting solar energy and rested primarily on the subjective beliefs of one board member. We therefore vacate the judgment entered in the board's favor.³

Background. The following facts are undisputed.⁴ The entire town is zoned residential-agricultural. The town has established a solar electric overlay district (SEOD) that allows for "large-scale ground-mounted solar electric installation[s] (greater than 10 kW [kilowatts])" as of right. However, any such installations located outside the SEOD require a special permit in accordance with §§ 11.2 and 18 of the bylaw.⁵ The

² The bylaw refers to "solar electric installations" while the statute uses the phrase "solar energy systems." See bylaw § 18.1; G. L. c. 40A, § 3, ninth par.

³ We acknowledge the amicus brief submitted by the Solar Energy Industries Association and the Alliance for Climate Transition in support of the plaintiffs.

⁴ Our recitation is drawn from the parties' joint statement of facts, the board's decision, and other documents submitted in connection with the cross motions for summary judgment.

⁵ Several provisions of the bylaw pertain to the issues before us, including provisions regulating the composition of

the board and special permit criteria, and § 18 is dedicated specifically to solar electric installations. We set forth the various sections as follows.

"SECTION 11. BOARD OF APPEALS

"There is hereby established a Board of Appeals which shall consist of three members

". . .

"2. Special Permits: The Board of Appeals may grant a special permit for a special exception as provided in this By-law, when it shall have found that the use involved will not cause or give rise to noise, odor, dust, refuse, exterior lighting, traffic or other considerations which would be offensive or detrimental to the present or future character of the neighborhood or the community and if the Board finds that the proposed use will not derogate from the intent and purpose of this By-law. Each such permit shall be subject to such conditions or safeguards as it may deem necessary or advisable. . . ."

"SECTION 18. SOLAR ELECTRIC INSTALLATIONS

"1. Purpose

"The purpose of this bylaw is to facilitate the creation of new large-scale solar electric installations by providing standards for the placement, design, construction, operation, monitoring, modification and removal of such installations that address public safety, minimize impacts on environmental, scenic, natural and historic resources and to provide adequate financial assurance for the eventual decommissioning of such installations.

"a. Applicability

". . .

"This section applies to any large-scale ground-mounted solar electric installation (greater than 10 kW [kilowatts]) in the Town of Petersham. In the Solar Electric Overlay District such facilities are allowed As-of-Right. Outside of the Solar Electric Overlay District, such facilities are allowed by special permit.

proposed site of the project is on property located outside of the SEOD, thereby requiring a special permit and site plan review.

As previously noted, the proposed project site is on land owned by Lapinkas. The property consists of undeveloped forest and wetlands and has frontage along New Athol Road. There are five direct abutters to the property, including privately owned undeveloped land, two residential lots, and the Riceville Pond site of the Harvard Forest,⁶ where public access is allowed for recreation, including hiking, dog walking, fishing, and hunting.

The project is a 4.3-megawatt (direct current) photovoltaic generation and 2.0-megawatt energy storage system and requires the construction of a ground-mounted solar array and battery racks. The solar panels will be mounted on a simple fixed-tilt, post, rail, and cross beam racking system. The entire solar

". . .

"9. Safety and Environmental Standards

". . .

"b. Land Clearing, Soil Erosion and Habitat Impacts

"Clearing of natural vegetation shall be limited to what is necessary for the construction, operation and maintenance of the installation or otherwise prescribed by applicable laws, regulations, and bylaws."

⁶ The Harvard Forest is a department of the Faculty of Arts and Sciences of Harvard University.

array, approximately 12,090 solar photovoltaic panels and related equipment, will be enclosed with a seven-foot high chain link fence and a locking gate. The property consists of approximately twenty-four acres, and the majority of the site is wooded; trees that shade the 14.3-acre portion of the property where the array will be located will be cleared in order to reduce shade and maximize the energy output of the system. Prior to the final submission of its application and site plan to the board, Sunpin obtained an order of conditions from the town conservation commission under the Wetlands Protection Act, allowing the project to proceed. See G. L. c. 131, § 40.

A public hearing on Sunpin's application and site plan was held on June 3, 2021, and continued on July 22, 2021, August 19, 2021, and September 23, 2021, at which time the public hearing was closed. Thereafter, two board members voted to approve the application and grant a special permit subject to certain conditions and safeguards, including the maintenance of vegetative screening to provide a natural visual buffer and noise barrier to the abutting residential properties.

The dissenting board member, Maryanne Reynolds, submitted a statement of reasons (statement) in which she set forth opposing findings and provided a detailed explanation for her vote. In her statement, which was incorporated into the board's decision, Reynolds stated that "Petersham is a town that prioritizes

natural and working lands. There is a deep and enduring ethos among the inhabitants to conserve, create, restore and employ the natural resources within the town." Reynolds acknowledged that the project satisfied the requirements of the site plan review but concluded that the requirements for a special permit were not satisfied primarily because "[t]he project is 'strongly discouraged' under applicable state [energy] policy"

The board contends that the "State policy" on which Reynolds relied is set forth in two documents: (1) the Clean Energy Results Questions & Answers Ground-Mounted Solar Photovoltaic Systems (Clean Energy Guide)⁷ and (2) the Massachusetts 2050 Decarbonization Roadmap (Roadmap).⁸

The Clean Energy Guide was issued in June 2015 by the Department of Energy Resources "to help local decision-makers" in the siting of solar energy systems with a goal of ensuring "that solar [photovoltaic] and other clean energy technologies are sited in a way that is most protective of human health and the environment, and minimizes impacts on scenic, natural, and historic resources." Clean Energy Guide at 3. The Clean Energy

⁷ Department of Energy Resources, Department of Environmental Protection, and Clean Energy Center, Clean Energy Results Questions & Answers Ground-Mounted Solar Photovoltaic Systems (June 2015).

⁸ Executive Office of Energy and Environmental Affairs, Massachusetts 2050 Decarbonization Roadmap (Dec. 2020).

Guide "strongly discourages" the siting of solar energy systems in locations that will "require significant tree cutting." Id. at 4.

The Roadmap was issued in December 2020 by the Executive Office of Energy and Environmental Affairs to "identify cost-effective and equitable strategies to ensure Massachusetts achieves net-zero greenhouse gas emissions by 2050." Roadmap at 1. Among other things, the Roadmap states that "[n]atural lands and ecosystems play a critical role in regulating the amount of [carbon dioxide] in the atmosphere. Forest ecosystems significantly contribute to this activity, especially in New England." Id. at 74.

In addition to relying on the Clean Energy Guide and the Roadmap in voting to deny Sunpin's application, Reynolds also cited to various provisions of the bylaw and specifically noted that her "nay" vote was consistent with the board's responsibility to promote the health, safety, and general welfare of the public. She concluded that,

"[a]pproving a special permit for the proposed project would be inconsistent with the Bylaw because it would not encourage the most appropriate use of land. Petersham wants to avoid the usual, unfortunate trajectory: first, natural lands are fragmented and punctuated with houses and businesses, then, as additional waves of development occur, built areas are joined together and filled in until the remaining natural lands have been fragmented into small, isolated pieces with greatly reduced environmental value. While we can't predict the future, granting [Sunpin] a

special permit for the proposed project would facilitate this trajectory and therefore should be denied."⁹

In addition, Reynolds noted the project would destabilize nearby property values, as expressed by one abutter at the public hearing.¹⁰

Discussion. We review a grant of summary judgment de novo. Williams v. Board of Appeals of Norwell, 490 Mass. 684, 689 (2022). "[S]ummary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law" (quotation and citation omitted). Id. When both parties have moved for summary judgment, the evidence is viewed "in the light most favorable to the party against whom judgment is to enter." Eaton v. Federal Nat'l Mtge. Ass'n, 93 Mass. App. Ct. 216, 218 (2018), quoting Albahari v. Zoning Bd. of Appeals of Brewster, 76 Mass. App. Ct. 245, 248 n.4 (2010).

We note at the outset that "standalone, large-scale [solar energy] systems, not ancillary to any residential or commercial

⁹ At the same time, Reynolds noted that Sunpin's request was the first special permit request for a solar energy project in the town but surmised that it would not be the last and that the board needed "to be especially cognizant of the precedent we are setting."

¹⁰ We note that Reynolds did not point to any concerns regarding odor, noise, dust, refuse, exterior lighting, or traffic -- several of the criteria set forth in the special permit section of the bylaw. See bylaw § 11.2.

use, are key to promoting solar energy in the Commonwealth." Tracer Lane II Realty, LLC v. Waltham, 489 Mass. 775, 781 (2022) (Tracer Lane). The Legislature has protected solar energy installations from local regulation by G. L. c. 40A, § 3, ninth par., which provides that "[n]o 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." Tracer Lane, supra at 779. "When interpreting this paragraph, we keep in mind that it was enacted to help promote solar energy generation throughout the Commonwealth." Id. Indeed, the Supreme Judicial Court has applied G. L. c. 40A, § 3, ninth par., to invalidate a local zoning provision that prohibited large-scale solar energy systems in all but one to two percent of land area in the municipality, where the prohibition was not reasonably grounded in public health, safety, or welfare. See Tracer Lane, supra at 781-782. While it is true that "municipalities have more flexibility in restricting solar energy systems than they do, for instance, in the context of education, religion, or child care," "stringent limitation" not "necessary to protect the public health, safety or welfare," "violates the solar energy provision" (citation omitted). Id. at 781.

Here, the parties do not challenge the validity of § 18 of the bylaw, and agree that the town's special permit requirement set forth in § 18 does not violate the protections afforded by the ninth paragraph of G. L. c. 40A, § 3.¹¹ The parties also agree that "[l]ike all municipalities, [the town] maintains the discretion to reasonably restrict the magnitude and placement of solar energy systems." Tracer Lane, 489 Mass. at 782.

Accordingly, our analysis focuses on the question whether the board abused its discretion under the special permit section of the bylaw, keeping in mind that the Legislature has determined that no regulation may prohibit a solar energy installation unless reasonably grounded in public health, safety, or welfare. Put another way, the question before us is whether the board used the special permit requirement to impose its own preference

¹¹ Under the bylaw, large-scale ground-mounted solar electric systems are allowed as of right only on a parcel of town-owned land consisting of 5.16 acres located near National Grid transmission lines, and all other proposed large-scale solar electric systems require a special permit. In the absence of a challenge to the bylaw, "the rule of law [is] that there is a presumption in favor of the validity of a municipal ordinance or by-law." Canton v. Bruno, 361 Mass. 598, 608 (1972). Thus, we do not address the issue whether the town's scheme, including the special permit requirement, is valid. But see Tracer Lane, 489 Mass. at 781 (outright ban of all large-scale solar energy systems in all but one to two percent of municipality's area is impermissible). We do note, however, that "the special permit may not be imposed unreasonably and in a manner designed to prohibit [a use protected by G. L. c. 40A, § 3], nor may the permit be denied merely because the board would prefer a different use of the locus, or no use." Prime v. Zoning Bd. of Appeals of Norwell, 42 Mass. App. Ct. 796, 802-803 (1997).

that large-scale solar energy systems not be placed in wooded areas. See Prime v. Zoning Bd. of Appeals of Norwell, 42 Mass. App. Ct. 796, 802-803 (1997) (special permit may not be denied to prohibit protected use or impose board's preference). See also Wendy's, 454 Mass. at 387 (we review whether reasons given by board "had a substantial basis in fact, or were . . . mere pretexts for arbitrary action or veils for reasons not related to the purposes of the zoning law" [citation omitted]). Here, as Reynolds's statement makes clear, the special permit was denied because the board preferred (on behalf of the town's inhabitants) a different use of the property, that is, to leave it in its natural state. In other words, the permit was denied because the board concluded that maintaining forest land was preferable to solar energy development that involved tree removal.¹² In reaching this conclusion, the board exceeded its discretionary powers. "[N]either G. L. c. 40A, § 6, nor the by-law permits denial of a special permit based on an undifferentiated fear of the future. Although a board may properly consider the reasonably likely impact of a particular use on an area's development potential, . . . a board may not deny a permit simply by conjuring a parade of horrors."

¹² We note that nothing in the record or the bylaw suggests that a private property owner is restricted from cutting trees on his or her property.

Britton, 59 Mass. App. Ct. at 75. See Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 57 (1985) (error to deny special permit because granting it might lead to future year-round occupancy; board improperly and impermissibly relied upon, "as bearing upon [the] present decision, a putative problem to be faced in the indefinite future"). "The board may not refuse to issue a permit for reasons unrelated to the standards of the by-law for the exercise of its judgment." Slater v. Board of Appeals of Brookline, 350 Mass. 70, 73 (1966) (no discretionary power to deny special permit because board thought adjacent land might be more appropriate location for parking).

Here, the town has addressed the specific issue of clearing natural vegetation for a solar energy project. Section 18.9(b) of the bylaw allows the "[c]learing of natural vegetation . . . limited to what is necessary for the construction, operation and maintenance of the [solar energy] installation" There is no suggestion that Sunpin will clear more natural vegetation than is necessary for the project's construction, operation, and maintenance. Moreover, there has been no showing that this particular parcel has unique characteristics that render it unsuitable to house a solar energy project -- aside from the fact that it is wooded. In this case, the board ignored the regulatory framework of the bylaw and imposed its view that tree

removal -- even that limited to "what is necessary for the construction, operation and maintenance of the installation" -- "would not encourage the most appropriate use of [the] land." As such, the decision was rendered in an "unreasonable, whimsical, capricious or arbitrary" manner. Wendy's, 454 Mass. at 382, quoting Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 486 (1999).

In reaching our conclusion, we are mindful that "[t]he board is entitled to deny a permit even 'if the facts found by the court would support its issuance.'" Doherty v. Planning Bd. of Scituate, 467 Mass. 560, 566-567 (2014), quoting Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley, 461 Mass. 469, 475 (2012). "[A] board's discretionary power of denial is not limitless: it will be upheld up to those rarely encountered points where no rational view of the facts the court has found supports the board's conclusion" (quotations and citation omitted). Wendy's, 454 Mass. at 383. However, the board cannot deny a permit based on its preferences, or State "guidance" that has not been adopted by the Legislature or the town, particularly in view of the town's enactment of a bylaw provision that addresses the very issue of clearing natural vegetation for solar energy installations. Indeed, the town acknowledged at oral argument that the town is at least ninety-seven percent forested -- a factor the town may well have

considered in adopting the provision addressing clearing natural vegetation for solar energy installations. Were it to deny a special permit for any large-scale solar electric installation project that requires clearing trees, there would be no distinction between the town's scheme and the one declared unlawful in Tracer Lane, 489 Mass. at 782.

Here, Reynolds expressed concern about the siting of the project on property that would require cutting down a significant number of trees, because "[m]aintaining trees assists the Commonwealth's energy policy goals because of the important water management, cooling and climate benefits trees provide," and the removal of the trees would adversely affect "habitat for wildlife, recreational opportunities and sense of place for people." While this may be so, the town specifically adopted a "solar electric installations" section of the bylaw for the purpose, among others, of "providing standards for the placement, design, construction, operation, monitoring, modification and removal of such installations that address public safety, [and] minimize impacts on environmental, scenic, natural and historic resources," which limits tree removal only to that amount necessary to install and maintain the array. Those standards do not suggest that denial of the permit here was necessary to protect public health, safety, or welfare. "More specific direction in the by-law is necessary to require

such specialized review." Mellendick v. Zoning Bd. of Appeals of Edgartown, 69 Mass. App. Ct. 852, 858 (2007) (special permit granting authority not obligated to consider "protection of endangered plant and animal species" in consideration of whether affordable housing "adversely affect[s] the neighborhood"). However important policies promoting preservation of woodlands may be, they have not been adopted by the town to an extent that would allow the board to reject the plaintiff's special permit application in the circumstances presented here. Where the board's consideration of the special permit application was necessarily limited by the provisions of G. L. c. 40A, § 3, ninth par., and could not be used as a mechanism to promote the board's preference for a different use -- or no use -- of the land, the board's decision exceeded its lawful discretion and therefore is not valid, and summary judgment in favor of the board was not proper.

The board contends that should we conclude, as we have, that its decision was improper, the proper result would be to direct a remand of the matter to the board for further consideration rather than order the board to issue the special permit. It is true that "[i]n the ordinary course, a reviewing judge is reluctant to order a board to implement particular relief, . . . [b]ut an order of particular relief may be appropriate where remand is futile or would postpone an

inevitable result." Wendy's, 454 Mass. at 387-388. See McLaughlin v. Zoning Bd. of Appeals of Duxbury, 102 Mass. App. Ct. 802, 814-815 (2023) (order directing issuance of special permit exceedingly rare where board has not considered whether reasonable conditions are appropriate). Here, the town admits there were no issues affecting the public health, safety, or welfare, see G. L. c. 40A, § 3, ninth par., other than the destruction of trees, and has identified no other issues related to the bylaw's special permit criteria. However, two of the members voted to approve the special permit with certain conditions designed to provide a screen for residential abutters. Accordingly, we vacate the judgment and remand "for entry of an order remanding the case to the board to expeditiously issue the special permit after considering whether imposition of reasonable conditions is warranted." McLaughlin, supra at 815. On remand, the board will not have the power to deny the special permit; it may impose only reasonable conditions if warranted.

So ordered.

**COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT**

WORCESTER, ss.

21 MISC 000626 (JSDR)

SUNPIN ENERGY SERVICES, LLC and
RALPH P. LAPINKAS, JR.,

Plaintiffs,

v.

DONALD J. O'NEIL, BRIAN
MACEWEN, and MARYANNE
REYNOLDS, in their capacity as
Members of the ZONING BOARD OF
APPEALS OF PETERSHAM,

Defendants.

**MEMORANDUM OF DECISION
ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

INTRODUCTION

This is an appeal pursuant to G. L. c. 40A, § 17, by plaintiffs Sunpin Energy Services, LLC (“Sunpin”) and Ralph P. Lapinkas, Jr. (“Mr. Lapinkas” and, collectively, “Plaintiffs”) from the denial by the zoning board of appeals of the town of Petersham (“the ZBA” and “the Town,” respectively) of the Plaintiffs’ application for a special permit for a proposed large-scale, ground-mounted solar energy system (“the Project”) on property located at New Athol Road, Assessors Map 402, Lot 38, in Petersham, Massachusetts (“the Property”). The matter is now before the court on Plaintiffs’ motion for summary judgment (“the Motion”) and the ZBA’s cross-motion for summary judgment (“the Cross-Motion”). Oral argument was held on July 19, 2023, supplemental materials were filed on July 28, 2023, and the matter was then taken under advisement. As is more fully set forth below, the Motion is DENIED and the Cross-Motion is ALLOWED.

UNDISPUTED FACTS

The following facts established in the record are undisputed or are deemed admitted.

1. Since 2012, the Town has been designated as a “Green Community” under the Green Communities Program administered by the Massachusetts Department of Environmental Resources (“DOER”) pursuant to G. L. c. 25A, § 10. Plaintiffs’ Response To Defendants’ Statement Of Additional Material Facts (“DSOMF”) ¶ 38.
2. The application and qualifying requirements for Green Community designations include “provid[ing] for the as-of-right siting of renewable or alternative energy generating facilities, renewable or alternative energy research and developmental facilities or renewable or alternative energy manufacturing facilities in designated locations.” G. L. c. 25A, § 10(c)(2). DSOMF ¶ 39.
3. In connection with its application for Green Community designation, the Town adopted the Solar Electric Installations provision of its Zoning By-Laws (“ZBL”), Section 18 (“Section 18”). DSOMF ¶ 40.
4. Since the adoption of Section 18, the Town has issued building permits for over 60 ground-mounted and building-mounted solar electric installations, for residences, farm properties, and businesses, such as the Petersham Country Store in the center of the Town. DSOMF ¶ 41.
5. In June 2015, DOER, the Massachusetts Department of Environmental Protection and the Massachusetts Clean Energy Center issued a document entitled “Clean Energy Results Questions & Answers Ground-Mounted Solar Photovoltaic Systems” (hereinafter, “Clean Energy Guide”). Defendants’ Appendix In Support Of Opposition To Plaintiff’s Motion For Summary Judgment (“D. App.”) Ex. E.
6. The purpose of the Clean Energy Guide was “to help local decision-makers” in the siting of solar energy systems with a goal of ensuring “that solar PV and other clean energy technologies are sited in a way that is most protective of human health and the environment, and minimizes impacts on scenic, natural, and historic resources.” D. App. Ex. E at 3; DSOMF ¶ 42.
7. The Clean Energy Guide “strongly discourages” the siting of solar energy systems in locations that will require significant tree cutting. D. App. Ex. E at 4; DSOMF ¶ 43.
8. In December 2020, the Massachusetts Executive Office of Energy and Environmental Affairs issued a report entitled “Massachusetts 2050 Decarbonization Roadmap” (hereinafter, “the Roadmap”) to “identify cost-effective and equitable strategies to ensure Massachusetts achieves net-zero greenhouse gas emissions by 2050.” D. App. Ex. F at 1; DSOMF ¶ 44.
9. Among other things, the Roadmap states that “[i]n addition to the other essential ecological, economic, and social services they provide, natural lands and ecosystems—particularly forests—serve as a stock of stored carbon and facilitate a flow of carbon from the atmosphere to further build up that stock. As a result, effective, data-driven siting and other land use strategies that balance land use priorities for conservation and sequestration with land use needs for new clean energy

- production and other human uses will be critically important going forward.” D. App. Ex. F at 31; DSOMF ¶ 45.
10. Mr. Lapinkas is the owner of the Property. Defendants’ Response To Statement Of Undisputed Material Facts In Support Of Plaintiffs’ Motion For Summary Judgment (“PSOMF”) ¶ 1.
 11. The Property is approximately 24 acres in size. DSOMF ¶ 22.
 12. The Property has frontage along a public way, New Athol Road, and shares a boundary line with more than one privately-owned property. DSOMF ¶ 24.
 13. According to the Affidavit Of Maryanne Reynolds, sworn to on June 25, 2023, D. App. Ex. B at ¶ 6, fourteen single-family residential properties abut the Property or are located in its vicinity.
 14. One of the privately-owned abutting properties is the Riceville Pond site of the Harvard Forest, where public access is allowed for recreation, including hiking, dog-walking, fishing and hunting. DSOMF ¶ 25.
 15. The Town is zoned Residential-Agricultural. PSOMF ¶ 4.
 16. The Town has a Solar Electric Overlay District. PSOMF ¶ 5.
 17. The ZBA is the Town’s “Special Permit Granting Authority.” PSOMF ¶ 8.
 18. Sunpin prepared an application for a special permit and for site plan review for the Project on March 30, 2021 (“the Application”), which was submitted to the ZBA on April 5, 2021. PSOMF ¶ 9.
 19. Ground-mounted solar electric installations greater than 10kW (kilowatts) rated nameplate capacity are allowed as of right in the Solar Electric Overlay District. PSOMF ¶ 5.
 20. Large-scale ground-mounted solar energy systems are permitted by special permit outside the Solar Electric Overlay District. PSOMF ¶ 6.
 21. The Property is located outside the Solar Electric Overlay District. Appendix Of Documents And Authorities In Support Of Plaintiffs’ Sunpin Energy Services, LLC And Ralph P. Lapinkas, Jr.’s Motion For Summary Judgment (“P. App.”) Ex. B, Statement Of Reasons (“Statement Of Reasons”) at 2 n.2.
 22. The Project, which is a 4.3-megawatt photovoltaic generation and 2.0-megawatt energy storage system, is proposed to generate electricity to be sold to National Grid. See PSOMF ¶ 2.
 23. The Application for the Project was the first special permit application to the ZBA for a large-scale ground-mounted solar energy system. DSOMF ¶ 27.
 24. In the Application, the Property is described as “a vacant lot primarily occupied by woods and wetland area,” D. App. Ex. A at 1, the “proposed fenced area of the solar PV array occupies approximately 14.3 acres and consists of approximately 12,090 solar PV modules,” *id.* and “[t]rees that would shade the array will be removed.” *Id.* at 4; see also *id.* at 7 (“The Majority of the Site is wooded; therefore, tree clearing

- will be required in order to reduce shading and maximize the energy output of the system.”).
25. The Project would require removal of existing trees from the area of the Property on which the solar array would be installed. DSOMF ¶ 31.
 26. The Project would consist of a ground-mounted solar array and battery racks, with the solar panels mounted on a simple fixed-tilt, post, rail, and cross beam racking system. DSOMF ¶ 26.
 27. The Project would extend over and occupy approximately 14.3 acres of the Property. DSOMF ¶ 29.
 28. The Project would be enclosed with a seven-foot-high chain link fence and locking gate. DSOMF ¶ 30.
 29. As set forth in the Certificate Of Decision On Special Permit & Site Plan Review dated November 29, 2021, P. App. Ex. B (“the Decision”), a public hearing on the Application was opened on June 3, 2021 and continued on July 22, 2021, August 19, 2021 and September 23, 2021, at which time the public hearing was closed. P. App. Ex. B at 2.
 30. At the close of the public hearing on September 23, 2021 and after deliberation by the ZBA, a motion to approve the Application failed by a vote of two to one, “thereby failing to meet the statutory requirement for a three (3) member board.” P. App. Ex. B at 7.
 31. Board member Maryanne Reynolds (“Ms. Reynolds”), who voted not to approve the Application, provided the 26-page Statement Of Reasons, which was incorporated into the Decision. See P. App. Ex. B.
 32. In the Statement Of Reasons, Ms. Reynolds stated that her vote denying the Application was “consistent with both the Board’s responsibility under the Zoning By-laws and the state’s guidance on its diversified energy policy, which guidance ‘strongly discourages’ citing [*sic*] such projects in the forest.” PSOMF ¶ 15.
 33. In the Statement Of Reasons, Ms. Reynolds also stated that, although “[t]he state does not prohibit the proposed project . . . state energy policy ‘strongly discourages’ it” because “[i]nstead of locating projects in places that require significant tree cutting, state policy ‘encourages designating locations in industrial and commercial districts, or on vacant, disturbed land.’” PSOMF ¶ 16.
 34. The Town’s Conservation Commission issued an Order Of Conditions under the Wetlands Protection Act for the Project. PSOMF ¶ 10.

The Applicable Provisions Of The ZBL

The following provisions of the Town’s ZBL, see P. App. Ex. C, are relevant here:

SECTION 1. PURPOSE

The purpose of this By-law is to promote the health, safety and general welfare of the inhabitants of Petersham; to lessen the danger from fire; to maintain the beauty of the Town; to secure the proper growth of the Town by encouraging the most appropriate use of land and buildings; and

to stabilize the value of property; all as authorized by Chapter 40A of the General Laws (the Zoning Act), as from time to time amended, and other applicable provisions of law.

...

SECTION 11. BOARD OF APPEALS

There is hereby established a Board of Appeals which shall consist of three members ...

...

2. Special Permits: The Board of Appeals may grant a special permit for a special exception as provided in this By-law, when it shall have found that the use involved will not cause or give rise to noise, odor, refuse, exterior lighting, traffic or other considerations which would be offensive or detrimental to the present or future character of the neighborhood or the community and if the Board finds that the proposed use will not derogate from the intent and purpose of this By-law. Each such permit shall be subject to such conditions or safeguards as it may deem necessary or advisable. ...

...

SECTION 18. SOLAR ELECTRIC INSTALLATIONS

1. Purpose.

The purpose of this bylaw is to facilitate the creation of new large-scale solar electric installations by providing standards for the placement, design, construction, operation, monitoring, modification and removal of such installations that address public safety, minimize impacts on environmental, scenic, natural and historic resources and to provide adequate financial assurances for the eventual decommissioning of such installations.

a. Applicability

Building-mounted solar electric installations are not subject to the requirements of this section but do require a building permit.

This section applies to any large-scale ground-mounted solar electric installation (greater than 10 kW (kilowatts)) in the Town of Petersham. In the Solar Electric Overlay District such facilities are allowed As-of-Right. Outside of the Solar Electric Overlay District, such facilities are allowed by special permit.

...

Smaller scale (10 kW or less) ground-mounted solar electric installations need only comply with subsection F.3.

...

3. General Requirements for all ground-mounted Solar Electric Installations

a. Compliance with Laws, Bylaws and Regulations

The construction and operation of installations shall be consistent with all applicable local, state and federal requirements, including but not limited to applicable safety, construction, electrical and communications requirements. All buildings and fixtures forming part of the installation shall be constructed in accordance with the State Building Code.

...

c. Dimensional Requirements

(1) Setbacks to all installation structures and equipment shall be at least 50 feet from the property lines.

(2) The height of any solar electric installation structure shall not exceed 20 feet.

(3) Installations larger than 25kW shall not be closer than 300 feet from a public way.

4. Site Plan Review

Installations larger than 10kW shall be subject to Site Plan Review by the Zoning Board of Appeals prior to construction or modification, as provided in this section. ...

...

8. Design and Performance Standards

a. Lighting

Lighting shall be minimal and comply with local, state and federal law and shall be shielded so as to minimize spillover into abutting properties. Lighting shall be directed downward and shall incorporate full cut-off fixtures to reduce light pollution.

b. Signage

A sign consistent with the Town's Bylaws shall be required to identify the owner and provide a 24-hour emergency contact phone number and may include identification of the manufacturer or operator of the installation.

c. Utility Connections

Wherever possible all utility connections from the solar electric installation shall be underground, depending on appropriate soil conditions, topography of the site and any requirements of the utility provider. Electrical transformers for utility interconnections may be above ground if required by the utility provider.

d. Roads

Access roads shall be constructed so as to minimize grading, removal of stone walls or trees and minimize impacts to environmental or historic resources.

e. Noise

Sound or noise levels may not exceed a decibel level of 50 dBA, as measured at the boundary of the property.

9. Safety and Environmental Standards

...

b. Land Clearing, Soil Erosion and Reporting

Clearing of natural vegetation shall be limited to what is necessary for the construction, operation and maintenance of the installation or otherwise prescribed by application laws, regulations, and bylaws.

STANDARD OF REVIEW ON SUMMARY JUDGMENT

Generally, summary judgment may be granted “where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Green Mountain Ins. Co. v. Wakelin*, 484 Mass. 222, 226 (2020), quoting *Boazova v. Safety Ins. Co.*, 462 Mass. 346, 350 (2012). See Mass. R. Civ. P. 56(c). In evaluating the factual record before it, the court must “make all permissible inferences favorable to the nonmoving party ... and resolve any disputes or conflicts in the summary judgment materials in their favor.” *Carey v. New England Organ Bank*, 446 Mass. 270, 273-274 (2006). Where both parties have moved for summary judgment, the evidence is viewed “in the light most favorable to the party against whom judgment is to enter.” *Eaton v. Federal Nat’l Mite. Ass’n*, 93 Mass. App. Ct. 216, 218 (2018), quoting *Albahari v. Zoning Bd. of Appeals of Brewster*, 76 Mass. App. Ct. 245, 248 n.4 (2010). “‘Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law’ (quotation and citation omitted).” *Aquino v. United Prop. & Cas. Co.*, 483 Mass. 820, 825 (2020), quoting *Surabian Realty Co. v. NGM Ins. Co.*, 462 Mass. 715, 718 (2012).

STANDARD OF REVIEW – G. L. c. 40A

As described by the Supreme Judicial Court in *E & J Props., LLC v. Medas*, 464 Mass. 1018, 1019 (2013), quoting *Wendy’s Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeals of Billerica*, 454 Mass. 374, 381 (2009), which in turn quotes *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 558 (1954), “[j]udicial review of a zoning board’s decision pursuant to G. L. c. 40A, § 17, ‘involves a peculiar combination of de novo and deferential analyses.’” In *Shirley Wayside Ltd. P’ship v. Board of Appeals of Shirley*, 461 Mass.

469, 474-475 (2012), the Supreme Judicial Court described the process of the trial court's review as follows:

The trial judge makes his own findings of facts and need not give weight to those the board has found. See G. L. c. 40A § 17; *Pendergast v. Board of Appeals of Barnstable*, *supra* at 558-559. The judge then “determines the content and meaning of statutes and by-laws and . . . decides whether the board has chosen from those sources the proper criteria and standards to use in deciding to grant or to deny the variance or special permit application” (citations omitted). *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73-74, 794 N.E.2d 1198 (2003). . . . After determining the facts and clarifying the appropriate legal standards, the judge determines whether the board has applied those standards in an “unreasonable, whimsical, capricious or arbitrary” manner. *Wendy's*, *supra* at 382, quoting *Roberts v. Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 487, 709 N.E.2d 798 (1999).

This review “typically requires two principal inquiries, one of which involves an almost purely legal analysis and the other of which involves a highly deferential bow to local control over community planning.” *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003).

The *Britton* court described the first inquiry as “an essentially legal analysis . . . to decide whether the board's decision was based on a ‘legally untenable ground,’ or, stated in a less conclusory form, on a standard, criterion or consideration not permitted by the applicable statutes or by-laws.” *Id.* at 73. “Deference is . . . owed to a local zoning board because of its special knowledge of ‘the history and purpose of its town's zoning by-law.’” *Wendy's*, 454 Mass. at 381, quoting *Duteau v. Zoning Bd. of Appeals of Webster*, 47 Mass. App. Ct. 664, 669 (1999). “Accordingly, a judge must give ‘substantial deference’ to a board's interpretation of its zoning bylaws and ordinances.” *Id.* “In the main, though, the court determines the content and meaning of statutes and by-laws and then decides whether the board has chosen from those sources the

proper criteria and standards to use in deciding to grant or to deny the variance or special permit application.” *Britton*, 59 Mass. App. Ct. at 73.

The second inquiry “involves a highly deferential bow to local control over community planning.” *Doherty v. Planning Bd. of Scituate*, 467 Mass. 560, 566 (2014), quoting *Shirley Wayside*, 461 Mass. at 475. “The board is entitled to deny a permit even ‘if the facts found by the court would support its issuance.’” *Doherty*, 467 Mass. at 566-67, quoting *Shirley Wayside*, 461 Mass. at 475, which in turn quotes *Wendy’s*, 454 Mass. at 383. A judge may overturn a board’s decision only when “no rational view of the facts the court has found supports the board’s conclusion.” *Id.* at 567.

APPLICATION TO THE UNDISPUTED FACTS

Turning first to an analysis of the criteria and standards employed, Ms. Reynolds appropriately relied upon relevant provisions of the ZBL and G. L. c. 40A, § 9. Ms. Reynolds first quoted from Section 11 of the ZBL: the ZBA “may grant a special permit for a special exception as provided in this By-law, when [1] it shall have found that the use involved will not cause or give rise to noise, odor, refuse, exterior lighting, traffic or other considerations which would be offensive or detrimental to the present or future character of the neighborhood or the community and [2] if the Board finds that the proposed use will not derogate from the intent and purpose of this By-law.” Statement Of Reasons at 7-8. Ms. Reynolds then quoted from Section 1 of the ZBL, which states that the purpose of the ZBL “is to promote the health, safety and general welfare of the inhabitants of Petersham; to lessen the danger from fire; to maintain the beauty of the Town; to secure the proper growth of the Town by encouraging the most appropriate use of land and buildings; and to stabilize the value of property.” Statement Of Reasons at 8. Turning to Section 18, Ms. Reynolds quoted from its stated purpose, which is “to

facilitate the creation of new large-scale solar electric installations by providing standards for the placement, design, construction, operation, monitoring, modification and removal of such installations that address public safety, [and] minimize impacts on environmental, scenic, natural and historic resources.” *Id.* That last phrase is taken verbatim from the Clean Energy Guide.

In addition to the just-cited provisions of the ZBL, Ms. Reynolds also quoted from G. L. c. 40A, § 3, ninth para., which provides that “[n]o 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.” Statement Of Reasons at 9. As noted by the Supreme Judicial Court in *Tracer Lane II Realty, LLC v. City of Waltham*, 489 Mass. 775, 780 (2022), “[t]hat statutory language provides municipalities with more flexibility than statutory protections for land use for education, religion, and child care, which allow only for reasonable regulations on such matters as bulk and height.” And, as noted in *PLH, LLC v. Town of Ware*, 2022 Mass. App. Unpub. LEXIS 767 (2022), the ninth paragraph of § 3, unlike its first and third paragraphs protecting agricultural and childcare use, permits a municipality to impose special permit requirements on solar energy uses. In addition, of relevance here, municipalities retain authority over the siting of solar energy uses. *Tracer Lane II*, 489 Mass. at 782 (“[I]ike all municipalities, Waltham maintains the discretion to reasonably restrict the magnitude and placement of solar energy systems.”). Accord *PLH, LLC*, 2022 Mass. App. Unpub. LEXIS at *5 (“The special permit requirement therefore gives the town a second opportunity to ensure large solar installations are appropriate for their location. This is a legitimate municipal purpose.”).

It bears noting that Section 1 of the ZBL describes its purpose as being, in part, “to promote the health, safety and general welfare of the inhabitants of Petersham,” and that G. L. c.

40A, § 9, ninth para., allows regulation of solar energy systems “to protect the public health, safety or welfare.”¹ As this court (Speicher, J.) recently observed, “[t]he meaning of ‘public welfare’ has not been considered in the context of G.L. c. 40A, §3, but it has been examined by the courts in other contexts.” *Summit Farm Solar, LLC v. Planning Bd. for New Braintree*, 30 LCR 61, 66 (2022). In *In re Opinion of the Justices to Senate*, 333 Mass. 773, 778 (1955), in which the Supreme Judicial Court opined on the constitutionality of a proposed act creating the Nantucket Historic District Commission, the court considered whether the statute could “rest upon the less definite and more inclusive ground that it serves the public welfare? The term public welfare has never been and cannot be precisely defined. Sometimes it has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts, but not to include ‘mere expediency.’”² The court went on to quote favorably from *Berman v. Parker*, 348 U.S. 26, 33 (1954):

The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community

¹ “General welfare” and “public welfare” appear to be used interchangeably in the case law. Compare *Kane v. Board of Appeals of City of Medford*, 273 Mass. 97, 104 (1930) (“Zoning laws are enacted under the police power and relate to public health, public safety and the general welfare.”) with *In re Opinion of the Justices*, 234 Mass. 597, 603 (1920) (“The public health, the public safety, the public morals, and, when defined with some strictness so as not to include mere expediency, the public welfare, each repeatedly has been held sound ground for the exercise of the police power.”). See also, e.g., *In re Opinion of the Justices*, 261 Mass. 523, 542 (1927) (“The Boston Elevated Railway is devoted to a public use and its operation and management concern the public welfare;” “The operation and management of the Boston Elevated Railway Company during the term of the lease are to be by a board of public officers for the promotion of the general welfare”); *In re Opinion of the Justices*, 234 Mass. 597, 603, 611 (1920) (“public welfare” “has been held sound ground for the exercise of the police power;” “[t]he suppression and prevention of disorder, the extinguishment of fires and the enforcement of regulations for street traffic, and other ordinances designed rightly to promote the general welfare”).

² In the Nantucket Historic District case, the court also commented on earlier definitions of “public welfare” that “originated before the extensive restrictions upon the use of private property now familiar in zoning rules had met with general acceptance,” 333 Mass. at 779, indicating that the more modern view of the concept was broader. As an example of the earlier construct, the court cited to *In Re Opinion of the Justices*, 234 Mass. 597 (1920) (addressing the constitutionality of a bill authorizing cities and towns to limit buildings according to their use or construction), quoted *supra* at n.1.

should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Having identified the proper criteria and standards, Ms. Reynolds proceeded to methodically apply them to the facts in the record before the ZBA. Notably, she agreed with the Plaintiffs that the Project would not cause issues with odor, dust, refuse, exterior lighting or traffic that would cause “concern,” or, as stated in Section 11 of the ZBL, “be offensive or detrimental to the present or future character of the neighborhood or the community.” In addition, while flagging concerns about noise and danger from fire, she concluded that those concerns could be addressed by conditions imposed in a special permit. Ms. Reynolds’s objections to the Project were based instead on (1) its adverse impact on natural and working lands, which she contended are important to the Town in a variety of ways identified by her, (2) its placement in a residential area, and (3) its negative impact on property values as expressed, in part, by an abutter to the Property. More broadly, Ms. Reynolds challenged the siting of the Project on property that would require cutting a significant number of trees, because “maintaining trees assists the Commonwealth’s energy policy goals because of the important water management, cooling and climate benefits trees provide,” Statement Of Reasons at 12, and their removal would adversely affect “habitat for wildlife, recreational opportunities and sense of place for people.” *Id.* While some of Ms. Reynolds’s objections are more compelling than others based on the record before this court, this is not a case presenting one of “those rarely encountered points where no rational view of the facts the court has found supports the board’s conclusion.” *Wendy’s*, 454 Mass. at 383.

The Plaintiffs’ arguments for overturning the Decision do not pass muster. While Plaintiffs correctly note that the Project is protected by the Dover Amendment, they fail to acknowledge the greater flexibility granted to municipalities with respect to solar energy

facilities, as opposed to agricultural and childcare uses. Ignoring the standards and criteria set forth in the Statement Of Reasons, the Plaintiffs wrongly contend that Ms. Reynolds did not employ the standards contained in the ZBL (she did, applying them in some instances in light of information contained in, among other things, the Clean Energy Guide and the Roadmap). The Plaintiffs further contend that the facts relied upon by Ms. Reynolds are not in the record, an argument that seems to ignore the materials provided in the ZBA's appendix. Finally, Plaintiffs argue that requiring a three-member board to vote unanimously to approve a special permit frustrates the purpose of the statute. This last argument ignores the plain language of G. L. c. 40A, § 9, which states, "A special permit issued by a special permit granting authority shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board," (with three exceptions not relevant here) and is not, as Plaintiffs argue, "the definition of arbitrary." Memorandum Of Law In Support Of Plaintiffs' Motion For Summary Judgment at 20. Board members can have competing and equally well-grounded positions. That one prevails over another does not render the ultimate decision arbitrary.

CONCLUSION

For the reasons set forth above, judgment shall issue dismissing the complaint in this matter with prejudice.

SO ORDERED.

By the Court (Roberts, J.)
/s/ Jennifer S.D. Roberts

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: August 8, 2023.