COMMONWEALTH OF MASSACHUSETTS
Massachusetts Appeals Court

2021-P-0429

TRACER LANE II REALTY, LLC
Appellee

v.

CITY OF WALTHAM AND WILLIAM L. FORTE, in his capacity as Inspector of Buildings for the City of Waltham,
Appellants

ON APPEAL FROM AN AWARD OF SUMMARY JUDGMENT BY THE LAND COURT

BRIEF AND ADDENDUM FOR THE APPELLANT, CITY OF WALTHAM

THE CITY OF WALTHAM
AND
WILLIAM L. FORTE
BY THEIR ATTORNEY

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1. Whether Waltham's enforcement of its zoning code, resulting in denial of Tracer Lane's request to use residential property in Waltham as an access road to abutting commercial property in Lexington to build a solar energy facility, violated G.L. c. 40A, § 3 where the provision prohibits only direct regulation of solar energy systems and not incidental effects on the same by otherwise reasonable zoning laws.

2. Whether Waltham, which will receive no benefit from the solar installation, must nevertheless set aside its prohibition against commercial activity in a residential zone to allow Tracer Lane to use a single-family residence lot to build an access road to construct and thereafter maintain a solar power plant in neighboring Lexington.

3. Whether the Land Court's decision denying the City's Motion for Summary Judgment and granting Summary Judgment to Tracer Lane was fundamentally flawed where it misrepresented the City's argument, ignored evidence presented by the City that contradicted the premise upon which the decision was based, and misinterpreted and misapplied recent Land Court decisions regarding the solar provision.

4. There are no appellate decisions concerning G.L. c. 40A, § 3, para. 9 and recent decisions from the Land Court appear to be conflicted regarding the extent to which municipalities may regulate solar energy installations necessitating the Court's guidance.

5. Whether G.L. c. 40A, § 3, para. 9 permits a municipality to prohibit commercial solar facilities in some zoned areas if it permits them in others.

STATEMENT OF THE CASE

The City of Waltham ("City" or "Waltham") brings this appeal from the March 5, 2021 decision of Land Court Judge Howard P. Speicher granting appellee Tracer Lane II Realty, LLC's ("Tracer Lane") motion for summary judgment and denying the City's motion for summary judgment. (RA7, AD 56)

Tracer Lane owns both a parcel of commercially zoned property in Lexington and an abutting residentially zoned property in Waltham. It informally sought permission from the City to use the residential property, which is improved by a single-family suburban home, as an access road to the Lexington property to construct a 1+ megawatt solar energy facility and thereafter to maintain the facility. (AD 71) When the City denied the request pursuant to its zoning code that

prohibits commercial activity in residentially zoned areas, Tracer Lane brought an action requesting declaratory relief under G.L. c. 240, § 14A, claiming that the Waltham zoning code does not specifically permit solar power arrays and, thus, is in violation of G.L. c. 40A, § 3, ¶ 9. (AD 71-81) The City contended, in part, that Section 3.245 of the code allows large scale solar installations, which qualify as energy power plants, as-of-right in industrial zones, and that, although not codified, Waltham's practice has been to allow - by permit, special permit, or variance - solar installations in commercial districts, as well as accessory use solar installations in both commercial and residential districts. (RA 21-25)

After conducting limited discovery, the parties filed cross-motions for summary judgment. The Land Court Judge's decision granting summary judgment to Tracer Lane is primarily based on the premise that, assuming *arguendo* Waltham's zoning code permits as-of-right solar installations in industrial areas but no solar facilities anywhere else, that represents less than 2% of Waltham's land area and, therefore, is an unreasonable regulation pursuant to G.L. c. 40A, § 3. (AD 71-81)

SUMMARY OF THE ARGUMENT

I. The Land Court erred in finding that the City's refusal to permit Tracer Lane's proposed use of the residential property in Waltham as an access road to commercially zoned land in Lexington to construct a solar array violated G.L. c. 40A, § 3.

A. Waltham's enforcement of its zoning code was not a direct regulation against construction of the solar array in violation of G.L. c. 40A, § 3.

B. Even if G.L. c. 40A, § 3 applies to the case at bar, Tracer Lane's proposed use of 119 Sherbourne Place is not permitted.

II. The City does not prohibit nor unreasonably regulate solar installations in violation of G.L. c. 40a, § 3, and the Land Court erred in focusing only on as-of-right use in industrial areas and ignoring evidence of city-wide solar installations to justify granting summary judgment to Tracer Lane.

A. The City permits solar installations in all zoning areas.

B. The City of Waltham does not unreasonably regulate solar installation.

C. The Land Court erred in ignoring evidence of permitted solar installations throughout Waltham and in its

misinterpretation of the *Northbridge* and *PLH* Land Court decisions.

STATEMENT OF THE FACTS

A. Tracer Lane's Lexington and Waltham properties.

Tracer Lane is the owner of a 30-acre parcel of land located in Lexington and zoned as commercial/manufacturing. (RA 26-28, 30-32) The land is unimproved except for "electric transmission lines running over a 250-foot wide NSTAR Electric Co. easement." (AD 63) Tracer Lane is also the owner of a separate, adjacent parcel located in Waltham at 119 Sherbourne Place. (RA 44-45) That property is located in an area designated as Residential Zone RA2 at the end of a cul-de-sac of well-maintained, up-scale, single-family homes. (RA 46-49) Zone RA2 requires a minimum lot size of 15,000 square feet and frontage of 80 feet for each home.

The general neighborhood of Sherbourne Place is an exclusive area of Waltham bordering on Lincoln to the immediate west and Lexington to the immediate north and northeast and has many of the qualities found in the residential areas of those wealthier communities, which is reflected in Waltham's assessment of Tracer Lane's property and its neighbors' at well over $800,000 each.

(RA 52-54, 55-62) Several of the streets in the immediate area are also cul-de-sacs, so have no through traffic. (RA 52-54)

Section 3.4 Table of Uses of the Waltham Zoning Code prohibits commercial activity in an RA2 zone. (AD 72) Accordingly, there are no commercial properties or commercial use of properties in the Sherbourne Place neighborhood. (RA 64)

B. Proposed solar installation and means of access.

Tracer Lane intends to erect on the Lexington property a ±1.0 MW commercial solar array covering 6.5 acres of a 30-acre lot and involving at least 3,916 solar panels and "two areas … consisting of equipment located on concrete pads" and has hired civil engineering firm Beals and Thomas to manage the project. (RA 27-28, 68-94) The Lexington property has no frontage on a public way, but Tracer Lane considered three possible means of access. (RA 32-33, 95-101)

The first and most desirable was to obtain a license from the City of Cambridge to use a cart path/access road owned and used by Cambridge to access the nearby Cambridge Reservoir and also used by right of easement by Eversource to access its power lines located on a swath of land on Tracer Lane's Lexington property, over

which Eversource also has an easement. (RA 30-32, 102-107) Although talks with Cambridge officials were initially promising, ultimately the Cambridge Law Department opined that such a license was contrary to Article 97 of the Amendments to the Massachusetts Constitution and, therefore, statutorily barred. (RA 30-32, 108-109)

Tracer Lane also considered a right of way off a private way also named Tracer Lane[1] in Waltham that could access the Lexington property across wetlands in Waltham and Lexington. (RA 30-33) It believed it had "a clear permitting path forward to access the site through the wetland resource areas …." (RA 110-115) Specifically, the civil engineering company opined that the solar array qualified "for limited project status" under 310 CMR 10.53(t), which allows for construction of a new access roadway needed to transport equipment to a renewable energy project site, "where reasonable alternative means of access to an upland area is unavailable." (RA 95-101) In 2018, in anticipation of developing this means of access, Tracer Lane prepared, but did not file, the requisite Notices of Intent of the

[1] Now named Data Drive.

project to both Lexington and Waltham Conservation Commissions. (RA 116-152, 30-33)

The third alternative was to access the Lexington property through the Sherbourne Place residential property both for construction and future maintenance purposes. Such use, according to Tracer Lane's expert, would "require removal of the existing trees between 119 Sherbourne Place and the abutting neighbor's lot ..., [and] [c]learing and grubbing and establishment of a crushed stone driveway. Upon completion of construction the driveway of 119 Sherbourne Place may need to be repaved due to damage from construction vehicle traffic and the crushed stone access replaced with another means for access for occasional maintenance." (RA 100)

The solar project anticipates erection of approximately 3,916 panels each measuring 6'5" x 3'3" . Conservatively, p reparation of the Lexington site and construction of the solar array would require vehicular traffic of at least 3900 heavy truck trips over at least a six-month period travelling through the Sherbourne Place residential neighborhood. (RA 38-39) Thereafter, maintenance of the land and array would necessitate at least 12 visits annually. (RA 153-170)

C. Permitted solar installations in Waltham.

Tracer Lane's proposed solar array falls within the industry accepted description of a power station or plant.(RA 174) Section 3.245 of the Waltham zoning code, entitled "Gas works, electric lighting and power stations," expressly permits as-of-right in industrial zones "[e]stablishments for the generation of power for public or private consumption purposes that are further regulated by Massachusetts General Laws." (AD 77) "Power station" is defined in Merriam-Webster's Dictionary as a "power plant." (RA 177-178) A power plant is an industrial facility that generates electricity from primary energy sources, including fossil fuel, nuclear energy, and alternative energy sources (solar, wind, geothermal, biomass, and hydropower). (RA 179-184) "Photovoltaic (PV) systems use solar electric cells that convert solar radiation directly into electricity. Individual PV cells are arranged into modules (panels) of varying electricity-producing capacities. PV systems range from single PV cells for powering calculators to large power plants with hundreds of modules to generate large amounts of electricity." (A 185-187) According to the U.S. Energy Information Administration (EIA), "[u]tility-scale [photovoltaic] power plants have at least 1,000 kilowatts

(or one megawatt) of electricity generating capacity." (RA 185-187)

In addition to as-of-right solar power plants in industrial zoned areas, the City allows various sizes of solar arrays in commercially zoned areas as an as-of-right accessory use or by permit issued by the Building Inspector, special permit issued by the Waltham City Council, or variance granted by the Zoning Board of Appeals. (RA 189-194, 195-200, 201-209) Further, Section 3.211 of the Waltham Zoning Code allows by right in residential zones "[a]ccessory use customarily incidental to any residential use permitted herein, provided that such use shall not include any activity conducted for gain, or any private walk or way giving access to such activity or any activity prohibited under this chapter." (AD 71) A stroll around Waltham establishes that solar arrays on residential properties are common and thus permitted in the City. (RA 210-261)

STANDARD OF REVIEW

An appellate court's review of a lower court's decision on cross motions for summary judgment is de novo, construing all evidence in the light most favorable to the party against whom judgment has entered. *Biewald v. Seven Ten Storage Software,*

Inc., 94 Mass.App.Ct. 376, 382 (2018); *Albahari v. Zoning Bd. of Appeals of Brewster*, 76 Mass.App.Ct. 245, 248 n. 4, (2010); *DiLiddo v. Oxford St. Realty, Inc.*, 450 Mass. 66, 70 (2007).

ARGUMENT

I. THE LAND COURT ERRED IN FINDING THAT THE CITY'S REFUSAL TO PERMIT TRACER LANE'S PROPOSED USE OF THE RESIDENTIAL PROPERTY IN WALTHAM AS AN ACCESS ROAD TO COMMERCIALLY ZONED LAND IN LEXINGTON TO CONSTRUCT A SOLAR ARRAY VIOLATED G.L. C. 40A, § 3.

A. Waltham's enforcement of its Zoning Code was not a direct regulation against construction of the solar array in violation of § 3.

Aware that Waltham prohibits commercial activity in residentially zoned areas, Tracer Lane crafted its Complaint to allege that the City's denial of the request to use the Sherbourne Place residential property to access a proposed solar power plant in Lexington was a violation of G.L. c. 40A, § 3, ¶ 9. The Land Court's adoption of that argument is misplaced. Tracer Lane's request was not to construct a solar plant on the residential property in Waltham, but to use the property solely as an access road to its commercial property in Lexington where the array would be located. The City's denial of the request was not designed to prevent construction of the solar array and, indeed, does not preclude Tracer Lane from constructing or thereafter

maintaining the solar installation; thus, it does not violate G.L. c. 40A, § 3.

G.L. c. 40A, § 3, ¶ 9 provides:

> 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.

If Tracer Lane sought to build the solar array in Waltham, the statute's applicability would not be in question and the analysis would be of the reasonableness of Waltham's regulations. However, no part of the array will be located in Waltham, and the City's denial was not intended to impede Tracer Lane's objective of constructing a solar array, but to preserve the residential nature of Sherbourne Place.

Tracer Lane's reliance on § 3 as it applies to Waltham's denial is without merit where it is established law that the provision "should be construed to prohibit only 'direct' regulation" of those categories protected by the statute, not incidental effects of otherwise reasonable limitations. *81 Spooner Road LLC v. Town of Brookline*, 425 Mass. 109, 116 (2008).

Spooner concerned G.L. c. 40A, § 3, ¶ 2, which prohibits municipal regulation of the interior area of

a single-family residence but provides for reasonable regulations concerning bulk and height of such buildings, as well various lot related restrictions. *Id*. at 110. The plaintiff developer challenged the validity of Brookline's bylaws that limited the maximum floor-to-area ratio and the exterior and bulk of single-family dwellings, arguing that the bylaws violated § 3 to the extent they had *any* effect on the interior area of the homes to be built. *Id*. at 111. The Land Court rejected the argument, holding that although the particular bylaw at issue designed to minimize bulk of the home would necessarily also affect its interior dimensions, it would do so only "incidentally." *Id*. at 110. On appeal, the Supreme Judicial Court upheld the Land Court ruling, agreeing with the town's position that § 3 "should be construed to prohibit only 'direct' regulation of interior area, and not incidental effects of reasonable dimensional, bulk, and density requirements." *Id*. at 116.

Spooner did not create new zoning law. In *Radcliffe College v. City of Cambridge*, 350 Mass. 613 (1966), the plaintiff challenged the city's attempt to enforce an ordinance requiring off-street parking, claiming it would necessitate turning land used as a quadrangle into

a parking area and thus would violate then G.L. c. 40A, § 2 (repealed in 1987) that prohibited any limitation on land used for educational purposes. *Id*. at 614. In rejecting the plaintiff's argument, the SJC noted that the ordinance was designed to alleviate the city's chronic parking problem and that the plaintiff's compliance with its requirements, while requiring "choices among the proper educational purposes of the institution" would not "impede the reasonable use of the college's land for its educational purposes." *Id*. at 618. In essence, the city ordinance was not directly targeting the college's use of its otherwise statutorily protected educational facilities even if its enforcement incidentally affected use of those same facilities, and thus was not violative of c. 40A, ¶ 2. *Id*.

In this instance, the City has presented no direct impediment to any aspect of Tracer Lane's solar project. Waltham's enforcement of section 3.4 of its zoning code with respect to permitted uses in city residential areas, as in *Spooner* and *Radcliffe College*, is wholly reasonable, directly related to its zoning goals, and its effects merely incidental to Tracer Lane's solar array ambitions. *See Town of Seekonk v. John J. McHale & Sons, Inc.*, 325 Mass. 271, 274 (1950) (enforcement of

bylaw limiting use of residentially zoned property had only indirect and collateral effect on plaintiff's proposed commercial activity since property still otherwise usable). Forcing the City to disregard the rights and expectations of owners of residentially zoned property to accommodate construction of a facility not within Waltham "would deprive the town of all ability to regulate 'density of population and intensity of use'" that is not mandated by § 3. *Spooner* at 117. *See also*, *Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 759 (1993) (institution protected by Dover Amendment "must comply with reasonable regulations designed to preserve a comfortable, desirable community" and c. 40A, § 3 "is intended to encourage 'a degree of accommodation between concern....'"); *Town of Brookline v. Co-Ray Realty Co.*, 326 Mass. 206, 213 (1950) (although by-law precluded plaintiff's intended use of property, it did not bar all uses and thus was reasonable).

Where the City's denial is not directly related to constructions of a solar energy facility in its community, § 3 is not implicated and should not be bootstrapped into the discussion because of the incidental effect of code enforcement.

B. Even if G.L. c. 40A, § 3 applies to the case at bar, Tracer Lane's proposed use of 119 Sherbourne Place is not permitted.

Cities and towns have independent municipal powers to adopt ordinances "for the protection of the public health, safety and general welfare." *Durand v. IDC Bellingham*, LLC 440 Mass. 45, 50-52 (2003). Such independent police powers include the right to enact zoning ordinances to control "land usages in an orderly, efficient, and safe manner to promote the public welfare." *Id*. An ordinance has a strong presumption of validity unless a party can demonstrate that it is "arbitrary and unreasonable, or substantially unrelated to the public health, safety … or general welfare." *Johnson v. Edgartown*, 425 Mass 117, 121 (1997). Such deference afforded local zoning laws is "consistent with the deference extended to other legislative acts." *See Connors v. Boston,* 430 Mass. 31, 35 (1999)(municipal acts presumed to be valid unless inconsistent with State or Federal law); *Commonwealth v. Henry's Drywall Co.,* 366 Mass. 539, 543 n. 5 (1974) (court will defer to legislature unless statute "patently offensive"); *W.R. Grace & Co.-Conn. v. City Council of Cambridge,* 56 Mass.App.Ct. 559, 566

(2002) ("we accord municipalities deference as to their legislative choices").

Tracer Lane's Complaint makes no claim that its Waltham property is incorrectly zoned nor did the Land Court so find; the company instead seeks to change the intended use of the property to accommodate development of its Lexington commercial property. The Land Court's subsequent allowance of Tracer Lane's motion for summary judgment is inconsistent with the accepted general principles that grant deference to legislative enactments and restrict property usage to that permitted by local zoning laws. *Whittemore v. Building Inspector of Falmouth*, 313 Mass. 248, 249 (1943) (not permissible to single out one lot to essentially become industrial district and subject to less onerous regulations where situated within "long-established residential area" and "surrounded on all sides for a substantial distance by an area zoned for single residences").

Some background of the nature of Tracer Lane's Waltham property is warranted. Number 119 Sherbourne Place is located in Residential Zone RA2 at the end of a cul-de-sac consisting of well-maintained, up-scale single-family homes. (RA 49-54) Zone RA2 requires a minimum lot size of 15,000 square feet and frontage of

80 feet for each home. The general neighborhood of Sherbourne Place is an exclusive area of Waltham bordering on Lincoln to the immediate west and Lexington to the immediate north and north east and has many of the qualities found in the residential areas of those wealthier communities, reflected in Waltham's assessment of Tracer Lane's property and its neighbors at well over $800,000 each. (RA 59-62)

Several of the streets in the immediate area are also cul-de-sacs, so have no through traffic and thus are used mainly only by residents and their visitors. (RA 53-54) Section 3.4 Table of Uses of the Waltham Zoning Code prohibits commercial as-of-right use in an RA2 zone. (AD 72) Accordingly, there are no commercial properties or commercial use of properties in the Sherbourne Place neighborhood. Notwithstanding the decidedly tranquil, picturesque nature of the neighborhood, Tracer Lane seeks, and the Land Court has granted it the right, to carve out the company's single lot and transform into an access road to accommodate trucks, heavy equipment, loaders, and other such vehicles to develop its Lexington property.

The extent of the proposed commercial activity in the neighborhood cannot be underestimated. According to

initial calculations prepared by Tracer Lane's agents, the project involves a minimum of 716 "construction material truckloads" rolling along Sherbourne Place to the property for preparation of the Lexington site and installation of the solar array. (RA 262-263) Since the construction vehicles must also leave the property - carrying the stumps, topsoil, cut trees, and other debris necessary to prepare the site – that would result in excess of 1400 vehicles driving through the neighborhood. (RA 264-266)

As shocking and burdensome as those numbers appear, Tracer Lane's own estimates reveal a far greater potential impact. Answer No. 20 of its Answers to Interrogatories regarding anticipated traffic on Sherbourne Palace associated with the project estimates a maximum of 32 trucks and a minimum of 15 trucks each day of preparation of the site and construction and 15 trucks each day during erection of the panels. (RA 38-39) Assuming at least a six-month, Monday through Friday construction window with a minimum 15 trucks making return trips each day, the number of vehicles using Sherbourne Place during the project rises, conservatively, to at least 3900 (26 weeks x 5 days x 15 trucks x 2 for return). Further, these numbers do not

include personal vehicles used by workers conducting the preparation and construction which would be parked on Sherbourne Place for the duration of each workday. Tracer Lane anticipates that "crew will park off site to the maximum extent practicable" – an acknowledgement that it cannot guarantee construction employee vehicles will not be parked on Sherburne Place for at least six months. (RA 38-39)

Tracer Lane argues that such activity would be temporary, but that sidesteps the intensity of the commercial activity during that period. Construction of the solar array, according to one proposal submitted to Tracer Lane, would include tree and stump removal and grinding, top soil removal, drainage installation, erection of dams, concrete pad construction for electric power equipment, gravel spreading, fence installation, solar array installation, among many activities, most of which are dirty, dusty tasks requiring heavy machinery. (RA 264-269)

The trucks which must necessarily traverse Sherbourne Place if it is used as an access road will be different in kind from those vehicles normally found in such a neighborhood both in terms of size and nature. Instead of a sedan or a light truck driving by, property

owners would have to endure thousands of heavy trucks and industrial vehicles rumbling along their quiet road. Additionally, Tracer Lane's argument that such activity would be temporary ignores that its request for commercial use of the Waltham property encompasses not just the initial construction of the array, but maintenance of it thereafter.

A "Site Owner's Manual" prepared for Tracer Lane by its engineering firm outlines "source control and pollution prevention measures and maintenance requirements of stormwater best management practices (BMPs) associated with the proposed development." (RA 153-170) Proposed maintenance of the property would include regular mowing, application of fertilizers, herbicides, and pesticides, snow removal, and inspections and preventative maintenance of infiltration trenches "after major storm events … during the first three months of operation and twice a year thereafter." (RA 160-163) The manual also notes the requirement for regular inspection and maintenance of grassed swales and spillways, including mowing and reseeding and sediment and debris removal (RA 162) The report recommends 12 annual BMPs events, but these deal only with the land, not the solar array.

The proposed installation is a ±1.0 MW array involving at least 3,916 solar panels. Although solar arrays can be remotely monitored, repairs or adjustments must be performed manually, which will require site visits by different personnel to those performing ground maintenance since they presumably involve unrelated skill sets. (RA 36-39) Additionally, as technology advances, Tracer Lane may decide to replace the panels, necessitating added extensive work and use of the proposed Sherbourne Place property. Moreover, the driveway which Tracer Lane must construct - leading from the street through the trees at the side and rear of the property to the abutting Lexington property - to support the initial construction vehicles must be maintained at the property for the anticipated maintenance tasks.

Thus, although Tracer Lane attempts to minimize its future use of the property after installation of the array, such use not only substantially alters the suburban landscape of the site but guarantees multiple visits each year of trucks with heavy equipment to perform various emergency and maintenance tasks. As noted, every single such commercial use is barred by the Waltham zoning code.

None of this is news to Tracer Lane, which fully appreciated the inherent difficulties of such use, as expressed in various emails and reports among its managers and agents. A report to the City of Cambridge, produced during Tracer Lane's overture to that entity to use a cart path owned by Cambridge which would have provided access to Tracer Lane's property, clearly stated Tracer Lane's own belief that it had no legal right to use the Sherbourne Place property as an access road. It states, in pertinent part:

> Under Massachusetts law, because this property is located in a single-family residential zoning district (Waltham) and the solar project is located in an industrial district (Lexington), use of the residential right of way would require a zoning variance to allow for the less restrictive use of the industrial district. It is unlikely that we could establish a legal hardship and we would face significant abutter opposition, particularly where the project would present no direct or indirect benefit in any form to the City of Waltham.

(RA 270-272)

Another report from Beals and Thomas regarding considerations for access to the solar project notes that the Waltham property was not proposed for construction access "in order to minimize abutter concerns. However, they may be concerned about maintenance access, as well as the clearing up to the

back of their properties, anyway." (RA 273-275) It further notes: "Our prior experience with another solar project indicated that access to commercial uses could not be made through residentially zoned land, which may prohibit use of this residential property for any access (maintenance or construction)? (sic)" (RA 273-275) An additional Beals and Thomas report from June 2017 acknowledged Section 3.89 of the Waltham Zoning Code which prohibits secondary access through residential zones where "commercial activity has a clear and legal means of access through a nonresidential zoning district…." (RA 100) It also admitted that using 119 Sherbourne Place as an access route would require removal of the existing trees between 119Sherbourne Place and the abutting neighbor's lot, establishing the access road and then, upon completion of construction, repaving due to damage from construction vehicle traffic." (RA 100)

Notwithstanding Tracer Lane's admissions of the intensive truck traffic associated with the project, the Land Court Judge ruled, "I do not find the exact number [of truck trips during construction] to be material," (AD 64) and "I do not find the exact number of trips projected post-construction … to be material to the

resolution of this case." (AD 64) Failing to consider the project's disruption to and its effects on the neighborhood goes against accepted principles of zoning. Zoning is intended to stabilize the use of property, protect areas from adverse uses, and guard property owners in more restricted (e.g., residential) districts against activities and uses permitted in less restrictive (e.g., commercial) areas. *Van Renselaar v. City of Springfield*, 58 Mass.App.Ct. 104 (2003). "The primary purpose of zoning with reference to land use is the preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods." *Picard v. Zoning Bd. of Appeals of Westminster*, 474 Mass. 570, 574 (2016) quoting *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston,* 324 Mass. 427, 431 (1949).

It is well settled law in Massachusetts that property in residential districts cannot be used as access roadways to adjacent non-residentially zoned lots. *Harrison v. Building Inspector of Braintree*, 350 Mass. 559, 561 (1966); *Richardson v. Zoning Board of Appeals of Framingham,* 351 Mass. 351, 381 (1966). In *Harrison,* the Court noted that the use of residentially zoned land - which barred all industrial activity - as

an access roadway for an adjacent industrial plant was prohibited. 350 Mass. at 561. In *Richardson*, the Court held that a proposed private road located in a single-family zone and designed to access an apartment building in a multi-family zone was not permitted where the single-family residential district did not list apartments among its allowed uses of the land. 351 Mass. at 381. *Accord*, *Brookline v. Co-Ray Realty Co., Inc.*, 326 Mass. 206, 211-212 (vacant land in single-family resident district could not be used as rear entrance to apartment house located on adjacent unrestricted lot); *Building Inspector of Dennis v. Harney*, 2 Mass.App.Ct. 584, 585-586 (1974) (roadway to commercially zoned property not permitted use in residential zone); *Cary v. Board of Appeals of Worcester*, 340 Mass. 748, 752 (1960) (invalid variance for parking for business extending into residential zone).

This largely immutable rule applies even when the differently zoned lot is in another municipality, as in the case at bar. *Beale v. Planning Board of Rockland*, 423 Mass. 690, 698 (1996) ("Where a parcel of land lies in two municipalities, each may apply its zoning laws to the portion that lies within its boundaries"); *Brookline v. Co-Ray Realty Co.*, 326 Mass. 206, 211-213 (1950)

(proposed use of property in Brookline single family zone as rear yard and service entrance to rest of lot located in Boston multi-family zone not permitted); *Town of Chelmsford v. Byrne*, 6 Mass.App.Ct. 848, 849 (Mass. App. Ct. 1978) (owner of land in industrial district could not use part of the same lot located in adjacent residential zone [in the same or another town] as access roadway for industrial use). It stems from the basic principle that "a municipality ought to be accorded the right to carry out the policies underlying its zoning ordinance or by-law with respect to the actual uses made within its borders." *Burlington Sand & Gravel v. Harvard*, 26 Mass.App.Ct. 436, 439 (1988).

The only exception to this general rule is for substantial hardship. *Lapenas v. Zoning Bd. of Appeals of Brockton*, 352 Mass. 530, 533 (1967). However, the holding in *Lapenas* has been held to be a "very narrow exception to the principles expressed in the *Brookline* and *Harrison* decisions and is limited in its application by the peculiar facts involved." *Beale*, 423 Mass at 699.

In *Lapenas*, the plaintiff's property straddled two adjacent towns with different respective zoning designations. When the board of appeals for one town denied the plaintiff's variance, it essentially barred

the plaintiff from using the whole parcel. The Court held that this unusual circumstance, plus the incidental benefit to abutting residences if the variance was allowed, was enough to reverse the board's decision. *Lapenas,* 352 Mass. at 533. Absent such extenuating facts, however, the substantial hardship standard is a high bar to satisfy, and "courts have upheld restrictions on use in one zone even when the restrictions make access to property in another zone a physical impossibility thereby effectively preventing use of the land in the less-restricted zone." *Beale*, 423 Mass at 700-701.

Here, the facts fall squarely within the majority of cases that have denied prohibited access use in residential areas: Tracer Lane's Lexington property has been zoned for commercial use, and its separately purchased Waltham property is zoned for residential use, but Tracer Lane intends to use the Waltham property as a throughway to access the Lexington commercial solar installation. Such use constitutes commercial use of a residential property. *Harrison*, 350 Mass. at 561. The City has the right to enforce its zoning laws within its boundaries, and accordingly, Tracer Lane cannot use its residential Waltham property for commercial access.

Beale, 423 Mass. at 698. The Land Court's decision acknowledged the well-established principle, but noted it was in conflict with the protections set forth in G.L. c. 40A, § 3. (AD 56-71) This conclusion is in error.

There is no obstacle to Tracer Lane's use of its Lexington property that necessitates disregarding Waltham's zoning code as it relates to residential uses. Tracer Lane has not asserted and cannot assert that it has no other means of access to the property to constitute a hardship substantial enough to overcome the use restriction because it may do so from a commercially zoned area of Waltham. *Beale*, 423 Mass at 700-701. Specifically, the land designated for the solar array may be reached via an existing right-of-way across land at the end of Tracer Lane in Waltham. (RA 96-99) The difficulty is that the right of way passes over a wetland area in both Waltham and Lexington, but, as Tracer Lane has acknowledged, that is not a bar to access use. (RA 96-99) After analyzing the potential permitting requirements to cross the wetlands area, Tracer Lane's civil engineers opined that "there is a clear permitting path forward to access the site through the wetland resource areas …." (RA 110-111) Specifically, the civil engineer noted that the solar array qualifies "for

limited project status" under 310 CMR 10.53(t), which allows for construction of a new access roadway needed to transport equipment to a renewable energy project site. (RA 95-110)

In anticipation of this means of access, in 2018 Tracer Lane prepared, but did not file, the requisite Notices of Intent to both Lexington and Waltham Conservation Commissions of the project. (RA 116-152) The project narrative of the proposed Notice of Intent to the Waltham Conservation Commission maintained that the Tracer Lane wetland access was necessary because the Cambridge Law Department had opined that its cart path was legally not available for use by Tracer Lane, but did not mention the viability of the Sherbourne Place property. (RA 132-139)

The drawback for that option from Tracer Lane's perspective was and remains the cost, which the civil engineer calculated, depending on method and materials, at between $77,800 and $192,000. (RA 279-280) This compares to the projected cost of using the residential property of "approximately $20,000." (RA 279-280) It also pales in comparison to the project's projected 30-year profits of tens of millions of dollars. (RA 282-288) Certainly, the initial financial outlay to obtain

approval to construct an access road across the wetland would be recouped multiple times over once the installation becomes operational.

In any event, whatever the cost savings Tracer Lane may enjoy is insufficient to vary the permitted use of 119 Sherbourne Place. *Bricknell Realty v. Board of Appeals of Boston*, 330 Mass. 676, 681 (1953) (fact that owner unable to put premises to more profitable use is a factor to be considered, but alone is not adequate cause for granting variance). As stated in *Everpure Ice Mfg. Co., Inc., v. Board of Appeals of Lawrence*, 324 Mass. 433 (1949), "[t]he loss of a gain which a landowner might secure from the conduct of a new business upon land properly included in a residential district is only one element to be considered, but it is not a controlling factor. It does not of itself furnish a sufficient reason for the granting of a variance." *Id*. at 438. The *Everpure* court further noted that "[t]he financial situation or pecuniary hardship of a single owner affords no adequate ground for putting forth this extraordinary power [a variance to build a commercial parking lot in a residential zone] affecting other property owners as well as the public." *Id*.

Tracer Lane has not proffered sufficient evidence that warrants disregarding the City's prohibition of commercial activity - regardless of the intensity of use - in a residential zone and the Land Court's decision allowing the same should be reversed.

II. THE CITY DOES NOT PROHIBIT NOR UNREASONABLY REGULATE SOLAR INSTALLATIONS IN VIOLATION OF G.L. C. 40A, § 3, AND THE LAND COURT ERRED IN FOCUSING ONLY ON AS-OF-RIGHT USE IN INDUSTRIAL AREAS AND IGNORING EVIDENCE OF CITY-WIDE SOLAR INSTALLATIONS TO JUSTIFY GRANTING SUMMARY JUDGMENT TO TRACER LANE.

A. The City permits solar installations in all zoning areas.

Tracer Lane's claim – which the Land Court did not reach - that the Waltham zoning code prohibits solar installations by virtue of its omission of the specific term "solar energy systems" in its descriptions of permitted uses in any zone, and is therefore violative of the solar energy protection provision of G.L. c. 40, § 3, ¶ 9, is without merit. The zoning code expressly permits solar installations without such specificity. Moreover, no such specific reference is required under the statute: paragraph nine merely requires that "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….” G.L. c. 40, § 3, ¶ 9.

The statute’s focus is on encouraging greater use of solar power and discouraging unreasonable regulation of solar energy systems and not on ensuring that municipalities use specific language to guarantee that their use is allowed. It is sufficient that an existing permitted use encompasses solar energy systems to satisfy c. 40, § 3, ¶ 9. *Shuman v. Aldermen of Newton,* 361 Mass. 758, 766 (1972) (“no fatal vagueness or uncertainty” in zoning ordinance where proposed use fell within “common and approved” meaning of words); *Fordham v. Butera*, 450 Mass. 42, 47 (2007) (bylaw need not include definition of a word which has a “well-understood ordinary meaning”); *Berliner v. Feldman,* 363 Mass. 767, 771 (1973), quoting *Commonwealth v. S.S. Kresge Co.,* 267 Mass. 145, 148 (1929) (bylaw regulating nonconforming uses not lacking requisite certainty where word “‘rebuild,’ meaning to build again, is an ‘everyday term’ whose meaning can be determined ‘according to the common and approved usages of the language’”). Where “solar energy systems” fall within an existing as-of-right use in the Waltham zoning code, Tracer Lane’s argument necessarily fails. *Haggerty v. Borrego Solar Sys., Inc.*, No. 15-CV-

0800, 2016 WL 7645371, at *3 (Mass. Super. Oct. 3, 2016) (Curran, J.) (court held as reasonable board's conclusion that solar panel system fell under definition of “electric generating” facility).

Section 3.245 of the Code, entitled “Gas works, electric lighting and power stations,” expressly permits as-of-right in industrial zones “[e]stablishments for the generation of power for public or private consumption purposes that are further regulated by Massachusetts General Laws.” (AD 77) The code provides no definition of any of the terms in the title, including power stations, but the Court may look for guidance in defining same to “ordinary principles of statutory construction” and give undefined words “usual and accepted meanings [that] are consistent with their statutory purpose.” *Eastern Point, LLC v. Zoning Board of Appeals of Gloucester*, 74 Mass.App.Ct. 481, 486 (2009) (“meanings are derived from sources presumably known to the statute’s enactors, such as other legal contexts and dictionary definitions”) It follows that scientific terms may be obtained from relevant industry and government publications.

"Power station" is defined in Merriam-Webster's Dictionary as a "power plant."[2] (RA 177-178) A power plant is an industrial facility that generates electricity from primary energy sources, including fossil fuel, nuclear energy, and alternative energy sources (solar, wind, geothermal, biomass, and hydropower). (RA 179-182) "Photovoltaic (PV) systems use solar electric cells that convert solar radiation directly into electricity. Individual PV cells are arranged into modules (panels) of varying electricity-producing capacities. PV systems range from single PV cells for powering calculators to large power plants with hundreds of modules to generate large amounts of electricity." (RA 184) The U.S. Energy Information Administration (EIA) explains that "[u]tility-scale [photovoltaic] power plants have at least 1,000 kilowatts (or one megawatt) of electricity generating capacity." (RA 187)

[2] Notably, an example of correct usage of the phrase after the definition states: "In many parts of the world skies clear of pollution have helped photovoltaic *power stations*, which convert light into electricity, become more productive and reliable.— *The Economist*, "Solar's new power New solar cells extract more energy from sunshine," 23 May 2020. (emphasis in original) (RA 178)

By these definitions, therefore, Tracer Lane's proposed solar array is a power station or plant. Indeed, Tracer Lane admitted as much in its Motion for Summary Judgment Statement of Undisputed Material Facts, ¶ 4: "Developer intends to construct a 1-Megawatt solar energy system … [of] individual solar panels … organized in rows of varying lengths between 90 and 430 feet contained in an area of approximately 413,600 square feet. The Project's sole purpose is to produce and contribute solar energy to the electric grid in accordance with the SMART program." (RA 172) *Haggerty,* at 1 ("undisputed that the solar collection farm in question is an electric generating facility.") Since solar energy systems are *expressly permitted* under Section 3.245, the Code is not in violation of c. § 3, ¶ 9.

In addition to permitting solar arrays in industrial zones, Waltham also allows - although not specifically codified - installation of solar panel arrays in commercial zones as-of-right, by permit issued by the Building Inspector, special permit issued by the Waltham City Council, and variance granted by the Zoning Board of Appeals. (RA 189-194, 195-200, 201-209) Further, Section 3.211 of the City of Waltham's Zoning Code allows by right in residential zones, "[a]ccessory

use customarily incidental to any residential use permitted herein, provided that such use shall not include any activity conducted for gain, or any private walk or way giving access to such activity or any activity prohibited under this chapter." (AD 71) A stroll around Waltham establishes that solar arrays on residential properties are common and thus permitted in the City. (RA 210-262)

Case law related to G.L. c. 40A § 3 ¶ 9 is limited, but the Court may rely on interpretations of other paragraphs in § 3 for guidance. *Petrucci v. Bd. of Appeals of Westwood*, 4 LCR 167, 168 (Mass. Land Ct. 1996) (holding that where few cases interpret c. 40A § 3's child care provision, extensive case law on § 3's religious provisions could analogously be applied). In so doing, courts have held that zoning by-laws do not have to explicitly state the allowance of protected categories, but need only not explicitly prohibit such categories. *See id.* Accessory use has also been recognized as an acceptable method of complying with § 3, as "[n]o distinction is made by the statute regarding its applicability to 'principal' or 'accessory' buildings." *Watros v. Greater Lynn Mental Health & Retardation Ass'n*, 421 Mass. 106, 113 (1995). Moreover,

interpretation of § 3 should not be literal "if the result will be to thwart or hamper the accomplishment of the statute's obvious purpose, and if another construction which would avoid this undesirable result is possible," so long as it is compatible with legislative intent. *Id.*

Thus, Tracer Lane's assertion that the Waltham zoning code prohibits solar installations by its failure to explicitly include them in describing acceptable uses is without merit where the code does not explicitly exclude same, provides for as-of-right use in industrial zones under Section 3.245, and permits solar arrays as an accessory use in commercial and residential zones. Tracer Lane is certainly free to add solar panels to its Waltham property as an accessory residential use; however, it cannot use its residential property as an industrial/commercial throughway to construct a for-profit solar array in a differently zoned property in neighboring Lexington. Section § 3, ¶ 9 is not meant as a tool to circumvent zoning laws, but is instead intended to prevent municipalities from the absolute prohibition or unreasonable regulation of solar installations, which the City does not do. *See Watros*, Mass. 106 at 113.

B. The City of Waltham does not unreasonably regulate solar installation.

The burden of establishing that local by-laws or requirements are unreasonable restrictions pursuant to § 3, ¶ 9 lies with the challenging party. *Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 759 (1993). "While G.L. c. 40A, § 3 forbids [municipalities] from imposing unreasonable restrictions against protected uses, it does not suspend the zoning laws in their entirety." *Vignaly v. Zoning Board of Appeals of the Town of West Boylston*, 2005 WL 2864792 at *5 (Mass. Super. Ct. 2005) (citations omitted).

In determining the reasonableness of by-laws, courts must be both mindful that a § 3 protected category use is not absolute and "strike a balance between preventing local discrimination against an educational use [or other prohibited category], and honoring legitimate municipal concerns that typically find expression in local zoning laws." *Trustees of Tufts College*, 415 Mass. 753 at 757 (holding that even educational purposes protected by § 3 must still comply with reasonable zoning regulations). Likewise, the requirement of obtaining a permit before engaging in activities protected under § 3 is wholly reasonable if

the permitting process is not, in and of itself, unreasonable, arbitrary, or capricious. *Prime v. Zoning Bd. of Appeals of Norwell*, 42 Mass.App.Ct. 796, 802 (1997) (holding that agricultural use protected by § 3 could still be subject to reasonable building permit processes).

In cases interpreting § 3, ¶ 9's solar energy protections, *Duseau v. Szawlowski*, 2015 WL 59500, *1 (Mass. Land Ct. 2015) and *Briggs v. Zoning Bd. of Appeals of Marion*, 2014 WL 471951, *1 (Mass. Land Ct. 2014) provide particular guidance in the instant matter. In *Duseau*, the defendants sought to construct a solar farm in a Rural Residential District in the town of Hatfield. The Hatfield ZBA concluded that, because the by-laws did not explicitly permit solar installations, § 3, ¶ 9 should be construed to allow the defendants to build their solar farm as-of-right in any district. Hatfield appealed and, in reversing the ZBA, the Land Court held that because the town allowed solar facilities by right in its industrial district, it could prohibit solar installations in all other districts, including Rural Residential zones. *Duseau,* 2015 WL 59500, at *7.

In *Briggs*, the plaintiffs appealed the Marion ZBA's denial of their petition to construct a solar array.

The plaintiffs contended that where the town's zoning by-laws did not specifically allow for solar installations in any district, and where the by-laws only permitted solar arrays as an accessory use in residential and non-residential zones, the restrictions constituted unreasonable regulations in violation of § 3, ¶ 9. *Briggs*, 2014 WL 471951, *3. The Court held, however, that, provided the ZBA could justify that "light manufacturing" - which was allowed by right in an industrial zone - encompassed solar energy, there was no violation of § 3, ¶ 9. *Id*. at *3. The Court further opined that the complete division between commercial solar energy systems and residential accessory solar uses under the bylaws to be reasonable and in accordance with § 3. *Id*. at *5.

The *Duseau* and *Briggs* decisions corroborate that Waltham's regulations and practice regarding solar installations are reasonable. Tracer Lane has not met its burden to establish that those regulations and practices violate § 3, ¶ 9. Further, because the solar array is not located in Waltham, the code's goal of preserving the sanctity of residential neighborhoods, and the decidedly deleterious effect the project would

have on Sherbourne Place, Tracer Lane could not hope to do so. *Trustees of Tufts College*, 415 Mass. 753 at 759.

C. The Land Court erred in ignoring evidence of permitted solar installations throughout Waltham and in its misinterpretation of the *Northbridge* and *PLH* Land Court decisions.

Although *Briggs* and *Duseau* correctly determined that it is not per se unreasonable to restrict certain types of solar arrays to certain zoned areas, the City submitted documentation at summary judgment proving that solar energy facilities are in use in Waltham not only in industrially zoned areas but also in commercial and residential areas, notwithstanding the absence of an ordinance specifically regulating solar arrays. The Land Court erred in ignoring the City's submissions which were relevant to the Court's analysis.

The lynchpin of the Land Court's decision is that Waltham permits solar installations in only industrial areas and since that represents only 2% of the city's land area, as a matter of law it is an unreasonable regulation of solar energy facilities in contravention of § 3, ¶ 9. (AD 66) The submitted facts do not support this conclusion. The City both argued and supported with evidence – notably, lists of Building Department permits, ZBA variances, and City Council special permits

issued to commercial and residential owners for solar array installations of various sizes – that solar energy facilities could be found throughout the City.[3] The lack of a comprehensive ordinance regulating solar energy installations clearly has not been an impediment to actual solar energy use in Waltham. The Land Court's decision is inherently flawed, therefore, where the very basis on which the ruling was made is erroneous.

Moreover, the Land Court misrepresented the City's position with respect to solar energy regulations. The Court noted that, "If one accepts Waltham's premise that solar energy systems are allowed as a matter of right in Waltham's four industrial zoning districts, *while they are prohibited in the rest of the city*, then solar energy facilities are allowed as a matter of right on less than 2%" of Waltham's total land area. (emphasis added) (AD 66) This is a distortion of Waltham's position. Far

[3] The ZBA decision noted in its decision: "Solar panels are currently found in every Zoning District in the City – from single family houses to large apartment buildings such as Cronin's Landing or Longview Place, from office buildings to the new hockey arena at Bentley University, from the MacArthur Elementary School to the Department of Public Works on Lexington Street, and also through the Limited Commercial Zoning District – from Bay Colony on Winter Street, to the new Wolverine building on Totten Pond Road, to other buildings through the Hobbs Brook Office Park." (RA 206)

from accepting that solar energy systems are barred from 98% of Waltham, the City's summary judgment brief set forth, as in this brief, the extensive use of solar energy systems in both commercial and residential areas and supported its argument with relevant documentation. If, then, the Land Court's only reason for granting summary judgment is based on a faulty premise, the decision must be reversed.

The Land Court's analysis of two recent Land Court decisions regarding § 3, ¶ 9 is similarly unsound. The Court cites *Northbridge McQuade, LLC v. Northbridge Zoning Bd. Of Appeals*, 18 MISC 000519 , slip op. (Land Ct. June 17, 2019) (Piper, C.J.)and *PLH LLC v. Town of Ware*, 18 MISC 000684 (Dec. 24, 2019) (Piper, C.J.), decided after *Northbridge*, as complementary to its decision in the instant case. Such analysis is flawed because it applies the holding of each case to the Land Court's own mischaracterization of the City's position and also fails to note other aspects of those decisions which favor the City's arguments.

Judge Speicher notes that *Northbridge* rejected "the argument, the same as the one made here by the city of Waltham" that solar facilities may be absolutely prohibited from certain zoning districts. Again, the

City's position is not starkly stated and, certainly, it has not followed that line of reasoning itself in permitting solar arrays *in all zoning areas of the city*. (RA 189-194, 195-200, 201-209, 210-262)

Moreover, Judge Speicher ignores the *Northbridge* Court's conclusion that limitation and prohibition of solar arrays are warranted in certain circumstances. *Id*. Notably, *Northbridge* states: "Before there is any regulation or prohibition of any given proposed solar development on any site in the town, there must be an analysis and a balancing of the need to prohibit or regulate measured against the legislatively determined public interest in rolling out facilities for the collection of solar energy." *Id*. This position appeared to be driven, at least in part, by the particular facts presented by the case where, without access through the residentially zoned portion of the property, the solar array proposed on an industrially zoned portion could not be built.[4] *Id*. Thus, the Court noted that the analysis conducted must be on a "very site-specific basis, use by use, parcel by parcel, neighborhood by

[4] This contrasts starkly with the facts of the present case where the plaintiff has another means of access to the Lexington property which does not involve Sherbourne Place.

neighborhood …. The touchstone has to be whether a level of regulation is reasonable or not, as necessary to protect the public health, safety, or welfare." *Id*. This discussion shows a markedly different analysis of the solar provision as suggested by cherry-picked language used in Judge Speicher's decision.

Judge Speicher's decision also fails to note that *PLH LLC v. Town of Ware* questions "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?" PLH LLC at 18 MISC 000684. Unquestionably, the *PLH* Court concluded, cities could impose reasonable regulations – including special permits – since their absence "would leave solar energy use in the Town without any effective regulation … [and] all of these projects outside this traditional method of municipal review." *d*. Such language echoes the general principal that c. 40, § 3 was intended to "strike a balance between preventing local discrimination against [a protected use] and honoring legitimate municipal concerns that typically find expression in local zoning laws." *Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 759 (1993)

When considering *Northbridge*, *PLH*, *Briggs*, *Duseau*[5] and other solar related cases, the general consensus is that towns may not impose town-wide prohibitions on solar installations, but may decide where they should be placed according to each municipality's individual concerns and the health, safety, and welfare of the population. *See Attorney General Op. 9750* (April 2020) (citing *Duseau* and *Briggs*, "as a general principle, we recognize that the Town may utilize its zoning power to impose reasonable regulations on solar uses based upon the community's unique local needs")

It bears repeating, in examining whether the City's prohibition against commercial activity in a residential zone is reasonable with respect to a solar installation of the size contemplated by Tracer Lane (even if it is in another municipality) that Sherbourne Place is a cul-de-sac located in a quiet, residential neighborhood of expensive single-family houses whose owners have a reasonable expectation of tranquil enjoyment of their homes. Tracer Lane's proposed six-month project, and thereafter continued access to the site for maintenance,

[5] The *Northbridge* Court actually notes that it took "some comfort in the decision reached in *Duseau v. Szawlowski Realty, Inc*."

completely upends that expectation. Instead of residing on a street with no through access to vehicular traffic, homeowners will face thousands of dirt and dust producing trucks, day after day, from 7am to 5pm, disrupting the quiet of the neighborhood and forever reducing it to a mere access road for a commercial project located in another town. Such factors must be of primary consideration. *DiRico v. Bd. of Appeals of Quincy*, 341 Mass. 607, 610 (1961) (noting a "marked depreciating effect upon the value of neighboring residential property for residential uses" when commercial activity introduced)*; Everpure Ice Mfg. Co. Inc.,* 324 Mass. at 438-439 ("the preservation of property of others in the neighborhood is a matter of material consequence"); *Hunt v. Milton Sav. Bank*, 2 Mass. App. Ct. 133, 139 (1974) (cannot ignore the predominantly residential character of the neighborhood).

The location of the array is a further consideration: neither Waltham nor the residents of Sherbourne Place will benefit in any way from the array, notwithstanding that the latter will bear the brunt of its construction and continuing maintenance. Nor is Sherbourne Place the only access point for the proposed array. This is not a situation – such as in *Northbridge* - in which the array

could not be built if access were not gained through the Waltham site; Tracer Lane is at liberty to use another site in Waltham located in a commercial zone, or could legally challenge the City of Cambridge's denial of use of its cart path. The Land Court's decision, which ignores those factors, is in error and must be reversed.

CONCLUSION

For the foregoing reasons, the Appellants City of Waltham and William L. Forte respectfully request that this Court reverse the Land Court's Decision on Cross-Motions for Summary Judgment and enter Judgment on their behalf.

Respectfully submitted,

City of Waltham and
William L. Forte
By their attorney

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ADDENDUM

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

MISCELLANEOUS CASE
No. 19 MISC 000289 (HPS)

TRACER LANE II REALTY, LLC,

Plaintiff,

v.

CITY OF WALTHAM and WILLIAM L. FORTE in his capacity as the INSPECTOR OF BUILDINGS for the CITY OF WALTHAM,

Defendants.

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

More than thirty-five years after the adoption of statutory protection from local zoning regulation for facilities for the generation of electricity by use of solar energy, the limits of that protection remain the subject of some uncertainty and dispute.[1] A not uncommon municipal argument, and the one posited by the city of Waltham in this case, is that a municipality may prohibit solar energy facilities in some parts of a municipality so long as they are allowed in other parts of the municipality, without running afoul of the protections for such facilities afforded by G. L. c. 40A, § 3. The city of Waltham takes the position that it may permissibly prohibit an access road to a solar energy facility proposed to be located in the midst of a residential subdivision (the actual solar energy facility is proposed to be located across a

[1] St. 1985, c. 637, § 2, approved December 23, 1985, added G. L. c. 40A, § 3, ¶ 9, providing zoning protection for solar energy systems.

municipal boundary in Lexington) because the Waltham Zoning Code (sometimes hereinafter, the "Ordinance") arguably (although not definitively) allows such facilities to be located as a matter of right in industrial zoning districts elsewhere in Waltham.

The plaintiff, Tracer Lane II Realty, LLC ("Tracer Lane") argues that it is entitled to build and use an access road over its property in a residentially zoned neighborhood to access its proposed solar energy facility next door in Lexington, notwithstanding the prohibition against any commercial uses in the residential district.

As there is no dispute as to any material facts, the parties filed cross-motions for summary judgment. A hearing on the cross-motions was held before me on November 24, 2020, after which I took the motions under advisement.

For the reasons that follow, I find and rule that Waltham's prohibition against solar energy facilities, and in this case an access road servicing such a facility, in all but industrial zoning districts, runs afoul of the protections afforded to such facilities by G. L. c. 40A, § 3. Accordingly, Tracer Lane's motion for summary judgment will be allowed, and Waltham's cross-motion will be denied.

FACTS

The following material facts are found in the record for purposes of Mass. R. Civ. P. 56, and are undisputed for the purposes of the pending cross-motions for summary judgment:

1. The plaintiff, Tracer Lane, is the owner of a parcel of land located at 119 Sherbourne Place in Waltham. (the "Waltham Site") The Waltham Site is improved by a single-family dwelling at the end of a cul de sac on a street zoned for residential use and occupied entirely by single-family homes.

2. The Waltham Site straddles the border of Lexington. Specifically, the back (north) lot line of the Waltham Site coincides with the municipal boundary between Waltham and Lexington, and is adjacent to Tracer Lane's development parcel in Lexington, on which it proposes to build a solar energy facility. (the "Lexington Site")

3. The Lexington Site is a thirty-acre parcel of land located adjacent to and just north of the Waltham Site. The Lexington Site is unimproved but for electrical transmission lines running over a 250-foot wide NSTAR Electric Co. easement.

4. The Lexington Site has no frontage on any public way. There is a private way owned by the city of Cambridge that could provide access to the Lexington Site, but Tracer Lane was unable to obtain permission to use the private way. The Lexington Site is zoned for commercial use, including the proposed ground-mounted solar array.

5. Tracer Lane has proposed the development of a ±1.0 megawatt ground-mounted solar array on 9.5 acres[2] of the Lexington Site. Tracer Lane plans to install approximately 3,916 solar panels measuring approximately 6'-5" x 3'-3" each, to be placed in rows on the Lexington Site, along with supporting equipment to be placed in two areas on concrete pads, and to be enclosed by a 7-foot high fence. The solar panels would be placed in rows in two separate areas of the Lexington Site, on either side of the 250-foot wide NSTAR easement, which roughly bisects the property.

6. Tracer Lane proposes access to and egress from the Lexington Site, for both construction purposes and for maintenance once constructed, by an access road to be constructed over the existing residential property it owns at the end of the cul de sac on Sherbourne Place,

[2] The record contains conflicting information with respect to the total coverage of the proposed solar array. Tracer Lane admitted Waltham's statement of undisputed fact, no. 6, that the proposed array will cover 6.5 acres. The parties also agreed, in statement of fact no. 12, that the proposed solar array will cover 413,600 square feet of area, which would be 9.5 acres. Whether the true area is 6.5 acres or 9.5 acres is immaterial.

from the end of the cul de sac to the north boundary of the property where it meets the Lexington Site. The access road is proposed to be 102 feet long and 12 feet wide.[3]

7. During construction, a period expected to last about eight months, there will be considerable truck traffic on Sherbourne Place and over the access road. Tracer Lane claims there will be an average of about twelve truck trips over the street per day during construction, with a maximum of thirty-two daily trips. Waltham disputes this estimate and claims the average number of trucks trips during construction is likely to be higher than twelve. Notwithstanding the dispute as to the exact number of truck trips, I do not find the exact number to be material.

8. After construction, Tracer Lane proposes to continue using the access road for access to and egress from the solar array on the Lexington Site. There will be no staff working regularly at the Lexington Site. The access road will be used to access the site for maintenance purposes, including such activities as cutting grass two or three times per season, inspections and maintenance of the solar panels and related equipment, and snow removal. While Waltham disputes Tracer Lane's characterization of post-construction traffic to the site for these purposes as "occasional," it can be fairly stated that there is no dispute that traffic for these purposes will be relatively infrequent, especially as compared to traffic during the period of construction. I do not find the exact number of trips projected post-construction, which has not been suggested or agreed to by the parties, to be material to the resolution of the issues in this case.

[3] The proposed access road, as well as the layout of the proposed solar array on the Lexington Site, is shown on a site plan attached as Exhibit A to the Affidavit of Nahigian.

9. Once construction of the proposed solar energy facility is complete, Tracer Lane's proposal calls for the access road to be smoothed, graded, and surfaced with turf-blocking pavers.

10. In the spring of 2019, William L. Forte, the Waltham building inspector, met with Tracer Lane to discuss the proposed access road over the Waltham Site. Mr. Forte advised Tracer Lane that the Ordinance did not allow commercial uses in residential zoning districts, and therefore the proposed access road, which would be accessory to a commercial use, was prohibited.

11. Absent a legislative zoning change, there are no provisions in the Waltham Zoning Code by which Tracer Lane could obtain a use variance or special permit to construct the proposed access road on the Waltham Site.

DISCUSSION

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 643–644 (2002). "The moving party bears the burden of affirmatively demonstrating that there is no triable issue of fact." *Id.* at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See *Attorney Gen. v. Bailey*, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law, and "an adverse party may not manufacture disputes by conclusory factual assertions." *Ng Bros. Constr. v. Cranney*, supra, 436 Mass. at 648. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When appropriate, summary judgment may be entered against the moving party and may be limited to certain issues. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976).

Additionally, "a party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 714 (1991). To succeed, the party moving for summary judgment does not need to submit affirmative evidence to negate one or more elements of the opposing party's claim, but the motion must be supported by some material contemplated by Rule 56(c). *Id.* Though the supporting material offered does not need to disprove an element of the claim of the party who has the burden of proof at trial, it "must demonstrate that proof of that element at trial is unlikely to be forthcoming." *Id.*

In the present action, there are no material facts in dispute. The question before the court in this declaratory judgment action brought pursuant to G. L. c. 240, § 14A, is whether, and to what extent, G. L. c. 40A, § 3 overrides the prohibition in the Waltham Zoning Code against the use of land in a residential zoning district for an access road to serve a solar energy facility located in a commercial zoning district in an adjacent municipality.

This case hinges on whether the Waltham Zoning Code, as applied to the subject property, violates the injunction in G. L. c. 40A, § 3 that local zoning ordinances and bylaws may not prohibit or unreasonably regulate the construction or operation of solar energy systems. Waltham's argument is straightforward: Solar energy facilities are "arguably" allowed as of right in the city's four industrial zoning districts, and are prohibited in all other districts. The city argues that this allocation of parts of the city in which solar energy facilities are allowed and other parts in which they are prohibited, constitutes a reasonable regulation that does not run afoul of the protections afforded to solar energy facilities by G. L. c. 40A, § 3.

The plaintiff's argument is two-fold: (1) The Waltham Zoning Code does not allow solar energy facilities in any zoning district as a matter of right, even in the industrial zoning districts, and accordingly, the Ordinance does not accommodate solar energy facilities as required by G. L. c. 40A, § 3; and (2) even if solar energy facilities are permitted as of right in the industrial zoning districts, the blanket prohibition against such facilities in all other districts still runs afoul of G. L. c. 40A, § 3.

The parties agree, correctly, that the proposed access road would unquestionably be prohibited were it being proposed for access to a more conventional commercial or industrial facility. The property over which the access road is proposed is in a residential zoning district, and is in fact located at the end of a cul de sac in a completely residential neighborhood. The proposed solar energy facility, located behind the subject property and over the boundary line in the town of Lexington, is in a commercial/manufacturing zoning district. An access road in a residential zoning district for a use located in another zoning district, is not permitted if the use is itself not permitted in the residential zoning district. *Bruni v. Planning Board of Ipswich*, 73 Mass. App. Ct. 663 (2009), citing *Beal v. Planning Bd. of Rockland*, 423 Mass. 690, 694 (1996); *Dupont v. Dracut*, 41 Mass. App. Ct. 293, 295-296 (1996).

The wild card thrown into the present situation is G. L. c. 40A, § 3, ¶ 9, which provides as follows:

> 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.

The extent of the regulation of solar energy systems permitted to municipalities under this provision has not been the subject of any appellate decision, but other exemptions from local zoning contained in G. L. c. 40A, § 3 have been the subject of considerable appellate litigation.

G. L. c. 40A, § 3 provides exemption from local zoning for religious uses, non-profit educational uses, agricultural uses, child care facilities and handicap accommodations. See, e.g., *Steege v. Bd. of Appeals of Stow*, 26 Mass. App. Ct. 970 (1988), (horse barn and riding school in residential zoning district is a protected agricultural use exempt from local zoning); *Bible Speaks v. Bd. of Appeals of Lenox*, 8 Mass. App. Ct. 19, 31 (1979) (town may not use bulk and dimensional regulations to nullify use exemption permitted to educational institutions); *Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc.*, 421 Mass. 106, 115 (1995) (use of a renovated barn to house and educate mentally handicapped adults in a residential zoning district is an exempt use protected under § 3); *Petrucci v. Bd. of Appeals of Westwood*, 45 Mass. App. Ct. 818 (1998) (use of barn as child care facility in residential zoning district protected under § 3, and dimensional regulations could not be used to effectively prohibit the use); *Gardner-Athol Area Mental Health Ass'n, Inc. v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12 (1987) (municipality may not prohibit or restrict the operation of an adult educational facility in a single family residential district pursuant to the Dover Amendment); *McLean Hospital Corp. v. Town of Lincoln*, 483 Mass. 215 (2019); (residential program for adolescent males was educational in character, and not medical, and was therefore exempt pursuant to G. L. c. 40A, § 3).

One thing all of these uses have in common is that because of the exemptive provisions of G. L. c. 40A, § 3, municipalities may not "prohibit" them, and may not subject them to "unreasonable" regulation, although the extent of reasonable regulation permitted differs for different exempt uses. While nonprofit educational uses and religious uses may only be subject to reasonable dimensional regulations, solar energy systems may not be subject to "unreasonable" regulations, without specification as to whether any "reasonable" regulation

could go beyond dimensional regulation, "except where necessary to protect the public health, safety or welfare."

"Unreasonable" regulation has generally been determined to be regulation that as a practical matter amounts to a prohibition or otherwise unduly restricts the protected use. There are several ways in which an applicant may demonstrate "unreasonableness." A zoning requirement is unreasonable if it detracts from usefulness of a structure, imposes excessive costs on the applicant, or impairs the character of a proposed structure. *Trustees of Tufts College v. Medford*, 415 Mass. 753, 759–760 (1993). Further, "proof of cost of compliance is only one way" to show unreasonableness, and courts must consider other aspects such as use or character of property. *Rogers v. Norfolk*, 432 Mass. 374, 385 (2000).

Even dimensional regulations that do not strictly prohibit a protected use may impair it to an impermissible degree. Instructive is *Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141 (2001), where a neighboring landowner challenged a decision by Belmont's zoning board of appeals approving a steeple on a Mormon temple that exceeded the bylaw height restriction. In its initial application, the church proposed a temple that would be 94,100 square feet, fifty-eight feet high, with six steeples, the tallest of which would be 156 feet high. After review, the board suggested alterations to the church's plan, namely a decrease in the steeple height (though still over the requirements set by the zoning bylaw). The church later submitted a revised plan that reduced the size of the proposed temple to 68,000 square feet, a height of fifty-six feet, and a single steeple of eighty-three feet. Abutters sued to enjoin the church from exceeding the height restrictions set forth in the bylaw. The Supreme Judicial Court agreed that a rigid application of Belmont's height restrictions for uninhabited projections would impair the character of the temple as a whole without advancing any

legitimate municipal interest. Further, while the board's revision of the church's original plan was appropriate, the revision did not have a significant impact on the character of the church as a whole, whereas strict adherence to the bylaw would have violated the Dover Amendment, as codified in G. L. c. 40A, § 3. Similarly in *Petrucci v. Bd. of Appeals of Westwood*, supra, 45 Mass. App. Ct. at 826–827, the court determined that a bylaw that would "disturb the sense of the building's continuity" and ruin its "architectural integrity" is "unreasonable" per the Dover Amendment. In *Prime v. Zoning Bd. of Appeals of Norwell*, 42 Mass. App. Ct. 796 (1997) the court was confronted with a proposed farm stand on land that was determined to be entitled to agricultural use protection under § 3. Ultimately, the Appeals Court determined that the board's special permit requirement would be unreasonable if applied in a way that amounted to an arbitrary denial or an undermining of the protected use. *Id.* at 802. However, in none of these cases was an appellate court asked to consider whether regulation limiting a protected use to specified zoning districts is a reasonable regulation consistent with the exemption from local prohibition or unreasonable regulation contained in G. I. c. 40A, § 3.

In the present case, the city of Waltham argues that it has not prohibited or unreasonably regulated solar energy facilities in violation of G. l. c. 40A, § 3, because it "arguably" allows such facilities as a matter of right in its industrial zoning districts. Pursuant to Sections 3.245 and 3.4 (Table of Uses) of the Ordinance, "power stations" are allowed as a matter of right in Waltham's four zoning districts labelled as "Industrial," and Waltham argues that solar energy systems are "arguably" power stations within the meaning of the Ordinance. By allowing solar energy facilities in specified parts of the city, Waltham argues, it has complied with the injunction in Section 3 against prohibition or unreasonable regulation of the use.

I need not, and do not, decide whether solar energy systems like the one proposed by Tracer Lane, are allowed as a matter of right, as "power stations," in Waltham's industrial zoning districts, because I do not accept the premise of the argument that if they are allowed as a matter of right in the industrial zoning districts, then Waltham may prohibit solar energy systems in all other districts, as it undisputedly does. Furthermore, whether a municipality may in some circumstances prohibit solar energy facilities in some districts while permitting them in others without running afoul of G. L. c. 40A, § 3, is also a question I need not answer categorically, because under the facts of this case, it is not a close question.

If one accepts Waltham's premise that solar energy systems are allowed as a matter of right in Waltham's four industrial zoning districts, while they are prohibited in the rest of the city, then solar energy facilities are allowed as a matter of right on less than 2% of Waltham's approximately 13.6 square miles of land area, and are prohibited on more than 98% of the city's land area.[4] This categorical exclusion of the vast majority of the city's area from even consideration of solar energy facilities, regardless of the surrounding built environment, the topography, and other considerations typically considered in site plan review or special permit review, unquestionably violates the requirement that municipalities not "prohibit or unreasonably regulate" such facilities. An outright prohibition in 98% of the municipality, or for that matter in any large segment of the municipality, without a showing that the prohibition is "necessary to protect the public health, safety or welfare," runs afoul of this statutory injunction, and it is irrelevant that such solar energy facilities may be permitted in four small pockets of the city.

[4] The parties submitted a copy of the Waltham Zoning Map as an agreed exhibit in this case. Using the GIS tools on Waltham's website, I determined that the four industrial zoning districts together occupy approximately 160 acres, or just under one quarter of a square mile, thereby comprising about 1.8 percent of Waltham's roughly 13.6 square miles of land area. I take judicial notice of this fact as a matter of public record. See *Porter v. Bd. of Appeal of Boston*, Mass. App. Ct. No. 19-P-1701, slip op. p. 6 (February 24, 2021) (facts appearing on map are appropriate subject of judicial notice).

The few cases that have addressed this issue are consistent with this conclusion or are distinguishable on their facts. In *Briggs v. Zoning Bd. of Appeals of Marion*, 22 LCR 45 (2014) (Sands, J.), a judge of the Land Court concluded that a local zoning bylaw that allowed solar energy systems in general business districts and limited business districts but prohibited them in residential zoning districts could be consistent with G. L. c. 40A, § 3. However, there is no discussion in the facts of that case with respect to the geographical extent of the areas in which solar energy systems were allowed and in which they were prohibited.

In *Duseau v. Szawlowski Realty, Inc.*, 23 LCR 5 (2015) (Cutler, C.J.), another judge of the Land Court accepted the argument of abutters opposed to a solar energy facility proposed in a residential district that the use was allowed in other, nonresidential districts, and was therefore prohibited in the residential district. However, the court acknowledged that the G. L. c. 40A, § 3 exemption would invalidate such a prohibition "if it can be demonstrated that restricting solar energy systems only to the Industrial districts is an 'unreasonable' regulation, and that such a regulation is not necessary to protect the public health and welfare." *Id.* at 9.

More recent decisions of the Land Court have recognized explicitly that the protective provisions of G. L. c. 40A, § 3 preclude municipalities from prohibiting solar energy facilities except in "that narrow ambit" where a denial is necessary to protect the public health, safety and welfare. In *PLH LLC v. Ware*, Mass. Land Ct., No. 18 MISC 000648 (Piper, C.J.) (Dec. 24, 2019), the court upheld a special permit requirement applicable to solar energy projects, but only provided 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." *Id.* at p. 12.

In *Northbridge McQuade, LLC v. Northbridge Zoning Bd. of Appeals*, Mass. Land Ct., No. 18 MISC 000519 (Piper, C J.), the court rejected the argument, the same as the one made here by the city of Waltham, that "the solar facility provisions [of G. L. c. 40A, § 3] ought to be, as a matter of legislative intent and interpretation, the only protected use subsection under § 3 where the possibility exists to allow absolute prohibition within certain zoning districts…The court sees nothing in the statutory language or purpose that would countenance carving out large areas of land by district in the town and making them immune from the remedial indulgent protections of § 3 with respect to this solar use." *Order Granting Partial Summary Judgment*, June 17, 2019, p. 2.

Like the judge in *Northbridge McQuade*, I reject the city of Waltham's argument that the prohibition of solar energy facilities on a categorical basis over entire districts (actually, over nearly the entire city) can be reconciled with the protective provisions of G. L. c. 40A, § 3. Waltham has not argued or shown any overriding health, safety or welfare justification for the near-total ban on solar energy facilities in the city. Further, as noted by Chief Justice Piper in *Northbridge McQuade*, the purpose of the solar energy facility protections of G.L. c. 40A, § 3, is "to require some 'standing down' by municipalities to encourage and protect solar facilities - a use that might be seen as unwelcome in municipalities at a local level - by abutters, neighbors, and by town government." *Id.* This purpose is not complied with by categorically prohibiting solar energy systems in large swaths of a city or town, and by doing so without any demonstration that the prohibition is necessary to protect the public health, safety or welfare.

Having determined that the Ordinance violates the stricture in G. L. c. 40A, § 3 against prohibition or unreasonable regulation of solar energy facilities, it remains to determine a remedy. The plaintiff argues that the use is permitted, and the municipality must be ordered to

simply allow the construction of the proposed access road. The city, having initially determined that the proposed road was prohibited, did not consider any aspect of the proposed construction. The court has determined that the proposed road is a protected exempt use pursuant to G. L. c. 40A, § 3, ¶ 9, but one that under certain circumstances is subject to "reasonable" regulation.

Regulation in the nature of site plan review that does not unreasonably interfere with the plaintiff's right to conduct the use, is consistent with the protections contemplated by the statute, but only where mechanisms for such review are in place. "[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 protections provided under § 3." *PLH LLC v. Ware,* supra, at p. 9; see also, *Dufault v. Millennium Power Partners, L.P.*, 49 Mass. App. Ct. 137 (2000); *Y. D. Dugout, Inc. v. Bd. of Appeals of Canton*, 357 Mass. 25 (1970).

However, because the Waltham Zoning Code prohibits the construction of solar energy systems in residential districts, it does not have in place an appropriately circumscribed special permit or site plan review provision or other mechanism that would allow for appropriate but limited review of a proposal to construct a solar energy system. Any review without the benefit of a provision in place in the Ordinance properly circumscribing such review would be necessarily and by definition ad hoc, arbitrary and subject to no appropriate limitations. Review that is not thus circumscribed would by definition be "unreasonable regulation" in violation of G. L. c. 40A, § 3.

"In the administration of controls limiting the use of land—as with any exercise of the police power—uniformity of standards and enforcement are of the essence. If the laws are not

applied equally they do not protect equally." *Fafard v. Conservation Comm'n of Reading*, 41 Mass. App. Ct. 561, 569 (1996). A review not based on an appropriately adopted bylaw or regulation is inherently arbitrary. *Fieldstone Meadows Development Corp. v. Conservation Comm'n of Andover*, 62 Mass. App. Ct. 265, 268 (2004) (regulation of work in wetlands buffer zone by unwritten policy was arbitrary and capricious). Review of a solar energy proposal, even for the permissible purpose to "protect the public health, safety and welfare," cannot occur in the absence of legislatively defined standards, because such an undefined review would confer on local authorities "a roving and virtually unlimited power to discriminate between different applications." *SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 108 (1994).

Accordingly, the court will issue a declaration pursuant to G. L. c. 240, § 14A declaring that the prohibition in the Waltham Zoning Code of the access road as proposed by Tracer Lane to facilitate access to its Lexington solar energy facility is invalid. The building inspector and the city of Waltham will be ordered to allow the construction of the proposed access road notwithstanding the prohibition in the Waltham Zoning Code against the installation of solar energy systems and structures relating thereto in residential zoning districts.

CONCLUSION

For the reasons stated above, plaintiff's motion for summary judgment is ALLOWED. The defendants' cross-motion for summary judgment is DENIED in all respects.

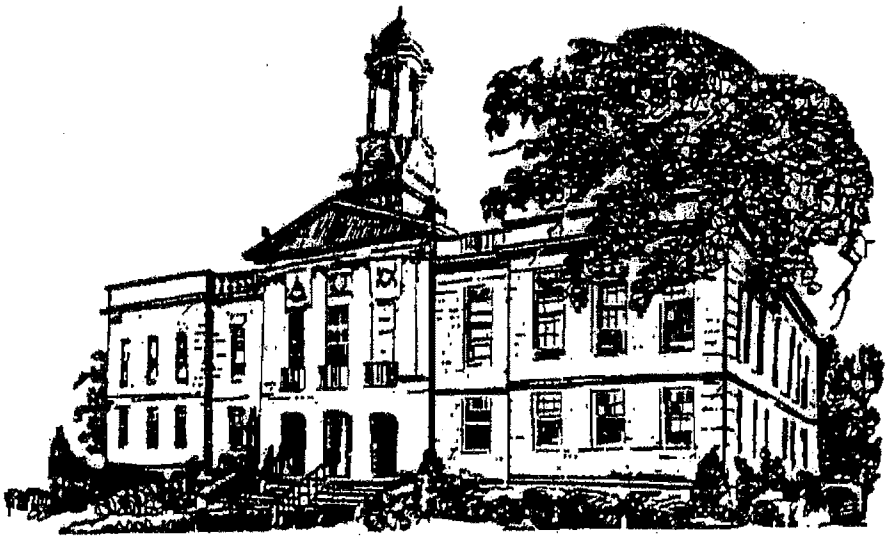
Judgment will enter in accordance with this decision.

Howard P. Speicher
Justice

Dated: March 5, 2021

ZONING CODE

CITY OF WALTHAM
MASSACHUSETTS



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Robert J. Waddick
CITY CLERK

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CITY OF WALTHAM

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JOSEPH VIZARD
ASSISTANT CITY CLERK

customary home occupation uses. Hair dressing and beauty parlors shall only be allowed when a special permit has been granted by the Board of Appeals, which shall consider the effects upon the neighborhood and the City at large of said special permit. In no instance shall any customary home occupation create any visible exterior changes to the residence in question.

3.211. Accessory uses/residential: Accessory uses customarily incidental to any residential use permitted herein, provided that such use shall not include any activity conducted for gain, or any private walk or way giving access to such activity or any activity prohibited under this chapter.

3.212. Private residential garage: A building associated with a residential structure for housing motor vehicles in which no business or industry connected directly or indirectly with motor vehicles is carried on.

3.213. Trailer/mobile homes: A dwelling unit that is not constructed in accordance with the standards set forth in the local building code applicable to site-built homes and is composed of one or more components, each of which was substantially assembled in a manufacturing plant and designed to be transported to the home site on its own chassis.

INSTITUTIONAL USES

3.214. Churches: Use of land, buildings or structures for public worship carried on by a recognized religious sect or denomination which may include religious instruction, maintenance of a convent, parish house or similar facility and activities whose purpose is substantially related to furthering the beliefs of such sect or denomination.

3.215. Educational uses: Uses of land, buildings or structures for providing learning in a general range of subjects on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic, and including use of land, buildings or structures for providing facilities for research, public education and public display which are owned and operated by the commonwealth or any of its agencies, subdivisions or bodies politic. Further, educational uses shall be construed to include any use of land, buildings or structures for providing learning in a general range of subjects on privately owned land by any educational entity accredited by the appropriate regulating authority.

3.216. Municipal buildings: City, federal and state owned structures designed for public administration, services and public safety purposes, except public housing development.

3.217. Cemeteries: Lands and associated structures used for public and private cemeteries.

3.218. Hospitals, philanthropic and charitable institutions: A public or private facility for the care and treatment of ill or injured people with all traditional and incidental support facilities, including parking facilities, such as hospitals, nursing homes, sanatoriums and rest homes, but excluding correctional institutions.

Z Attachment 4

City of Waltham

Sec. 3.4. Table of Uses.

[Amended 6-10-1991 by Ord. No. 27154; 6-10-1991 by Ord. No. 27156; 12-12-1991 by Ord. No. 27265; 12-23-1991 by Ord. No. 27265; 3-8-1993 by Ord. No. 27503; 5-9-1994 by Ord. No. 27715; 5-23-1994 by Ord. No. 27732; 1-11-1995 by Ord. No. 27853-A; 3-28-1995 by Ord. No. 27884; 5-22-1995 by Ord. No. 27909; 5-13-1996 by Ord. No. 28125; 5-28-1996 by Ord. No. 28135; 8-4-1997 by Ord. No. 28403; 2-26-2001 by Ord. No. 29197; 5-28-2002 by Ord. No. 29513; 12-23-2002 by Ord. No. 29628; 3-1-2005 by Ord. No. 30012; 4-28-2008 by Ord. No. 30876; 12-22-2008 by Ord. No. 31011; 6-23-2009 by Ord. No. 31147; 6-27-2011 by Ord. No. 31583; 10-16-2013 by Ord. No. 32037; 12-9-2013 by Ord. No. 32080; 1-13-2014 by Ord. No. 32097; 6-23-2014 by Ord. No. 33106; 3-14-2016 by Ord. No. 33408; 3-27-2017 by Ord. No. 33702; 8-1-2017 by Ord. No. 33817; 9-10-2018 by Ord. No. 34192; 12-10-2018 by Ord. No. 34282; 4-22-2019 by Ord. No. 34437; 5-28-2019 by Ord. No. 34472]

Use With Special Permit Reference	RA-1	RA-2	RA-3	RA-4	RB	RC	RD	HR1	HR2	BA	BB	BC(1)	LC	C	I	C/R	Use Reference
Residential																	
Single-family detached (Sec. 3.606)	Y	Y	Y	Y	Y	Y	Y	Y	N	S1	S1	N	N	N	N	N	3.21
Two-family detached (Sec. 3.607)	N	N	N	N	Y	Y	Y	N	N	S1	S1	N	N	N	N	N	3.22
Accessory dwelling units (Sec. 3.616)	S2	S2	S2	S2	N	N	N	N	N	N	N	N	N	N	N	N	3.23
Multifamily dwellings (Sec. 3.618)	N	N	N	N	N	Y1	Y1	Y	Y1	Y1	Y1	Y1	N	N	N	N	3.24
Rooming houses	Y	Y	Y	Y	Y	Y1	Y1	Y	N	Y1	Y1	Y1	N	N	N	N	3.25
Lodging houses (Sec. 3.639)	N	N	N	N	N	S1	N	N	N	S1	S1	S1	N	N	N	N	3.26
Hotels/motels (Sec. 3.617)	N	N	N	N	S1	S1	N	N	N	S1	S1	S1	S1	S1	N	N	3.27
Family day-care homes (Sec. 3.609)	Y	Y	Y	Y	Y	Y	Y	Y	Y	S1	S1	S1	N	N	N	N	3.28
Medical offices in residences	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	3.29
Customary home occupations (Sec. 3.611)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	N	N	3.210
Accessory uses/residential (Sec. 4.22)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	3.211
Garage, private	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	3.212
Trailer/mobile home	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	3.213
Institutional																	
Churches	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	3.214
Educational uses	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	3.215
Municipal buildings	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	3.216
Cemeteries	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	3.217
Hospitals, sanitoriums, nursing homes, philanthropic institutions (Sec. 3.610)	S1	S1	S1	S1	S1	S1	S1	Y (3.811)	Y (3.811)	S1	S1	S1	N	N	N	N	3.218

KEY:

Y = Permitted use as of right
N = Not permitted
Y1 = Permitted by right and additional intensity of use permitted by special permit from the City Council
S1 = Use permitted only by special permit by City Council
S2 = Use permitted only by special permit by Board of Appeals

Sec. 3.4. Table of Uses.

Use With Special Permit Reference	RA-1	RA-2	RA-3	RA-4	RB	RC	RD	HR1	HR2	BA	BB	BC(1)	LC	C	I	C/R	Use Reference
Assisted living facilities	N	N	S1	S1	S1	S1	S1	Y1	Y1	S1	S1	N	N	N	N	N	3.218A
Cat shelter	S1	S1	S1	S1	S1	S1	S1	N	N	S1	S1	S1	Y	Y	Y	N	3.218B
Public service corporations (Sec. 3.614)	S2	S2	S2	S2	S2	S2	S2	S2	S2	S2	S2	S2	N	S2	S2	N	3.219
Membership clubs (Sec. 3.608)	S1	S1	S1	S1	S1	S1	S1	S1	S1	S1	Y1	Y1	N	Y1	Y1	S1	3.220
Garages, public	N	N	N	N	N	N	N	Y (3.811)	Y (3.811)	Y1	Y1	Y1	Y1	Y1	Y1	N	3.221.
Commercial																	
Retail stores (Sec. 3.634)	N	N	N	N	N	N	N	N	N	Y1	Y1	Y1	N	Y1	Y1	N	3.222, 3.27
Body art establishments (Sec. 3.222A)	N	N	N	N	N	N	N	N	N	N	S1	S1	N	S1	S1	N	2.347
Laundromats	N	N	N	N	N	N	N	N	N	N	Y1	Y1	N	Y1	Y1	N	3.223
Business and professional offices and banks	N	N	N	N	N	N	N	Y (3.811)	S1 (3.811)	Y1	Y1	Y1	Y1	Y1	Y1	N	3.224
Organ procurement organization	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	N	N	3.224A
Drive-in customer service (Sec. 3.635)	N	N	N	N	N	N	N	N	N	S1	S1	S1	S1	S1	S1	N	3.225
Arcades	N	N	N	N	N	N	N	N	N	N	N	N	Y1	Y1	Y1	N	3.226
Retail gasoline stations (Sec. 3.634)	N	N	N	N	N	N	N	N	N	Y1	Y1	N	N	Y1	Y1	N	3.227
Restaurants	N	N	N	N	N	N	N	N	N	Y1	Y1	Y1	N	Y1	Y1	N	3.228
Retail bakery	N	N	N	N	N	N	N	N	N	Y1	Y1	Y1	N	Y1	Y1	N	3.228C
Delicatessen	N	N	N	N	N	N	N	N	N	Y1	Y1	Y1	N	Y1	Y1	N	3.228D
Fast-food establishments (Sec. 3.620)	N	N	N	N	N	N	N	N	N	S1	S1	N	N	S1	S1	N	3.229
Taverns	N	N	N	N	N	N	N	N	N	N	Y1	N	N	Y1	Y1	N	3.230
Micro-brewery restaurant	N	N	N	N	N	N	N	N	N	N	N	Y	S1	N	N	N	3.228A
Catering establishments	N	N	N	N	N	N	N	N	N	N	Y1	N	N	Y1	Y1	N	3.231
Funeral homes	N	N	N	N	N	N	N	N	N	Y1	Y1	Y1	N	Y1	Y1	N	3.232
Private schools	N	N	N	N	N	N	N	N	N	Y1	Y1	Y1	N	Y1	Y1	N	3.233
Radio and television broadcasting studios	N	N	N	N	N	N	N	N	N	N	Y1	Y1	Y1	Y1	Y1	N	3.234
Radio, television, microwave, communication, radar or other tower (Sec. 3.621)	N	N	N	N	N	N	N	N	N	N	N	N	Y1	Y1	Y1	N	3.234

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Sec. 3.4. Table of Uses.

Use With Special Permit Reference	RA-1	RA-2	RA-3	RA-4	RB	RC	RD	HR1	HR2	BA	BB	BC(1)	LC	C	I	C/R	Use Reference
Indoor theaters	N	N	N	N	N	N	N	N	N	N	N	S1	S1	S1	S1	N	3.235
Newspaper publishing and printing	N	N	N	N	N	N	N	N	N	N	Y1	Y1	N	Y1	Y1	N	3.236
Car wash (Sec. 3.622)	N	N	N	N	N	N	N	N	N	N	S1	N	N	S1	S1	N	3.237
Wholesale, storage and warehousing	N	N	N	N	N	N	N	N	N	N	Y1	N	N	Y1	Y1	N	3.238
Off-street parking (Sections 3.601 through 3.605)	Y	Y	Y	Y	S1	S1	S1	Y (3.811)	Y (3.811)	Y	Y	Y	Y	Y	Y	N	3.239
Used car lot (Sec. 3.632)	N	N	N	N	N	N	N	N	N	N	S1	N	N	S1	S1	N	3.240
Associated commercial recreation (Sec. 3.636)	N	N	N	N	N	N	N	N	N	S1	S1	S1	S1	S1	S1	N	3.267
Accessory uses/commercial	N	N	N	N	N	N	N	Y (3.811)	Y (3.811)	Y	Y	Y	Y	Y	Y	Y	3.241
Tea shop	N	N	N	N	N	N	N			N	N	Y1	Y1		N	N	3.228B
Animal shelter (Sec 3.643)	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	S1	N	3.226D
Kennel (Sec. 3.644)	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	S1	N	3.226E
Medical marijuana treatment center (Sec. 11.210)	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	N	Use Reference Article XI
Medical marijuana cultivation (Sec. 11.28)	S1	S1	S1	S1	S1	S1	S1	S1	S1	S1	S1	S1	S1	S1	S1	S1	Use Reference Article XI
Electronic game center	N	N	N	N	N	N	N	N	N	N	N	Y	N	N	N	N	3.226G
Marijuana establishments (nonmedical marijuana)	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	N	
Commercial marijuana cultivation (nonmedical marijuana)	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	N	
Smoke shop (Sec. 3.647)	N	N	N	N	N	N	N	N	N	S1	S1	S1	N	S1	S1	N	3.222B
Industrial																	
Accessory off-street parking	N	N	N	N	N	N	N	Y (3.811)	Y (3.811)	N	Y	Y	Y	Y	Y	N	3.242
Railroad and transit station	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	3.243
Windmills	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y1	Y1	N	N	Y1	Y1	N	3.244
Electric lighting, gas works and power stations	N	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	N	3.245
Fuel oil and gas storage	N	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	N	3.246

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Use With Special Permit Reference	RA-1	RA-2	RA-3	RA-4	RB	RC	RD	HR1	HR2	BA	BB	BC(1)	LC	C	I	C/R	Use Reference
Heavy trucking and equipment storage (Sec. 3.628)	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	N	3.247
Open storage	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	3.248
Truck or private bus terminals	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	Y1	N	3.249
Light manufacturing (Sec. 3.623)	N	N	N	N	N	N	N	N	N	N	S1	N	Y1	Y1	Y1	N	3.250
Research labs, structures and accessory uses	N	N	N	N	N	N	N	Y (3.811)	S1 (3.811)	N	N	N	Y1	Y1	Y1	N	3.251
General manufacture	N	N	N	N	N	N	N	N	N	N	N	N	N	Y1	Y1	N	3.252
Autobody shop (Sec. 3.626)	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	N	3.253
Plastics manufacturing (Sec. 3.629)	N	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	N	3.254
Steam laundry	N	N	N	N	N	N	N	N	N	N	N	N	N	N	Y1	N	3.255
Heliports-airports (Sec. 3.627)	N	N	N	N	N	N	N	S1	S1	N	N	N	S1	S1	N	N	3.256
Junkyards (Sec. 3.633)	N	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	N	3.257
Garbage dumps and sanitary landfills	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	3.258
Composting facility (3.640)	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	N	3.2581
Yard waste transfer station (3.641)	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	N	3.2582
Organic products storage (3.642)	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	N	3.2583
Automobile recycling center	N	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	N	3.259
Accessory uses/manufacturing	N	N	N	N	N	N	N	N	N	N	N	N	Y	Y	Y	N	3.260
Adult entertainment enterprises (Sec. 2.303A)	N	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	N	3.2421
Agriculture																	
Farms	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	3.261
Livestock farms under 5 acres (Sec. 3.612)	S2	S2	S2	S2	S2	S2	S2	S2	S2	S2	S2	S2	S2	S2	S2	N	3.262
Livestock farms over 5 acres	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	3.262
Farm stands	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	3.263
Conservation/Recreation																	
Conservation, water and water supply area	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	3.264
Public outdoor recreation facility	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	3.265
Semipublic outdoor recreation facility (Sec. 3.630)	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	S1	3.266

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Conservation/Recreation																	
Nonprofit sports/recreational clubs with grounds for games and sports	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	S1	Y1	3.220A
Commercial recreational facilities, outdoor	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	S1	Y1	3.226B
Commercial recreational facilities, indoor (Sec. 3.608A)	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	S1	S1	3.226A
Commercial conservation/nature facilities	N	N	N	N	N	N	N	N	N	N	N	N	S1	S1	S1	S1	3.226C
Small athletic and fitness facilities, indoor	N	N	N	N	N	N	N	N	N	Y	Y	Y	Y	Y	Y	N	Use Reference 3.226F

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NOTES:
(1) Residential uses shall only be allowed in the BC District on upper floors (floors two through five) unless development occurs as part of a Riverfront Overlay District special permit (See Section 8.4.) or as part of an intensity of use special permit, provided that in no case shall any first-floor residential unit or portion thereof be located on or within 50 feet of the street line of any of the followings streets: Elm Street, Main Street, Moody Street. In the BC District, residential uses shall have separate and distinct entrances from any and all commercial uses, and commercial and residential uses shall not be located on the same floor, except that commercial and residential uses may be allowed on the first floor where development occurs as part of an intensity of use special permit, provided that in no case shall any first-floor residential unit or portion thereof be located on or within 50 feet of the street line of any of the followings streets: Elm Street, Main Street, Moody Street. Multiple residential and/or nonresidential principal buildings may be allowed in the BC District on the same lot when development occurs as part of an intensity of use special permit, provided that all other provisions of Section 4.215 shall be complied with. Further, in instances of new residential construction, excluding rehabilitation or remodeling of existing structures, said residential uses shall be permitted to abut other structures of any type on only one side, and all other sides shall be at least 25 feet from all other structures.

(3) The permitted uses specifically exclude disseminating or offering to disseminate adult matter to minors, and suffering minors to view the display or linger in the store shall be deemed evidence of violation of this section.

(4) No adult entertainment enterprise shall be located within the same block or within 500 feet of a residential zone, conservation-recreation zone, dwelling unit, school, place of worship, church, park, playground, youth center or another adult entertainment enterprise.

(5) Parking requirements for adult entertainment enterprises shall comply with Article V of this chapter.

(6) Dimensional requirements for adult entertainment enterprises shall comply with Article IV of this chapter.

3.243. Railroad and transit stations: Use of land and structures for railroad or other rail transit stations or motor bus transportation stations for the purpose of handling passengers and the rights-of-way incident thereto, but not including railroad yards, shops, sheds and freight terminals.

3.244. Windmill. A structure which serves as a supplemental electrical generation source, provided that no such windmill shall be closer to any lot line than the combined height of the tower to the hub and a blade extended vertically.

3.245. Gas works, electric lighting and power stations: Establishments for the generation of power for public or private consumption purposes that are further regulated by Massachusetts General Laws.

3.246. Fuel oil and gas storage: Facilities for the storage of natural gas under pressure, gasoline, fuel oil and other petroleum products.

3.247. Heavy trucking and equipment storage: Buildings or land used for the storage of heavy trucks, heavy contracting equipment and earthmoving equipment. "Storage" shall mean the keeping of such vehicles or equipment or portions or parts thereof, remaining unutilized or stationary, in open lots or in uncovered or unenclosed areas between the hours of 10:00 p.m. and 6:00 a.m. or any portion thereof. "Heavy contracting equipment and earthmoving equipment" shall mean equipment or vehicles with a curb weight in excess of three tons which can be used in the construction or reconstruction of streets and sidewalks or in excavation work or in similar activities. A "heavy truck," for the purposes of this chapter, shall mean any truck with a cab weight in excess of five tons, whether or not such truck is used in construction work.

3.248. Open storage: Storage or display of merchandise or goods, new or used, whether for sale at retail or wholesale, whether crated, uncrated or in cartons, within 10 feet of the street line; storage or display of used merchandise or goods or of cartons or crates, whether full or empty, between the line of the front of the building and the street line; storage or display of used merchandise or goods or of cartons or crates, whether full or empty, unless all such items are screened from view from public or private ways and from adjacent residentially zoned properties whenever stored out of doors; storage out of doors of merchandise or goods, whether new or used, after normal business hours unless stored in an enclosed area. This subsection shall not apply to the storage or display of motor vehicles in connection with the operation of a duly licensed motor

KeyCite Yellow Flag - Negative Treatment
Distinguished by Tracer Lane II Realty, LLC v. City of Waltham, Mass.Land Ct., March 5, 2021

2014 WL 471951
Only the Westlaw citation is currently available.
Massachusetts Land Court.
Department of the Trial Court.

Dale BRIGGS and Laura Briggs, Plaintiffs,
v.
ZONING BOARD OF APPEALS OF MARION and Jonathan Sylvia, Elizabeth Dunn, Domingo P. Alves, Jr., Eric Pierce, and Thomas Cooper, as they are members of the Zoning Board of Appeals of Marion, Defendants.

No. 13 MISC 477257(AHS).
|
Feb. 6, 2014.

Synopsis

Background: Application for a building permit to construct and install a solar energy farm was denied by the Building Commissioner, and Marion Zoning Board of Appeals enied applicants' appeal. Applicants filed complaint appealing decision.

Holding: The Land Court, Department of the Trial Court, Alexander H. Sands, III, Justice. held that Zoning Board was required to determine if solar energy farm was "light manufacturing" under its bylaws.

Remanded.

West Headnotes (1)

[1] Zoning and Planning ⇐ Directing further action by local authority

In zoning dispute involving application to construct solar energy system within residential zone, zoning board of appeals' failure to make determination whether system could be categorized as light manufacturing under its bylaws, and therefore allowed as non-accessory use in General Business (GB) and Limited Industrial (LI) Districts, warranted remand to board. G.L. c. 40A, § 1A; G.L. c. 40A, § 3; G.L. c. 40A, § 17.

DECISION

ALEXANDER H. SANDS, III, Justice.

*1 Plaintiffs filed their unverified Complaint on March 14, 2013, pursuant to

G.L. c. 40A, § 17, appealing a decision (the "ZBA Decision") of Defendant Marion Zoning Board of Appeals (the "ZBA") which denied Plaintiffs' appeal of the Building Commissioner's denial of Plaintiffs' application for a building permit (the "Building Permit") to construct and install a solar energy farm at property located at 512 County Road, Marion, MA ("Locus"). A case management conference was held on April 22, 2013. Plaintiffs filed their Motion for Summary Judgment on August 16, 2013, together with supporting memorandum, Statement of Material Facts, and Affidavit of Dale Briggs. On September 17, 2013, the ZBA filed its Opposition, together with supporting memorandum and Statement of Additional Material Facts. Plaintiffs filed their Reply on September 24, 2013. A hearing on the motion was held on September 30, 2013, and the matter was taken under advisement.

I find that the following material facts are not in dispute:

1. Locus is a vacant lot containing 5.93 acres, has 100 feet of frontage on County Road, and is located in a Residence D Zoning District. Locus is shown on the "Approval Not Required Plan" dated April 11, 2013 and prepared by N. Douglas Schneider & Associates, Inc. (the "ANR Plan"). Locus is also shown as Lot 17 on Assessors Map 21. Plaintiffs reside on abutting property to the south of Locus located at Lot 14 on Map 21.

2. In August of 2012 Plaintiffs filed an application (the "Application") with the Marion Building Commissioner for the Building Permit to construct and install a "solar energy system" on Locus. The solar energy system would contain 3,520 panels in a fenced area, and met all applicable setback and yard requirements of the Marion Zoning Bylaws (the "Bylaws"). [1] The facility will be located in a wooded area and will be partially screened in areas that will be visible.

1 The ZBA Decision states that the Application included "the commercial sale of energy produced by the 'solar farm' at [Locus]." Plaintiffs did not dispute this fact. Furthermore, they admitted the ZBA's statement that "Plaintiffs' proposed use is commercial in nature."

3. On September 4, 2012, the Building Commissioner denied the Application (the "Building Commissioner Decision").

4. Plaintiffs appealed the Building Commissioner Decision to the ZBA. The ZBA held a public hearing on February 7, 2013, and on February 22, 2013, voted to deny the appeal (the ZBA Decision). The ZBA Decision made the following findings:

1. The Marion Zoning Bylaw allows for the development of solar energy facilities as a accessory use to otherwise permitted residential and non residential uses (see Section 6.3).

2. The Marion Zoning Bylaw provides for the development of solar energy facilities as a permitted use within the Limited Industrial District ("LI District"). See Section 4.2.

3. The Marion Zoning Bylaw provides for the development of solar energy facilities pursuant to receipt of a special permit in the General Business District ("GB District"). See Section 4.2.

4. The Board concludes that the Zoning Bylaw neither "prohibits" nor "unreasonably regulates" the installation or use of solar energy facilities.

*2 The ZBA Decision stated

> The Marion Zoning Bylaw prohibits uses and structures not specifically allowed, either by right or by special permit, within the Town's named zoning districts. The development of a commercial solar energy facility is, accordingly, prohibited within the Town's Residential Zoning Districts. The prohibition of commercial solar energy facilities within the Town's designated residential districts does not violate the spirit or intent of G.L. c. 40A, s. 3 and it cannot be said to constitute a facially or even as applied violation of the statute.

The ZBA Decision did not make findings on the possible impacts of a solar energy facility on the public health, safety, or welfare.

5. The ANR Plan was approved by the Marion Planning Board on April 25, 2013, and was sufficient to preserve the "use of [Locus]" under G.L. c. 40A, § 6, for three years from the date of submittal.[2] Therefore, Plaintiffs have vested rights against zoning changes in the Residence D Zoning District, and the Bylaws at the time of filing of the ANR Plan govern this matter.[3] The ANR Plan was recorded with the Registry on May 9, 2013, at Plan Book 57, Plan 1055.

2 However, neither party nor the ANR Plan state the date of the ANR Plan's submittal, which is the start date for the preservation of the "use of Locus."

3 On May 13, 2013, the Marion Town Meeting considered two zoning amendments relative to solar energy systems. Article 30, which would have allowed solar

> energy systems in a Residential zoning district by special permit, was defeated. Article 31, which proposed a Municipal Solar Overlay District and would allow large scale solar energy systems to be built on municipal land, passed.

6. G. L. c. 40A, § 1A defines "solar energy system" as

> 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.[4]

[4] Another state statute dealing with solar access (G.L. c. 40A § 9B,) doesn't appear to be applicable to this case.

No one disputes that Plaintiffs' proposed solar farm is a "solar energy system" as defined in G.L. c. 40A, § 1A of the Bylaws.

7. G. L. c. 40A, § 3 states as follows:

> 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.

8. § 4.1 of the Bylaws states:

> Except as may be provided otherwise in this Bylaw, no building or structure shall be constructed, and no building or structure or land or part thereof, shall be used for any purpose or manner other than for one or more of the uses hereinafter set forth as permitted in the district in which such building, structure or land is located or set forth as permissible by Special Permit in said district as so authorized.

9. § 6.3 of the Bylaws states that "[a]ccessory uses are permitted only in accordance with lawfully existing principal uses." "Accessory Use" is defined in § 11 of the Bylaws as: "[a] use incidental and subordinate to the principal use of the structure or lot."

10. At the time of the filing of the Application, the Bylaws did not mention a "solar energy system." The Use Table (§ 4.2) does not include "solar energy systems" in any zoning district's permitted uses.

11. Table of Principal Use Regulations (§ 4.2) states the use of "Light Manufacturing" is allowed in a LI District as of right, and with a Special Permit in a GB District.

*3 12. "Light Manufacturing" is defined in § 11 of the Bylaws as "fabrication, assembly, processing, finishing work or packaging."

Plaintiffs argue that the ZBA Decision is arbitrary, capricious, an abuse of discretion, and violates G.L. c. 40A § 3. Specifically, Plaintiffs contend that because solar energy systems do not fall in a principle use category provided by the Bylaws, the only allowed use of solar energy systems is as accessory to residential and non-residential principle uses. Plaintiffs argue that this restriction on solar energy systems is 'unreasonable regulation' in violation of G.L. c. 40A, § 3. Plaintiffs also contend that should this court find that the ZBA violated G.L. c. 40A, § 3, Plaintiffs are entitled to a 'builder's remedy.' I shall examine each issue in turn.

A. Bylaws

Under the Bylaws at the time of filing, Plaintiffs argue that solar energy systems, including their proposed solar farm, are unreasonably restricted. They contend that the residential accessory use and non-residential accessory use allowed by the Bylaws, is the only permitted use of a solar energy system because no districts explicitly allow them, and as a result they must be excluded.[4] (See Bylaws § 4.1.) In particular, Plaintiffs argue that neither the LI District nor the GB District allow solar energy systems because they are not listed in the use table, and because solar energy collection does not fall under the Bylaws' definition of "light manufacturing," which is listed in the use table.

4 This court is not convinced that the Bylaws allow solar energy systems as an accessory use to residential and non-residential uses because the term 'solar energy systems' appears no where in the Bylaws. However, the parties agree on the fact that solar energy systems are available as an accessory use.

In their brief, the ZBA states that a commercial non-accessory solar farm is a "light manufacturing" use under the Bylaws, which is not allowed in a residential district but is allowed as of

right in a LI District, and is allowed by Special Permit in a GB District.[5] Therefore, the ZBA argues, it cannot be said that solar energy systems have been unreasonably regulated because they are allowed in designated commercial districts, and as accessory in a residential district to residential uses. "Light Manufacturing" is defined as "fabrication, assembly, processing, finishing work or packaging" by the Bylaws in § 6.3(11) "Definitions."[6] The ZBA contends that a solar energy system could be considered "processing" under the Bylaws pursuant to the definition of "light manufacturing". The ZBA argues a solar farm "encompasses the 'process' by which sunlight is collected and converted to an energy commodity." Plaintiffs do not deny this statement in their Reply, but also state that a solar energy system does not involve a "processing" of electricity.[7] They rely on the statutory definition of a solar energy system which is defined under G.L. c. 40A, § 1A as

> 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.

*4 Plaintiffs argue that a solar energy system does not have any attribute that would fit within the Bylaws' definition. Plaintiffs also argue that the term "manufacture" has been interpreted by case law as involving tangible differences in physical qualities, of which a solar farm has none. Plaintiffs cite cases that hold the process of changing the same material into another form is not manufacturing. See *Tilcon–Warren Quarries v. Commissioner of Revenue*, 392 Mass. 670, 467 N.E.2d 472 (1984) (quarry operation is not manufacturing, which is defined as "transformation of some preexisting substance or element into something different, with a new name, nature or use,"); *The Charles River Breeding Labs. v. State Tax Comm'n*, 374 Mass. 333, 372 N.E.2d 768 (1978) (breeding laboratory is not manufacturing, which "involves a change of some substance, element, or material into something new or different",); *Hopkinton LNG Corp. v. State Tax Comm'n*, 372 Mass. 286, 362 N.E.2d 205 (1977) (conversion of gas to liquid is not manufacturing, which is defined as "something possessing a new nature and name and adapted to

5 This court notes that both parties have agreed that Plaintiffs' solar farm is a commercial use.

6 Any of these terms defines "manufacturing".

7 Plaintiffs cite Webster's definition of "process" as "a series of actions or operations conducing to an end; especially: a continuous operation or treatment especially in manufacture." Merriam–Webster Dictionary, 2014 Edition.

a new use"). Plaintiffs argue that using these cases as guidance, there is no reasonable definition of "manufacturing" that would include solar energy systems. [8] Essentially, Plaintiffs contend that solar energy collection and conversion is analogous to the above-referenced cases in that the process takes material and converts it into another form without adding anything or changing its nature.

8 However, these cases deal with the definition of the word "manufacturing" for tax purposes, and not the usage of the term "light manufacturing" for the purposes of the local zoning bylaw.

As a result of the forgoing, the disputed issue is whether or not a solar energy system can be categorized as "light manufacturing" under the Bylaws and would therefore be allowed as a non-accessory use in the GB District and the LI District. The problem is that in the ZBA Decision, the ZBA did not make findings that solar energy systems could be categorized as "light manufacturing" for zoning purposes. The ZBA Decision stated that "[the] Bylaw provides for the development of solar energy facilities as a permitted use within the Limited Industrial District ... [and the] Bylaw provides for the development of solar energy facilities pursuant to receipt of a special permit in the General Business District." There was no specific finding as to why solar energy systems are an allowed use in either the GB District (with a Special Permit,) or the LI District. Nowhere in the ZBA Decision does the term "light manufacturing" appear. The explanation that solar energy systems fall into the category of "processing," and therefore are allowed in the LI District and the GB District as "light manufacturing," was only put forth in the ZBA's Opposition Brief.

This court reviews the ZBA Decision de novo. Because "solar energy systems" were not mentioned in the Bylaws at the time of filing, there is no provision governing this dispute. The ZBA has correctly asserted that it is entitled to deference in interpreting its Bylaws. *Wendy's Old Fashioned Hamburgers of N.Y., Inc., v. Board of Appeals of Billerica,* 454 Mass 357, 381, (2009), *Tanner v. Board of Appeals of Boxford,* 61 Mass.App.Ct. 53, 57, (1985). But it has not made a determination of a solar energy system as "light manufacturing". As a result, this court opines that the ZBA should be extended the opportunity to make findings on this issue. This case is therefore remanded to the ZBA to hold a hearing within thirty days of this decision and to make findings on whether solar energy systems are "light manufacturing" under the Bylaws. This court retains jurisdiction over the matter after such decision is rendered. The parties shall advise this court within twenty days of the date of the remand decision whether such decision shall be appealed, and if so, shall file such appeal with this court.

B. G.L. c. 40A, § 3

*5 Plaintiffs assert that the ZBA Decision constitutes unreasonable regulation and prohibition on solar energy systems under G.L c. 40A, § 3. Plaintiffs focus on the language of G.L. c. 40A, § 3, and argue that unless their proposed solar energy system endangers the health, safety or welfare of the public, it cannot be prohibited by the ZBA. Because Plaintiffs gave evidence to the ZBA that their proposal would not endanger the health, safety or welfare of the public, they argue that the ZBA's denial of their appeal constitutes the unreasonable regulation prohibited by the statute.

Plaintiffs assert, in Dale Briggs' affidavit, that there would be no adverse impacts on the health, safety, or welfare of the public from the solar farm. The affidavit states that the solar panels which would be installed are "typical" and "have been tested in many installations." The plan for the proposed facility would include a fence, and Plaintiffs argue that an attractive nuisance would be unlikely because no children live on any abutting property. The affidavit also addressed the fact that neighbors would not likely see the solar farm as the area was wooded, and where applicable, would be screened from the abutting properties. Therefore, Plaintiffs argue that there is no evidence of any endangerment to the public health, safety, or welfare, from their solar energy system.

The ZBA Decision made no findings on the impact of Plaintiffs' proposal on the public health, safety, or welfare. The ZBA did not reach this issue because they found the regulations imposed on Plaintiffs to be reasonable. The ZBA appeared to determine that solar energy systems fall under the category of 'light manufacturing' and are therefore allowed by right in the LI District and in the GB District by Special Permit. As discussed, *supra,* the ZBA Decision did not describe how a solar farm would fall under the category of "light manufacturing." Provided that the ZBA can make such determination, this court must decide whether such determination, as imposed by the Bylaws, is 'unreasonable' under G.L. c. 40A, § 3.

Plaintiffs appear to argue that the Bylaws are unreasonable because solar energy farms are only allowed as an accessory use, not that the limitation of solar energy farms to the LI District and the GB District is unreasonable. It does not appear that they disagree with the ZBA Decision that a commercial solar energy system is not appropriate for a residential zone. The ZBA Decision, which prohibits large scale commercial solar farms in a residential district, appears to be rational. Separation of residential and commercial districts is a longstanding purpose of zoning. See *Circle Lounge and Grille, Inc. v. Board of Appeal,* 324 Mass. 427,431, (1949) ("[t]he residence zone was designed to protect residence against business"); *DiGiovanni v. Pope,* 20 LCR 44, (2012)*DiGiovanni v. Pope,*

20 LCR 44, (2012) (holding primary uses that are commercial are prohibited in residential districts); *SCIT Inc., v. Planning Board of Braintree,* 19 Mass.App.Ct. 101, 107, 472 N.E.2d 269 (1986) (zoning ordinances are intended to apply uniformly and divide land into compatible uses to have a predictive quality). Therefore, provided that the ZBA can justify a finding that a solar energy farm is "light manufacturing" under the Bylaws, I find that the ZBA Decision, which maintains the division between commercial solar energy systems and residential accessory solar energy uses, is reasonable and does not violate G.L. c. 40A, § 3.

***6** After the remand and after all remaining issues have been resolved, I shall issue a judgment in this case.

All Citations

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Massachusetts Land Court, Department of the Trial Court, Hampden County.

Mary B. DUSEAU, Susan L. Moorman, Kathleen Z. Zeamer, Daniel K. Edwards, Judith B. Zahn, as Trustee for the Judith B. Zahn Living Trust, Barbara R. O'Shepa, Stanley J. Pitchko, Jr., Patricia J. Pitchko, Alan Borowski, Stephen E. Laizer, Patricia Laizer, Melissa A. Hession, David J. Musante, Cindy A. Barcomb, Kathleen A. Sheehan, Anita R. Gingras, Melody S. Edwards, Jason Laprade, James Tarr also known as James N. Tarr and Betsy Tarr, Plaintiffs,
v.
SZAWLOWSKI REALTY, INC., Town of Hatfield, and Hatfield Solar, LLC, Defendants.
Mary B. Duseau, Susan L. Moorman, Kathleen Z. Zeamer, Daniel K. Edwards, Judith B. Zahn, as Trustees for the Judith B. Zahn Living Trust, and
Barbara R. O'Shepa, Stanley J. Pitchko, Jr., Patricia J. Pitchko, Alan Borowski, Stephen E. Laizer, Theresa A. Laizer, Melissa A. Hession, David J. Musante, Cindy A. Barcomb, Kathleen A. Sheehan, Anita R. Gingras, Melody S. Edwards, Jason Laprade, Jennifer LaPrade, James Tarr also known as James N. Tarr and Betsy Tarr, Plaintiffs,
v.
Szawloski Realty, Inc., Bryon Nicholas, Michael F. Paszek, Francis Spellacy and Darryl Williams, as they are Members of the Hatfield Zoning Board of Appeals, Town of Hatfield, and Hatfield Solar, LLC, Defendants.

Nos. 12 MISC 470612 JCC, 13 MISC 477351 JCC.

Jan. 2, 2015.

DECISION ON PARTIES' CROSS–MOTIONS FOR SUMMARY JUDGMENT

JUDITH CUTLER, Chief Justtice.

INTRODUCTION

***1** These two consolidated cases stem from the Defendant Hatfield Solar, LLC's ("Hatfield Solar") proposed construction of 8,000 + solar collection panels on property in the Town of Hatfield's Rural Residential district, known and numbered as 45 Chestnut Street in Hatfield (the "Property"). Plaintiffs are the owners of other properties in the Town of Hatfield, seeking to block construction of the solar collection facility in its proposed location.

In Land Court Case No. 12 MISC 470612 ("Case 1"), Plaintiffs seek a declaratory

judgment, pursuant to G.L. c. 240, § 14A, concerning the applicability of certain provisions of the Town of Hatfield Zoning By-laws (the "By-laws"), specifically Use 5.26 in the By-laws' Section 3 Table of Permitted Uses, to Hatfield Solar's proposed use of the Property.[1] In Count I of Land Court Case No. 13 MISC 477351 ("Case 2"),[2] Plaintiffs appeal pursuant to G.L. c. 40A, § 17 from a decision of the Hatfield Zoning Board of Appeals (the "Board") which upheld the issuance of a building permit for the solar collection panels on the Property on the grounds that the use is not a permitted use described in Use 5.26, and must be allowed as an exempt use pursuant to G.L. c. 40A, § 3, ¶ 9 (the "§ 3 Solar Provision").

1 Use 5.26 is a numbered use category listed in the Table of Permitted Uses ("Table 1"). Table 1 appears in Section 3.0 of the By-laws, and not in Section 5.0 of the By-laws, which is entitled "Special Permits, Site Plan Approval and Site Plan Review." Therefore, although the Parties both refer to this use category as "*Section* 5.26," for clarity purposes, it will instead be referenced throughout this Decision as "Use 5.26."

2 The Case 2 Complaint includes four counts, three of which are not at issue in this summary judgment motion. Count II seeks a declaratory judgment concerning a boundary dispute between Defendant Szawlowski and Plaintiffs Jason and Jennifer Laprade; Count III seeks a permanent injunction to remove any construction done while Case 1 is pending; and Count IV seeks money damages for trespass. On April 29, 2013, Plaintiffs agreed to the dismissal of their Count IV claim.

Ultimately, both cases hinge on the interpretation of the Table of Use Regulations in the By-laws. In particular, Use 5.26 in Table 1 lists three categories of renewable or alternative energy facilities which are permitted by right, with site plan approval, in the Industrial ("I") and Light Industrial ("LI") districts (collectively, the "Industrial Districts"), and prohibited in all other districts of the Town. Plaintiffs seek to establish that Hatfield Solar's solar collection facility falls into one of three renewable or alternative energy uses permitted in the Industrial Districts and that, therefore, the § 3 Solar Provision does not automatically exempt Hatfield Solar's Project from application of the By-laws. Hatfield Solar argues that its solar collection facility is not a permitted use in any district of the Town and, therefore, must be exempted from zoning regulation pursuant to the § 3 Solar Provision.

Plaintiffs filed Case 1 on September 25, 2012, naming the Town of Hatfield (the "Town") and the owner of the Property, Szawlowski Realty, Inc. ("Szawlowski") as Defendants. The Town filed an answer

on October 15, 2013, seeking dismissal of Plaintiffs' request for declaratory judgment.[3] Szawlowski filed an answer on October 23, 2012, asserting the following affirmative defenses: failure to state a claim for which relief can be granted, lack of standing and subject matter jurisdiction, failure to name a necessary party, ripeness, and failure to exhaust all administrative remedies. Hatfield Solar was allowed to intervene in Case 1 on November 5, 2012, and answered the Complaint, asserting the same affirmative defenses as Szawlowski, except the failure to exhaust administrative remedies. Plaintiffs filed their Complaint in Case 2 on March 22, 2013, after the Board denied their administrative appeal of the building permit for the solar collection panels.[4] The two cases were consolidated on April 29, 2013.

3 The Town has not otherwise actively participated in the defense of Case 1.

4 Pursuant to G.L. c. 40A, § 17, no answer was required.

***2** On May 23, 2013, Hatfield Solar moved for summary judgment in Case 1, that the installation of solar panels for the collection of energy is a use which must be allowed by right in the Rural Residential District pursuant to the § 3 Solar Provision because it is not otherwise allowed in the Town of Hatfield. Hatfield Solar also moved for summary judgment in Plaintiffs' Case 2, G.L. c. 40A, § 17 appeal, that the Board's correctly upheld the building permit because, in the absence of a use regulation specifically permitting the construction of the proposed solar collection facility anywhere in the Town, the § 3 Solar Provision exempts the use from prohibition in the RR District in which the facility would be located.

Plaintiffs have opposed Hatfield Solar's motions for summary judgment, and have cross-moved for a summary judgment in Case 1 in its favor, declaring that Use 5.26 of the By-laws' Table of Uses applies to the use proposed by Hatfield Solar, restricting it to the Industrial Districts only. They have also moved for partial summary judgment in Case 2, invalidating the Board's decision. Plaintiffs take the position that Hatfield Solar's proposed use is either a "Renewable or Alternative Energy Development Facility," or a "Renewable or Alternative Energy Manufacturing Facility" under Use 5.26, and that Use 5.26 constitutes a reasonable regulation of the installation of solar energy collection facilities such as Hatfield Solar proposes, making Hatfield Solar's project ineligible for exemption under the § 3 Solar Provision.

On October 30, 2013, a hearing was held on the Parties' cross-motions. On November 13, 2013, after the Parties were given an opportunity to file supplemental briefing, the court took the cross-motions under advisement.[5] Now, on the basis of

the pleadings and other Rule 56 materials filed in this matter, I have determined that there are no material facts in dispute and that the Plaintiffs are entitled to summary judgment as a matter of law in Case 1 and to partial summary judgment in Count 1 of Case 2.

5 After the summary judgment hearing, the court granted the parties additional time to brief the issue of whether Hatfield Solar qualified as a "public service corporation" entitled to an exemption from local zoning granted by the Department of Telecommunications and Energy under G.L. c. 40A, § 3, ¶ 2. Plaintiffs and Hatfield Solar filed their supplemental briefs on November 12 and November 13, 2013, respectively. Because I have decided the cross-motions on other grounds, it is not necessary to reach this issue.

UNDISPUTED MATERIAL FACTS

Based upon the pleadings and other admissible Rule 56 materials, as well as the Parties' oral representations at the summary judgment hearing, I find the following material facts are not in dispute:

1. Defendant Hatfield Solar, LLC ("Hatfield Solar") is a duly organized and existing Massachusetts limited liability company with its principal office at 88 Black Falcon Avenue, Suite 342, in Boston.

2. Defendant Szawlowski Realty, Inc. ("Szawlowski") is a duly organized and existing Massachusetts business corporation with a principal office at 103 Main Street in Hatfield.

3. Szawlowski is the record owner of the property located at 45 Chestnut Street in Hatfield (the "Property"). The Property consists of approximately 35.6 acres and is zoned Rural Residential ("RR").

4. Szawlowski has leased the property to Hatfield Solar for the planned installation of 8,000 panels for the collection of solar energy, with an installed electric generating capacity of approximately 2400 kilowatts (2.4 megawatts) (the "Project"). The Project will generate electricity, which Hatfield intends to sell to utility companies on a "wholesale basis." Hatfield Solar does not intend to provide or sell electricity directly to retail customers.

***3** 5. The Town of Hatfield Zoning By-laws ("By-laws") Section 3.0, entitled "Use Regulations," states that "[e]xcept as provided by law or in this By-law, no building or structure shall be erected, and no building, structure or land or part thereof shall be used for any purpose or in any manner other than one (1) or more of the uses hereinafter set forth as permitted by right, permitted

by site plan review, or as permissible by special permit and so authorized. Any use not specifically permitted is prohibited."

6. Section 3.0 of the By-laws includes a Table of Use Regulations ("Table 1"). According to Table 1, Use 5.26 is permitted by right, subject to "Site Plan Review—Administrative Review from the Planning Board," in the Industrial Districts only. Use 5.26 includes the following: "Renewable or Alternative Energy Development Facilities, Renewable or Alternative Research and Development (R & D) Facilities, or Renewable or Alternative Energy Manufacturing Facilities including for the manufacture and/or assembly of equipment for Solar, Thermal, Solar Photovoltaic, Hydro Electric and Wind Generation."

7. Use 5.26 was added to the By-laws by vote of the Hatfield Annual Town Meeting on May 11, 2010.

8. On October 24, 2012, the Hatfield Building Inspector issued building permit No. 2012–2914 (the "Building Permit") for construction of the Project on the Property.

9. On November 16, 2012, Plaintiffs appealed to the Board from the issuance of the Building Permit. [6]

6 Hatfield Solar does not challenge the Plaintiffs' standing in their summary judgment motions.

10. On February 20, 2013, the Board denied the appeal and upheld the issuance of the Building Permit to Hatfield Solar ("Decision"). The Decision states, in relevant part, that Plaintiffs "allege that the project is not permitted in a Rural Residential District under Use 5.26 of the Hatfield Zoning [By-laws] and further allege that the zoning protection for solar energy systems pursuant to [G.L. c. 40A, § 3, ¶ 9] is not applicable to this project and seek the revocation of the Building Permit." The Board voted, following discussion, "to deny the appeal of the [Plaintiffs] and to uphold the issuance of the Building Permit by the Building Inspector."

11. On March 5, 2013, the Board amended the Decision, by adding the following language: "[t]he reason for denial is that based on its legislative history and plain language, [Use] 5.26 of the Hatfield Zoning [By-laws] is not applicable to the construction contemplated under the building permit. Moreover, the language of G.L. c. 40A, § 3 exempts solar collection panels that are the subject of this building permit."

DISCUSSION

Pursuant to Mass. R. Civ. P. 56(c), summary judgment is appropriate when there are no genuine issues of material fact and, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *Opara v. Mass. Mut. Life Ins. Co.*, 441 Mass. 539, 544 (2004); *Attorney General v. Bailey*, 386 Mass. 367, 37071 (1982) (citations omitted). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue of fact and that the record entitles them to judgment as a matter of law. *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 711 (1991). Evidence submitted is viewed in the light most favorable to the non-moving party. *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). When the court is faced with cross-motions, as is the situation here, it analyzes the parties' legal positions guided by which party has the burden on the issues before the court. Each moving party bears the burden of affirmatively demonstrating the absence of triable issues of fact and its entitlement to judgment as a matter of law. *Lev v. Beverly Enter.-Massachusetts, Inc.*, 457 Mass. 234, 237 (2010). Here, the undisputed material facts are sufficient to entitle the Plaintiffs to judgment as a matter of law on both the Case 1, G.L. c. 240, § 14A claim and the Case 2, G.L. c. 40A, § 17appeal.

I. *The Project is a Permitted Use under the By-laws.*

***4** Section 3.0 of the By-laws addresses the uses allowed in each of the Town's zoning districts. Section 3.0 includes a Table of Use Regulations (Table 1). Table 1 lists six broad categories of uses. Under each of the broad categories, there are specific uses listed by number. For each of the numbered uses, Table 1 denotes those districts in which the use is allowed by right, allowed by special permit, or allowed by right with site plan approval. Section 3.0 provides that that any use "not specifically permitted" under this By-law "is prohibited."

One of the broad categories of uses in Table 1 is "Wholesale, Transportation and Industrial Uses." Use 5.26, which falls under said category, includes the following: "Renewable or Alternative Energy Development Facilities, Renewable or Alternative Research and Development (R & D) Facilities, or Renewable or Alternative Energy Manufacturing Facilities including for the manufacture and/or assembly of equipment for Solar, Thermal, Solar Photovoltaic, Hydro Electric and Wind Generation." According to Table 1, the Use 5.26 facilities are permitted by right, subject to administrative site plan review, only in the Industrial Districts of the Town, and are prohibited in all other districts.

It is undisputed that the Hatfield Solar Project is a facility for the collection of solar energy for the purpose of generating

electricity, which Hatfield will then sell to wholesalers. As such, it falls within the first category of facilities listed under Use 5.26—"Renewable or Alternative Energy Development Facilities." The By-laws do not define "Renewable or Alternative Energy Development Facilities." Nor do they define the separate terms "renewable or alternative energy" and "development facility."

In the absence of an express definition of a word or phrase in the bylaw itself, however, the court looks to "ordinary principles of statutory construction." *Eastern Point, LLC v. Zoning Bd. of Appeals,* 74 Mass.App.Ct. 481, 486 (2009), citing *Framingham Clinic Inc. v. Bd. of Appeals of Framingham,* 382 Mass. 283, 290 (1981). Under those rules, undefined words are given their "usual and accepted meanings, as long as these meanings are consistent with their statutory purpose." *Eastern Point, LLC,* 74 Mass.App.Ct. at 386, citing *Commonwealth v. Zone Book, Inc.,* 372 Mass. 366, 369 (1977). Meanings are derived from sources presumably known to the statute's enactors, such as other legal contexts and dictionary definitions. *Zone Book, Inc.,* 372 Mass. at 369. The undefined term at issue should be construed together with any associated words or phrases within the statutory context. *Bldg. Comm'r of Franklin v. Dispatch Commc'ns of New England, Inc.,* 48 Mass.App.Ct. 709, 717–718 (2000). When interpreting a zoning bylaw or ordinance, technical words and phrases, or ones that may have acquired a "peculiar and appropriate meaning in law," are construed according to such meaning. G.L. c. 4, § 6, ¶ 3.

***5** When necessary, courts may also turn to the General Laws and other legislation in order to assign meaning to undefined terms, because the interpretation of provisions using identical language must be uniform. *Bldg. Inspector of Mansfield v. Curvin,* 22 Mass.App.Ct. 401, 403 (1986). Courts interpreting other provisions in G .L. c. 40A, § 3 (" § 3") have consistently relied on statutes pertaining to matters outside the zoning context in order to determine the scope of uses protected by § 3. When interpreting the § 3, ¶ 1 exemption for agricultural uses, for example, the Appeals Court looked to the provisions of G.L. c. 61A, concerning the assessment and taxation of agricultural land, to determine whether the raising and selling of horses constituted "agriculture" under § 3. *Bateman v. Bd. of Appeals of Georgetown,* 56 Mass.App.Ct. 236, 243 (2002); *Steege v. Bd. of Appeals of Stow,* 26 Mass.App.Ct. 970, 971 (1988). Similarly, the Supreme Judicial Court relied on decisions addressing the tax exemption statutes when construing the § 3 educational use exemption. *See, e.g., Regis College v. Town of Weston,* 462 Mass. 280, 290 n. 12 (2012) (and cases cited). The process is identical when faced with alleged zoning restrictions of religious institutions, with the court free to investigate other sources in order to

determine whether the § 3 exemption for religious uses applies. *See* *Needham Pastoral Counseling Ctr., Inc. v. Bd. of Appeals of Needham*, 29 Mass.App.Ct. 31, 45 (1990) (stating other legal contexts and definitions are helpful, and relying on federal and state case law, legal treatises and articles in an attempt to define religious activity).

Here, Plaintiffs offer a compelling argument that "alternative energy development," is a technical term already defined by statute. In particular, § 1 of G.L. c. 164, the statute governing the manufacture and sale of gas and electricity, defines "alternative energy development" as including, but not limited to, "*solar energy,* wind, wood, alcohol, hydroelectric, biomass energy systems, renewable non-depletable and recyclable energy sources." [Emphasis added.] This definition was added in 2008. *See* 2008 Mass. Acts c. 169. In the same 2008 legislative act, the identical definition of "alternative energy development" was added to G.L. c. 25A, § 3, and G.L. c. 25A, § 10(c) was amended to list the qualifications necessary for a municipality to qualify for "green" community funding, providing that "[t]o qualify as a green community, a municipality or other local government body *shall ... provide for the as-of-right siting of renewable or alternative energy generating facilities, renewable or alternative energy research and development facilities, or renewable or alternative energy manufacturing facilities in designated locations* [.]" Notably, the three types of renewable or alternative energy facilities which a municipality must allow in order to qualify as a green community under the 2008 legislation generally match the three types of renewable or alternative energy facilities listed under Use 5.26 as allowed by right in the Industrial Districts. [7]

7 The only difference is the use of the word "development" instead of "generating" in the first category of Use 5.26. I do not view this difference as significant because "development" is a synonym for "generation." See *Roget's Desk Thesaurus* (2004).

***6** Use 5.26 was added to the By–Laws in 2010, two years after the definitions of "alternative energy development" and the green community requirements were added to G.L. c. 25A and G.L. c. 164. Thus, the drafters of the Use 5.26 amendment, and the Town Meeting adopting said amendment, were presumably aware of the statutory language adopted in 2008. *See Zone Book, Inc.*, 372 Mass. at 369 (a word's accepted meaning may be drawn from sources presumably known to a statute's enactors).

The legislative history of the Use 5.26 amendment also implies an intent to conform the Use 5.26 list of facilities to include all three types described in G.L. c. 164, § 10 for green community qualification. The text of the Use 5.26 amendment originally

proposed at a Planning Board hearing on April 12, 2010 listed only two types of facilities: "Alternative Energy Research and Development Facilities and/or Manufacturing Facilities including for the manufacture of equipment...." However, the final form of the amendment enacted on May 11, 2010 included the third and separate "Renewable or Alternative Energy Development Facilities" category, and also revised the titles of the other two facilities to include "renewable"-indicating a deliberate intent to include all three types of facilities described in c. 164, including solar energy generating facilities like the Project. Hatfield Solar has offered no contrary legislative history relating to the Use 5.26 amendment.

Further, the court must, if possible, construe by-laws so as to maintain their validity. *Shea v. Town of Danvers,* 21 Mass.App.Ct. 996, 997 (1986), citing *Doliner v. Town Clerk of Millis,* 343 Mass. 10, 15 (1961). As noted above, Section 3.0 of the By-laws provides that "any use not specifically permitted is prohibited." In light of the strictures of the § 3 Solar Provision, and where the By-laws do not otherwise expressly permit solar energy facilities, construing Use 5.26 to include the Project under "Renewable or Alternative Energy Development Facilities" avoids a potential conflict with the § 3 Solar Provision. *See Fordham v. Butera,* 450 Mass. 42, 44 (2007) (citations omitted) (stating that every presumption is to be made in favor of a bylaw, and its enforcement is not to be refused unless it conflicts beyond a reasonable doubt with an enabling act or the Constitution); *Wilson v. Town of Sherborn,* 3 Mass.App.Ct. 237, 240 (1975);

Hatfield Solar argues in its summary judgment motion that its Project does not fall under any category listed under Use 5.26 because it does not involve *manufacturing or development of equipment.* I reject Hatfield Solar's assertion that Use 5.26 includes only facilities that *manufacture or develop* solar panels—i.e. the equipment to be used as part of the Project—but does not include a facility which collects solar energy using those panels. To support its argument, Hatfield Solar asks this court to read the clause "including for the manufacture and/or assembly of equipment for Solar, Thermal, Solar Photovoltaic, Hydro Electric and Wind Generation" as modifying *all three* of the facilities described under Use 5.26. However, this interpretation is contrary to the well-established rules of statutory construction[8] that a modifying clause generally refers to the last antecedent, unless the subject matter or dominant purpose of the statute requires a different interpretation. *Selectmen of Topsfield v. State Racing Comm'n,* 324 Mass. 309, 312 (1949). The use of the word "or" is disjunctive "unless the context and main purpose of all the words demand otherwise." *Miller v. Miller,* 448 Mass. 320, 329 (2009) (citations omitted).

8 Traditional canons of statutory construction apply to zoning bylaws. *Doherty v. Planning Bd. of Scituate*, 467 Mass. 560, 567 (2014), citing *Framingham Clinic Inc. v. Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981).

*7 Here, the three different types of renewable or alternative energy facilities listed under Use 5.26 are separated both by commas and by use of the conjunction "or." And there is nothing in the By-laws to suggest that use of the word "or" should not be treated as disjunctive. Thus, each listed facility must be treated as separate and distinct from the others. Moreover, there is nothing in the By-laws to suggest that the final modifying clause, "including the manufacture and/or assembly of equipment for Solar, Thermal, Solar Photovoltaic, Hydro Electric and Wind Generation" should be applied to more than the immediately preceding facility —"Renewable or Alternative Energy Manufacturing Facilities ."[9]

9 Hatfield Solar is correct that the Project does not fall within the category of "Renewable or Alternative Energy Manufacturing Facilities." Section 9.47 of the By-laws defines the term "manufacturing" as an "[e]stablishment engaged in the mechanical or chemical transformation, fabrication, assembly, conversion, alteration, finishing, or process treatment of materials or substances into new products including the assembling of component parts, the manufacturing or refurbishing of products, and the blending of materials such as lubricating oils, plastics, resins, or liquors." Since it is undisputed that the Project will not involve manufacture of physical products or equipment, it does not fall within the third type of facility listed under Use 5.26. The Project also does not fall within the second of the three listed categories under Use 5.26: "Renewable or Alternative Research and Development (R & D) Facilities." Section 9.59 of the By-laws defines a "research and development facility" as a business that "engages in research, or research and development, or innovative ideas in technology-intensive fields. Examples include but are not limited to: research and development of computer software, information systems, communication systems, transportation, geographic information systems, multimedia and video technology." There is nothing in the summary judgment record to suggest that the Project involves scientific or technological research, however. Rather, the Project's sole purpose is to collect solar energy for wholesale distribution. Therefore,

the Project also does not fit into the second type of facility listed in Use 5.26.

For the reasons stated, I find that the Plaintiffs are entitled to summary judgment in Case 1, declaring that pursuant to the By-laws, Section 3, Table 1, Use 5.26, Hatfield Solar's proposed solar panel collection facility is permitted by right, with administrative site plan review, in the Industrial and Light Industrial Districts, and prohibited in all other districts of the Town, including the RR District in which the Property is located.

2. *The Board's Decision was Based on an Incorrect Interpretation of Use 5.26.*

Under G.L. c. 40A, § 17, a zoning board's decision will not be overturned unless it is "based on a legally untenable ground or is unreasonable, whimsical, capricious or arbitrary." *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass.App.Ct. 68, 72 (2003), citing *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). Here, for the reasons discussed at length in the preceding paragraphs, the Board based its Decision on an incorrect interpretation of Use 5.26. Therefore, the Decision must be annulled.

The Board's initial Decision, dated February 25, 2013, simply states that the Board voted "to deny the appeal and to uphold the issuance of the Building Permit by the Building Inspector." On March 5, 2013, the Decision was amended, adding that "[t]he reason for denial is that based on its legislative history and plain language, [Use] 5.26 of the Hatfield Zoning [By-law] is not applicable to the construction contemplated under the building permit. Moreover, the language of G.L. c. 40A, § 3 exempts solar collection panels that are the subject of this building permit."

Massachusetts General Laws, Chapter 40A, § 3, ¶ 9 (referred to herein as the "§ 3 Solar Provision") states, in relevant part, that "[n]o zoning ordinance or bylaw 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."

The § 3 Solar Provision does not provide the blanket exemption suggested by the Board's finding. Under the statutory language, a municipality may reasonably regulate solar energy systems, but cannot prohibit them outright. As discussed above, this court has determined that the Project falls under the first of the three types of facilities listed under Use 5.26 (i.e., a "Renewable or Alternative Energy Development Facility") which, pursuant to Table 1 of the Bylaws, is allowed by right with administrative site plan review in the Industrial Districts of the Town, although prohibited in all other districts, including the RR District in which the

Property is located. Thus, to the extent that the Project may be classified as a type of "solar energy system"[10] or a structure that facilitates the collection of solar energy, addressed under the § 3 Solar Provision, then an exemption under such Provision would be implicated only if it can be demonstrated that restricting solar energy systems only to the Industrial Districts is an "unreasonable" regulation, and that such a regulation is not necessary to protect the public health and welfare.

10 "Solar energy system" is defined in Section 1A of G.L. c. 40A as "a device or structured design feature, a substantial purpose of which is ... to provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating." The court has found no reported decisions determining the scope of this definition and, in particular, whether a solar collection system is intended only for ancillary use providing energy sources to the principal use, or may also include a commercial, electricity generating facility such as Hatfield Solar's Project.

*8 The reasonableness of a regulation depends on the particular facts of each case, and factors that may be considered include whether a regulation substantially diminishes or detracts from a proposed project's usefulness, or imposes an excessive cost that outweighs legitimate municipal concerns. *Trustees of Tufts College v. Medford*, 415 Mass. 753, 757 (1993). Hatfield Solar bears the burden of proving the local bylaw is unreasonable as applied to its project. *Rogers v. Town of Norfolk*, 432 Mass. 374, 383 (2000), citing *Trustees of Tufts College*, 415 Mass. at 757. However, Hatfield Solar has not addressed this issue,[11] and it was apparently not considered by the Board.

11 At oral argument, Hatfield Solar confirmed its position that the § 3 Solar Provision controls because, where neither Use 5.26 nor any other provisions of the By-laws allow solar collection facilities such as the Project, solar collection facilities are deemed a prohibited use in all districts of the Town pursuant to Section 3.0 of the Bylaws ("[a]ny use not specifically permitted is prohibited") in contravention of the § 3 Solar Provision. By limiting its argument in this manner, Hatfield Solar never challenged the reasonableness of Use 5.26 if it were applied to the Project. Because neither party argued the issue of reasonableness or unreasonableness or presented any evidence in regard to the question of reasonableness, I do not reach the issue here. *See Green v. Brookline*, 53 Mass.App.Ct. 128, n. 11 (2001) (declining to reach an issue not

raised at the lower court and not briefed or argued by the parties).

Generally, the party claiming an exemption from a statutory provision carries the burden to prove that it is entitled to the exemption. *Goodrow v. Lane Bryant,* 432 Mass. 165, 170 (2000); *see also* *New England Forestry Found. v. Bd. of Assessors of Hawley,* 468 Mass. 138, 148 (2014) (tax exemption); *Trustees of Tufts College v. Medford,* 415 Mass. at 763 (agricultural exemption under G.L. c. 40A, § 3). Hatfield Solar, as the party claiming that its Project is exempt from operation of the By-laws pursuant to G.L. c. 40A, § 3, ¶ 9, has failed to carry its burden on summary judgment.

Therefore, and in light of my decision in Case 1, I find that the Board's Decision upholding the issuance of the Building Permit is based on the legally incorrect premise that the Project is not regulated under Use 5.26 and is consequently exempt from zoning regulation by the § 3 Solar Provision. The Plaintiffs are, therefore, entitled to summary judgment under Count I in Case 2, annulling the Board's Decision. The matter is remanded to the Board for further proceedings consistent with this Decision.

Final Judgment shall not enter at this time, as there remain unresolved claims in Case 2 of the Consolidated cases. Within fourteen (14) days of this Decision, counsel shall contact Sessions Clerk Kathleen Hayes to schedule a status conference. Counsel should confer with each other to arrive at several, mutually acceptable alternative conference dates before contacting the Sessions Clerk.

All Citations

Not Reported in N.E.3d, 2015 WL 59500

End of Document

33 Mass.L.Rptr. 663
Superior Court of Massachusetts,
Worcester County.

Claire and John HAGGERTY
v.
BORREGO SOLAR
SYSTEMS, INC. et al. [1]

[1] Christy Pease (individually), David Robbins, Michael Scully, Sargon Hanna, Linda Hassinger, Robert Hassinger, and Andrew Clark, as members of the Grafton Planning Board; Robert Berger, as Grafton building inspector; and William McCusker, Michael Robbins, Elias Hanna, Peter Adams, and Kay Reed, as members of the Grafton Zoning Board of Appeals.

Nos. 15–CV–0800, 16–CV–0056.
|
Oct. 3, 2016.

MEMORANDUM OF DECISION AND ORDER ON MR. AND MRS. HAGGERTYS' MOTION FOR SUMMARY JUDGMENT

DENNIS J. CURRAN, Justice.

***1** Mr. and Mrs. John and Claire Haggerty seek to annul the decision of the Grafton Planning Board which granted a special permit to neighbor Christy Pease to construct and operate a four-acre renewable solar collection farm on residential property directly across the street from their home. They have brought a motion for summary judgment because, they claim, the Grafton Planning Board granted the special permit under an inapplicable provision of the town's zoning by-law. [2]

[2] The Haggertys also move for summary judgment on a consolidated case, Civil Action No. 16–CV–0056, in which they appeal the decision of the Grafton Zoning Board of Appeals affirming the initial decision of the building inspector to issue a building permit to construct a solar collection facility. If the special permit is annulled, there is no basis for the issuance of the permit upon which the inspector's decision relied.

For the reasons that follow, the Haggertys' motion must be **DENIED.**

BACKGROUND

The following undisputed facts are taken from the summary judgment record and where disputed, the facts are viewed in the light most favorable to the nonmoving party. *See* *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 38 (2005).

Claire Haggerty owns and lives, along with her husband, John, at 90 Old Upton Road, Grafton, Massachusetts. Christy Pease owns 79 Old Upton Road, which lies directly across the street. Ms. Pease runs a business on the property where she leases her barn stalls for boarding and for horseback riders to congregate before going on trail rides in the area. The properties owned by both Ms. Pease and the Haggertys are located in an R–40 zoning district that provides sites for "low density residential development." They are not located in the "Campus Development Overlay" district, a zoning area so designated by Grafton's By–Law.

Ms. Pease entered into a lease with Borrego Solar to construct and operate a renewable solar collection farm on a portion of her property. On September 22, 2014, Borrego applied to the Grafton Planning Board for a special permit to construct the solar collection farm on Ms. Pease's property under the "Electric Generation" use regulation of the By–Law. The facility consists of 2,058 solar panels designed to sit on racking above the ground.

The Grafton Planning Board held hearings on the special permit application and site plan modification. On May 5, 2015, the Planning Board voted 5–0 to grant the special permit and 3–1 to approve the site plan. The special permit allowed Borrego to construct the solar energy facility under section 3.2.3.1 of the By–Law. The Haggertys appealed this decision of the Planning Board.

Section 3.2.3.1 of the By–Law is a Use Regulation Schedule that sets out what type of buildings or structures shall be permitted in specific zoning districts, as well as what type of authorization is required before constructing such a building or structure. Under section 1.5.1 of the By–Law, the Planning Board "shall have the authority to grant special permits for all uses designated with the symbol" on the Use Regulation Schedule in section 3.2.3.1.

In section 3.2.3.1, under the "Electric generating or distribution station or substation" classification, the R–40 zoning district is designated with the "S" symbol indicating that such an "electric generating or distribution station or substation" may be built in the R–40 district under special permit. The By–Law does not define what an "electric generating or distribution" station is. However, it is undisputed that the solar collection farm in question is an electric generating facility. *Consolidated Statement of Facts* ¶ 14.

***2** Under section 3.2.2.1, "[w]here an activity might be classified under more than one of the uses in the Use Regulation Schedule, the more specific classification shall determine permissibility; if equally specific the more restrictive shall govern."

Section 9 of the By–Law governs the uses and structures that fall within the Campus Development Overlay district of Grafton, an area of .775 square miles

that makes up 3.48% of the town.[3] Section 9.2.A provides that "all uses and structures within that district permitted by the provisions of this section 9, and *any other uses and structures shall be governed solely by the provisions of this by-law relating to the underlying district in which such uses and structures are located*". (Emphasis added).

3 The Campus Development Overlay district was created in 1992 to "promote the development of commercial activities in the fields of biotechnology, other sciences, and related activities within a small area of the Town related to the existing Tufts University campus."

Under section 9.4B of the By–Law, the use of "research and development in the fields of Alternative energy and Renewable Energy" is permitted inside the Campus Development Overlay district. The By–Law specifically defines "Renewable energy" in section 2.1, in part, as: "[e]nergy derived from natural resources which are regenerated over time through natural processes. Such energy resources include the sun (solar) ... Renewable energy resources may be used directly or indirectly to create other more convenient forms of energy."

DISCUSSION

I. *Standard of Review*

Summary judgment shall be granted when all material facts have been established and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Miller v. Mooney*, 431 Mass. 57, 60 (2000). The moving party bears the burden of demonstrating the absence of a triable issue from the pleadings, depositions, answers to interrogatories, and any affidavits. *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 808–809 (1991). The Court reviews all of the evidence and draws any inference in the light most favorable to the nonmoving party. *Drakopoulos v. U.S. Bank Nat'l Ass'n*, 465 Mass. 775, 777 (2013).

The moving party satisfies its burden at the summary judgment stage if it can demonstrate "that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). "Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a material fact in order to defeat the motion." *SCA Servs., Inc. v. Transportation Ins. Co.*, 419 Mass. 528, 531 (1995). "[B]are assertions and conclusions ... are not enough to withstand a well-pleaded motion for summary judgment." *Polaroid Corp. v. Rollins Envt'l Svcs. (NJ), Inc.*, 416 Mass. 684, 696 (1993).

Judicial review of the Planning Board's approval of a special permit is a *de novo* analysis. *Grady v. Zoning Bd. of Appeals of Peabody*, 465 Mass. 725, 729 (2013). Under G.L. c. 40A, § 17, this court hears *de novo* all issues raised on appeal, makes independent findings of fact and determines the legality of the Board's decision. *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 558–559 (1954). Although fact-finding in the Superior Court is *de novo*, we review with deference the legal conclusions made by and within the authority of the Board. *Mellendick v. Zoning Bd. of Appeals of Edgartown*, 69 Mass.App.Ct. 852, 857 (2007). A reasonable construction that a zoning board gives to its town's by-laws is entitled to deference. *Cameron v. DiVirgilio*, 55 Mass.App.Ct. 24, 29 (2002). The decision of a zoning board "cannot be disturbed unless it is based on a legally untenable ground" or is based on an "unreasonable, whimsical, capricious, or arbitrary" exercise of its judgment in applying land use regulation to the facts. *Roberts v. Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 487 (1999).

II. *Analysis*

***3** The Haggertys argue that the Planning Board unreasonably ignored the fact that the solar panel facility Borrego placed on Ms. Pease's property was categorized under the "renewable energy" use category in section 9 rather than the more general "electric generating" use category in the Use Regulation Schedule of section 3.2.3.1. Alternatively, the Haggertys argue that the "electric generating" use provision of the Use Regulation Schedule does not encompass renewable solar energy applications because of the inclusion of a "wind energy conservation [*sic*] system" in section 3.2.3.1(8).

Borrego and the other defendants contend that the Planning Board decision was reasonable and the Haggertys' interpretation of the interplay between Section 3.2.3.1, the Use Regulation Schedule, and section 9, governing the Campus Development Overlay district, has no foundation in fact or law.

a. *Categorization of Solar Panel Facility*

It is undisputed that Ms. Pease's property at 79 Upton Road is located in the R–40 zoning district of Grafton and is not within the Campus Development Overlay district; and the Planning Board made such a finding. Based upon the Use Regulation Schedule set forth in section 3.2.3.1, the Board therefore granted the special permit to allow Borrego to build solar panels on Ms. Pease's property.[4]

[4] As previously mentioned, it is undisputed that the Use Regulation Schedule allows for "[e]lectric generating or distribution station or substation" use in the R–40 zoning district through a special permit application process.

The Haggertys' argument that the proposed solar facility is a renewable solar energy application more properly classified under the more restrictive "Renewable Energy" use provision of section 9 is unavailing. Section 9.2.A unambiguously provides that section 9 governs uses and structures of the Campus Development Overlay district and that "any other uses and structures shall be governed *solely* by the provisions of this by-law relating to the underlying district in which uses and structures are located." (Emphasis added). Since 79 Upton Road lies within the R–40 zoning district, uses and structures on this property are governed solely by the By–Law relating to R–40 districts. Plainly, section 9 of the By–Law does not apply to the solar farm in this case which is located in the R–40 district and not within the Campus Development Overlay district.

The Zoning Board's decision to grant a special permit for the solar farm under the "electric generating" use category is neither unreasonable nor "whimsical, arbitrary, or capricious." *See* *Roberts*, 429 Mass. at 487. The decision is grounded in the Zoning Board's determination that a proposed solar farm constitutes an electric generating station. The Haggertys have provided no citation to any portion of the By–Law indicating that section 9, which governs the Campus Development Overlay district, should apply to this property.

The Haggertys also seek support for their position in section 3.2 .2.1, arguing that the proposed solar panels should be classified under the "Renewable Energy" use provision of section 9, and not the more generic "electric generating" use regulation in section 3 .2.3.1. Section 3.2.2.1 provides that "[w]here an activity might be classified under more than one of the uses in the *Use Regulations Schedule,* the more specific classification shall determine permissibility."(Emphasis added). The "Renewable Energy" use provision in section 9 is not in the Use Regulations Schedule found in section 3.2.3.1. Therefore, the Haggertys' argument that the proposed solar panels should be classified under the more restrictive "renewable energy" use provision of section 9 is not supported by the By–Law.

b. *Electric Generating Station and Wind Energy Conversion Classification*

*4 Alternatively, Mr. and Mrs. Haggerty argue that the inclusion of a "wind energy conservation [*sic*] system" in the Use Regulation Schedule indicates that the "electric generating" stations classification excludes renewable energy sources, is similarly unfounded. While it is possible that Grafton's inclusion of a wind energy conversion system on the Use Regulation Schedule indicated that the town chose to allow wind systems but not solar panel systems in residential districts, this is not the only reasonable interpretation of the By–Law. [5]

5 Although not directly argued by the Haggertys, the Court notes that section 3.2.2.7 of the By–Law provides "[a]ny use which cannot reasonably be classified under any use listed in the Use Regulations schedule is specifically not allowed in all districts." The Haggertys do concede that the solar panels in question are an "electric generating" facility. Therefore, section 3.2.2.7 does not merit a grant of summary judgment in the Haggertys' favor on the grounds that a renewable solar energy application is permitted only in the Campus Development Overlay district.

"[A]lthough interpretation of the by-law is in the last analysis a judicial function, deference is owed to a local zoning board's home grown knowledge about the history and purpose of its town's zoning by-law." *Duteau v. Zoning Bd. of Appeals of Webster*, 47 Mass.App.Ct. 664, 669 (1999). Furthermore, in determining an appeal under G.L. c. 40A, § 17, "a court owes deference to the interpretation of a zoning by-law by local officials" when that interpretation is reasonable. *Pellulo v. Croft*, 86 Mass.App.Ct. 908, 909–10 (2014). Even considering the inclusion of the wind energy conversion system immediately after the "electric generating" section, the Planning Board's interpretation that a solar panel system falls under the definition of an "electric generating" category is reasonable.

The Haggertys do not dispute that the solar collection farm is designed to collect and convert solar energy while including power transformers, underground electrical conduits, and power inverter enclosures. Similarly, they concede that the solar array may be classified as an electric generating system. The Planning Board's determination that the proposed solar system is an "electric generating" system is reasonable and ought to be accorded deference. *See Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley*, 461 Mass. 469, 475 (2012) (a court only owes deference to local officials' determination of a by-law if that interpretation is reasonable).

ORDER

For these reasons, Mr. and Mrs. Haggerty's motion must be ***DENIED.***

Judgment shall enter forthwith for all defendants in both cases bearing dockets numbered 15–CV–0800 and 16–CV–0056.

All Citations

Not Reported in N.E.3d, 33 Mass.L.Rptr. 663, 2016 WL 7645371

End of Document

Skip to main content

18 MISC 000519 Northbridge McQuade, LLC v. Thomas Hansson Member of the Northbridge Zoning Board of Appeals , et al. PIPER

- Case Type
- Miscellaneous
- Case Status
- Open
- File Date
- 10/09/2018
- DCM Track:
-
- Initiating Action:
- ZAC - Appeal from Zoning/Planning Board, G.L. Chapter 40A, § 17
- Status Date:
- 10/09/2018
- Case Judge:
- Piper, Hon. Gordon H.
- Next Event:
-
-

Property Address

McQuade's Lane
Northbridge

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

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Events

Date	Type	Event Judge	Result
12/17/2018 11:35 AM	Case Management Conference	Piper, Hon. Gordon H.	Case Management Conference held
05/20/2019 11:30 AM	Summary Judgment Hearing	Piper, Hon. Gordon H.	Case Taken Off of the List.
06/17/2019 02:15 PM	Summary Judgment Hearing	Piper, Hon. Gordon H.	Held
12/23/2019 11:00 AM	Status Conference	Piper, Hon. Gordon H.	Held
02/20/2020 11:00 AM	Pre-Trial Conference	Piper, Hon. Gordon H.	Held
04/29/2020 11:15 AM	Summary Judgment Hearing	Piper, Hon. Gordon H.	Rescheduled-Covid-19 emergency

Docket Information

Docket Date	*Docket Text*	Amount Owed
10/09/2018	Complaint filed.	
10/09/2018	Case assigned to the Fast Track per Land Court Standing Order 1:04.	
10/09/2018	Land Court miscellaneous filing fee Receipt: 393786 Date: 10/09/2018	$240.00
10/09/2018	Land Court surcharge Receipt: 393786 Date: 10/09/2018	$15.00
10/09/2018	Uniform Counsel Certificate for Civil Cases filed by Plaintiff.	
10/16/2018	Affidavit of Service, filed.	
10/30/2018	The case has been assigned to the F Track. Notice sent.	
10/30/2018	Event Scheduled Judge: Piper, Hon. Gordon H. Event: Case Management Conference Date: 12/17/2018 Time: 11:35 AM Notice to: Attorney Henry Lane Judge: Piper, Hon. Gordon H.	
12/12/2018	Appearance of David J Doneski, Esq. for Thomas Hansson Member of the Northbridge Zoning Board of Appeals, William Corkum Member of the Northbridge Zoning Board of Appeals, Kevin Quinlan Member of the Northbridge Zoning Board of Appeals, Randy Kibbe Member of the Northbridge Zoning Board of Appeals, Cindy Donati Member of the Northbridge Zoning Board of Appeals, filed	
12/12/2018	Joint Case Management Conference Statement, filed.	
12/17/2018	December 17, 2018. Case Management Conference held. Attorneys Lane and Doneski appeared. By February 28, 2019, municipal defendant to file motion for (partial) summary judgment addressing legal issue(s) not requiring discovery, including as to whether a use variance prohibition properly may be a basis for refusal of the zoning board to grant relief where the project claims entitlement to protections afforded to solar facilities under G.L. c. 40A, § 3. Land Court Rule 4 to govern content of that filing and timing and content of subsequent filings. Discovery to close June 28, 2019. (Piper, C.J.) (Notice of Docket Entry sent to Attorneys Henry Lane and David Doneski)	
02/28/2019	Defendants' Motion for Summary Judgment, filed.	
02/28/2019	Defendants' Statement of Undisputed Material Facts, filed.	
02/28/2019	Defendants' Memorandum of Law in Support of Summary Judgment, filed.	
03/11/2019	Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 05/20/2019 Time: 11:30 AM Notice to: Attorneys Henry Lane and David Doneski	
03/28/2019	Assented-to Motion to Enlarge Time for Filing Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed.	
04/12/2019	Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed.	
04/12/2019	Defendants' Statement of Undisputed Material Facts with Plaintiff's Responses thereto and Plaintiff's Statement of Additional Undisputed Material Facts, filed.	
04/12/2019	Affidavit of Christopher Clark, filed.	

Docket Date	Docket Text	Amount Owed
06/20/2019	Event Resulted: Summary Judgment Hearing scheduled on: 06/20/2019 11:30 AM has been resulted: Case Taken Off of the List. Hon. Gordon H. Piper, Presiding	
06/11/2019	Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 06/17/2019 Time: 02:15 PM Notice to: Attorneys Henry Lane and David Doneski	
06/17/2019	Appearance of Michael Dana Rosen, Esq. for Northbridge McQuade, LLC, filed	
06/17/2019	Event Resulted: Summary Judgment Hearing scheduled on: 06/17/2019 02:15 PM has been resulted: June 17, 2019. Hearing held on defendants' motion for summary judgment. Attorneys Henry Lane and Michael Rosen appeared for the plaintiff. Attorney David Doneski appeared for the defendant members of the Northbridge Zoning Board of Appeals. Following argument, the court DENIED defendants' motion for summary judgment pursuant to Mass. R. Civ. P. 56. The plaintiff filed no cross-motion for summary judgment, but the court nevertheless GRANTED partial summary judgment, as it is able to do so, in favor of plaintiff for the reasons laid upon the record from the bench and summarized as follows. The court concludes that the Board proceeded on a legally untenable ground and acted in error when it made the categorical determination that the board lacked power to entertain the request to authorize plaintiff's solar project. This was based on the use violation that flows under conventional zoning from the necessary passage across the residentially zoned land on a private way to serve the solar energy facility to be physically installed, as it would be by right but for the access issue, on the industrially zoned property. The Board based on its erroneous reading of the solar facility provisions of G.L. c. 40A, § 3, relied improperly on (1) the use prohibition arising from using a private way across residentially- zoned land to provide access to the solar facility in the industrial district and (2) on the bylaw's prohibition of the grant of any use variance. As a consequence, the board did not have the opportunity, as the court now concludes it ought, to consider the reasonableness or not of the various levels of regulation (or in an appropriate case, prohibition) that would be necessary to protect the public health, safety, or welfare if this solar project is to proceed. The language of G. L. c. 40A, § 3 is clear on its face: "No zoning ordinance or bylaw should prohibit or... unreasonably regulate." That language does not include additional words that indicate that what the statute forbids is only a town- wide prohibition. The statute does not say that it may be satisfied by providing some availability of the protected solar use in certain parts of town but not in others. In reaching this conclusion, the court has taken into account the difference in the wording that is used for the various uses in the various protective and indulgent provisions of § 3, but does not see a sufficient distinction to say that the solar facility provisions ought to be, as a matter of legislative intent and interpretation, the only protected use subsection under § 3 where the possibility exists to allow absolute prohibition within certain zoning districts. This is not the case under the statute and the jurisprudence under it for the longstanding § 3 protected uses including for religious, educational, child care, amateur radio facilities, and the variety of other uses the legislature has chosen to bring under the protective umbrella of § 3. In no other case does § 3 countenance an absolute zoning district wide ban on a protected use. The purpose of this remedial provision was to require some "standing down" by municipalities to encourage and protect solar facilities- a use that might be seen as unwelcome in municipalities at a local level- by abutters, neighbors, and by town government. Fulfillment of this remedial purpose requires the town entertain and where appropriate, issue permits and approvals for solar facilities even in a residential district where the zoning bylaw purports to ban the use. The court sees nothing in the statutory language or purpose that would countenance carving out large areas of land by district in the town and making them immune from the remedial indulgent protections of § 3 with respect to this solar use. Before there is any regulation or prohibition of any given proposed solar development on any site in the town, there must be an analysis and a balancing of the need to prohibit or regulate measured against the legislatively determined public interest in rolling out facilities for the collection of solar energy. The need for regulation for even prohibition must in all districts be weighed against the need to protect the public health, safety, or welfare. The court does not accept the town's argument that the prohibition could exist as a matter of district wide fiat and this is particularly true given the facts of this case- where the nature of the site, without too much dispute in the record, is set up so that the solar use itself takes place physically entirely on industrial zoned land where the use is as of right. Only the issue of access across residential land prevents as of right development of the solar facility. Plaintiff should receive, for the first time, the opportunity to demonstrate to the board that it is not likely there is going to be a great deal of impact flowing from the passage across the private, residentially zoned land to access the proposed site. The court recognizes that there is not a lot of appellate guidance on the issues briefed by counsel. The court takes some comfort in the decision reached in Duseau v. Szewtowski Realty, Inc., 23 LCR 5 (2015) (Misc. Case No. 12 MISC 470612) (Cutler, C.J.). The decision reached in Briggs v. Zoning Board of Appeals of Marion, 22 LCR 45 (2014) (Misc. Case No. 13 MISC 477257) (Sands, J.) does not persuade this court that it is merely a matter of whether as a town wide matter, there is some reasonableness to a zone by zone approach. Rather, the court now concludes that the correct municipal analysis of a solar facility project must be made on a micro (site specific) level rather than on a macro (town-wide) level. The legislative intent is best served by having that analysis conducted, as it is on all the other Dover Amendment and § 3 cases, on a very site specific basis, use by use, parcel by parcel, neighborhood by neighborhood. Given that the board proceeded on this legal untenable ground it, never had the occasion to weigh in and hear the parties, neighbors and the others who are interested parties, on the question whether some regulation, or indeed an outright prohibition, ought to be applied here. The touchstone has to be whether a level of regulation is reasonable or not, as necessary to protect the public health, safety, or welfare. This court will retain jurisdiction of this case. The court will annul the decision of the Board and remand the matter back to the board for a newly noticed full public hearing to consider the application that was before it with the understanding, based on the courts' order, that the Board cannot categorically rely on the prohibition of use here as it did in the first instance. There is no reason to require the project proponent to submit any application for variance because the purpose of the protective language of § 3 is to override prohibitions on use unless they are justified based on necessity to protect public health, safety, or welfare. That is a legislative override on what would otherwise be the applicable variance standards that would be indicated where there is a use that is prohibited in a given district but is not protected under § 3. The Board will hear the applicant, and others interested, on the question of the reasonableness or not of a prohibition or a regulation. The board would then have an opportunity, after hearing, to make its findings and to issue a decision on the application that was originally before it after engaging in the weighing § 3 requires. By July 12, 2019, counsel to confer with their respective clients and each other and submit a form of an order of remand that is specific as to the scope and the timing of remand providing specific milestones for noticing, convening, opening, and closing the remand hearing before the board. (Piper, C.J.) (Notice of Docket Entry sent to Attorneys Henry Lane, Michael Rosen, and David Doneski)	
07/12/2019	[Proposed] Order of Remand, filed.	
07/18/2019	Remand Order Issued. (Copies Sent to Attorneys Henry J. Lane, Michael Dana Rosen, David J. Doneski) Judge: Piper, Hon. Gordon H.	
11/18/2019	Joint Status Report, filed.	
11/25/2019	Motion to Amend Complaint, filed.	
12/04/2019	December 4, 2019. Plaintiff's Motion to Amend Complaint ALLOWED. Status Conference scheduled for December 23, 2019 at 11:00 A.M. Parties to file a joint written report with the court by December 18, 2019 recommending the next steps that should take place in this case to progress plaintiff's renewed appeal promptly, including proposed dates for the close of discovery and proposed deadlines for the filing of dispositive motions. (Piper, C.J.) (Notice of Docket Entry sent to Attorneys Henry Lane, Michael Rosen, and David Doneski) Judge: Piper, Hon. Gordon H.	
12/04/2019	Amended Complaint, filed.	
12/04/2019	Scheduled Judge: Piper, Hon. Gordon H. Event: Status Conference Date: 12/23/2019 Time: 11:00 AM Notice to: Attorneys Henry Lane, Michael Rosen, and David Doneski	
12/04/2019	Affidavit of Service, filed.	
12/19/2019	Joint Report, filed.	
12/23/2019	Event Resulted: Status Conference scheduled on: 12/23/2019 11:00 AM December 23, 2019. Status conference held. Attorneys Henry Lane and Michael Rosen appeared for the plaintiff. Attorney David Doneski appeared for the defendant members of the Northbridge Zoning Board of Appeals. Following colloquy with counsel, court is convinced that at this stage of the case, the matter must be either: (1) remanded again to the Northbridge Zoning Board of Appeals so that the Board may make a determination as to whether plaintiff is entitled to a frontage variance, (2) proceed forward for a second round of limited summary judgment practice, or (3) move forward with de novo review and have the court hear evidence at a trial on the merits. By January 17, 2020, parties are to file joint written report, confirming that the parties have by their counsel conferred, and outlining how they would like to proceed. Court to act on report without further hearing unless otherwise ordered. Unless the court orders otherwise based on the parties' submission, case is to proceed to trial on the merits. A pre-trial conference is scheduled for February 20, 2020 at 11:00 a.m. (Piper, C.J.) (Notice of Docket Entry sent to Attorneys Henry Lane, Michael Rosen, and David Doneski)	

Docket Date	Docket Text	Amount Owed
12/27/2019	Scheduled Judge: Piper, Hon. Gordon H. Event: Pre-Trial Conference Date: 02/20/2020 Time: 11:00 AM Notice to: Attorneys Henry Lane, Michael Rosen, and David Doneski	
01/17/2020	January 21, 2020. Joint Report, filed. The parties' joint request for an extension of time to report to the court on next steps is ALLOWED. Parties to confer and submit a further joint report on or before February 14, 2020. (Piper, C.J.) Judge: Piper, Hon. Gordon H.	
02/18/2020	Joint Pre-Trial Conference Memorandum, filed.	
02/20/2020	Event Resulted: Pre-Trial Conference scheduled on: 02/20/2020 11:00 AM February 20, 2020. Pre-Trial Conference held. Attorneys Shane Picard and Michael Rosen appeared for plaintiff. Attorney David Doneski appeared for defendant. After colloquy with counsel, court noted that the prior ruling on summary judgment indicated that plaintiff need not apply for a use variance because the purpose and effect of the relevant protective language of G. L. c. 40A, § 3 is to override prohibitions on use unless they are justified based on necessity to protect public health, safety, or welfare, and that constitutes a legislative override of what would otherwise be the applicable variance standard; however, this ruling did not explicitly the question of whether the need for a dimensional variance from frontage requirements of the bylaw is subject to the same legislative override. The motion for summary judgment did not present the question of the effect of § 3 on the need for plaintiff to have sought or received a frontage variance, and so the court's ruling did not directly reach that issue. Parties agreed that this is a purely legal question that may properly be resolved on summary judgment. The court had earlier invited the parties to submit further summary judgment motions on this question, but they have not done so. Nevertheless, the court is convinced that resolution of this issue on summary judgment, if possible, is preferable to proceeding now to trial de novo with that issue unresolved. By March 5, 2020, Plaintiff to file motion for summary judgment addressing the effect of the protective language of G. L. c. 40A, § 3 on the form of relief, if any, that plaintiff must acquire from the Board concerning plaintiff's frontage insufficiency, and what standard the Board properly should apply when evaluating that request for relief. Defendant to file any opposition by March 19, 2020. (Piper, C.J.) (Notice of Docket Entry sent to Attorneys Henry Lane, Michael Rosen, and David Doneski)	
03/05/2020	Plaintiff's Motion for Partial Summary Judgment, filed.	
03/05/2020	Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, filed.	
03/05/2020	Joint Statement of Material Facts, filed.	
03/09/2020	Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 04/29/2020 Time: 11:15 AM Notice to: Attorneys Henry Lane, Michael Rosen, and David Doneski	
03/19/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Summary Judgment Hearing scheduled on: 04/29/2020 11:15 AM Has been: Rescheduled-Covid-19 emergency Hon. Gordon H. Piper, Presiding Email Notice to Attorneys Henry Lane, Michael Rosen, and David Doneski	
04/06/2020	Defendants' Response to Plaintiff's Statement of Material Facts, filed (by email).	
04/06/2020	Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed (by email).	
04/06/2020	Defendants' Motion to Strike Affidavit of Eric J. Las, filed (by email).	

Financial Summary

Cost Type	Amount Owed	Amount Paid	Amount Dismissed	Amount Outstanding
Cost	$255.00	$255.00	$0.00	$0.00
Total Total	Total $255.00	Total $255.00	Total $0.00	$0.00

Receipts

Receipt Number	Receipt Date	Received From	Payment Amount
393786	10/09/2018	Lane, Esq., Henry J	$255.00
Total	Total	Total Total	$255.00

Case Disposition

Disposition	Date	Case Judge
Undisposed		Piper, Hon. Gordon H.

2019 WL 7201712
Only the Westlaw citation
is currently available.
Massachusetts Land Court,
Department of the Trial Court,.
Hampshire County.

PLH LLC, Plaintiff,
v.
TOWN OF WARE, Defendant.

MISCELLANEOUS CASE
No. 18 MISC 000648 (GHP)
|
Dated: December 24, 2019

ORDER

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

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

***1** 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 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.

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

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.

***2** 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.

***3** 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 [11] § 3, would be improper.

*4 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.

All Citations

Not Reported in N.E. Rptr., 2019 WL 7201712

End of Document

2005 WL 2864792
Only the Westlaw citation
is currently available.
Superior Court of Massachusetts.

Joseph VIGNALY et al.
v.
ZONING BOARD OF
APPEALS OF THE TOWN
OF WEST BOYLSTON et al.[1]

[1] The other defendants are the individual members of the Zoning Board of Appeals of the Town of West Boylston viz., Daniel A. Mullen, Matthew P. Colangelo, Lynn A. Sullivan, Richard W. Walendziak and Charles C. Witkus, and the Woodhaven Camp Ground Association, Inc.

No. 20011499A.
|
Oct. 11, 2005.

MEMORANDUM OF DECISION AND ORDER

PETER W. AGNES, JR. Justice.

***1** This is an appeal by the plaintiffs pursuant to G.L.c. 40A, § 17 from two decisions by the defendant Zoning Board of Appeals of the Town of West Boylston (hereafter, "ZBA") which had the effect of authorizing the issuance of building permits to permit the defendant Woodhaven Camp Ground Association, Inc. (Hereafter, "Woodhaven") to renovate and winterize four cottages located on their campground. The plaintiffs are abutters to a camp site in the Town of West Boylston that is owned by the defendant Woodhaven. The Court's role in such cases is to "hear all evidence pertinent to the authority of the board ... and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or ... make such other decree as justice and equity may require." G.L.c. 40A, § 17. The case was tried on the basis of live testimony, documentary evidence in the form of numerous exhibits, and certain stipulations of fact. Based on the credible evidence presented at the trial, the court makes the following findings of fact and rulings of law.

FINDINGS OF FACT

A. Background

Woodhaven operates as a Christian, non-profit camp on about 65 acres of land at 55 Campground Road in West Boylston. Its stated purpose is to provide "Christian training and recreational activities for all peoples of all faiths with special emphasis on strengthening, encouraging, and fostering the moral principles and character of youth; and to hold religious meetings ..." It was organized as a non-profit corporation

under the laws of the Commonwealth of Massachusetts in 1956. It has been recognized by the federal government as tax-exempt, charitable, educational or religious organization since 1968. It is exempt from taxation under local law.

Mr. George Detellis, Jr., one of the witnesses at trial, is the Executive Director of Woodhaven and a member of its board of directors. Mr. Detellis resides in Winter Springs, Florida about ten months of the year and two months in Massachusetts. Title to the property is in the name of Woodhaven Camp Ground Association, Inc. With an address in Orlando, Florida. See exhibit 8. Woodhaven was founded by Mr. Detellis's grandfather on what at the time was Mr. Detellis's great grandfather's farm. Mr. Detellis lived at Woodhaven for ten years while his father was the Director and his mother was the President.

Woodhaven consists of a chapel, dormitory, dining hall, kitchen, bath houses, cabins, and recreational facilities which include an Olympic-size swimming pool, bath house, basketball court and sports field. This case concerns a portion of Woodhaven which contains four cabins (see exhibit 12) fronting on Campground Road. The portion of the property containing the cabins was acquired by Woodhaven in 1959. Exhibit 4. The plaintiffs reside at 62 Campground Road and are abutters to Woodhaven. See exhibit 20 (photo of home).

B. The Erection of Cabins

***2** Woodhaven is located in a Single Residence Zoning District (SR District) under the zoning bylaws of the Town of West Boylston. Sometime in 1966, Woodhaven had a plan prepared which divided a portion of the land it had acquired in 1959 (exhibit 4) into five lots, one of which contained an existing stone house (lot 1). Woodhaven then erected four cabins each of which was shown as a separate lot on the plan. The cabins are located on lots 2-5 of this plan. Each cabin has a single toilet and its own septic system. The Planning Board of the Town of West Boylston endorsed the Woodhaven plan ("approval not required") on April 17, 1966. See exhibit 5. At the time of their construction, the cabin lots conformed to the dimensional requirements applicable in the SR District (15,600 square feet of area and 120 feet of frontage). See exhibit 6.

Under the current bylaws, lots in the SR District require a minimum of 40,00 square feet. Only one of the four lots meets this current requirement. See exhibit 10 (Lot 2 is 19,200 square feet; lot 3 is 25,630 square feet; lot 4 is 31,700 square feet and lot 5 is 64,530 square feet).

C. Proposals to Alter the Four Cabins.

As of 2001, however, due to changes in the applicable zoning laws, 3 of

the 4 cabin lots no longer conform to the dimensional requirements of the zoning bylaw. See exhibit 7. In early 2001, Woodhaven applied for building permits to make certain alternations to the 4 cabins to consist of (a) new windows, (b) sliding doors, (c) the addition of insulation, (d) new 10′ x 14′ pressure-treated wooden decks, and (e) the installation of kitchenettes which would consist of cabinets, a stove, a sink and a small refrigerator. See exhibit 8. The cabins were in need of repair at the time. The only external feature that would change as a result of the proposed alterations was the addition of the deck in the rear away from the side facing the abutters.

D. Decisions made by Building Inspector and ZBA

On March 2, 2001, the Building Inspector denied Woodhaven's application indicating that the applicant would require a variance from the Board of Appeals (Board). The Building Inspector reasoned that he had not been asked to issue permits on grounds that Woodhaven was an exempt religious use and that therefore it would have to obtain relief from the Zoning Board of Appeals (ZBA). See exhibit 8 (Interoffice memo dated March 2, 2001). Woodhaven, in turn, appealed this denial to the Board. See exhibit 8 (Petition dated May 8, 2001). In its petition, it stated that "[t]he four cabins located on campground Road will continue to be used as temporary seasonable housing for camp visitors and staff, including the corporation's Executive Director ... The proposed improvements will not constitute any change or substantial extension of the use as accessory facilities for camp staff and visitors." Exhibit 8 (Petition dated May 8, 2001). On June 21, 2001, The Board conducted a public hearing on the matter. On June 26, 2001, the Board voted unanimously to grant the application by Woodhaven. See exhibit 10-11. Thereafter, on August 16, 2001, after the abutters appealed that determination to the Superior Court, the Board acted on a second petition filed by Woodhaven in which a Special Permit was sought and allowed that relief as well. See exhibit 12. The plaintiffs amended their complaint to include an appeal of this decision to the Superior Court as well.

***3** On September 4, 2001, Woodhaven asked the Building Inspector to take formal action on its application to renovate the 4 cabins. See Exhibit 14. The Building Inspector responded in writing on September 13, 2001 by stating that he would not approve the applications by Woodhaven until the Board of Health determined that the septic systems were adequate. See Exhibit 15. Thereafter, Woodhaven applied for a building permit to construct a portion of what they requested in their original application, namely the addition of a deck and a sliding glass door for each cabin. In its application dated October 15, 2001, the cabins were described as "housing for summer camp." See exhibit 16. In issuing

the permits on November 21, 2001, the Building Inspector described the changes as "deck and interior alterations-summer cottage." Woodhaven has completed the exterior alterations, but has not made any of the alterations to the interior of the cabins.

E. Past, Present and Proposed Uses of the Camp and the Cabins

Since 1968, Woodhaven has been used primarily as a summer camp. The principal purpose of the property has been and continues to be to provide children with safe and fun day camp activities. In recent years, the cabins have been used intermittently but principally during the summer months.[2] However, there have been winter activities on the property including church meetings at the winterized chapel for many years. Woodhaven did have its own congregation at the site from 1991-95. More recently, however, the chapel has been leased for use by a nearby congregation. The goal of the Woodhaven is to operate a day camp facility that will be enjoyable and safe for local youths both during the summer months and for winter weeks when school children are on vacation. The camp employs specialists in the areas of sports, drama, adventure etc. In addition to recreational activities, Woodhaven's day camp includes a weekly chapel session[3] and patriotic observances at the beginning and the end of each day. There was no other evidence presented that the Camp has used the cabins for religious or educational activities.

2 There is no evidence before me of what constitutes "summer" use and whether it refers to the period of time when school children are on summer vacation or more broadly to the months when people are able to reside in cabins that are not winterized.

3 No evidence was offered about the "chapel service." It is unknown, for example, whether it is denominational or nondenominational, whether it is optional or required, and whether it involves any religious service or instruction.

From time to time, the Board of Directors has rented the camp to other Christian, non-profit groups. Woodhaven has approval from the Board of Health authorizing it to host over 100 children. Woodhaven has about 30 staff personnel in total with at least 6 on site at all times the Camp is operating. Although Woodhaven represented to the ZBA that it did not have any plans to expand the use of the camp or to use the cabins in the winter, Mr. DeTellis testified that he wants to expand operations to the entire 12 months of the year including rentals to other qualifying organizations. If the Woodhaven expanded to year-round operations, the cabins would be used to house staff on a year-round basis. However, it is the intention of Woodhaven not to lease the cabins to

persons other than staff or family, and not to operate on other than a day camp basis. There is no evidence that the proposed alterations will have any appreciable effect on the aesthetics or the environment of the neighborhood in terms of visible changes in the structures or adverse impacts associated with increased traffic etc. [4]

4 Statements by the plaintiffs that there will be an increase in traffic are not supported by any evidence in the record before the court.

RULINGS OF LAW

1. Timeliness of the administrative appeal.

***4** The first question raised by the plaintiffs is whether the defendant Woodhaven acted in a timely manner in appealing the Building Inspector's denial of its application for a building permit on March 2, 2001. The appeal was not filed with the town's ZBA until May 9, 2001 which was 68 days later. General Laws c. 40A, § 15 requires that, in order to be timely filed, an appeal under G.L.c. 40A, § 8 from a denial of a building permit must be filed with the city or town clerk within 30 days of the order or decision which is being filed. This requirement is applied strictly to annul action by the board in cases in which an appeal is not filed in a timely manner unless there are extraordinary circumstances which prevent a party from acting within 30 days. See *Elio v. Zoning Bd. Of Appeal of Barnstable*, 55 Mass.App.Ct. 424, 429, 771 N.E.2d 199, further app. rev. den. 437 Mass. 1109, 774 N.E.2d 1099 (2002). See also *Carstensen v. Cambridge Zoning Bd. Of Appeals*, 11 Mass.App.Ct. 348, 416 N.E.2d 522 (1981) ("Normally, strict compliance with the rules for taking appeals is necessary and the failure to pursue such a statutory remedy within the time frame set forth deprives the appeals board of jurisdiction to review actions concerning permits."). Therefore, the defendant ZBA had no authority to act on the defendant Woodhaven's administrative appeal. See exhibit 9.

2. Issuance of Special Permit by the ZBA.

Despite the lack of jurisdiction over Woodhaven's administrative appeal, the question remains whether the defendant ZBA acted properly in granting Woodhaven a building permit. The first question is whether it the ZBA had authority to grant a Special Permit to Woodhaven. Under the zoning by-law of the Town of West Boylston in effect at the time of the proceedings in this case, see exhibit 7, the ZBA is authorized to grant a Special Permit to permit an applicant to alter a non-conforming use "in those cases where a finding is made that such a change, extension, or alteration shall not be substantially more detriment (sic) to the neighborhood than the existing use." See exhibit 7,

section 1.4(B). See also exhibit 7, section 6.2(E). The court found that at the time the cabins were constructed they conformed to the existing zoning by-law. However, at some point thereafter the town amended in zoning by-law and increased the minimum lot size required in an SR District such that 3 of the 4 lots on which the cabins are located became non-conforming.

The West Boylston by-law specifically recognizes that both religious and educational uses are allowed as a matter of right in an SR District. See Section 3.2(D)(2) (Religious Use) and Section 3 .2(D)(3) (Educational Use "exempted by G.L.c. 40A, § 3"). The reference to G.L.c. 40A, § 3 does not serve to restrict the scope of the by-law in terms of making religious or educational uses permissible as a matter of right, but merely incorporates by reference decisional law construing the phrases "religious sect or denomination" and "educational purposes" as they appear in the statute.

***5** On the record before the court, the evidence does not permit a finding that the Woodhaven camp is operated by a "religious sect or denomination" as that phrase is used in G.L.c. 40A, § 3 or that it is operated for "religious purposes." See *Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham*, 29 Mass.App.Ct. 31, 557 N.E.2d 43, further app. rev. den. 408 Mass. 1103, 560 N.E.2d 121 (1990) ("An element of religion subsidiary to the dominant secular use does not convert that use to one which is for religious purposes any more than an element of education converts a residential facility for elderly persons to a use for educational purposes."). A day camp described as one with a Christian focus but which is not affiliated with a religious organization or congregation, which does not have a curriculum which includes any religious instruction, and in which the campers are not supervised or guided by persons affiliated with a religious organization or congregation is not a camp that is operated by a "religious sect or denomination" as that phrase is used in G.L.c. 40A, § 3 or operated for "religious purposes." It's certainly possible that the owners and operators of Woodhaven have that purpose in mind, but they did not meet their burden of proof on that issue in this case.

The phrase "educational purposes" in the context of G.L.c. 40A, § 3 has been given a broad compass by our appellate courts. For example, in *Bible Speaks v. Board of Appeals of Lenox*, 8 Mass.App.Ct. 19, 391 N.E.2d 279 (1979), the Appeals Court described it as a broad definition that includes uses and activities that are "directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all ..." *Id.* at 29, 391 N.E.2d 279 (citations omitted). "The definition is echoed in Webster's Third New International Dictionary (1971) which gives as one

of the definitions of education: "the act or process of providing with knowledge, skill, competence, or usu(ally) desirable qualities of behavior or character or of being so provided esp(ecially) by a formal course of study, instruction, or training.' " *Harbor Schools, Inc. v. Board of Appeals of Haverhill,* 5 Mass.App.Ct. 600, 605, 366 N.E.2d 764 (1977).

A day camp for young people that provides recreational activities, and teaches crafts, games, and other skills certainly qualifies as an educational purpose, activity or use. Since the parties do not dispute that Woodhaven meets the definition of a "nonprofit educational corporation" within the meaning of G.L.c. 40A, § 3, see Stipulation of Facts paragraphs 1, 2 and 3, it is beyond question that Woodhaven has a right to carry on a day camp program in an SR District under the West Boylston by-law.

The defendant Woodhaven maintains that under the facts involved in this case the ZBA was not required to make a finding that the proposed alterations to the cabins were permissible expansions of a nonconforming use. Relying on *Watros v. Greater Lynn Mental Health and Retardation Association, Inc.,* 421 Mass. 106, 653 N.E.2d 589 (1995), it argues that when the historical use of a structure on property is a permitted use under G.L.c. 40A, § 3 and the organization in question intends to continue to use it for that purpose in the future, the ZBA has no choice but to grant a special permit. In *Watros,* however, the court did not face the question of whether the particular renovations to be made in the structure (a barn that was to be converted for use as a residence) were lawful, but rather whether the barn could be used as a residence. Here, the issue is not wintertime use as opposed to summertime use of the cabins, but rather whether specific alterations in the structure itself are permissible. While G.L.c. 40A, § 3 forbids the Town from imposing unreasonable restrictions against protected uses, it does not suspend the zoning laws in their entirety. See, e.g., *Martin v. Corporation of the Presiding Bishop of Church of Jesus Christ of Latter Day Saints,* 434 Mass. 141, 747 N.E.2d 131 (2001); *Rogers v. Norfolk,* 432 Mass. 374, 734 N.E.2d 1143 (2000); *Trustees of Tufts College v. Medford,* 415 Mass. 753, 616 N.E.2d 433 (1993).

***6** Assuming that the *Watros* case is not applicable, the question remains whether the proposed alterations to the cabins will constitute changes which are substantially more detrimental to the neighborhood than the existing use. The cabins in question have been in place since 1966. Each cabin already has its own septic system. The addition of new windows, a sliding door, insulation, a 10-foot by 14-foot deck and an interior kitchenette is not detrimental to the neighborhood. It will not enlarge the living area of the cabins or affect the set back from Campground Road. It will not change or alter in any significant way the appearance of the cabins from the vantage point of

the abutters, other than to make them more visually attractive. The new decks are in the rear and will have no significant impact on the use of the cabins. The changes will not alter the purpose for which the cabins have been and are being used. I agree with the determination made by the ZBA that "[t]he renovations will improve the appearance of the cabins which have become worn and in need of roofing and siding. The addition of small decks on the rear of each cabin will cause no undue detriment to the neighborhood in that they are not facing any residential abutters." Exhibit 10 at 4.

The plaintiffs principal complaint is with the plans to operate the day camp on a year-round basis. This may or may not come about, but in any case it is not an issue that implicates the Town's zoning laws.

ORDER

The court takes the following actions on the plaintiff's request for rulings of law: numbers 1, 2, 3, 4, 5, 6, 7, and 11 are allowed; numbers 8, 9, 12, 13, and 14 are denied. For the above reasons, the decision of the defendant ZBA granting the defendant Woodhaven a Special Permit under Section 1.4(b) of the by-laws of the Town of West Boylston to obtain building permits to winterize, renovate and improve four cabins as provided in their application is *AFFIRMED*.

All Citations

Not Reported in N.E.2d, 2005 WL 2864792

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure,

I, Bernadette D. Sewell, Esq., hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass.R.A.P. 16(a)(13)(addendum);

Mass.R.A.P. 16(e)(references to the record);

Mass.R.A.P. 18(appendix to the briefs);

Mass.R.A.P. 20(form and length of briefs, appendices, and other documents); and

Mass.R.A.P. 21 (redaction)

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I, Bernadette D. Sewell, Esq., hereby certify that on the 20th day of August, 2021, the foregoing Brief and Addendum – previously submitted on August 16, 2021 - were served upon the attorneys of record for the Appellee by the Electronic Filing System, namely:

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