DAVID P. BERSON

ATTORNEY AT LAW
LICENSED TO PRACTICE IN NY AND MA

Mar 8, 2023

Town of Holliston Planning Board
703 Washington Street
Holliston, MA 01746

RE: MGL 40A Section 3 - Solar
Bartzak PV I, LLC ("Applicant")
0 Bartzak Drive(the "Property")

Dear Chair Apuzzo Langton and Board Members:

My office represents the above named Applicant relative to their application for a Large-Scale Solar Power Generation System ("LSPGS"), in accordance with Section F.2 of the Schedule of Uses found in the Holliston Zoning Bylaw. This letter is meant to be a limited legal opinion rendered to you in connection with said application. This opinion is specifically limited to the Planning Board's authority to issue a decision relative to the proposed solar use on the Property as it relates to Massachusetts General Law Chapter 40A Section 3, colloquially called the "Dover Amendment".

In connection with this opinion, we have made such investigation of law and other inquiries as we were reasonably able to make. There may be other laws and regulations that are applicable, but those addressed below are those which are customarily of concern to this and other law firms in which review or render opinions on these matters. We have also examined and relied upon the plans and documents hereinafter specifically listed which are based upon the professional expertise and knowledge of the authors thereof.

We have assumed that the factual information contained in these plans, documents and other sources of factual information is true and the statements made and conclusions set forth therein are accurate. We have made no independent examination of facts except for a review of documents expressly set forth herein. We have assumed the genuineness of all signatures, the authenticity of all documents submitted to us as originals, and the conformity with the original of all documents submitted to us as copies. We have assumed the completeness and validity of all public documents, laws, ordinances, rules and regulations. We have assumed that all decisions and permits issued and other actions taken by any public authority referenced herein have been duly authorized and have been issued or taken after all requisite notices have been given and all requisite public hearings have been held and that all appeal periods with respect thereto have expired without the filing of any appeals.

We render no opinion on matters except as specifically herein stated. We have examined and relied upon the following documents, plans, surveys, cases and materials with respect to the Property as we deemed relevant to render this opinion:

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1. "The Town of Holliston Zoning-Bylaws" last amended May 9, 2022, which was furnished to us by the Town of Holliston through the Municipal Website (hereinafter, the "Zoning Bylaw");
2. "The Town of Holliston Zoning Map" revised May of 2017, which was furnished to us by the Town of Holliston through the Municipal Website (hereinafter, the "Zoning Map");
3. Online Public Geographic Information Systems Map for the Town of Holliston (the "GIS");
4. Publicly available submissions of Applicant, including Plan sets;
5. Trustees of Tufts College v. City of Medford 33 Mass App. Ct. 580 (1992) 415 Mass. 753 (1993);
6. Briggs v. Zoning Board of Appeals of Marion 22 LCR 45 (2014);
7. Duseau v. Szawlowski Realty 23 LCR 5 (2015);
8. LaFond v. Grandy 2017 WL 1719224 (2017);
9. PLH LLC v. Town of Ware 2019 WL 7201712;
10. Tracer Lane II Realty, LLC v. City of Waltham, 489 Mass. 775 (2022);
11. Kearsarge Walpole LLC v Lee, 2022 WL 4938498 (2022);
12. May 17, 2021 - Confirmation E-mail from Town Planner Re: Dover Amendment;
13. June 6, 2022 - discussion with Building Inspector Re: proposed LSPGS project and Dover Amendment;
14. Massachusetts General Laws Chapter 40A (Zoning Enabling Act) and Massachusetts General Laws Chapter 40A inserted by Chapter 808 of the Acts of 1975 (The "Zoning Act").

    * *We are relying that the Zoning Bylaws and Zoning Map were validly and duly adopted and enacted in accordance with all applicable laws, rules and regulations.*

According to the Zoning Map, the Property is an approximately 2.9 acred parcel situated within both the Industrial zoning district and the Residential Agricultural ("RA") zoning district. Under Section F.2 of the Schedule of Uses in the Zoning Bylaw, LSPGS uses are allowed in the Industrial zoning district with issuance of a Special Permit from the Planning Board. LSPGS uses are not allowed in the RA zoning district according to the Zoning Bylaws.

Statutes and Caselaw

MGL c. 40A Section 3

The Dover Amendment (MGL c.40A s. 3) was enacted by the Massachusetts State Legislature in 1950, and further amended over the 1960's and 1970's. The Legislature, when enacting the Dover Amendment, determined that there were certain types of uses which served a larger public purpose and were therefore worthy of, not only encouragement, but also protection from local municipal interference. Prior to the enactment of the Dover Amendment, a number of

these protected uses (religious uses, educational uses, agricultural uses, child care facilities, and others) fought discrimination and heavy regulation, not only on where and to what extent they could be located in many communities, but whether they would be allowed at all (the "Non-Solar Uses").

The language used by the Legislature when describing the protection afforded to theses uses was relatively consistent throughout the statute:

> "No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements."
>
> "No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." *(remaining sections intentionally omitted to save space)*

The bulk of the case law analyzing these Non-Solar Uses, was also very similar in nature and application of the law. There are generally two categories of cases dealing with these Non-Solar Uses; (i) cases focused on whether the underlying activity of the petitioner falls within a protected category as enumerated under the statute, or (ii) cases focused on what extent local regulations can "reasonably" be applied to the protected use.

Generally speaking, Non-Solar Uses are similar in that they may not be prohibited from operating within a specific zoning district in the municipality, whether directly or indirectly through over-regulation, nor may the local authority require a special permit for a Non-Solar Use. Over the years there have been a number of cases for these Non-Solar Uses which have set certain precedents with respect to how a municipality may enact "reasonable regulations" as permitted under the statute.

In *Trustees of Tufts College v. City of Medford,* 415 Mass. 753 (1993), Tufts College, was attempting to construct additional buildings and parking lots in the City of Medford. The City of Medford objected to the proposed structures and attempted to apply its dimensional ordinances to the protected educational use. The Appeals Court made it clear that since the local requirements were enacted to protect legitimate concerns related to the public health, safety, and welfare that "[T]he question of reasonableness of a local zoning requirement…will depend on the particular facts of each case. Because local zoning laws are intended to be uniformly applied, an educational institution making challenges similar to those made by Tufts will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project." *Id at 759*. The Court also found that the underlying protected claimant need not obtain or apply for any type of Variance from local regulations as part of the process for approval.

Although the *Tuft College* case dealt with an educational use, it is relatively well settled that municipalities may impose their underlying dimensional regulations on any of these Non-Solar Uses, unless the claimant can prove that the underlying dimensional regulations are unreasonable as applied to its project.

In 1985, the Massachusetts Legislature amended the language of Massachusetts General Law Chapter 40A Section 3 to include Solar as a protected use. The language of the amended section varied from the previous language used for the Non-Solar Uses:

> "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 language for the new Solar addition did not include the express language prohibiting municipalities for requiring Special Permits for these types of protected uses. Furthermore, there was no language limiting local municipal regulations to those required concerning the "bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements"; municipalities could regulate solar uses provided those regulations were "reasonable" and "necessary to protect the public health, safety or welfare."

The lack of clear legislative guidance on how solar uses should be treated forced solar developers and municipalities to seek answers from the court system. Since the inclusion of solar as a protected use, there have been a number of cases which have provided some guidance on how municipalities should handle regulating solar uses within its boarders.

The Courts have found that although outright prohibitions against solar uses are against the law, these uses may be regulated much more heavily than other protected uses and even restricted or prohibited from certain zoning districts. See *Briggs v .Zoning Board of Appeals of Marion,* 22 LCR 45 (2014), and *Duseau v. Szawlowski Realty*, 23 LCR 5 (2015).

In *LaFond v. Grandy*, 2017 WL 1719224 (2017), the Land Court addressed a situation in which the local regulations had no provision for solar uses. There, the Building Inspector in the Town of Plymouth issued zoning permits for a solar project located within a residential zoning district. These permits were issued following a determination by the Building Inspector, the chief zoning enforcement officer, that as the Town of Plymouth's prohibitive bylaw did not have any provisions for solar, those uses were not allowed under the Town Bylaw. He determined that as solar was a protected use under the Dover Amendment, he could not deny the applications. An abutter to the project appealed to the Court claiming that the solar uses could have been included within those uses described in the Light Industrial zoning district. The Land Court upheld the Building Inspector's determination and issuance of the permits.

The Land Court has also addressed whether a solar project is protected from the Special Permit process similar to the Non-Solar Uses. In *PLH LLC v. Town of Ware,* 2019 WL 7201712 (2019), a developer sought appeal with the Land Court challenging the Town of Ware's imposition of a Special Permit process to its solar project, claiming it violated the Dover Amendment. The Land Court made it very clear that a Town may elect to require Special Permits for these solar projects and that the language offering protection to the Non-Solar Uses from Special Permits was intentionally excluded.

In June of 2022, the Supreme Judicial Court (SJC), the highest Appeals Court in Massachusetts, transferred a case to their docket dealing with a solar project protected by the Dover Amendment, *Tracer Lane II Realty, LLC v. City of Waltham*, 489 Mass. 775 (2022). It is significant to note that in addition to *Tracer Lane* being the first Dover Amendment case involving solar to have been heard by the SJC, this was transfer was done on their own motion; which means they specifically elected to hear this case because they felt the need to provide guidance on the statutory interpretation and application of the Dover Amendment as it relates to solar.

In *Tracer Lane*, a solar developer was developing a project on a parcel of property located in both the Town of Lexington and City of Waltham. The solar array was primarily located on the

Lexington portion of the property, however, the frontage and access was located over the Waltham portion. The Waltham portion of the property was located in a residential zoning district and the Waltham zoning regulations prohibited solar projects within the residential zoning district; Waltham's zoning regulation allowed solar in the Industrial Zoning District. The Town of Waltham denied the application and the solar developer appealed the decision to the Land Court. The Land Court found in favor of the solar developer and Waltham filed an appeal upon which time the SJC transferred the case to their docket. The SJC found in favor of the solar developer and provided some additional guidance for reviewing future solar projects subject to local regulations.

The Court found that Waltham had a legitimate interest in prohibiting solar from specific zoning districts as they were entitled to preserve the characteristics of each unique zone. However, the Court further found that the specific inclusion of solar as a category in the Dover Amendment was done with thought and deliberation, and the reason for its inclusion was to promote solar development as "these standalone, large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth". Furthermore, the Court found that Waltham's zoning regulations were unreasonably prohibitive against solar and therefore invalid. The Court reviewed the amount of available land in Waltham and determined that only 2% of the available land in the Town was allocated to Industrial uses, and by extension, solar. The Court held that "an outright ban of large-scale solar energy systems in all but one to two percent of a municipality's land area restricts rather than promotes the legislative goal of promoting solar energy."

There have not been many cases following the *Tracer Lane* decision, however, a recent Land Court case, *Kearsarge Walpole LLC v. LEE*, 2002 WL 4938498 (2022), further supports the SJC findings in *Tracer Lane*. In *Kearsarge* the Land Court overturned the Town of Walpole's determination that a municipal solar project could not be built in a rural residential district. The Court once again approved the project as the allowable area in the Town of Walpole for solar development, according to their zoning bylaw, was approximately 2% of the Town's area.

MGL c. 40A Section 7

According to Massachusetts General Laws Chapter 40A Section 7, the Building Inspector is the zoning enforcement agent in each respective municipality. According to the language of the law, the Building Inspector:

> "[S]hall be charged with the enforcement of the zoning ordinance or by-law and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or by-law; and no permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law."

The Building Inspector, issues or withholds permits, renders zoning determinations, reviews enforcement requests, ensures compliance with municipal regulations, and administers the State Building Code.

Discussion

The Applicant did not file this application without first going through the appropriate local channels and processes. In early 2021, Applicant through their engineering firm, had a discussion with the Town Planner to confirm the viability of the proposed solar project located on the

property at 0 Bartzak Drive. On or about May 17, 2021, the Applicants confirmed the information obtained during that prior discussion with the Holliston Town Planner via e-mail; the Town Planner specifically confirmed that the residential portion of the project would be exempted from local zoning due to the Dover Amendment. Following this confirmation from the Town Planner, Applicant once again through their engineering firm, contacted the Building Inspector on or about June 6, 2022, to discuss the proposed solar project. During this discussion, Applicants were once again informed that this was a viable LSPGS project and that the Dover Amendment would exempt that portion of the project located in the residential zoning district. The Applicant then subsequently filed an application for a Special Permit, consistent with these discussions, with the Town Clerk and Planning Board on July 27, 2022.

Applicant's proposed LSPGS project complies with all of the underlying dimensional regulations and criteria set forth within the Zoning Bylaw; except for that portion located within the RA zoning district. While the Court has made it clear that the Town of Holliston has a legitimate interest in preserving the unique character of the RA Zoning District, that legitimate concern is not "necessary to protect the public health, safety, and welfare" (quoting from MGL c. 40A Section 3), and further does not outweigh the public benefit derived from the LSPGS.

Holliston's outright ban on Solar development in any district but the Industrial zoning district is a significantly prohibitive zoning bylaw. This is particularly true when we consider the amount of available land in Holliston, located within the Industrial zoning district, viable for LSPGS projects. Compared to the 2% highlighted in the *Tracer Lane* case, we see that the Holliston Bylaw, allowing approximately 2.4% for solar development, is ultimately not much more permissive.

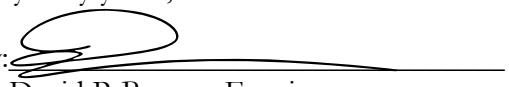
Furthermore, when we consider this project's proposed location within the Town's overall RA zoning district, we see that in this particular instance, the Town's legitimate interest of maintaining each unique zone's characteristics is already being frustrated by the proximity to the Industrial zoning district. This proposed project is not on a parcel located solely within a residential neighborhood or zoning district, totally separate in nature and character from Industrial uses. The majority of this project is located within the Industrial zoning district, and those residential abutters living adjacent to the Industrial district must be prepared to expect industrial activities nearby. While that there are a number of hazardous and noxious industrial uses which are appropriately prohibited from residential zoning districts for reasons directly relating to the public health, safety, and welfare, it is our belief and the SJC's belief, that the passive collection of solar energy can exist in residential zoning districts safely and without destroying the residential character of a zoning district. Unlike many other industrial uses solar is not a hazardous or noxious industrial use unsuited for the residential zoning district, and can be developed in residential locations, such as the subject Property, without significantly changing the overall unique characteristics of each zoning district; solar is well suited to residential districts, as evidenced by the number of roof-top solar panels installed on homes in the area.

Conclusion

While a portion of the Applicant's project is located within the RA zoning district, the proposed project otherwise complies with the underlying zoning regulations of the Holliston Zoning Bylaw. The Applicant's proposed LSPGS use is exempted from the prohibition, as evidenced by the language of the Dover Amendment, current case law, and the particular facts surrounding this specific LSPGS project. It is our opinion that the Town of Holliston's outright ban of LSPGS uses in the RA zoning district is not necessary to protect the public health, safety, and

welfare, nor do we believe that the Town of Holliston's current zoning bylaw, as it relates to LSPGS, would withstand scrutiny by a reviewing appellate court. The Applicant"s underlying LSPGS use may, and should, be approved by the Town of Holliston.

Very truly yours,

By: 

David P. Berson, Esquire

KeyCite Yellow Flag - Negative Treatment
Distinguished by Spectrum Health Systems, Inc. v. Town of Weymouth, D.Mass., December 4, 2006

415 Mass. 753
Supreme Judicial Court of Massachusetts, Suffolk.

TRUSTEES OF TUFTS COLLEGE
v.
CITY OF MEDFORD.

Argued March 2, 1993.
|
Decided July 9, 1993.

Synopsis
College brought action challenging application of dimensional, parking, and loading-space requirements of zoning ordinance to several construction projects. The Land Court, Suffolk County, Robert V. Cauchon, J., decided that ordinance could not for most part be validly applied to projects in question, and city appealed. The Appeals Court, 33 Mass.App.Ct. 580, 602 N.E.2d 1105, modified judgment, and further review was sought. The Supreme Judicial Court, Greaney, J., held that: (1) under reasonable construction of ordinance's definition of "lot," requirement regarding number of parking spaces could be applied to proposed library addition; (2) college failed to establish that application of ordinance provisions dealing with loading spaces and setbacks would be unreasonable; and (3) city could not be prospectively enjoined from applying ordinance to future construction projects in core area of campus or to future projects such as those that resulted in college's suit.

Affirmed as amended in part, vacated in part.

O'Connor, J., concurred in part, dissented in part, and filed opinion.

West Headnotes (17)

[1] **Zoning and Planning**🔑Applicability to Persons or Places

Local zoning requirements which are adopted under provision of Dover amendment authorizing municipality to adopt and apply "reasonable regulations" concerning bulk, dimensions, open space, and parking to land and structures for which educational use is proposed, and which would serve legitimate municipal purposes sought to be achieved by local zoning, such as promoting public health or safety, preserving character of adjacent neighborhood, or other statutory purpose, may be permissibly enforced against educational use. M.G.L.A. c. 40A, § 3.

25 Cases that cite this headnote

[2] **Zoning and Planning**🔑Reasonableness in general

Zoning requirement that results in something less than nullification of proposed educational use may be unreasonable within meaning of Dover amendment. M.G.L.A. c. 40A, § 3.

1 Case that cites this headnote

[3] **Zoning and Planning**🔑Applicability to Persons or Places

Because local zoning laws are intended to be uniformly applied, educational institution challenging application of such laws to proposed educational use bears burden of proving that local requirements are unreasonable as applied to its proposed project; institution may do so by demonstrating that compliance would substantially diminish or detract from usefulness of proposed structure, or impair character of institution's campus, without appreciably advancing municipality's legitimate concerns, or by establishing excessive cost of compliance with requirement without significant gain in terms of municipal concerns. M.G.L.A. c. 40A, § 3.

17 Cases that cite this headnote

[4] **Zoning and Planning**🔑Reasonableness in general

For purposes of provision of Dover Amendment pursuant to which municipality may adopt and apply "reasonable regulations" to land and structures for which educational use is proposed, it is not necessary that local zoning requirements be drafted specifically for application to educational use in order to be considered reasonable. M.G.L.A. c. 40A, § 3.

10 Cases that cite this headnote

[5] **Zoning and Planning**🔑Reasonableness in general

Proof that local zoning law could accomplish its purpose if it were drafted in terms other than those chosen will not suffice to establish that municipality's choice of regulation is unreasonable within meaning of provision of Dover Amendment pursuant to which municipality may adopt and apply "reasonable regulations" to land and structures for which educational use is proposed. M.G.L.A. c. 40A, § 3.

4 Cases that cite this headnote

[6] **Zoning and Planning**🔑Variances and exceptions

Accommodation sought to be accomplished by Dover amendment, between educational use of property and matters of critical municipal concern, cannot be achieved by insisting that educational institution seek variance to obtain permission to complete its project. M.G.L.A. c. 40A, § 3.

2 Cases that cite this headnote

[7] **Zoning and Planning**🔑Applicability to Persons or Places

Although court may consider municipality's proper concession that particular requirement of its zoning law is unreasonable as applied to proposed educational use, apart from such concession, remaining requirements of local zoning laws, if otherwise reasonable, still apply. M.G.L.A. c. 40A, § 3.

1 Case that cites this headnote

[8] **Zoning and Planning**🔑Effect of determination; res judicata and collateral estoppel

If variance is granted at request of educational institution, and not challenged by aggrieved party within time period permitted by statute, variance cannot thereafter be attacked as improper. M.G.L.A. c. 40A, § 3.

[9] **Zoning and Planning**🔑Garages and parking

In context of provision of zoning ordinance dealing with number of additional parking spaces needed when construction was undertaken on lot, definition of "lot" as duly recorded parcel of land that was commonly owned and had definite boundaries and was not divided by street could reasonably be construed as treating discrete areas of university's core campus, bounded by streets, as single commonly owned lots; therefore, application of provision to proposed library addition that also called for new parking garage on same such lot was not unreasonable within meaning of statute dealing with application of ordinances to proposed educational uses. M.G.L.A. c. 40A, § 3.

2 Cases that cite this headnote

[10] **Zoning and Planning** Meaning of Language

Court should construe local zoning requirement in manner that sustains its validity if such can be done without straining common meaning of terms employed.

2 Cases that cite this headnote

[11] **Zoning and Planning** Garages and parking

Parking, as it affects physical conditions on and around educational use, is legitimate municipal concern and proper subject of local zoning regulation. M.G.L.A. c. 40A, § 3.

2 Cases that cite this headnote

[12] **Zoning and Planning** Applicability to Persons or Places

College failed to establish that application of zoning ordinance to require additional loading spaces in connection with new construction would be unreasonable such that requirement could not be applied. M.G.L.A. c. 40A, § 3.

[13] **Zoning and Planning** Applicability to Persons or Places

When compliance by educational institution with zoning ordinance will involve no significant cost or other hardship to institution, and does not interfere to any appreciable extent with institution's plans, institution has failed to make out case that requirement as applied to it is unreasonable. M.G.L.A. c. 40A, § 3.

[14] **Zoning and Planning** Reasonableness

Evidence did not establish that zoning ordinance's setback requirement was unreasonable as applied to college's construction of parking garage; although it was claimed that compliance with ordinance would increase cost of project, no estimate as to amount of such increase was put in evidence, and municipality showed that its setback would permit vehicles easier access to garage and thus reduce congestion and enhance safety. M.G.L.A. c. 40A, § 3.

1 Case that cites this headnote

[15] **Zoning and Planning** Injunctive relief

Where requirements of zoning ordinance did not facially discriminate against educational uses and were presumptively valid, municipality could not be prospectively enjoined from applying requirements to future construction projects in core area of college campus or to future projects similar to those which brought about college's challenge to application of requirements; whether application of neutral requirement to educational project was reasonable was fact-specific inquiry. M.G.L.A. c. 40A, § 3; c. 240, § 14A.

[16] **Zoning and Planning** Reasonableness in general

Whether requirements of local zoning law are reasonable cannot be decided in the abstract.

[17] **Zoning and Planning** Schools and education

Local zoning law that improperly restricts educational use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances. M.G.L.A. c. 40A, § 3; c. 240, § 14A.

4 Cases that cite this headnote

Attorneys and Law Firms

****435 *753** Eric W. Wodlinger, Boston (Robert J. Blumsack, City Sol., with him), for defendant.

Daniel J. Gleason, Boston (Donald R. Peck & Edward C. Mendler, with him), for plaintiffs.

***754** David R. Rodgers & Jeffrey Swope, Boston, for Association of Independent Colleges and Universities in Massachusetts, amicus curiae, submitted a brief.

John A. Pike, Boston, for Abstract Club & another, amici curiae, submitted a brief.

****436** Before LIACOS, C.J., and WILKINS, ABRAMS, NOLAN, LYNCH, O'CONNOR and GREANEY, JJ.

Opinion

GREANEY, Justice.

This case concerns whether dimensional, parking and loading space requirements of the Medford zoning ordinance (ordinance) can be applied to several construction projects planned by Tufts College.[1] After a trial on a complaint brought in the Land Court by Tufts under G.L. c. 240, § 14A (1990 ed.), a judge of that court decided that the ordinance requirements could not, for the most part, be validly applied to Tufts' projects consistent with G.L. c. 40A, § 3, second par., as inserted by St.1975, c. 808, § 3 (generally referred to as the Dover amendment).[2] Medford appealed. The Appeals Court, relying on Medford's interpretation of the ordinance requirements and concessions made by Medford, determined that the judgment should be modified to permit application to Tufts' projects of some of the provisions. 33 Mass.App.Ct. 580, 602 N.E.2d 1105 (1992). We granted further appellate review. We agree with the Appeals Court that modification of the judgment is appropriate.

***755** The projects as to which there remains controversy[3] are a 96,000 square foot addition to the Wessell Library (Wessell), Tufts' undergraduate library, and a multi-level parking garage which is planned on the site of an existing building on the southern side of Boston Avenue. The garage will provide parking spaces initially for 290 vehicles with an ability to be expanded to 530 spaces. Both projects will be located in the core, or Hill, area of Tufts' campus, on land zoned by Medford for "Apartment–2 Residential" use. Tufts also sought a determination that requirements of the ordinance could not be applied to future, as yet unspecified, projects in the core area of its campus.

The requirements of the ordinance that remain at issue provide for: (1) a front-yard setback dependent on the size of the building and calculated by a formula (§ 6.3.5[c]); (2) one loading space (twelve feet in width and thirty feet in length) for each 50,000 square feet of new construction (§§ 5.3, 10.41 and 10.45);[4] and (3) one parking space for each 750 square feet of ****437** new construction which must be located ***756** either on the same lot as the new construction or within 200 feet thereof (§§ 5.3, 10.2 and 10.24). The ordinance defines the term "lot" as a duly recorded parcel of land which is commonly owned and has definite boundaries and is not divided by a street (§ 3.30).[5]

Application of these requirements to the Wessell addition would require Tufts to provide 130 new parking spaces on the Wessell lot (or within 200 feet thereof). Assuming that the ordinance could be construed as treating each building on the campus as occupying a separate lot, see note 5 *supra,* the Land Court judge interpreted the parking requirement as necessitating "postage stamp" parking lots adjoining each project Tufts might undertake in the core area of its campus. The judge considered this requirement to be incompatible with the character of the Tufts campus. In the judge's opinion, the proposed Boston Avenue garage provided a reasonable solution to the parking problem faced by Tufts, but it was not a solution permitted under the ordinance. The judge also concluded that Wessell did not need two additional loading spaces. He therefore ruled that provisions of the ordinance requiring off-street parking and loading spaces "did not rise to the level of 'reasonable regulations' within the meaning of G.L. c. 40A, § 3, and, accordingly, [were] inapplicable to Tufts' use of its land in Medford."

The ordinance also requires a fifty-foot setback from Boston Avenue for the new parking garage (§ 6.3.5[c]). Tufts proposes a thirty-foot setback for the garage. "The

evidence was to the effect that there is no absolute physical impediment to constructing a garage of the planned dimensions with a setback of fifty feet, but the cost will be increased because of the sharply rising slope of the land behind the ***757** garage and because of the need that will be created to support the foundation of another building, a power plant, situated on the same hillside. No estimate of the expected cost increase was put in evidence....” 33 Mass.App.Ct. at 585, 602 N.E.2d 1105. The Land Court judge, who took a view of the campus, noted that the topography of the land at the proposed garage site might warrant the grant of a variance under G.L. c. 40A, § 10, from the setback requirement. Based on a need for a solution to a serious parking problem facing Tufts, and apparently assuming that the garage might not be built if the setback requirement was enforced, the judge concluded that full setback would unreasonably interfere with the use of Tufts' land. He declared, therefore, that the setback requirement could not be enforced. Finally, the judge extended his conclusion that the various requirements of the ordinance that were in contention could not be applied to any future construction that might be undertaken by Tufts in the core area of the campus, and, in a postjudgment order (entered on Tufts' request), the judge defined the area of Tufts that he considered to constitute the “core campus.”

1. *The Dover Amendment.* We first discuss generally applicable legal principles. The Dover Amendment bars the adoption of a zoning ordinance or by-law that seeks to prohibit or restrict the *use* of land for educational purposes. However, a proviso to the statute authorizes a municipality to adopt and apply “reasonable regulations” concerning bulk, dimensions, open space and parking, to land and structures for which an educational use is proposed. The whole of the Dover Amendment, as it presently stands, seeks to strike a balance between preventing local discrimination against an educational use, see *Newbury Junior College v. Brookline,* 19 Mass.App.Ct. 197, 205, 472 N.E.2d 1373 (1985), and honoring legitimate municipal concerns that typically find expression in local zoning ****438** laws. This case requires us to address that balance in practical terms.

[1] [2] Local zoning requirements adopted under the proviso to the Dover Amendment which serve legitimate municipal purposes sought to be achieved by local zoning, such as promoting ***758** public health or safety, preserving the character of an adjacent neighborhood, or one of the other purposes sought to be achieved by local zoning as enunciated in St.1975, c. 808, § 2A, see *MacNeil v. Avon,* 386 Mass. 339, 341, 435 N.E.2d 1043 (1982), may be permissibly enforced, consistent with the Dover Amendment, against an educational use. See *Radcliffe College v. Cambridge,* 350 Mass. 613, 215 N.E.2d 892 (1966); *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 31, 391 N.E.2d 279 (1979) (a building inspector may properly deny permits to an educational institution for a structure that does not comply with “reasonable regulations”). See also *Southern New England Conference Ass'n of Seventh–Day Adventists v. Burlington,* 21 Mass.App.Ct. 701, 710, 490 N.E.2d 451 (1986) (local zoning law protecting wetlands applied to property protected by Dover Amendment). The *Radcliffe College* case suggests that a local zoning provision that requires an educational institution to adapt plans for the use of its land may be enforced, so long as the provision is shown to be related to a legitimate municipal concern, and its application bears a rational relationship to the perceived concern. On the other hand, a zoning requirement that results in something less than nullification of a proposed educational use may be unreasonable within the meaning of the Dover Amendment. See *Radcliffe College v. Cambridge, supra,* 350 Mass. at 619, 215 N.E.2d 892 (concluding that a parking requirement could be applied, but suggesting that future application might be unreasonable if the result would require the educational institution to provide more parking spaces “than could in reason be deemed necessary to take care of the cars brought to the [area] by the use made of it by the college”).[6]

***759** [3] [4] [5] What we have said thus far suggests that the question of the reasonableness of a local zoning requirement, as applied to a proposed educational use, will depend on the particular facts of each case. Because local zoning laws are intended to be uniformly applied, an educational institution making challenges similar to those made by Tufts will bear the burden of ****439** proving that the local requirements are unreasonable as applied to its proposed project. The educational institution might do so by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns.[7] Excessive cost of compliance with a requirement imposed on an educational institution, without significant ***760** gain in terms of municipal concerns, might also qualify as unreasonable regulation of an educational use. We reject the suggestion that only local zoning requirements drafted specifically for application to educational uses are reasonable within the scope of the Dover Amendment. Nothing in that statute mandates the adoption of local zoning laws which are tailored specifically to educational uses. See Report, *supra* at 26 (observing that *ideally* regulations should be specifically adapted to educational uses). Similarly, proof that a local zoning law could accomplish its purpose if it

were drafted in terms other than those chosen will not suffice to establish that the municipality's choice of regulation is unreasonable.[8] See *Moss v. Winchester,* 365 Mass. 297, 299, 311 N.E.2d 555 (1974).

[6] [7] [8] The Appeals Court observed in this case that the Dover Amendment is intended to encourage "a degree of accommodation between the protected use ... and matters of critical municipal concern ...." (citations omitted). 33 Mass.App.Ct. at 584, 602 N.E.2d 1105. We agree with this observation, but add that such an accommodation cannot be achieved by insisting that an educational institution seek a variance to obtain permission to complete its project.[9] *Radcliffe College v. Cambridge, supra,* 350 Mass. at 619, 215 N.E.2d 892, citing *Russell v. Zoning Bd. of Appeals of Brookline,* 349 Mass. 532, 535, 209 N.E.2d 337 (1965). Additionally, a court may consider a municipality's proper concession, such as was made here in the course of litigation, that a particular requirement ***761** of its zoning law is unreasonable as applied to a proposed educational use. Apart from any concession, the remaining requirements of the local zoning law, if otherwise reasonable, would still apply. *Doliner v. Town Clerk of Millis,* 343 Mass. 10, 15, 175 N.E.2d 925 (1961) (zoning by-law provisions treated as separable). *Attorney Gen. v. Dover,* 327 Mass. 601, 608, 100 N.E.2d 1 (1951). We now consider application of the ordinance's requirements to Tufts' projects in light of these principles and the Appeals Court's modification of the Land Court judgment.

[9] 2. *Wessell addition. a. Parking.* The Appeals Court modified the judgment by deleting therefrom language that declared the ordinance's parking requirements inapplicable to the Wessell addition. As the basis for so doing, the Appeals Court agreed with Medford's contention that the ordinance's definition of the term "lot," see note 5 *supra,* could be construed as treating discrete areas of Tufts' core campus, bounded by streets, as single commonly owned lots. Under this interpretation, the proposed Boston Avenue garage and Wessell would occupy the same lot. The parking that will be provided by the garage (a minimum of 290 spaces) more than satisfies the ordinance's requirement that Tufts, in conjunction with the Wessell addition, provide a minimum of 130 new ****440** parking spaces on the lot containing Wessell.

[10] A court should construe a local zoning requirement "in a manner which sustains its validity," *Doliner v. Town Clerk of Millis, supra,* 343 Mass. at 15, 175 N.E.2d 925, if this can be done without straining the common meaning of the terms employed. *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham,* 382 Mass. 283, 290, 415 N.E.2d 840 (1981). *Hall v. Zoning Bd. of Appeals of Edgartown,* 28 Mass.App.Ct. 249, 254, 549 N.E.2d 433 (1990). The ordinance's definition of lot logically applies to the part of the Tufts campus in which Wessell is situated and the parking garage will be located.[10]

***762** [11] Based on this interpretation, Tufts has not shown that the parking requirements of the ordinance are unreasonable as applied to the Wessell addition. It was properly found in the Land Court that there is a serious parking problem on Tufts' core campus and on public streets adjacent thereto. Parking, as it affects physical conditions on and around an educational use, is a legitimate municipal concern and a proper subject of local zoning regulation. *Radcliffe College v. Cambridge, supra,* 350 Mass. at 617 & n. 4, 215 N.E.2d 892. Compliance by Tufts with the parking requirements of the ordinance "would not require a greater number of spaces than could in reason be deemed necessary to take care of the cars brought to the [area] by the use made of it by the college." *Id.* at 619, 215 N.E.2d 892. While Tufts might prefer to defer addressing the parking problem, the ordinance's requirements can be satisfied by the construction of the parking garage, a use of Tufts' land recommended to the college by its consultants and found to be reasonable by the Land Court judge. We therefore agree with the Appeals Court that the requirements concerning parking are reasonable as applied to Tufts' campus, and that Medford can require Tufts to construct the Boston Avenue parking garage (or some equivalent which satisfies the ordinance's requirements) as a condition to building the Wessell addition.

[12] b. *Loading spaces.* The Land Court judge concluded that deliveries to Wessell would not be sufficient in number to justify the two additional loading spaces required by the ordinance. He determined, therefore, that the loading space requirements of the ordinance could not reasonably be applied to the Wessell addition. The Appeals Court revised this portion ***763** of the judgment because of "the ease with which compliance [with the loading space requirements can be] achieved." 33 Mass.App.Ct. at 586, 602 N.E.2d 1105. Tufts contends that the notion of "ease of compliance" is foreign to Dover Amendment jurisprudence. We disagree.

[13] On this aspect of the appeal, the Appeals Court simply expressed, in different terms, the principle that the burden of proving a local zoning requirement unreasonable under the Dover Amendment falls on the educational institution challenging the requirement. When compliance will involve no significant cost or other hardship to an educational institution, and does not interfere to any appreciable extent with the institution's plans, the

institution has failed to make out a case that the requirement, as ****441** applied, is unreasonable.[11]

[14] 3. *Parking garage.* The Appeals Court also deleted the portion of the judgment that declared the ordinance's setback requirement inapplicable to construction of the Boston Avenue garage. As noted, the evidence was that the parking garage could be constructed with the fifty-foot setback required by the ordinance, but that compliance with the ordinance would increase the cost of the project. No estimate of the amount of the increase was put in evidence by Tufts. Medford, on the other hand, demonstrated that Boston Avenue, a major public way, has only one traffic lane in each direction and is heavily travelled, particularly at rush hours. The fifty-foot setback will permit vehicles easier access to the garage reducing congestion and enhancing safety. With no particularized evidence in this case as to the cost and difficulty of compliance that can be measured against Medford's legitimate concerns as to traffic congestion and safety, the Land ***764** Court judge lacked an appropriate basis for the conclusion that Tufts had proved the setback requirement unreasonable as applied to construction of the parking garage. 33 Mass.App.Ct. at 585, 602 N.E.2d 1105.[12]

[15] [16] 4. *Future projects.* We also agree with the Appeals Court's decision to modify the judgment by deleting therefrom language declaring that Medford cannot apply ordinance requirements to future construction projects in the core area of Tufts' campus or to future projects similar to Wessell, Olin, or the parking garage. Whether requirements of a local zoning law are reasonable cannot be decided in the abstract. The central question is whether application of the requirements to a specific project in a particular setting furthers legitimate municipal concerns to a sufficient extent to warrant requiring an educational institution, a use granted special protected status by the Dover Amendment, to alter its development plans. As the Appeals Court correctly stated, this "is essentially a fact-based determination, one that cannot properly be made for possible future construction projects not detailed in the evidence." 33 Mass.App.Ct. at 583, 602 N.E.2d 1105.

Tufts argues nonetheless that the Appeals Court's deletion from the judgment of references to future, speculative projects is inconsistent with the scope of ***765** G.L. c. 240, § 14A,[13] the statute that confers ****442** authority on the Land Court to pass on the validity of local zoning requirements. This argument misconstrues the nature of the showing an educational institution must make to prevail when seeking a determination under G.L. c. 240, § 14A, as to the reasonableness of applying a local zoning law to its property.

[17] A local zoning law that improperly restricts an educational use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances. In this case, for example, the Land Court judge properly declared invalid the site plan and special permit requirements of the ordinance as to present *and* future, unspecified projects on the Tufts campus. *The Bible Speaks v. Board of Appeals of Lenox, supra,* 8 Mass.App.Ct. at 32–33, 391 N.E.2d 279. The Appeals Court correctly did not disturb this aspect of the judgment. The other requirements of the ordinance (parking, setback and dimensional regulations) challenged by Tufts do not facially discriminate against educational uses and are presumptively valid under the proviso to the Dover Amendment. The relief sought by Tufts pursuant to G.L. c. 240, § 14A, was a determination that, *as applied,* ***766** the regulations were unreasonable. As has been said, like certain other kinds of challenges to the applicability of a local zoning law, this relief presents a question that can be properly resolved only by reference to specific facts. See *Sinn v. Selectmen of Acton,* 357 Mass. 606, 610, 259 N.E.2d 557 (1970) (validity of exemption of all municipal uses from use regulations "can be determined only by examining its application in particular cases"); *Aronson v. Sharon,* 346 Mass. 598, 603, 195 N.E.2d 341 (1964) (whether by-law is sustainable exercise of municipality's police powers or a deprivation of private property without compensation "often depends upon the facts of the particular case"). See *Southern New England Conference Ass'n of Seventh–Day Adventists v. Burlington,* 21 Mass.App.Ct. 701, 710, 490 N.E.2d 451 (1986). There the Appeals Court declined to rule whether boundary established by wetlands by-law was valid as applied to the church's land, stating: "In the absence of any evidence bearing on the issue of the lawfulness of the application of the by-law to set the wetlands boundary, any attempt at decision on this record would require speculation and would be unfair to one party or the other." The Appeals Court properly concluded that the Land Court's rulings embodied in the judgment as to future, unspecified, projects of Tufts lacked a proper factual foundation, and that such projects were not an appropriate subject for relief pursuant to G.L. c. 240, § 14A.

5. *Disposition.* The judgment is amended, in numbered paragraph 2, by striking the words, "and any other future structures or additions which may be similarly situated," and by striking numbered paragraphs 3, 4, and 5. The judgment is also amended to declare that the parking requirements of the ordinance are not invalid, and that as applied to Wessell these requirements can be met by construction of the requisite number of spaces in the

proposed Boston Avenue parking garage or by an equivalent solution which satisfies the requirements. As so amended, the judgment is affirmed. The order defining the phrase "core campus" is vacated.

So ordered.

***767** O'CONNOR, Justice (concurring in part and dissenting in part).

Statute 1950, c. 325, § 1, entitled "An Act prohibiting discriminatory zoning by-laws and ordinances," amended ****443** G.L. c. 40, § 25, a predecessor of G.L. c. 40A, § 3, by adding the following words: "No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid." In *Attorney Gen. v. Dover,* 327 Mass. 601, 100 N.E.2d 1 (1951), the court held that a town of Dover zoning by-law prohibiting the erection, alteration, or use of a building in a residential district for a sectarian educational use was invalid under St.1950, c. 325, § 1. That act subsequently became known as the Dover Amendment. *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 27 n. 10, 391 N.E.2d 279 (1979). Statute 1950, c. 325, § 1, was susceptible to an interpretation that would invalidate any zoning ordinance or by-law (regulation) that would have imposed on a sectarian, educational use any requirement concerning bulk and height of structures, yard size, lot area, setback, open space, building coverage or parking area. Indeed, that construction appears to have been urged by the plaintiff, and accepted by the Land Court judge, in *Radcliffe College v. Cambridge,* 350 Mass. 613, 614, 215 N.E.2d 892 (1966) ("The college claims to be exempt from art. VII, § 2 [an ordinance requiring off-street parking], by reason of G.L. c. 40A, § 2, as amended through St.1959, c. 607, § 1, which provides 'that no ordinance or by-law which prohibits or limits the use of land for any church or other religious purpose or for any educational purpose which is religious, sectarian, denominational or public shall be valid' ").

By St.1975, c. 808, § 3, the Legislature struck out G.L. c. 40A and inserted a new chapter 40A in its place. The new c. 40A provides in relevant part, "No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious ***768** sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." That provision, were it to be construed without reference to the proviso, would present the same ambiguity that was present in the Dover Amendment, St.1950, c. 325, § 1. Absent the proviso, the language of the statute could fairly be construed to mean that any requirement as to bulk and height of structures, yard size, lot area, setback, open space, building coverage or parking area, imposed on parcels of land devoted to religious or educational uses, is unauthorized. The obvious purpose of the proviso is to make clear that such requirements, if not intentionally or in practical effect discriminatory against the protected uses, and if rationally related to the purposes of zoning regulations enumerated in St.1975, c. 808, § 2A, are authorized, valid, and enforceable without reference to the use to which a particular parcel is put.[1] [2]

****444 *769** Nothing in G.L. c. 40A suggests that the Legislature intended to discriminate *in favor* of religious and educational uses. Yet, if the court is right in concluding that, in certain circumstances, a trial judge or appellate court must exempt a parcel, which is devoted to a protected use, from zoning regulations that are binding on parcels devoted to all other uses, such discrimination results. Surely, if parcels not committed to protected uses must comply with zoning regulations concerning off-street parking, setback of buildings, lot area and the like, regardless of the difficulty of compliance, but an educational institution is exempt if it demonstrates that "compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns," or that compliance would result in "excessive cost ... without significant gain in terms of municipal concerns," as the court states, *ante* at 439, discrimination occurs of a type that is the reverse of the discrimination targeted by the Dover Amendment.

General Laws c. 40A, § 3, is clear. No zoning ordinance or by-law may "prohibit, regulate or restrict the use of land or structures for ... educational purposes on land owned or leased by ... a nonprofit educational corporation" like Tufts College, but "such land or structures may be subject to reasonable regulations [that is, reasonable regulations, although not mandated, are authorized, and such land or structures are subject to them] concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Nothing in chapter 40A authorizes a judge or a court to declare

facially reasonable nondiscriminatory regulations inapplicable to a particular parcel, or to exempt a particular parcel from them, whenever the judge or court, acting as a master planner, decides that the "application of the requirements to a specific project in a particular setting ***770** [would not] further[ ] legitimate municipal concerns to a sufficient extent to warrant" application and enforcement of the regulations. *Ante* at 441.

The challenged requirements of the ordinance in this case are reasonable. They do not discriminate against statutorily protected land uses either by expressed intention or in practical operation. The ordinance is use-neutral. Furthermore, the ordinance is rationally related to legitimate municipal zoning objectives. No one appears to contend otherwise. In my view, contrary to the thrust of the court's opinion, the court would have no right to declare the challenged requirements inapplicable to the Tufts College property. For that reason, and not for the reasons articulated by the court, I am satisfied that the challenged requirements apply in this case. Accordingly, to the extent that the court orders numbered paragraphs 3, 4 and 5 struck from the judgment, thereby achieving that result, I concur with the order. However, because the order striking language from paragraph 2 of the judgment is premised incorrectly, I believe, on the idea that future applicability of the challenged regulations must depend on facts yet to be developed and on a "balancing" of the extent of the imposition on the use represented thereby compared to municipal concerns, I dissent from the court's order insofar as it strikes language from paragraph 2 of the judgment.

APPENDIX.

HOUSE—No. 5009

"1. *Dover Amendment.* It is unfortunate that the present state of the law is such that some communities may have legitimate doubts about the validity of regulations which would impose reasonable controls on institutions presently covered by the Dover amendment. The Department would encourage the use of such control where essential to the well-being of the adjacent neighborhood, and where the regulation will not seriously jeopardize the mission of the protected institutions. ****445** Thus, the Department proposes to clarify the present language so as to achieve the aims of the general court in passing the original amendment while at the same time precluding unwise restrictions on the power of the communities to regulate the land use activities of churches and educational institutions. The proposed ***771** language, for example, would specifically authorize the imposition of reasonable regulations concerning density or intensity of occupancy, bulk and height [of] structures, yards and setbacks, as well as limitations upon the location of accessory uses which traditionally have tended to be detrimental to adjacent property. Ideally, this should be accomplished by adopting regulations specifically designed to apply to uses protected by the Dover Amendment located in otherwise restricted zones, thus avoiding the problem of attempting to apply the *same* bulk regulations to the protected uses as ordinarily apply to other permitted uses in the zone. For example, instead of attempting to apply residential dimensional regulations to churches or schools located in a residential zone (See, *Sisters of the Holy Cross v. Town of Brookline,* 347 Mass. 486 [198 N.E.2d 624] (1964)) the by-law or ordinance should establish dimensional regulations specifically applicable to churches or schools located in such zones."

All Citations

415 Mass. 753, 616 N.E.2d 433, 84 Ed. Law Rep. 430

Footnotes

1 Tufts' campus is partly located in the city of Somerville. Somerville was originally named as a defendant in Tufts' action, but Tufts and Somerville arrived at an agreement with regard to the construction that will occur in Somerville. The remaining matters affect the projects planned for the Medford portion of the campus.

2 The pertinent provisions of G.L. c. 40A, § 3 (1990 ed.), read as follows: "No zoning ordinance or by-law ... shall ... regulate or restrict the use of land or structures for religious purposes or for educational purposes ... by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations

concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." The history of the special zoning status granted to educational and religious uses of land is recounted in *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 27 n. 10, 391 N.E.2d 279 (1979).

3 Several matters that were the subject of controversy in the Land Court are no longer at issue. The ordinance contains a provision that requires site plan review in conjunction with an application for a special permit for projects having a significant impact on Medford. Relying on *The Bible Speaks v. Board of Appeals of Lenox, supra,* the Land Court judge concluded that the site plan review and special permit requirements of the ordinance could not be applied to Tufts' projects. Medford does not dispute this point.

Prior to trial, Medford granted Tufts a variance from the ordinance's parking and loading space requirements as to the construction of the Olin Language and Culture Center (Olin), a new classroom building. The Land Court decision nonetheless provided that the ordinance's parking and loading space requirements were inapplicable to Olin. Medford does not challenge this ruling.

Tufts also contested the application of dimensional and parking requirements to a proposed addition to its Cousens Gymnasium and Hamilton Pool facility. The judge concluded that the requirements could be applied to this project. Tufts no longer questions this conclusion.

4 A loading space is a striped-in area of pavement, adjacent to a building, reserved for trucks and other vehicles making deliveries to the building. The purpose of loading spaces is to provide off-street access to a delivery site and thus alleviate traffic congestion that may result when vehicles, particularly trucks, block busy streets while trying to make deliveries.

5 The ordinance also provides (§ 6.24[a]) that buildings on the same lot "shall not be less than the same distance from one another as if they were on separate lots." The Land Court judge found that application of this provision would necessitate drawing imaginary "lot lines" on Tufts' campus for purposes of calculating the required distance between buildings. Medford has conceded that this provision is unreasonable as applied to the construction of Olin, Wessell, and the Boston Avenue parking garage.

6 The legislative history supports the conclusion that G.L. c. 40A, § 3, second par., is intended to incorporate the principles enunciated in *Sisters of the Holy Cross v. Brookline,* 347 Mass. 486, 198 N.E.2d 624 (1964), and in *Radcliffe College v. Cambridge,* 350 Mass. 613, 215 N.E.2d 892 (1966). In the Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act (Jan.1972) (Report), which preceded enactment of the present Zoning Act, the statutory protection accorded educational uses was considered. See Report, 1972 House Doc. No. 5009. As to the then existing law, it was said (at p. 21) that "the scope of the [educational use protection], as presently worded, would seem to depend on whether or not the application of bulk regulations to the institution within the ambit of its protection has the effect of defacto prohibition on use as opposed to a channeling effect where alternative educational ... uses are available." With regard to proposed § 3, the Report (at p. 26) "encourag[ed] the use of [reasonable bulk, dimensional and parking] control[s] where essential to the well-being of the adjacent neighborhood, and where the regulation will not seriously jeopardize the mission of the protected institutions."

In maintaining that facially neutral zoning requirements automatically can be applied to an educational use, the dissent, *post,* fails to take into account this legislative history, and the cases cited above, which St.1975, c. 808, § 3, was intended to codify. See *Newbury Junior College v. Brookline,* 19 Mass.App.Ct. 197, 199 n. 4, 472 N.E.2d 1373 (1985); *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 29, 391 N.E.2d 279 (1979) (St.1975, c. 808, c. 3, synthesizes Dover amendment and case law construing it). The *Radcliffe College* and *Sisters of the Holy Cross* cases plainly provide that facially neutral requirements cannot be applied to educational uses without further inquiry into the outcome produced by such an application. Particularly where the requirements sought to be applied do not take into account the special characteristics of an educational use (such as on-campus living and dining arrangements and the need for large classroom and library buildings), as is the case here, application of the requirements to the property of an educational institution may be inappropriately restrictive. If the approach suggested by the dissent is followed, a set

of facially neutral zoning requirements could be adopted that would, in practice, prevent almost any educational use of land.

7 For example, a showing that the parking requirements of the ordinance, as applied, would necessitate that Tufts pave over significant open areas of the campus, would demonstrate the unreasonableness of the ordinance in view of the fact that construction of the proposed garage will provide an adequate solution to the parking problem.

8 For example, the fact that the Medford ordinance might alleviate the parking problem on and around the Tufts campus by means of a regulation based on the size of the student population does not prove that requiring additional parking in association with new construction is an unreasonable means of addressing an existing parking deficiency.

9 However, if a variance is granted at the request of an educational institution, and not challenged by an aggrieved party within the time period permitted by statute, the variance cannot thereafter be attacked as improper. See *O'Blenes v. Zoning Bd. of Appeals of Lynn,* 397 Mass. 555, 492 N.E.2d 354 (1986); *Bjornlund v. Zoning Bd. of Appeals of Marshfield,* 353 Mass. 757, 231 N.E.2d 365 (1967).

10 Tufts suggests that another provision of the ordinance, (§ 7.51) which limits structures that may be built in a rear yard, prohibits more than one major structure on a single lot, and therefore forecloses application of the ordinance's definition of "lot" to areas of Tufts' campus already containing numerous major structures. As a matter of construction, we are not persuaded by Tufts' position. The provision in question must be read in conjunction with § 6.24(a), see note 5 *supra,* which *permits* multiple structures on a single lot. We think that § 7.51 only limits structures that can be built within the rear yard setback requirement imposed by the ordinance. More to the point, the record contains no evidence that Medford has invoked § 7.51 as a basis for blocking construction of the addition to Wessell or the parking garage. Thus, we do not have occasion to construe this provision, or to consider its reasonableness, as applied to Tufts' projects. See *Doliner v. Town Clerk of Millis, supra,* 343 Mass. at 10, 14–15, 175 N.E.2d 925.

11 *Tisbury v. Martha's Vineyard Comm'n,* 27 Mass.App.Ct. 1204, 544 N.E.2d 230 (1989), relied on by Tufts, is not to the contrary. In *Tisbury,* the evidence established that requiring compliance with by-law provisions governing the size of oil tanks would, in practice, prohibit the landowners from using their property for agricultural purposes (also protected by G.L. c. 40A, § 3). In other words, application of the by-law provisions would nullify a protected use. This is clearly distinguishable from a situation in which compliance does not encroach to any appreciable extent on an educational institution's right to set its own priorities for the use of its land.

12 The Appeals Court went on to observe that, although Tufts had not proved the ordinance unreasonable for purposes of the Dover Amendment, it might nonetheless be entitled under G.L. c. 40A, § 10, to a variance from the setback requirement because of the topography of the Boston Avenue site. It is obvious that the Appeals Court's conclusion that the setback requirement was reasonable did not rest on the possible availability of a variance for the structure. The Appeals Court properly observed that, even though Tufts had failed to prove the setback ordinance unreasonable as applied to the parking garage (for the reasons explained above), the particular characteristics of the lot might nonetheless entitle Tufts to obtain a variance. See *Josephs v. Board of Appeals of Brookline,* 362 Mass. 290, 285 N.E.2d 436 (1972) (variance granted due in part to sloping lot and increased cost of compliance); *Broderick v. Board of Appeal of Boston,* 361 Mass. 472, 280 N.E.2d 670 (1972) (same). Tufts thus has an independent means of seeking relief from application of the setback provision if it chooses to pursue the point.

13 In full, G.L. c. 240, § 14A, as amended by St.1975, c. 808, § 5, provides: "The owner of a freehold estate in possession in land may bring a petition in the land court against a city or town wherein such land is situated, which shall not be open to objection on the ground that a mere judgment, order or decree is sought, for determination as to the validity of

a municipal ordinance, by-law or regulation, passed or adopted under the provisions of chapter [40A] or under any special law relating to zoning, so called, which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land, or any part thereof, or of present or future structures thereon, including alterations or repairs, for determination of the extent to which any such municipal ordinance, by-law or regulation affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon or otherwise as set forth in such petition. The right to file and prosecute such a petition shall not be affected by the fact that no permit or license to erect structures or to alter, improve or repair existing structures on such land has been applied for, nor by the fact that no architects' plans or drawings for such erection, alteration, improvement or repair have been prepared. The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or could be claimed or not."

1 The court incorrectly states, *ante* at —— n. 6, that "[i]f the approach suggested by the dissent is followed, a set of facially neutral zoning requirements could be adopted that would, in practice, prevent almost any educational use of land." To the contrary, if the approach suggested by the dissent were to be followed, zoning regulations, such as those at issue in *Sisters of the Holy Cross of Massachusetts v. Brookline,* 347 Mass. 486, 198 N.E.2d 624 (1964), that would "in practice, prevent almost any educational use of land" would, for that very reason, be discriminatory against a protected use, and would therefore be unauthorized (invalid).

2 The court also states, *ante* at 438 n. 6, that "[i]n maintaining that facially neutral zoning requirements automatically can be applied to an educational use, the dissent fails to take into account" Report, 1972 House Doc. No. 5009. It is true that I do not consider that piece of legislative history significant. "Only if the statute is ambiguous, or couched in terms that suggests that [the court] do so, [does the court] look beyond the express statutory language." *Pobieglo v. Monsanto Co.,* 402 Mass. 112, 116, 521 N.E.2d 728 (1988). Neither condition for looking beyond the express statutory language is present here. However, even if one were to consider Report, 1972 House Doc. No. 5009, it would not suggest that the Legislature intended by St.1975, c. 808, § 3, to discriminate *in favor* of protected uses with respect to parking and setback and similar restrictions. The relevant recommendation contained in the Report at page 26 may be found in the appendix to this opinion.

End of Document

2015 WL 59500
Only the Westlaw citation is currently available.
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").

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.

***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.

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]

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]

***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).

***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]

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.

***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.

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

Footnotes

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.

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.

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.

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

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).

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).

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.

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.

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).

End of Document

2017 WL 1719224
Only the Westlaw citation is currently available.
Massachusetts Land Court,
Department of the Trial Court,.
Plymouth County.

Gene LAFOND, Plaintiff
v.
Tim GRANDY, Kenneth Buechs, Malcom MacGregor, Paul McAlduff, Robert Bielen, and Steven Lydon, as they are Members of the Plymouth Zoning Board of Appeals, Paul McAuliff, as he is Director of Inspectional Services of the Town of Plymouth, and Renewable Energy Development Partners, LLC, Defendants

16 MISC 000385 (KFS)
|
May 2, 2017

DECISION DENYING PLAINTIFF's MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' CROSS–MOTION FOR SUMMARY JUDGMENT

Karyn F. Scheier, Justice

***1** In this two- count complaint, Plaintiff sought to challenge a proposed solar project (Project) owned by Renewable Energy Development Partners, LLC (REDP), which has been permitted by the Plymouth Building Inspector. Plaintiff had requested the Building Inspector enforce the Bylaw, and issue a cease and desist order against REDP, which he declined to do. Plaintiff did not appeal the Building Inspector's decision to the Plymouth Board of Appeals (Board) within thirty days, as required under sections 8, and 15, of G. L c. 40A (The Zoning Act). Instead, Plaintiff initiated this action, seeking relief under G.L. c. 40A, § 17, in Count I, and declaratory relief under G.L. c. 231A, in Count II. In defense of his failure to appeal the Building Inspector's action, Plaintiff asserts, among other things, that he is excused from exhausting the Zoning Act's administrative remedies before seeking judicial review because such attempts would be futile in this case. During the summary judgment hearing, Plaintiff assented to the dismissal of his G.L. c. 40A, § 17 claim set forth Count I, leaving only Plaintiff's request for declaratory relief for determination in this summary judgment decision. This court concludes on the record that the court lacks jurisdiction because Plaintiff failed to exhaust his administrative remedies.

At issue in Plaintiff's declaratory judgment count is the Building Inspector's interpretation of G.L. c. 40A, § 3, paragraph 9, read in conjunction with the Bylaw. The statute provides "[n]o zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare." The Building Inspector determined that the Plymouth Bylaw makes no express provision for solar energy systems. The form of the Bylaw is prohibitive, meaning that uses which are not specifically allowed are deemed prohibited. Because the Solar Project is not a use specifically mentioned in the Bylaw, the Building Inspector concluded that it is prohibited. He further concluded that the Bylaw's prohibition of such use violates G.L. c. 40A, § 3, and therefore he approved REDP's application for its Project. Plaintiff's position is that the Building Inspector's interpretation is flawed because REDP's Project falls within the category of uses allowed in a Light Industrial (LI) district, therefore there is no outright ban in the Town of Plymouth and G.L. c. 40A, § 3 is not violated.

By agreement of the parties, the case is before the court on cross-motions for summary judgment, incorporating all aspects of a Motion to Dismiss filed by REDP.[1] The record includes the Bylaw; affidavits of Margaret Sheehan, Esq., Plaintiff's counsel; Plaintiff Gene LaFond and Ms. Sharl Heller, on behalf of Plaintiff; and affidavits of Kate Moran Carter, Esq., and Thomas Melehan, on behalf of REDP, and the exhibits attached to the parties' motions and affidavits. The following material facts are not in dispute.[2]

***2** The Parties

1. Defendant Renewable Energy Development Partners, LLC (REDP) is a Massachusetts-based project development company that specializes in the distributed generation renewable energy market.

REDP has experience permitting and developing solar projects on both private and municipal land. Thomas Melehan is REDP's managing director. Plaintiff is an abutter to the proposed Project site.

The Project

2. The Project is located on land that is zoned Rural Residential (RR). Both the project site and Plaintiff's property are located within the RR district of the Bylaw.

3. The Director of Inspectional Services (DIS) issued certain zoning permits to REDP for the Solar Project, comprising multiple solar arrays with a generating capacity. The Project will involve the collection of solar energy for electricity generation.

The 2012 Permits

4. The Building Inspector issued two permits: Zoning Permit # Z20120251 on March 29, 2012, and # Z20120153 on March 8, 2012 (2012 Zoning Permits).

a. # Z20120251 approved the installation of "152,500 sq. ft. of solar panels and related access road, pads, equipment, lights and fence, subject to attached Planning letter dated 2/14/12 and Public Works letter dated 2/28/12." This permit was for Lot 57A as shown on the Site Plan filed with the application.

b. # Z20120153 approved the installation of "39,670 sq. ft. of solar panels and related access road, pads, equipment, lights and fence, subject to attached Planning letter dated 2/14/12 and Public Works letter dated 2/28/12." This permit was for Lot 47B as shown on the Site Plan.

The 2016 Permits

5. The Building Inspector issued two permits: Zoning Permit # Z20160256 on March 8, 2016, and # Z20160275, on March 11, 2016 (2016 Zoning Permits).[3]

a. # Z20160256 approved the construction of "a solar panel array 4055 solar pv panels groundmounted at 1.27 MW, access road, pads, equipment and fence, [subject] to Site Plan review from Planning [d]ated 2/14/12, DPW comments dated 2/18/16 and Fire [Dept.] comments dated 2/19/16." This permit is for Lot 59–2 and was a new permit.

b. # Z20160275 approved the construction of "4,522 PV Solar panels at 1.4 MW ground mounted array, equipments, pads and fence; subject to Site Plan Review [d]ated 2/14/12; DPW comments dated 2/18/16 and Fire [Dept.] comments dated 2/19/16." This permit was an amendment to the permit for Lot 57A issued in 2012.

Requests for Enforcement

6. Plaintiff's counsel sent a letter, dated May 19, 2016, to the Building Inspector, the Chair of the Board of Selectmen and the Planning Director requesting an enforcement action and stop work order "regarding [REDP's] Industrial Solar Facility, Off Herring Pond Road, Plymouth." The letter stated, in part, "[t]he Town appears to be under the wrongful impression that G.L. c. 40A, Section 3, exempts solar facilities from local zoning. It does not. The Renewable Energy Development project that is now underway is governed by the Zoning Bylaw yet the Town has failed to enforce the Bylaw, inventing a hybrid approval process and only required a 'site plan review.' "

***3** 7. In a letter dated May 26, 2016, Plaintiff's counsel requested the Building Inspector "put the Town and [REDP] on notice that [Plaintiff] intends to pursue all legal options to stop work on the [Project]." This letter referenced the May 19, 2016 letter requesting enforcement "with regard to this project" and the Building Inspector's failure to "issue a stop work order to prevent further environmental destruction and zoning violations while the dispute ... is resolved." Counsel further stated that Plaintiff intended to "appeal [the] denial to the [Zoning Board] as provided by the Bylaw and G.L. c. 40A and to thereby exhaust our administrative remedies."

8. In a letter dated May 31, 2016, the Building Inspector denied Plaintiff's request for enforcement, stating "[t]he zoning permits comply with [G.L. c. 40A, section 3] and Plymouth Zoning Bylaw section 205–1. 'No zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems.' "

9. On July 8, 2016, Plaintiff's counsel sent another letter to the Building Inspector, requesting an enforcement action regarding the "Renewable Energy Development Partners LLC Industrial Solar Facility, 144R Herring Pond Road, Plymouth." The letter stated the Building Inspector had "failed to respond in writing to the May 19, 2016 request for enforcement and stop work order in this matter as required by G.L. c. 40A, section 7."

10. In response, Town Counsel emailed Plaintiff's counsel on July 29, 2016, explaining "[the Building Inspector] responded to [the] May 19, 2016 request for zoning enforcement with respect to Renewable Energy Partners, no further response is required with respect to [the] duplicative request of July 8, 2016."

Unrelated Proposed Solar Projects in Plymouth

11. Since the Town's approval of the Project, it has approved several other solar projects, with approximately 29 MW of the projects located in residentially-zoned areas.

12. On July 18, 2016, the Building Inspector denied a request for enforcement submitted by Plaintiff's counsel on behalf of a third party unrelated to Plaintiff and not a party to this lawsuit. The request pertained to a particular proposed solar array project at 59 Kristin Road in Plymouth. The Building Inspector denied the request, stating, "[t]he zoning permit complies with [G.L. c. 40A, § 3] and [Bylaw] Section 205–1. 'No zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems.' "

"Rule 56(c) of the Massachusetts Rules of Civil Procedure ... provides that a judge shall grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Attorney General v. Bailey, 386 Mass. 367, 370–71 (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 it 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). The court may treat a motion to dismiss for lack of subject matter jurisdiction as one for summary judgment when considering matters outside the pleadings. Bell v. Zoning Bd. of Appeals, 429 Mass. 551, 555 (1999).

I. G.L. c. 231A

***4** Plaintiff argues this court has jurisdiction under G.L. c. 231A. REDP counters that, because Plaintiff failed to exhaust his administrative remedies under the Zoning Act he is barred from now seeking declaratory relief.

G.L. c. 231A provides, in relevant part,

> [t]he supreme judicial court, the superior court, the land court ... within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sough thereby and such declaration, when made, shall have the force and effect of a final judgment or degree and be reviewable as such ....

The purpose of this statute is to "afford a plaintiff relief from uncertainty and insecurity with respect to rights, duties, status and other legal relations. [It] 'is to be liberally construed and administered.' " Nelson v. Comm'r of Corr., 390 Mass. 379, 388 (1983) (citations omitted).

* * * * *

a. Exhaustion of Administrative Remedies

On May 19, 2016, Plaintiff submitted a request for a zoning enforcement action and stop work order to the Building Inspector. The Building Inspector denied that request on May 31, 2016. Under G.L. c. 40A, § 8, "[a]n appeal to the permit granting authority ... may be taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative officer[.]" The Board is the permit granting authority in Plymouth. Under G.L. c. 40A, § 15, an appeal to the Board must be taken within thirty days from the date of the order or decision being appealed. Therefore, following the Building Inspector's denial, the next step in the administrative process was an appeal to the Board not later than June 30, 2016.

"The general rule ... is that, if administrative action 'may afford the plaintiffs some relief, or may affect the scope or character of judicial relief, exhaustion of the possibilities [of such administrative action] should ordinarily precede independent action in the courts.' " Clark & Clark Hotel Corp. v. Bldg. Inspector of Falmouth, 20 Mass. App. Ct. 206, 209 (1985), citing Nelson v. Blue Shield of Massachusetts, Inc., 377 Mass. 746, 752 (1979). Plaintiff failed to appeal the Building Inspector's denial of enforcement to the Board and exhaust all administrative remedies. Accordingly, he may not now seek the same relief by recasting his claim as a declaratory judgment action.

Plaintiff's c. 231A claim under Count II attempts to circumvent his failure to appeal the Building Inspector's refusal to issue a stop work order. A request for declaratory relief "does not operate to suspend the ordinary requirement that a plaintiff exhaust his administrative remedies before seeking judicial relief. While c. 231A was intended as remedial legislation giving a party a new and additional procedure for resolving controversies, there is no indication that it was intended as an automatic substitute for administrative proceedings." East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination, 364 Mass. 444, 450–451 (1973) (citations omitted); Clark & Clark Hotel, 20 Mass. App. Ct. at 212.

***5** In defense of his decision to forego an appeal to the Board, Plaintiff argues his claim falls within one of the exceptions to the exhaustion doctrine. G.L. c. 231A, § 3 provides "the failure to exhaust administrative relief prior to bringing an action under section one shall not bar the bringing of such action if the petition for declaratory relief is accompanied by an affidavit stating that the practice or procedure set forth pursuant to section two is known to exist by the agency or official therein described and that reliance on administrative relief would be futile."[4] Plaintiff argues that the Building Inspector and the Board have established a practice of exempting solar projects, like the one at issue here, from their prohibition in residentially-zoned districts. He characterizes this practice as "consistently repeated," demonstrated by the Building Inspector's denial of Plaintiff's requests for enforcement as to REDP's Project, and alleged denials for requests for enforcement against other unrelated solar projects in the Town.[5] Secondly, Plaintiff argues any appeal to the Board would be futile because a final administrative decision would have taken months to reach, at which time the Project would become a "*fait accompli*."

Exceptions to the exhaustion doctrine are narrowly applied. Allowing a plaintiff to pursue declaratory relief to avoid administrative remedies risks substituting the court, rather than the administrative agency, as fact-finder. See Gallo v. Div. of Water Pollution Control, 374 Mass. 278, 288 (1978) (stating that bypassing the administrative appeal procedure risks frustrating the "comprehensive and uniform statutory scheme"). The Board is the appropriate body to interpret its own Bylaw, in accordance with G.L. c. 40A, § 3, and is accorded deference due to its "special knowledge" of the bylaw's history and purpose. Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica, 454 Mass. 374, 381 (2009). Zoning boards often are required to interpret the interaction between local regulations and the Commonwealth's statutes, specifically G.L. c. 40A, § 3, which is required here. See, e.g., Regis College v. Town of Weston, 462 Mass. 280 (2012); Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter–Day Saints, 434 Mass. 141 (2001). Plaintiff's failure to appeal to the Board deprived it of reviewing the Building Inspector's determination and providing a decision informed by the Board's local knowledge and expertise, actions falling well within its jurisdiction.[6] Also, the remedies set forth in the Zoning Act are expressly meant to be exclusive.

***6** Plaintiff has failed to demonstrate the Building Inspector's denial of enforcement constitutes a "practice ... known to exist by the agency or official" that would render any appeal futile. The record before the court shows that the Building Inspector issued one denial of Plaintiff's May 19, 2016 request for enforcement, on May 31, 2016. While Plaintiff characterizes its subsequent letters, one submitted on May 26th, and one submitted on July 8, 2016, as separate new requests for enforcement actions, all three letters pertain to the same Project. Plaintiff's July 8, 2016 letter appears to acknowledge this, stating the Building Inspector had "failed to respond in

writing to the May 19, 2016 request for enforcement and stop work order *in this matter* as required by G.L. c. 40A, section 7" (italics added). The July 8, 2016 letter does not constitute a second, unrelated request for enforcement.

The permitting of unrelated solar projects also does not demonstrate any practice or pattern by the Board that would effectively justify forgoing an appeal due to futility. Plaintiff cannot support its claim that an appeal to the Board is futile based on decisions rendered by the Building Inspector.[7] Plaintiff had the opportunity to appeal the Building Inspector's denial issued on May 31, 2016. He was not denied an administrative appeal, but instead simply chose not to pursue one. See Athol Mem'l Hosp. v. Comm'r of Div. of Med. Assistance, 437 Mass. 417, 425 (2002). Plaintiff is unable to now sidestep that choice by repackaging it pursuant to G.L. c. 231A.[8]

II. Conclusion

"Ordinarily, when a party brings a declaratory judgment action pursuant to G.L. c. 231A, the rights of the parties should be declared .... However, where the court lacks jurisdiction to make a declaration of rights, the correct disposition of the case is dismissal of the complaint." Iodice v. Newton, 397 Mass. 329, 335 (1986); see also Colangelo v. Bd. of Appeals, 407 Mass. 242, 247 (1990) (stating one cannot avoid the requirements of G.L. c. 40A, § 17, by framing a challenge as a request for declaratory judgment). Plaintiff did not exhaust his administrative remedies before seeking judicial review, therefore this court lacks jurisdiction.[9]

For the foregoing reasons, Plaintiff's motion for summary judgment is **DENIED**. Defendant REDP's motion for summary judgment is **ALLOWED**, and Count II of Plaintiff's complaint will be **DISMISSED**. Since Plaintiff previously waived his claim under G.L. c. 40A, s. 17, the entire complaint will be dismissed.

Judgment to enter accordingly.

All Citations

Not Reported in N.E.3d, 2017 WL 1719224

Footnotes

1 The municipal defendants joined in REDP's motion to dismiss.

2 Plaintiff and REDP each submitted a statement of material facts as well as responses to the other's submissions. Because Plaintiff withdrew Count I during oral argument and after the case had been fully briefed, many facts presented by the parties are no longer material to the remaining count, and therefore are not set forth above. Some undisputed facts are set forth for context.

3 A zoning permit is apparently a prerequisite to a building permit under the Plymouth Bylaw.

4 Plaintiff did not submit affidavits with his unverified Complaint and Prayer for Declaratory Judgment and Injunctive Relief, filed July 13, 2016. The Complaint alleged in paragraph 39 that "[e]xhaustion of administrative remedies is not [a] viable option, would be futile and would not provide an adequate remedy because the Town's unlawful legal position on this issue has become entrenched over the past two years." Several affidavits were attached to Plaintiff's motion for a temporary restraining order and preliminary injunction, filed July 20, 2016, and supplemented with additional filings on July 28, 2016, and August 3, 2016, which did not specifically address the issue of futility or the Board's known practices and procedures.

Plaintiff's supplement filed August 3, 2016, states the Town effectively "foreclosed all further avenues for exhaustion ... by informing [Plaintiff's counsel] that the [Building Inspector] would not respond to Plaintiff's July 8, 2016 request for enforcement ..." and that this "arbitrary and legally unfounded refusal to respond ... has foreclosed the Plaintiff's ability for administrative appeal to the [Board], depriving Plaintiff of the opportunity to exhaust administrative remedies." Additional affidavits are attached from Plaintiff's counsel, Gene LaFond and Sharl Heller.

5 The parties in their statement of material facts could agree only that, following the Building Inspector's approval for the Project in this case, several other solar projects have been approved, some within residentially-zoned areas. The parties did not agree as to the specific number of projects. The court has included facts regarding unrelated projects solely for the context of Plaintiff's legal position with respect to his claim of futility.

6 Plaintiff's argument that the time required for the Board to render a decision on any appeal supports his futility argument because the Project would be complete is unavailing. Plaintiff had the opportunity to request preliminary injunctive relief and did so, albeit unsuccessfully. The fact that a party may lawfully proceed with and potentially complete work (at its risk) under a permit approved by the Building Inspector pending the appeal process does not constitute futility under G.L. c. 231A, § 3. The futility exception applies when the "power or authority of the agency [itself is] in question, and not where the exercise of that agency's discretion is challenged." Ciszerski v. Industrial Acc. Bd., 367 Mass. 135, 141 (1975). The Board has the authority to interpret its own Bylaw in the first instance.

7 Plaintiff also has not pointed to decisions or actions taken by *the Board* that demonstrate any appeal to the Board would have been futile.

8 G.L. c. 231A will not rescue a plaintiff who failed to comply with the time standards required under G.L. c. 40A. Cappuccio v. Zoning Bd. of Appeals of Spencer, 398 Mass. 304, 314 (1986).

9 Having determined Plaintiff failed to exhaust his administrative remedies, the court does not reach the merits of his declaratory judgment action with respect to the Building Inspector's interpretation of the Bylaw.

End of Document

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.

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.

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]

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.

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 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.

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) (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. Not Reported in N.E. Rptr., 2014 WL 471951

All Citations

Footnotes

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."

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.

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

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.

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.

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.

End of Document

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.

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 § 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

Footnotes

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

187 N.E.3d 1007

489 Mass. 775
Supreme Judicial Court of Massachusetts,
Suffolk.

TRACER LANE II REALTY, LLC
v.
CITY OF WALTHAM & another. [1]

SJC-13195
|
Argued March 7, 2022
|
Decided June 2, 2022

Synopsis

Background: Developer of proposed large-scale solar energy system brought action against city seeking declaration that city could not prohibit developer from building a road on its property in residential zone to access system, which was to be located in commercial zone of neighboring town. The Land Court Department, Middlesex County, Howard P. Speicher, J., 2021 WL 861157, granted summary judgment for developer. City appealed.

Holdings: In a case of first impression, the Supreme Judicial Court, Lowy, J., held that:

[1] statutory protections afforded to solar energy systems against local zoning regulations applied to access road, and

[2] city's arguably allowing solar energy systems in industrial zones did not preclude developer from laying road.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment; Motion for Summary Judgment.

West Headnotes (5)

[1] Judgment Absence of issue of fact

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c).

[2] Appeal and Error Deference given to lower court in general

Appeal and Error De novo review

Supreme Judicial Court reviews a decision on a motion for summary judgment de novo and, thus, accords no deference to the decision of the motion judge.

[3] Zoning and Planning Public utilities

Zoning and Planning Residential Districts

Proposed road on developer's property in city's residential zone, to be used to access a planned large-scale solar energy system that was to be located in commercial zone of neighboring town, was part of the solar energy system, and thus the road had statutory protections afforded to such systems against local zoning regulation except when necessary to protect the public health, safety, or welfare, where the road would facilitate the primary system's construction, maintenance, and connection to electrical grid. Mass. Gen. Laws Ann. ch. 40A, § 3.

[4] Zoning and Planning Public utilities

Statutory protection from local zoning regulation afforded to solar energy systems, "except where necessary to protect the public health, safety or welfare," provides municipalities with more flexibility than statutory protections for land use for education, religion, and child care, which allow only for reasonable regulations on such matters as bulk and height. Mass. Gen. Laws Ann. ch. 40A, § 3.

[5] Zoning and Planning Public utilities

Zoning and Planning Residential Districts

Statutory protections for solar energy systems against local zoning regulation except when necessary to protect the public health, safety, or welfare allowed developer to lay a road on its property in city's residential zone to access its planned large-scale solar energy system in commercial zone in neighboring town, even if city's zoning code allowed solar energy systems in industrial zones, where industrial zones encompassed only one to two percent of city's total land area, and code's ban on systems in all but one to two percent of city restricted rather than promoted the legislative goal of promoting solar energy. Mass. Gen. Laws Ann. ch. 40A, § 3.

***1008** Renewable Energy. Zoning, By-law, Validity of by-law or ordinance, Accessory building or use, Permitted use.

CIVIL ACTION commenced in the Land Court Department on June 12, 2019.

The case was heard by Howard P. Speicher, J., on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Attorneys and Law Firms

The following submitted briefs for amici curiae:

Bernadette D. Sewell, Assistant City Solicitor, for the defendants.

David C. Fixler (John J. Griffin, Jr., & John F. Farraher, Jr., also present) Boston, for the plaintiff.

Thomas Melone, for Allco Renewable Energy Limited.

Ben Robbins & Daniel B. Winslow, for New England Legal Foundation.

Sander A. Rikleen, David A. Michel, Boston, & Stella T. Oyalabu, for First Parish in Bedford, Unitarian Universalist.

Michael Pill, Northampton, pro se.

Maura Healey, Attorney General, & David S. Frankel & Megan M. Herzog, Special Assistant Attorneys General, for the Commonwealth.

Margaret E. Sheehan & Jonathan Polloni, for Save the Pine Barrens, Inc., & others.

David K. McCay, Lauren E. Sparks, & Tatiana Tway, for town of Spa & another.

Kate Moran Carter, Charles N. Le Ray, & Nicholas P. Shapiro, for Real Estate Bar Association for Massachusetts, Inc., & another.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ. Renewable Energy.

Opinion

LOWY, J.

***1009** Tracer Lane II Realty, LLC (developer), seeks to build a solar energy system centered in Lexington and an access road to the facility through Waltham. Although the solar energy system would be centered on property zoned for commercial use, the access road would be on property zoned for residential use. Waltham officials indicated to the developer that the developer could not construct the access road because the road would constitute a commercial use in a residential zone. However, a Land Court judge determined on cross motions for summary judgment that this prohibition was improper because G. L. c. 40A, § 3, ninth par., which protects solar energy systems from local regulation that is not "necessary to protect the public health, safety or welfare," allowed the developer to lay the access road. We affirm. [2]

Background. 1. Facts and procedural history. The following facts are undisputed. The developer owns land in Lexington and in Waltham. The Lexington property is in an area zoned for commercial and manufacturing use, whereas the Waltham property is in an area zoned for residential use. The developer intends to construct a one-megawatt solar energy system centered on the Lexington property that will cover an area of approximately 413,600 square feet and contribute solar energy to the electrical grid. To access the

part of the solar energy system that is on the Lexington property, the developer intends to build an access road over its Waltham property. Construction vehicles would use the access road while the solar energy system was being built, and maintenance trucks would periodically use the access road thereafter. The access road would include overhead wires and utility poles connecting the structure in Lexington to the electrical grid.

Waltham officials indicated informally to the developer that the developer could not lay the access road because, according to Waltham, the road was not permitted in a residential zone. The developer then brought a complaint against Waltham and its building inspector in the Land Court pursuant to G. L. c. 240, § 14A, seeking a declaration that Waltham could not prohibit the developer from building the access road.[3] The parties cross-moved for summary judgment.

***1010** A Land Court judge allowed the developer's motion and declared that any prohibition on constructing the access road was improper pursuant to G. L. c. 40A, § 3, portions of which are often referred to as the Dover Amendment. That section states, in relevant part: "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." G. L. c. 40A, § 3, ninth par.

Waltham and its building inspector appealed, and we transferred the case to this court on our own motion.

2. Waltham's zoning code. The parties dispute the extent to which Waltham's zoning code permits solar energy systems. According to the developer, the zoning code does not permit solar energy systems at all because, according to the code, "Any use of any building, structure or premises, not expressly permitted ..., is hereby prohibited." Because the zoning code does not mention solar energy systems, the developer argues, it prohibits them.

Waltham asserts that the zoning code expressly permits solar energy systems in industrial zones, which encompass approximately one to two percent of Waltham's total area.[4] According to the zoning code, industrial zones may include "[e]stablishments for the generation of power for public or private consumption purposes that are further regulated by Massachusetts General Laws."

Waltham also argues that the zoning code permits "accessory" solar energy systems in residential and commercial zones. The zoning code defines "accessory use" as the "[u]se of land, building or part of building that is customarily incidental and clearly subordinate to the principal use of the premises." The zoning code also defines accessory use as applied to residential and commercial zones.[5]

[1] **[2]** Discussion. 1. Standard of review and legal background. "Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Boelter v. Selectmen of Wayland, 479 Mass. 233, 237, 93 N.E.3d 1163 (2018), quoting Boazova v. Safety Ins. Co., 462 Mass. 346, 350, 968 N.E.2d 385 (2012). See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). "We review ***1011** a decision on a motion for summary judgment de novo and, thus, 'accord no deference to the decision of the motion judge.' " Boelter, supra, quoting Drakopoulos v. U.S. Bank Nat'l Ass'n, 465 Mass. 775, 777, 991 N.E.2d 1086 (2013).

The statute at issue here, G. L. c. 40A, § 3, "was originally enacted to prevent municipalities from restricting educational and religious uses of land, but the Legislature has expanded [the statute] over time to ensure that other land uses would be free from local interference" (citation omitted). Crossing Over, Inc. v. Fitchburg, 98 Mass. App. Ct. 822, 829, 161 N.E.3d 432 (2020). The Legislature demonstrated its intent to protect solar energy systems from local regulation when it passed "An Act promoting solar energy and protecting access to sunlight for solar energy systems." St. 1985, c. 637. See Berriault v. Wareham Fire Dist., 365 Mass. 96, 97, 310 N.E.2d 110 (1974) (statute's title evidence of legislative intent). That statute added a paragraph to G. L. c. 40A, § 3, that states: "No 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." G. L. c. 40A, § 3, ninth par., inserted by St. 1985, c. 637, § 2. When interpreting this paragraph, we

keep in mind that it was enacted to help promote solar energy generation throughout the Commonwealth. Cf. Watros v. Greater Lynn Mental Health & Retardation Assoc., Inc., 421 Mass. 106, 113-114, 653 N.E.2d 589 (1995) (interpreting G. L. c. 40A, § 3, second par., in light of Legislature's "overall intent ... to prevent local interference with the use of real property for educational purposes").

[3] 2. Whether the access road is governed by G. L. c. 40A, § 3, ninth par. The solar energy provision applies to "solar energy systems" and "structures that facilitate the collection of solar energy." G. L. c. 40A, § 3, ninth par. [6] Waltham acknowledges that the structure proposed to be built on the Lexington property is a "solar energy system." It argues, however, that the access road proposed to be built on the Waltham property is not governed directly by G. L. c. 40A, § 3, ninth par. We disagree.

Because we have not yet analyzed the ninth paragraph of G. L. c. 40A, § 3, we turn to the abundant case law interpreting that section's other paragraphs. See Rogers v. Norfolk, 432 Mass. 374, 377-378, 734 N.E.2d 1143 (2000) (looking to other paragraphs of G. L. c. 40A, § 3, for guidance when interpreting third paragraph for first time). In those cases, we have considered ancillary structures to be part of the protected use at issue. See Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 149, 747 N.E.2d 131 (2001) (church steeple need not have independent religious function to be considered part of religious use); Watros, 421 Mass. at 113-114, 653 N.E.2d 589 ("No distinction is made by the statute regarding its applicability to 'principal' or 'accessory' buildings, and it is clear that the over-all intent of the Legislature was to prevent local interference with the use of real property for educational purposes"); Trustees of Tufts College v. Medford, 415 Mass. 753, 754-755, 763-764, 616 N.E.2d 433 (1993) (applying statute to college's parking garage). ***1012** See also Henry v. Board of Appeals of Dunstable, 418 Mass. 841, 844, 641 N.E.2d 1334 (1994) ("the scope of the agricultural or horticultural use exemption encompasses related activities"). We reach the same conclusion here. Given the access road's importance to the primary solar energy collection system in Lexington -- it will facilitate the primary system's construction, maintenance, and connection to the electrical grid -- we conclude that the access road is part of the solar energy system. Cf. Beale v. Planning Bd. of Rockland, 423 Mass. 690, 694, 671 N.E.2d 1233 (1996) (access road in one zoning district leading to another zoning district "is considered to be in the same use as the parcel to which the access leads"). Therefore, G. L. c. 40A, § 3, ninth par., applies to the access road.

[4] 3. Whether G. L. c. 40A, § 3, ninth par., prohibits Waltham's decision. The solar energy provision provides that a municipality shall not "prohibit or unreasonably regulate the installation of solar energy systems ... except where necessary to protect the public health, safety or welfare." G. L. c. 40A, § 3, ninth par. That statutory language provides municipalities with more flexibility than statutory protections for land use for education, religion, and child care, which allow only for reasonable regulations on such matters as bulk and height. See G. L. c. 40A, § 3, second par. ("No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes ...; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements"), third par. ("No zoning ordinance or bylaw ... shall prohibit, or require a special permit for, the use of land or structures ... for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements").

[5] The case law addressing these other protected uses is nevertheless helpful in deciding whether a prohibition or regulation of solar energy systems is valid. When evaluating an ordinance or by-law's facial validity under other sections of G. L. c. 40A, § 3, we have balanced the interest that the ordinance or by-law advances and the impact on the protected use. See Rogers, 432 Mass. at 379, 734 N.E.2d 1143 ("The proper test for determining whether the provision in issue

contradicts the purpose of G. L. c. 40A, § 3, third par., is to ask whether the footprint restriction furthers a legitimate municipal interest, and its application rationally relates to that interest, or whether it acts impermissibly to restrict the establishment of child care facilities in the town, and so is unreasonable").

The interest that Waltham's zoning code presumably advances -- preservation of each zone's unique characteristics -- is legitimate. See Rogers, 432 Mass. at 380, 734 N.E.2d 1143 ("preservation of the residential character of neighborhoods is a legitimate municipal purpose to be achieved by local zoning control"). And, as just discussed, municipalities have more flexibility in restricting solar energy systems than they do, for instance, in the context of education, religion, or child care. Nevertheless, Waltham's zoning code unduly restricts solar energy systems.

Assuming Waltham is correct that the zoning code permits solar energy systems at all, it allows large-scale systems like the ***1013** one at issue here in at most one to two percent of its land area. These standalone, large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth. See Executive Office of Energy and Environmental Affairs, Massachusetts 2050 Decarbonization Roadmap, at 4, 59 n.43 (Dec. 2020) ("the amount of solar power needed by 2050 exceeds the full technical potential in the Commonwealth for rooftop solar, indicating that substantial deployment of ground-mounted solar is needed under any circumstance in order to achieve [n]et [z]ero [greenhouse gas emissions by 2050]"). [7] Nothing in the record suggests that this stringent limitation is "necessary to protect the public health, safety or welfare." G. L. c. 40A, § 3, ninth par. Where Waltham has prohibited solar energy systems like the one here in all but one to two percent of its land area, its zoning code violates the solar energy provision.

Like all municipalities, Waltham maintains the discretion to reasonably restrict the magnitude and placement of solar energy systems. An outright ban of large-scale solar energy systems in all but one to two percent of a municipality's land area, however, restricts rather than promotes the legislative goal of promoting solar energy. In the absence of a reasonable basis grounded in public health, safety, or welfare, such a prohibition is impermissible under the provision.

Conclusion. Because G. L. c. 40A, § 3, ninth par., prohibits Waltham from banning the solar energy system here, including its access road, from all but one to two percent of Waltham's land area, we affirm the judgment below.

Judgment affirmed.

All Citations

489 Mass. 775, 187 N.E.3d 1007

Footnotes

1 Inspector of buildings for Waltham.

2 We acknowledge the amicus briefs submitted by Allco Renewable Energy Limited; New England Legal Foundation; First Parish in Bedford, Unitarian Universalist; Michael Pill; the Commonwealth; Save the Pine Barrens, Inc., select board of Pelham, select board of Wendell, planning board of Buckland, planning board of Pelham, planning board of Shutesbury, planning board of Wendell, conservation commission of Wendell, Save Massachusetts Forests, Wareham Land Trust, Jones River Watershed Association, Concerned Citizens of Franklin County, and RESTORE: The North Woods; town of Charlton and town of Warren; and the Real Estate Bar Association for Massachusetts, Inc., and the Abstract Club.

We do not address in this opinion arguments made by amici that are not "sufficiently related" to the arguments raised by the parties. Police Dep't of Salem v. Sullivan, 460 Mass. 637, 640 n.6, 953 N.E.2d 188 (2011).

3 General Laws c. 240, § 14A, states, in pertinent part: "The owner of a freehold estate in possession in land may bring a petition in the land court against a city or town wherein such land is situated ... for determination as to the validity of a municipal ordinance, by-law or regulation ... which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land ...."

4 The Waltham zoning map is in the record. To determine the percentage of Waltham that is in an industrial zone, we, like the Land Court judge, used the geographic information system version of the zoning map, available at https://webgis.city.waltham.ma.us/GPV51/Viewer.aspx [https://perma.cc/WDX3-4CS4?type=image]. See Bask, Inc. v. Borges, Mass. Land Ct., No. 19 MISC 000529, 28 LCR 568, 575 n.48, 2020 WL 7688035 (Dec. 23, 2020) (where zoning map was in record, court took judicial notice of geographic information system version of map).

5 According to the zoning code, an accessory use in a residential zone is an "[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." An accessory use in a commercial zone is an "[a]ccessory use[ ] customarily incidental to commercial uses allowed by this chapter, including but not limited to day care, cafeteria and health club facilities for employees only, and further including satellite dish antennas and similar transmission devices used for private business purposes of businesses located on the lot."

6 For purposes of G. L. c. 40A, § 3, ninth par., a "solar energy system" is "a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating." G. L. c. 40A, § 1A.

7 Available at https://www.mass.gov/doc/ma-2050-decarbonization-roadmap/download [https://perma.cc/J593-CVNM].

2022 WL 4938498
Only the Westlaw citation is currently available.
Massachusetts Land Court,
Department of the Trial Court,.
Norfolk County.

KEARSARGE WALPOLE, LLC, Norfolk County, by and through its Board of County Commissioners, and Norfolk County Agricultural High School, by and through its Board of Trustees, Plaintiffs,
v.
John LEE, Susanne Murphy, Robert Fitzgerald, Mary Jane Coffey, Drew Delaney and David Anderson, as they are the Members of the Walpole Zoning Board of Appeals, and the Town of Walpole, Defendants.

MISCELLANEOUS CASE No. 21 MISC 000449 (KTS)
|
Dated: October 4, 2022

DECISION

By the Court. (Smith, J.)

***1** This is an appeal under G. L. c. 40A, § 17 from a decision of the Walpole Zoning Board of Appeals (the "Board"). The decision upheld the Walpole building commissioner's determination that a large-scale, ground-mounted solar photovoltaic array (the "Project") may not be constructed on land in a rural residential zoning district. The land is owned by Plaintiff, Norfolk County (the "County"), which intends to lease it to Plaintiff, Kearsarge Walpole, LLC ("Kearsarge"), for Kearsarge to develop and operate the Project. Plaintiff, Norfolk County Agricultural High School ("Norfolk Aggie"), has used the land in the past in connection with its curriculum and asserts it will continue to use the land in the future after the Project is completed.

The question on appeal is whether the Walpole zoning bylaw may lawfully preclude the construction and operation of a large-scale solar energy facility at the property. The parties have filed cross-motions for summary judgment as the material facts are not in dispute. I heard oral arguments in the Land Court on June 15, 2022. At the conclusion of the hearing, I requested further briefing from the parties in light of the recent decision of the Massachusetts Supreme Judicial Court in *Tracer Lane II Realty, LLC v. City of Waltham*, 489 Mass. 775 (2022). The court received supplemental memoranda from the parties on July 18, 2022.

For the reasons discussed below, I find that the Board's decision must be annulled because the Walpole zoning bylaw violates the protections provided for solar energy facilities by G. L. c. 40A, § 3, as articulated in the *Tracer Lane* decision.

Undisputed Facts[1]

1. The property in question is located at 1377 North Street in Walpole (the "Property"). It is owned by the County.

2. The Property is comprised of approximately 53 acres of land, portions of which have been used by Norfolk Aggie for grazing livestock. It is located in the Rural Residential zoning district under the Walpole zoning bylaw and zoning map.

3. Prior to June 2017, Norfolk Aggie expressed interest to the County in bringing solar energy to the school and to the classroom.

4. In June 2017, the County solicited proposals for the installation and operation of solar facilities on properties owned by the County and used for educational purposes by Norfolk Aggie (the "Solar Array RFQ").

5. The Solar Array RFQ identified the Property as one of the sites where the County intended to develop a solar facility.

6. The Solar Array RFQ also required any applicant "to develop a ninth through twelfth grade curriculum in solar energy [for Norfolk Aggie] that conforms to Common Core and Next Generation State Science Standards" (the "Solar Energy Curriculum").

7. In September 2017, Kearsarge was declared the

successful bidder under the Solar Array RFQ.

8. Thereafter, a negotiation process began between Kearsarge and the County under which Kearsarge proposed and refined its design of the solar energy facilities first described in its response to the Solar Array RFQ. In January 2020, Kearsarge, the County, and Norfolk Aggie entered into an "updated and restated" letter of intent (the "LOI"), which covered the construction of solar facilities at four locations in Walpole, including the Property.

***2** 9. Under the LOI, the solar facility proposed for the Property is a 5.0-Megawatt AC ground-mounted canopy facility that is to be sited on approximately 17.5 acres of the 53-acre parcel.

10. In the fall of 2020, Kearsarge constructed a parking lot solar facility and a rooftop solar facility on the Norfolk Aggie campus as contemplated by the LOI. Both facilities are currently operating and generate energy which is allocated to Norfolk Aggie. The facilities have also been incorporated into the curriculum at Norfolk Aggie.

11. On January 15, 2021, Kearsarge entered into an Energy Management Services Agreement (the "EMSA") with the County and Norfolk Aggie. The EMSA provided that Kearsarge would lease the Property from the County and develop and operate the Project there. Kearsarge would pay annual rent of $198,258 with annual increases of 1.5% for twenty years. In addition, energy produced by the facility would result in a discounted rate for the cost of electricity to the County and Norfolk Aggie. The Property would continue to be used as part of the Norfolk Aggie campus, but the solar energy facility would be owned and operated by Kearsarge.

12. On March 24, 2021, Kearsarge applied to the Walpole Planning Board for site plan review of the Project to be constructed at the Property.

13. On March 26, 2021, the Walpole building commissioner refused to sign the application because the "use is not allowed in the district." As a result, Kearsarge withdrew its site plan review application.

14. On May 11, 2021, Kearsarge applied to the building commissioner for a building permit to construct the Project at the Property.

15. On May 25, 2021, the building commissioner denied Kearsarge's application for three reasons. First, he found that the Project qualified as a "Large Scale Ground-Mounted Solar Photovoltaic" use that is not permitted in a Rural Residential zoning district. Second, he found that the zoning exemption for an educational use under G. L. c. 40A, § 3 was not applicable to the Project because its predominant purpose was not "educational-related." Third, he found that purpose of the zoning bylaw was to "protect our rural and residential districts from large scale commercial uses. Thus allowing these districts to maintain their residential identity." Kearsarge timely appealed the building commissioner's decision to the Board.

16. After a public hearing, the Board issued a decision upholding the building commissioner's determination.

17. In support of that decision, the Board found that the purpose for which the Property was to be leased—a large-scale ground-mounted solar facility—is not an essential government function of the County that would exempt that use from local regulation, that the Walpole zoning bylaw permits the construction of solar facilities in other zoning districts and, therefore, does not prohibit or unreasonably regulate the installation of solar energy systems in Walpole under G. L. c. 40A, § 3, and that the Project is not an educational use protected from local regulation by G. L. c. 40A, § 3 because its primary purpose is to generate revenue for the County with only an incidental benefit to the educational endeavors of Norfolk Aggie.

Applicable Zoning Provisions

***3** 18. Under the Walpole bylaw, the general purpose of all residential zoning districts is "to secure for residents a pleasant environment retaining as many natural features as possible and secure from the intrusion of incompatible and disruptive activities that belong in other zoning districts." Section 4.2.A. The Project is proposed for land in a Rural Residential zoning district. Rural Residential districts, in particular, have as their primary purpose "to provide an area for agriculture, open space, and lower density, single-family residential land use." Section 4.2.A(1). A large-scale ground-mounted solar energy facility is not allowed in this district.

19. However, Section 15 of the bylaw created a Large-Scale Ground-Mounted Solar Photovoltaic Overlay District ("SPOD") which permits the construction of large-scale ground-mounted solar facilities in zoning districts that fall within a SPOD. The express purpose of the SPOD bylaw is

"to promote the creation of new large-scale

> ground-mounted solar photovoltaic installations by providing standards for the placement, design, construction, operation, monitoring, modification and removal of such installations that address public safety, minimize impacts on scenic, natural and historic resources and to provide adequate financial assurance for the eventual decommissioning of such installations."

20. There are four SPODs in Walpole that cover properties whose underlying zoning are either Industrial or Limited Manufacturing. The amount of land area currently covered by the SPODs is between 1.85% and 2.07% of the total land area in Walpole.

21. The Property is not located in one of the four SPODs.

22. The Walpole zoning bylaw permits smaller scale solar facilities outside of a SPOD when they are accessory uses incidental to a primary use within each of the zoning districts in Walpole.

Discussion

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Hakim v. Massachusetts Insurers' Insolvency Fund*, 424 Mass. 275, 283 (1997); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711 (1991). The moving party bears the burden of affirmatively demonstrating that there is no triable issue of fact. *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). 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 summary judgment motion. *White v. Univ. of Mass. at Boston*, 410 Mass. 553, 556-557 (1991).

In this case, there are no material facts in dispute. The legal question before the court is whether the Project is protected from regulation by the Walpole zoning bylaw. The Plaintiffs argue that the Project is immune from regulation by the bylaw because (1) the County's proposed use constitutes an essential government function; (2) the Project, as a solar facility, is a protected use exempt from regulation under G. L. c. 40A, § 3; and (3) the Project includes an educational component that will be available to students at Norfolk Aggie which entitles it to protection as an educational use under G. L. c. 40A, § 3. I will address each argument in the order presented by the parties.

I. Essential Government Function

"The doctrine of essential government functions prohibits municipalities from regulating entities or agencies created by the Legislature in a manner that interferes with their legislatively mandated purpose, absent statutory provisions to the contrary." *Greater Lawrence Sanitary Dist. v. Town of N. Andover*, 439 Mass. 16, 21 (2003), citing *Town of Bourne v. Plante*, 429 Mass. 329, 332 (1999). Whether the action of such an agency or other state entity is protected from local regulation has most often involved the examination of the special legislation creating it which contains a specific statutory mandate delineating its functions. See, e.g., *Massachusetts Bay Transp. Authority v. Cit of Somerville*, 451 Mass. 80 (2008) (describing a statute which placed "the determination as to the character of its facilities ... within the exclusive authority of the MBTA board.") The essential government function doctrine, however, covers more than just the specific functions enumerated in the statute. "The immunity extends beyond the 'essential government function' to cover 'action reasonably related to that function.' " *Town of Bourne v. Plante*, 429, Mass. 329, 332 (1999).

***4** The cases that have addressed the scope of the essential government function doctrine focus on whether the uses in question were expressly authorized by statute. See *Greater Lawrence Sanitary Dist. v. Town of N. Andover*, 439 Mass. 16 (2003) (sanitary district was immune from local regulation that had the effect of interfering with the construction and operation of a sludge facility because the district's legislative mandate was to plan, build, and operate facilities for the treatment and disposal of wastewater and sludge); *Town of Bourne v. Plante*, 429 Mass. 329 (1999) (steamship authority was immune from municipal regulations on land leased from private entities for parking because the provision of adequate parking areas for users of the ferry service was reasonably related to the steamship authority's legislative mandate to provide adequate transportation to Nantucket and Martha's Vineyard); *Cnty. Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 380 Mass. 706 (1980) (special legislation authorizing county to construct and operate jail facility was immune from local zoning regulation which impeded the county commissioners from performing this statutory task); *Town of Freetown v. Zoning Bd. of Appeals of Dartmouth*, 33 Mass.App.Ct. 415 (1992) (special legislation authorizing construction and operation of a regional refuse disposal center immune from local zoning regulation); *Inspector of Buildings of Salem v. Salem State College*, 28 Mass.App.Ct. 92 (1989)

(construction of buildings on Salem State College campus was reasonably related to the legislative purpose of Massachusetts State College Building Authority so that it was not required to comply with city zoning ordinance). The point of this doctrine is to allow an agency or other state-created entity the freedom to pursue and accomplish its public mission without interference from a zoning statute that may apply to only one municipality. *Bourne,* 429 Mass. at 332.

The scope of the immunity is broad and applies not only to property and facilities owned by the agency or entity, but also to leased property and facilities. *Cnty. Comm'rs of Bristol v. Conservation Comm'n*, 380 Mass. at 713. It also extends to actions that are reasonably related to fulfilling the government entity's statutory purpose. *Greater Lawrence Sanitary Dist.*, 439 Mass. at 21-22.

In this case, the parties acknowledge that the essential government function doctrine applies to the County. The parties diverge, however, over the scope of the County's legislative mandate and whether leasing County land for the development of a ground mounted solar facility falls within one of the County's essential functions.

The Board takes a narrow view of the County's statutory mandate and the government functions that are essential to fulfill that mandate. It argues that the County's lease of property to Kearsarge for the construction and operation of a large-scale solar energy facility is not expressly authorized by general or special legislation and, therefore, the Project is not reasonably related to one of the City's essential government functions.

The Plaintiffs, on the other hand, take an expansive view of the County's essential functions. They have stitched together an argument that the leasing of County land for use as the site of a large-scale solar facility will generate revenue for the County that will fund its legislatively mandated government functions, will allow for the sale of electricity to the County and Norfolk Aggie at discounted rates which will save the County money to the benefit of all of its constituent cities and towns, will support the County's goal of reducing its carbon footprint, and will provide educational opportunities to the students at Norfolk Aggie. While creative in its construction, this argument stretches the essential government function doctrine beyond its intended limits.

The County's powers are broadly described in G. L. c. 34, §§ 1 *et seq.*, and include "buying and holding, for county uses, personal estate and land lying therein, and of contracting and doing other necessary acts relative to its property and affairs."[2] The County is expressly authorized to lease its land. G. L. c. 34, § 14. Also, within its authorized activities under G. L. c. 34, § 3, the County oversees the management of operations at the Norfolk Registry of Deeds and Land Court, the Norfolk Aggie, the Wollaston Recreational facility, and the trial court facilities in Norfolk County, and has broad responsibility for the County's conservation and open space land. To the extent that the County engages in any activities that are reasonably related to these affairs, they would constitute essential government functions that would be immune from regulation by the Walpole zoning bylaw. But that is as far as the essential government function doctrine goes.

***5** Here, the County intends to lease its land to Kearsarge so that Kearsarge can construct and operate a large-scale solar facility. The County will benefit financially from the Project in the form of annual lease payments, which the County can use to fund its other operations, and cost savings from the solar energy credits on the electric bills of the County and Norfolk Aggie. Fundamentally, it is a revenue generating and cost savings proposition for the County. Although the County's statutory powers do include the power to hold and lease land, as well as the power to enter into contracts relative to county property, it does not follow that every action the County takes pursuant to these powers is immune from local regulation under the essential government function doctrine. The question, then, is whether the mere collection of revenue and the cost savings for electricity that will result from the Kearsarge leasing arrangement are sufficiently related to an essential government function of the County that immunizes the Project from regulation by the Walpole zoning bylaw. I conclude that it does not.

The appellate cases make clear that the protections of the essential government function doctrine apply to those activities of the County that involve or are reasonably related to the use of land to fulfill a specific legislative mandate. The County's legislative mandate is set forth in G. L. c. 34, §§ 1 *et seq.* and includes the authority to lease its property for the purpose of generating revenue to fund its operations. However, the authority to lease county property does not extend the protections of the essential government function doctrine to the business of any tenant such that the tenant would enjoy complete freedom from zoning regulation. Otherwise, the County would be free to engage in any business or affair not specifically authorized by statute, without interference from local regulation, so long as it was conducted through the leasing of its real property. Such a broad mandate for the County's essential functions is not supported by General Laws Chapter 34 or the cases that have construed its provisions.

The County is also not specifically authorized to engage in the development and operation of a large-scale solar energy facility. That the arrangement with Kearsarge will generate revenue for the County does not cloak Kearsarge's business with the veneer of an essential government function. The incidental financial and other benefits of the Project, while real, are not "reasonably related" to the County's legislative mandate as described in Chapter 34. Even the possibility that the Property, once developed and operating, may be used in connection with the Solar Energy Curriculum at Norfolk Aggie is too attenuated from the County's essential functions to shield this Project from regulation by Walpole's zoning bylaw. Furthermore, the County does not argue that the essential government function doctrine applies because the Project is reasonably related to the management of operations at Norfolk Aggie; rather, it makes a blanket argument that leasing property for the purpose of raising revenue exempts the Project from the zoning bylaw. This argument reaches too far. Regulation of the Project by the Walpole zoning bylaw will not prevent the County from satisfying its legislative mandate and, thus, is permissible.

II. Protection of Solar Energy Systems Under G. L. c. 40A, § 3

The Legislature amended G. L. c. 40A, § 3 in 1987 to add paragraph 9 for the purpose of promoting solar energy generation throughout the Commonwealth. In particular, paragraph 9 protects the installation of solar energy systems from unreasonable regulation by local zoning bylaws 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 scope of this protection was not previously explored by any Massachusetts appellate court until this summer when the Supreme Judicial Court ("SJC") decided *Tracer Lane Realty II, LLC v. City of Waltham*, 489 Mass. 775 (2022).

***6** *Tracer Lane* involved a challenge to the Waltham zoning bylaw brought by a developer of solar energy facilities who had been informed by Waltham city officials that its proposed construction of an access road to its project in Lexington would not be permitted in a residential zone. The developer asserted that such a prohibition constituted an unreasonable regulation of a solar energy facility in violation of G. L. c. 40A, § 3.

The Waltham zoning bylaw in question did not expressly permit solar energy systems in any zoning district, but contained language that, if generously construed, allowed large-scale ground-mounted solar energy facilities in all industrial zoning districts and allowed rooftop or other smaller scale solar energy facilities as "accessory uses" in residential and commercial zones. The land area in the industrial zones in Waltham comprised approximately 1-2% of the total land area of the city. In deciding whether the zoning bylaw was a valid regulation of solar facilities under G. L. c. 40A, § 3, the SJC balanced the interest advanced by the bylaw against its impact on the installation of solar energy facilities that the statute is intended to promote. It measured the competing interests as follows:

> "The interest that Waltham's zoning code presumably advances—preservation of each zone's unique characteristics—is legitimate.... And, as just discussed, municipalities have more flexibility in restricting solar energy systems than they do, for instance, in the context of education, religion, or child care. Nevertheless, Waltham's zoning code unduly restricts solar energy systems."

Id. at 781.

The court reasoned that the development of stand-alone large-scale solar energy facilities, in particular, is "key to promoting solar energy in the Commonwealth." *Id.* Where only 1-2% of the land in Waltham is zoned for a stand-alone solar energy facility, and nothing else indicating that such a "stringent limitation is 'necessary to protect public health, safety or welfare,' " the bylaw violated G. L. c. 40A, § 3. The court concluded that, while municipalities may reasonably restrict the magnitude and placement of solar energy facilities, the

> "outright ban of large-scale solar energy systems in all by one to two percent of a municipality's land area ... restricts rather than promotes the legislative goal of promoting solar energy. In the absence of a reasonable basis grounded in public health, safety, or welfare, such a prohibition is impermissible under [G. L. c. 40A, § 3, para. 9]."

Id. at 782.

In this case, the Walpole zoning bylaw expressly permits, as a matter of right, large-scale ground-mounted solar energy facilities in the zoning districts that fall within one of the four SPODs. The land area covered by the SPODs makes up approximately 1.85% to 2.07% of the total land area in Walpole. Under *Tracer Lane*, this limitation on the area available for large-scale facilities may only survive scrutiny under G. L. c. 40A, § 3 if it is rooted in the protection of public health, safety, or welfare.

The interests protected in the Rural Residential zones in Walpole are agriculture, open space, and an area for lower

density, single-family residential land use. Section 4.2.A(1). While preserving these interests is a legitimate goal of the bylaw, absent a finding of a significant detriment to the interests of public health, safety, or welfare, the town cannot prohibit a large-scale ground-mounted solar facility in a Rural Residential zone.

***7** The Board asserts that the bylaw, in general, is friendly to the installation of solar energy facilities as large-scale facilities are permitted as a matter of right in a SPOD and smaller scale facilities are permitted as accessory uses in other zoning districts. The Board also argues that there is other land in industrial and limited manufacturing districts, but not currently covered by a SPOD, that may be available in the future for a large-scale facility with town meeting approval.[3] By and through this argument, the Walpole zoning bylaw falls squarely within the analysis provided by the SJC in *Tracer Lane*.

The Walpole zoning bylaw advances the important municipal purpose of preserving open space and agricultural land in the Rural Residential zones in Walpole. Where the bylaw advances a municipal purpose outside the umbrella of public health, safety, and welfare—like preserving open space and agricultural land—*Tracer Lane* suggests that the bylaw may only preclude development of a solar facility if there is ample other land area in the municipality available for large-scale solar facilities.

Here, like *Tracer Lane*, only approximately 2% of the land in Walpole is available for the installation of a large-scale solar energy facility without any demonstration that the prohibition in other zoning districts advances the interests of public health, safety, and welfare. Thus, the outright ban of large-scale solar facilities in the Rural Residential zone unduly restricts rather than promotes the legislative goal of G. L. c. 40A, § 3 of promoting solar energy. Thus, Walpole's prohibition against solar facilities in the rural residential zone is invalid under G. L. c. 40A, § 3. Walpole may not deny Kearsarge a building permit for the Project because the Property is located in the Rural Residential zone. For this reason, the Board's decision is annulled.

III. Dover Amendment – Educational Purpose

Because I have ruled that the Walpole zoning bylaw that prohibits large-scale solar energy facilities in residential districts is invalid, whether the Project is protected as an educational use under the Dover Amendment is moot. Nonetheless, I will address the arguments raised by the parties as it may provide guidance moving forward.

The Dover Amendment exempts from local zoning laws those uses of land and structures that are used for "educational purposes." *Regis College v. Town of Weston*, 462 Mass. 280, 281 (2012). It strikes a balance between preventing discrimination by a municipality against educational uses and respecting legitimate municipal concerns for the regulation of land uses. *Trustees of Tufts Coll. v. Medford*, 415 Mass. 753, 757 (1993). Whether a proposed use is sufficiently related to education to be protected is determined by a two-prong test. *McLean Hospital Corp. v. Town of Lincoln*, 483 Mass. 215, 220 (2019). First, the use must have as its "bona fide goal something that can reasonably be described as 'educationally significant.' " *Regis College*, 462 Mass. at 285. Second, "the educationally significant goal must be the 'primary or dominant' purpose for the which the land or structures will be used." *Id.*

In this case, the Solar Array RFQ mandated that the successful bidder develop a Solar Energy Curriculum for use at Norfolk Aggie. It is undisputed that Norfolk Aggie has already incorporated the parking lot and rooftop solar facilities into its curriculum. These facts demonstrate that the Project has as a bona fide goal which is educationally significant under the first prong of *Regis College*. However, this goal is not the primary or dominant purpose of the Project.

***8** The primary purpose of the Project is to generate revenue for the County to offset operating costs and deliver a discount on electricity bills to the County and Norfolk Aggie. Indeed, the EMSA between the County and Kearsarge identifies the purpose of the Project as follows: "The County's intent was to use this Solar Project to address, meet or exceed several of its goals, objectives, strategies, and actions concerning the County's and School's fiscal needs." It would be a stretch to conclude that, under *Regis College* and *McLean Hospital*, the predominant purpose of the Project is educational. The predominant purpose of the Project is financial with only, at best, an incidental benefit to the educational pursuits of Norfolk Aggie. Thus, the Project is not protected from regulation by the Walpole zoning bylaw as an educational use under the Dover Amendment.

Conclusion

For the reasons set forth in this Decision, I find and rule that the decision of the Board which upheld the building inspector's decision to deny Kearsarge a building permit

is annulled. As such, the Plaintiffs' motion for summary judgment is ALLOWED and the Board's cross-motion for summary judgment is DENIED. In reaching this Decision, I have reviewed all of the material submitted by the parties, including that which is the subject of the Plaintiffs' motion to strike the affidavit of Patrick Deschenes. The Plaintiffs' motion to strike is, therefore, denied.[4] The matter is remanded for the purpose of allowing Kearsarge to file an application for site plan review of its proposed project. There is evidence in the record that, during the public hearing process, the Board received comments from town departments concerning the delineation of wetland jurisdictional boundaries on the Property, and design elements that implicated a town water easement and the protection of a water aquifer on or near the Property. This Decision makes no determination regarding the legitimacy of those concerns or their impact on the design of the Project or the site plan review process, including whether a conservation commission filing is necessary or appropriate.

Judgment will enter annulling the decision of the Board.

All Citations

Not Reported in N.E. Rptr., 2022 WL 4938498

Footnotes

1 The undisputed facts that are germane to this decision are taken from the Parties' respective Statements of Material Facts.

2 The County's property and affairs are managed by its commissioners who are elected officials who serve a four-year term. G. L. c. 34, § 4.

3 As evidence that such approval could be achieved at a town meeting, the Board points to one or more previous occasions in the past when the SPOD bylaw has been amended.

4 The court acknowledges the motion and accompanying amicus curiae brief filed by Walpole Preservation Alliance, Inc. which sets forth reasons for its opposition to the Project.