



Land Use & Zoning and Environmental Law Sections Webinar on September 21, 2022

Tracer Lane II Realty, LLC v. City of Waltham

Benefits of Decision

<u>Solar Project Proponents</u>	<u>Municipalities</u>
<ul style="list-style-type: none"> • Section 3’s Solar Provision intended “to Protect Solar Energy Systems from Local Regulation when” enacted in 1985. • “When interpreting this Paragraph, We Keep in Mind that it Was Enacted to Help Promote Solar Energy Generation throughout the Commonwealth.” • Recognition that “Standalone, Large-Scale Systems, Not Ancillary to Any Residential or Commercial Use, Are Key to Promoting Solar Energy in the Commonwealth.” • In Construing Solar Exemption in § 3, Court May “Turn to the Abundant Case Law Interpreting that Section’s Other Paragraphs” Regardless of Municipalities’ Greater Authority to Regulate 	<ul style="list-style-type: none"> • Statutory Language for Solar Exemption “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.” • Thus, Unlike with Other Dover Uses, Municipalities May Enact Prohibitions and Unreasonable Regulations, if “Necessary to Protect the Public Health, Safety or Welfare.” • “[A]ll Municipalities . . . Maintain[] the Discretion to Reasonably Restrict the Magnitude and Placement of Solar Energy Systems.” • “In the Absence of a Reasonable Basis Grounded in Public Health, Safety, or

<p>Solar Facilities than Other Exempt Uses.</p> <ul style="list-style-type: none"> • “Ancillary Structures,” such as Access Drives, Are to Be Considered “to Be Part of the Protected Use.” • Where Municipality “Has Prohibited Solar Energy Systems . . . in All But One to Two Percent of its Land Area, its Zoning Code Violates the Solar Energy Provision.” • Facial Challenges Can Succeed on Summary Judgment (as a Matter of Law). • Relatedly, If Facial Challenges Can Succeed as a Matter of Law, then More Solar Bylaws Should Be Susceptible to Invalidation by the AG’s Office During Initial Review. 	<p>Welfare, . . . a Prohibition [of Solar Facilities from All But 2% of a Municipality] Is impermissible under the” Solar Exemption of § 3.</p> <ul style="list-style-type: none"> • Perhaps in the Presence of Such Evidence, Such a Prohibition Would Be Permissible. • “The Interest that Waltham's Zoning Code Presumably Advances – Preservation of each Zone’s Unique Characteristics – Is Legitimate[,]” <i>i.e.</i>, Integrity of Zoning District Remains a Legitimate Zoning Interest
<p style="text-align: center;"><u>Entire Land Use Bar</u></p> <ul style="list-style-type: none"> • “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.” • Continuing with Trend of SJC’s Liberalization of Rules of Evidence as They Relate to Judicial Notice and Local Zoning Law, Courts May Take Judicial Notice of Geographic Information from Zoning Maps. 	

Questions Left Unanswered

- What constitutes unreasonable regulation? What is regulation divorced from the health, safety, or welfare nexus?
- What is the standard for the quantum and quality of evidence for the health, safety or welfare nexus such that prohibitions and unreasonable regulations governing solar facilities would be permissible? Who bears the burden? (Generally, it is the Dover Amendment use proponent who bears the burden, but does this principle extend to proving that a regulation is not so necessary?)
- Is there a distinction between allowable accessory structures and uses to those protected under G.L. c. 40A, § 3, and structures and uses that are subsumed within and part of the integrated whole of such protected uses? How broad of a protective net does § 3 cast?
- Whether uses protected by the Dover Amendment may be prohibited in some zoning districts within a municipality, if they are allowed in others. (We know that this scheme is impermissible, if the districts in which the use is allowed amounts to 2% of the territorial jurisdiction of the municipality.)
- What if there were “a reasonable basis grounded in public health, safety, or welfare”? Would a prohibition against solar facilities except in 1%-2% of a municipality’s territorial jurisdiction, then, pass muster?
- May Dover Amendment uses be made subject to discretionary permitting requirements?
- Whether large-scale, ground-mounted solar farms constitute “establishments for the generation of power for public or private consumption purposes that are further regulated by Massachusetts General Laws.”