COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-13195

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TRACER LANE II REALTY, LLC,
Plaintiff-Appellee

vs.

CITY OF WALTHAM, ET AL.,
Defendant-Appellants

_____

ON APPEAL FROM THE JUDGMENT OF THE
MASSACHUSETTS LAND COURT

_____

BRIEF OF AMICI CURIAE

THE REAL ESTATE BAR ASSOCIATION FOR
MASSACHUSETTS, INC. AND THE ABSTRACT CLUB

IN SUPPORT OF PLAINTIFF-APPELLEE

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Kate Moran Carter (B.B.O. #663202)
Charles N. Le Ray (B.B.O. #600196)
Dain, Torpy, Le Ray, Wiest & Garner, PC
745 Atlantic Ave., Suite 500, Boston, MA 02111
Tel. No.: (617) 542-4800
kcarter@daintorpy.com, cleray@daintorpy.com

Nicholas P. Shapiro (B.B.O. #673490)
Phillips & Angley
One Washington Mall, Boston, MA 02108
Tel. No.: (617) 367-8787
nshapiro@phillips-angley.com

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the amici curiae state that (1) the Real Estate Bar Association for Massachusetts, Inc. ("REBA"), is a nonprofit corporation organized under the laws of the Commonwealth of Massachusetts, and (2) The Abstract Club is an unincorporated, voluntary association (collectively, the "Amici"). No publicly traded corporation owns more than 10% of the stock of either of the Amici.

DECLARATION REGARDING PREPARATION OF AMICI BRIEF

In accordance with Rule 17(c)(5) of the Rules of Appellate Procedure, the Amici declare that the undersigned counsel authored the brief, and that no party or party's counsel authored it in whole or in part. The Amici also declare that no outside party, person, or entity contributed money intended to fund preparation or submission of this brief.

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STATEMENT OF INTERESTS OF AMICI CURIAE

REBA is the largest specialty bar in the Commonwealth, a non-profit corporation that has been in existence for over 100 years. It has nearly 2,000 members practicing throughout the Commonwealth. Through its meetings, educational programs, publications, and committees, REBA assists its members in remaining current with developments in the field of real estate law and practice, and in sharing in the effort to improve that practice. REBA also promulgates title standards, practice standards, ethical standards, and real estate forms, providing authoritative guidance to its members and the real estate bar generally as to the application of statutes, cases, and established legal principles to a wide variety of circumstances that practitioners face in evaluating titles and handling real estate transactions.

The Abstract Club is a voluntary association of experienced real estate law lawyers. Founded over 150 years ago, with membership limited by its by-laws to 100 members, it is comprised of lawyers who are considered leaders in the field of real estate law.

REBA and the Abstract Club have formed a Joint Amicus Committee, a joint committee of the two organizations comprised of real estate lawyers with many years of experience. From time to time, the Joint Amicus Committee files amicus briefs on important questions of law. On several occasions it has been requested to do so by this court or the Appeals Court. All Committee members serve without compensation.

Members of both REBA and The Abstract Club represent project proponents and abutters alike before local boards and in the courts of this Commonwealth. These representations often involve the use of land or structures for solar energy systems, religious purposes, educational purposes, or other uses afforded protections from local zoning control under the so-called Dover Amendment, G. L. c. 40A, § 3. The Amici and their members therefore occupy a unique vantage point and can attest, with particular authority, to the importance of doctrinal consistency on the issue presented by this appeal.

STATEMENT OF THE CASE

The Amici adopt the Statement of the Case provided by the Plaintiff-Appellee in their brief.

STATEMENT OF FACTS

The Amici adopt the Statement of Facts provided by the Plaintiff-Appellee in their brief.

SUMMARY OF ARGUMENT

Section 3, in particular, and the Zoning Act, generally, are the primary checks and balances on broad municipal Home Rule authority over zoning. The predominant purpose of Section 3 is to preempt and prohibit local interference with uses the Legislature has determined are socially-productive, but frequently locally-unpopular. [pp.39-43]. For nearly 50 years, the Massachusetts Judiciary has tried to strike a proper balance between robustly protecting exempt uses, while reserving municipal authority reasonably to regulate such uses, through density and dimensional regulations (preferably tailored to such uses). [pp. 15-23]. In so doing, the binding authorities have construed exempt uses broadly; and treated exempt uses equally, applying the same standard, first fully articulated in Trustees of Tufts College v. Medford ("Tufts"), 415 Mass. 753 (1993), to all manner of exempt uses, regardless of minor textual differences among § 3's many paragraphs.

While the jurisprudential themes have remained constant, the lived experience under § 3 tells a different story. [pp.31-36]. Cities and towns continue to ignore and challenge the Legislature's intent to exempt certain uses from local prohibition. Nearly 30 years after Tufts and despite repeated judicial exhortations, most municipalities, like Waltham here, still have failed to adopt tailored zoning for exempt uses. In courtrooms around the Commonwealth, cities and towns continue, to this day, to claim that exempt uses are not exempt; that being exempt allows a use to be prohibited in some, if not most, zoning districts; and that (frequently discretionary) permits for exempt uses were reasonably withheld.

The reversal rate, reflected by the binding authorities, shows that municipalities have an abnormally high chance of convincing trial courts that State-law supremacy should bow to Home Rule. [pp.35-36]. Even the appellate courts have struggled consistently to apply the Tufts standard, and this court itself has repeatedly been split in Section 3 cases. Therefore, in sum, in spite of the Legislature's injunction, proponents of exempt uses can expect municipal overreach and/or years of

litigation, at best. And, frequently victory comes too late. Justice delayed is all too often justice denied, as obstruction and delay result in many exempt uses never being developed and operated, regardless of ultimate judicial outcomes.

Solar facilities fit snugly into this sad narrative. The Legislature showed no intent to treat solar as a lesser class of exempt use when it amended Section 3 in 1985. [pp.24-26]. Indeed, energy independence, in the face of Russian aggression, and responding to climate change are no less of policy imperatives today than in 1985. What has changed, what is different, is that there now has been nearly 50 years of municipal chaffing at State-law supremacy, 50 years of cities and towns trying to evade Section 3's mandates.

To counsel's knowledge, this is the first instance in which the amici solicitation question has been posed by this court concerning an exempt use. In dicta, the appellate courts have strongly suggested or outright stated that exempt uses are to be allowed, categorically, as-of-right in all zoning districts. For the reasons that follow, this court should use this case to announce such a bright-line rule.

ARGUMENT

I. Constitutional Context: Home Rule and State-Law Preemption.

Massachusetts is a so-called "strong Home Rule" jurisdiction. See MASS. CONST. art. 89.[1] [Add.60]. In the area of land-use regulation via zoning, municipal Home Rule authority is broad. See, e.g., Roma III, Ltd. v. Board of Appeals of Rockport ("Roma"), 478 Mass. 580, 585-586 (2018), citing Bobrowski, Handbook of Massachusetts Land Use and Planning Law, § 2.03 (3d ed. 2011) ("Legislature has long bestowed broad authority on cities and towns to regulate the use of land through various zoning enactments"). "[T]he zoning power is one of a city's or town's independent municipal powers included in art. 89, § 6's broad grant of powers to adopt ordinances or by-laws for the

[1] Wickersham, Note: The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes, 18 HARV. ENVTL. L. REV. 489, 502 (Summer 1994) (acknowledging Massachusetts as strong Home Rule jurisdiction, while noting and providing examples of binding judicial authorities affirming state-law preemption of local zoning); Provost, Article and Comment: The Massachusetts Hazardous Waste Facility Siting Act: What Impact on Municipal Power to Exclude and Regulate?, 10 B.C. ENVTL. AFF. L. REV. 715, 761 (1982) (reciting legislators' comments about state-law preemptive statute, and substantiating that Home Rule authority is not merely codified in our constitutional structure, but also entrenched in our political culture in Massachusetts).

protection of the public health, safety, and general welfare." Board of Appeals of Hanover v. Housing Appeals Committee in Dep't of Community Affairs, 363 Mass. 339, 359 (1973).

However, as an excessively strong localist center of constitutional gravity can make the implementation of state-wide policy goals very difficult, if not impossible,[2] "[t]he adoption of the Home Rule Amendment [did] not alter[] the Legislature's supreme power in zoning matters as long as the Legislature acts in accordance with § 8" of the Amendment. Board of Appeals of Hanover, 363 Mass. at 360. "[M]unicipalities can pass zoning ordinances or by-laws as an exercise of their independent police powers but these powers cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature in

[2] See, e.g., Gomes, What Price, Home Rule?, Boston Globe, June 8, 2002, at A17. Because this case requires this court to construe an expressly preemptive statute, how this court answers the dispositive inquiry will have a significant impact on many state-wide policies, enacted by the Legislature, affecting zoning. See, e.g., St. 2020, c. 358, § 18, adopting G. L. c. 40A, § 3A (creating multi-family as-of-right mandates for so-called MBTA communities).

accordance with § 8's provisions." Id. See Sturges v. Chilmark, 380 Mass. 246, 253 (1980).

For this reason, while "art. 89's adoption has 'effected substantial changes in the legislative powers of the General Court and . . . cities and towns[,]'" Board of Appeals of Hanover, 363 Mass. at 357, quoting Opinion of the Justices, 356 Mass. 775, 787 (1969), the Home Rule Amendment did not inaugurate any significant doctrinal shift in this court's jurisprudential approach to determining the legality of local law, in relation to state law. See Bloom v. Worcester, 363 Mass. 136, 149-157 (1973). The standard has remained the same after the Amendment's enactment as it was before.[3]

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[3] The standard, first set by the seminal Bloom decision, was "derived from judicial treatment of two analogous situations": (1) "when it is asserted that Federal legislation has preempted a particular field so that State legislation in the same field is barred"; and (2) "when it has been asserted that a local ordinance or by-law is invalid because it was enacted in violation of a statute which allowed local regulation only if 'not repugnant to law' (G. L. c. 40, § 21) or only if not 'inconsistent' with the laws of the Commonwealth" before the adoption of the Home Rule Amendment. Id. at 150-151. The latter standard, however, was already "'more or less analogous to the power of the State to make regulations for certain phases of interstate commerce, which are valid until they are displaced or abrogated by an Act of Congress regulating these same phases.'" Id. at 151 n. 10, quoting Milton v. Donnelly, 306 Mass. 451, 458 (1940). See, e.g., John Donnelly &

The standard for determining the legality of local law, in relation to its consistency with state law, has been coextensive with principles of Federal preemption under the Supremacy Clause, since well before the Home Rule Amendment was enacted, and thus it remains to this day. See West Street Assocs. LLC v. Planning Board of Mansfield, 488 Mass. 319, 322 (2021), quoting Connors v. Boston, 430 Mass. 31, 35 (1999) ("In determining whether local action is inconsistent with State law, similar to the Federal preemption analysis, 'the touchstone of the analysis is whether the State Legislature intended to preempt the city's authority to act'"); Bloom, 363 Mass. at 155 ("In determining whether a local ordinance or by-law is 'not inconsistent' with any general law within the meaning of those words in § 6 of the Home Rule Amendment and in § 13 of the Home Rule Procedures Act, the same process of ascertaining legislative intent must be performed as has been performed in the Federal preemption cases and in our own cases involving 'inconsistent' or 'repugnant' local ordinances or by-laws"). See also note 3, supra.

Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 212 (1975), quoting Milton, supra.

Within this constitutional framework, the Zoning Act is **the** principal check on excessive localism in land-use policy, frustrating the Legislature's state-wide policies and goals. And, Section 3 is **the** source of state-law protection for, among others, socially productive uses that are frequently locally unpopular. Thus, this court is construing the scope of an express preemption provision of a state statute that serves an essential function in our Home Rule constitutional system, in relation to land use policy. This context must be considered in rendering a decision.

Although the broad vision of Section 3 has been correctly construed by the Massachusetts Judiciary from the start, the tensions between Home Rule authority and the supremacy of the General Laws and Declaration of Rights has led to unpredictable, internally inconsistent, and downright volatile decisional law for exempt uses under the Zoning Act. E.g., compare, Campbell v. City Council of Lynn, 415 Mass. 772, 775 (1993) ("[a]s a general rule, a municipality cannot condition the use of property for an educational purpose on the grant of a special permit"); with Trustees of Boston College v. Board of Alderman of Newton, 58 Mass. App. Ct. 794, 802 (2003)

("[w]e agree with the judge that the special permit procedure, in itself, cannot be declared invalid in all circumstances involving educational institutions"). This case provides this court with a chance to do significant structural work to make Section 3 operate more effectively, for its intended constitutional purpose, cleanly and predictably.

REBA and the Abstract Club respectfully request that this court exercise its power of superintendency to improve land use law in Massachusetts, by answering the amicus solicitation question categorically, in a manner that affords robust protection for exempt uses. Respect must be paid to the thoughtful judicial minimalism of the trial judge below, but the binding principle, on the relevant issue, should be an easily administrable, bright-line rule: Section 3 of the Zoning Act, categorically, without qualification, bars municipalities from prohibiting any exempt uses in any zoning districts, regardless of whether exempt uses are allowed in some districts. Such regulation is impermissible and constitutes per se unreasonable regulation in violation of the statute.

Categorical, bright-line rules are not without their dangers; they can reflect the use of a machete

when a scalpel would be more appropriate. But, here, the plain meaning of the statute was to act categorically. Intrinsic to being an exempt use is that it, generally, be allowed as-of-right, literally, everywhere. Cities and towns will decry the loss of authority and policy flexibility. However, that is the point of a state zoning act in a strong Home Rule jurisdiction: Section 3's "purpose is "'to prevent local interference with the use of real property' -- whether of land or of structures thereon for the exempt purposes identified in the statute." Petrucci v. Westwood Board of Appeals, 45 Mass. App. Ct. 818, 822 (1998), quoting Watros v. Greater Lynn Mental Health & Retardation Ass'n, 421 Mass. 106, 113 (1995).

A bright-line rule would not eliminate municipal authority outright under the cooperative federalist schema contemplated by the Dover Amendment case law to date. Cities and towns would still be able to ensure that Dover Amendment uses, while allowed everywhere, are not permitted as-of-right at every property in Massachusetts. Reasonable dimensional regulations, truly needed for public health, safety, and welfare, and "specifically tailored to the protected use" as exhorted by the case law, will continue naturally to

cull inappropriate parcels from consideration for protected uses. Rogers v. Norfolk, 432 Mass. 374, 379 (2000) quoting Tufts, 415 Mass. at 771 ("'Ideally, municipal restriction 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'") (emphasis in original); Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 34 (1979) (severing facially reasonable "bulk, dimensional, and parking regulations" from the bylaw provisions offending Dover Amendment; "requiring site plans, information statements, and special permits for educational uses" in ordering remedy).[4]

[4] "Density regulations serve independent and important public interests that cannot be fully achieved through use restrictions. See Bransford v. Zoning Board of Appeals of Edgartown, 444 Mass. 852, 860-861, 832 N.E.2d 639 (2005) (Greaney, J., concurring), and authorities cited (reasoning and result subsequently adopted in Bjorklund v. Zoning Board of Appeals of Norwell, 450 Mass. 357, 358, 878 N.E.2d 915 [2008]); Opinion of the Justices, 234 Mass. 597, 604-605, 127 N.E. 525 (1920). Logically, there is no reason why protection as a preexisting nonconforming use should exempt a lot from generally applicable density regulations, or vice versa. Cf. G. L. c. 40A, § 3, second and third pars. (prohibiting municipalities from categorically barring certain uses of land but

In the final accounting, given the intended effect to Section 3's limits on local authority is necessary to avoid the collapse of the Home Rule structure, to prevent local self-interest from supplanting the Legislature's clearly-stated goals for the entire Commonwealth. An overly diffused and effectively unreviewable localist power would render this Commonwealth ungovernable. See 1 Records of the Federal Convention of 1787 24 (Farrand ed. 1911) (Articles of Confederation proved unworkable and failed because Federal "government could not defend itself against incroachments from the states" and "was not even paramount to the state constitutions"). Thus, even from the vantage of wanting to preserve the Home Rule system, this court should adopt the proposed, bright-line rule.[5]

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allowing them to impose on those uses reasonable density regulations)." Shirley Wayside Ltd. P'ship v. Board of Appeals of Shirley, 461 Mass. 469, 478 n. 10 (2012).

[5] But see Freemark, Steil & Thelen, Varieties of Urbanism: A Comparative View of Inequality and the Dual Dimensions of Metropolitan Fragmentation, POLITICS & SOCIETY, Vol. 48(2), 235-174 (2020); Barron, Frug & Su, Dispelling the Myth of Home Rule: Local Power in Greater Boston (2003 ed.); Fennell, Book Review: The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies By William A. Fischel, 112 YALE L.J. 617

II. Construing G. L. 40A, § 3: Express Preemption, Statutory Text, and Relevant Decisional Law.

"[L]egislative intent to preclude local action must be clear." West Street Assocs., 488 Mass. at 322, citing Bloom, 363 Mass. at 154. The intent to preempt local law "can be either express or inferred." St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. of Springfield ("St. George"), 462 Mass. 120, 126 (2012). Here, as in St. George, the "Legislature has made an explicit indication of its intention in this respect". Id., quoting Wendell v. Attorney Gen., 394 Mass. 518, 524 (1985).

Section 3 is titled "Subjects which zoning may not regulate; exemptions."[6] A statute's title may be considered in its construction. See Board of Appeals of Hanover, 363 Mass. at 352, citing Silverman v. Wedge, 339 Mass. 244, 245 (1959). Section 3 exempts a series of uses of land and structures from local

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(2002); Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 COLUMBIA LAW REV. 1 (1990).

[6] Section 3's title continues with "public hearings; temporary manufactured home residences," Section 3's only textual reference to public hearings relates to limitations on restricting the use of land or structures by a public service corporation. G. L. c. 40A, § 3.

zoning in Massachusetts. See Roma, 478 Mass. at 586, quoting Sturges, 380 Mass. at 253 ("'Legislature intended to permit cities and towns to adopt any and all zoning provisions which are constitutionally permissible, subject, however, to limitations expressly stated in that act (see, e.g., G. L. c. 40A, § 3) or in other controlling legislation'") (emphases added).

"Where the Legislature demonstrates its express intention to preempt local action, inconsistent local regulations are invalid under the Home Rule Amendment." St. George, 462 Mass. at 129, citing Connors, 430 Mass. at 39-40. This inquiry ultimately amounts to an ordinary question of statutory construction. See id. at 126-130. However, the inquiry is also conducted with a particular eye to the intra-state federalist system created by the Home Rule Amendment and state-law supremacy within that system. See, e.g., West Street Assocs., 488 Mass. at 322-324. Thus, while "[m]unicipalities generally are afforded 'considerable latitude' in self-government in matters of local concern[,]" id. at 322, quoting Bloom, 363 Mass. at 154; "[t]here is no presumption, as in the case of due process or equal protection challenges to

legislation, in favor of the constitutionality of a by-law challenged on home rule grounds as inconsistent with a statute." Wendell, 394 Mass. at 524.

The Section 3 case law has followed this required pattern. The binding authorities have started, as they must, with the express language of the statute. See, e.g., McLean Hospital Corp. v. Lincoln, 483 Mass. 215, 220 (2019), quoting G. L. c. 40A, § 3, second par.; Petrucci, 45 Mass. App. Ct. at 821 (1998) ("[e]ach of [Section 3's] words must be read literally so as to give them their customary meaning"). Section 3 contains express, preemptive exemptions from local zoning for "agriculture",[7] "educational", "religious", "child care facility", and "solar energy systems [and] structures" uses.[8] All are socially-productive uses that are frequently unpopular locally. Each exemption employs similar syntax, prohibiting cities and towns

[7] As well as "aquaculture, silviculture, horticulture, floriculture or viticulture" uses.

[8] Paragraphs 6, 7 and 9 of G. L. c. 40A, § 3 exempt from local zoning regulation temporary mobile homes to be used after the destruction of a home by force majeure, handicapped access ramps and licensed amateur radio antennae, respectively. This brief focuses on the exempt uses that have been the subject of substantial judicial treatment.

from prohibiting such uses, while preserving limited regulatory authority in cities and towns.

In light of Section 3's remedial purpose, protecting socially-productive uses, these exemptions have been ascribed "expansive," "broad," and "comprehensive" -- though plain meaning -- definitions.[9] This broadly-defined protection for

[9] See McLean Hospital, 483 Mass. at 216, 219-226 ("educational" uses include residential life skills program for young men who exhibit extreme emotional dysregulation); Regis College v. Weston, 462 Mass. 280, 284-394 (2012) ("educational" uses may include age-restricted residential housing with mandatory educational component); Watros, 421 Mass. at 115 ("educational" uses include residence for developmentally challenged adults); Gardner-Athol Area Mental Health Assoc. v. Zoning Board of Appeals of Gardner, 401 Mass. 12, 13 (1987) ("educational" uses include "residential care facility for four adults with mental disabilities"); Rosenfeld v. Zoning Board of Appeals of Mendon, 78 Mass. App. Ct. 677, 680 (2011), quoting Bateman v. Board of Appeals of Georgetown, 56 Mass. App. Ct. 236, 243 (2002), ultimately quoting Steege v. Board of Appeals of Stow, 26 Mass. App. Ct. 970, 971-972 (1988) ("agriculture" uses include horse stable and riding academy); Modern Cont'l Constr. Co. v. Building Inspector of Natick, 42 Mass. App. Ct. 901, 901-903 (1997) ("agriculture" uses include slaughter house for animals raised on premises); Building Inspector of Sturbridge v. McDowell, 35 Mass. App. Ct. 924, 925-926 (1993) ("agriculture" uses include dog breeding); Mansfield v. Curvin, 22 Mass. App. Ct. 401, 402-404 (1986) ("agriculture" uses include piggery); Commissioner of Code Inspection of Worcester, v. Worcester Dynamy, Inc., 11 Mass. App. Ct. 97, 99-100 (1980) ("educational" uses include dormitories). C.f. Building Inspector of Peabody v. Northeast Nursery, 418 Mass. 401, 404-405 (1994) ("agriculture" uses do not include nursery where no trees grown); Tanner v.

exempt uses applies to the use of both land and structures, both accessory and principal, and either to owners or lessees. See Watros, 421 Mass. at 111-114 (construing exemption for "educational" uses); Petrucci, 45 Mass. App. Ct. at 822-823 (1998), citing Watros, supra (construing exemption for "child care" facilities).[10] The decisional law teaches that, when evaluating a protected use, the courts must not parse steeple, kitchen, or parking lot from the protected use to which they are appurtenant or accessory. See Martin v. Corp. of Presiding Bishop of the Church of

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Board of Appeals of Boxford, 61 Mass. App. Ct. 647, 652 (2004) ("agriculture" uses do not include veterinary hospitals); Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham, 29 Mass. App. Ct. 31, 33-38 (1990) ("religious purposes" do not include psychological counseling, even with pastoral component); Worcester County Christian Communications, Inc. v. Board of Appeals of Spencer, 22 Mass. App. Ct. 83, 86-90 (1985) (depending on programming, radio station may be "educational" or "religious" use).

[10] "[I]t is clear that the over-all intent of the Legislature was to prevent local interference with the use of real property for educational purposes." Watros, supra at 113. "If we were to construe G. L. c. 40A, § 3, as the plaintiffs argue we should, a nonprofit educational corporation could be prevented by zoning restrictions from leasing a suite of rooms for an educational purpose within a larger building. Only those nonprofit educational corporations with sufficient financial resources to lease or purchase an entire property would enjoy the protection of G. L. c. 40A, § 3. Such a constrictive result is neither required by the language of the statute nor consistent with its purpose." Id. at 113-114.

Jesus Christ of Latter-Day Saints, 434 Mass. 141, 149 (2001) ("To view each element, each section of a 'structure,' as requiring an independent 'religious' use leads to impossible results: Is a church kitchen or a church parking lot a 'religious' use? We have not formulated the test so narrowly").

The protections of Section 3 also transcend other protections under the Zoning Act. When an exempt use occurs within a preexisting, nonconforming structure, the rules governing the extension and enlargement of such structures bow to the protections afforded by Section 3. See Petrucci, 45 Mass. App. Ct. at 824, citing Campbell v. City Council of Lynn, 415 Mass. 772, 777-778 n. 6 (1993) (when party "is entitled to relief based on § 3[,] there is no reason to require proceedings under § 6"). But see Trustees of Boston College, 58 Mass. App. Ct. at 800 ("uphold[ing] the Land Court's determination that the regulations on reconstructing a nonconforming building applied by the board were not unreasonable per se").

Consistent with the approach of the trial judge below, Massachusetts appellate courts have declined to read minor textual variations among the exemptions as evincing a Legislative intent to treat them

differently. See Petrucci, 45 Mass. App. Ct. at 820-823 n. 8. To the contrary, the binding authorities have construed Section 3 exemptions consistently, applying case law from one exemption as governing another and vice versa, regardless of textual distinctions. See Rogers, 432 Mass. at 377-378, citing Campbell & Tufts, supra ("[a]lthough we have never examined G. L. c. 40A, § 3, third par., we have had occasion to interpret analogous language, set forth in G. L. c. 40A, § 3, second par., inserted by St. 1975, c. 808, § 3 (Dover Amendment), affording educational and religious institutions protection from local zoning regulation"). See also Martin, 434 Mass. at 151, 152 (2001), citing Rogers and Petrucci, supra (applying childcare facility case law to religious use); Petrucci, supra at 825 n. 10, citing Prime v. Zoning Board of Appeals of Norwell, 42 Mass. App. Ct. 796, 802 (1997)(applying Tufts standard for "reasonable regulations" of educational use to agricultural use exemption).

This court has sought to strike an appropriate balance, affording robust protection to exempt uses, while honoring the Legislature's intent to reserve only limited regulatory authority in cities and towns.

See Martin, 434 Mass. at 148, quoting Tufts, 415 Mass. at 757 (§ 3 "seeks to strike a balance between preventing local discrimination against a religious use and honoring legitimate municipal concerns that typically find expression in local zoning laws") (citation omitted). See Rogers, 432 Mass. at 383, citing Tufts, supra (same).

Section 3 "'bars the adoption of a zoning ordinance or by-law that seeks to prohibit or restrict the use of land for'" protected uses, with the "'proviso'" that "'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.'" Trustees of Boston College, 58 Mass. App. Ct. at 802, quoting Tufts, 415 Mass. at 757 (emphasis in original). "A municipality may not, however, 'through the guise of regulating bulk and dimensional requirements under the enabling statute, proceed to "nullify" the use exemption permitted to an educational institution.'" Trustees of Boston College, supra at 800, quoting Bible Speaks, 8 Mass. App. Ct. at 31, citing Sisters of the Holy Cross v. Brookline, 347 Mass. 486, 494 (1964).

"While the reasonableness of a local zoning requirement will depend on the particular facts of each case," Massachusetts courts must "consider whether the requirement sought to be applied takes into account 'the special characteristics of the exempt use,' adding that a zoning requirement that results 'in something less than nullification of a proposed exempt use may be unreasonable within the meaning of the Dover Amendment.'" Martin, 434 Mass. at 151, quoting Tufts, 415 Mass. at 758-759 & n. 6. "There are several ways in which an applicant may demonstrate 'unreasonableness.'" Martin, supra, citing Tufts, supra at 759-760 (zoning requirement unreasonable if it detracts from usefulness of structure, imposes excessive costs on applicant, or impairs character of proposed structure); Rogers, 432 Mass. at 385 ("proof of cost of compliance is only one way" to show unreasonableness, and court must consider other aspects such as use or character of property); Campbell, 415 Mass. at 778 (same).

Courts should consider whether the local zoning restrictions will impair "the character of the [exempt use], while taking into account the special characteristics of its exempt use." Martin, 434 Mass.

at 151. See Trustees of Boston College, 58 Mass. App. Ct. at 802, quoting Campbell, 415 Mass. at 778. ("[s]trict application of the FAR regulation 'would significantly impede an educational use, . . . without appreciably advancing municipal goals embodied in the local zoning law'"). Intrusion into "matters of aesthetic and architectural beauty" may be factors to be considered in deciding whether a local zoning requirement "impairs the character" of an exempt use. Martin, supra quoting Tufts, 415 Mass. at 757. See Trustees of Boston College, supra at 804, quoting Martin, supra, ultimately quoting Tufts, supra (same).

To prevail, a claimant need not prove that no other options would be available if its protected use were not allowed at the proposed location. Rogers, 432 Mass. at 385 ("defendants seriously mischaracterize [Tufts] when they assert that a court may not grant an exemption . . . without particularized evidence [of no other options]"). "The central question is whether application of" a zoning restriction "to the plaintiff's proposed project furthers a legitimate municipal concern to a sufficient extent to warrant requiring the plaintiff to alter her plans." Rogers, supra, citing Tufts, 415 Mass. at 764. "When the

record satisfactorily demonstrates . . . that the application of [a] requirement to the plaintiff's property would significantly impede the use of the premises as a [protected use], while not substantially advancing a valid goal of [a municipality's] zoning regulation, the provision is unreasonable as applied." Rogers, supra.

Notwithstanding this harmony in themes, to provide robust protection to protected, exempt uses, the lived experience and practice under the Dover Amendment has been volatile. Reality has not matched the legislative intent to protect, and curtail municipal interference with, exempt uses. Cities and towns have engaged in multiple rounds of litigation, and leveraged permitting authority in adjacent fields, to thwart exempt uses. See, e.g., Newbury Junior College v. Brookline, 19 Mass. App. Ct. 197 (1985) (town may not, through the exercise of lodging house licensing power, achieve by the back door a limitation on the use of land for educational purposes (college dormitories) protected by G. L. c. 40A, § 3). Dover Amendment use plaintiffs have been forced to endure years of protracted litigation to vindicate their rights. See, e.g., Trustees of Boston College, 58

Mass. App. Ct. 794 (2003) (Boston College denied local relief for project in 1996; obtained a final favorable decision on appeal in 2003). As the Amici have experienced all too often, "delay may contribute to the effective defeat" of real estate development. Taylor v. Board of Appeals of Lexington, 451 Mass. 270, 279 (2008).[11]

The reversal rate on appeal shows that the trial courts have struggled to apply the standards set forth by the appellate courts.[12] And, this struggle has

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[11] One of the undersigned counsel was a first-hand witness to the Boston College litigation, which, although it ended with a judgment favorable to the school, included a remand for local authorities to reconsider off-street parking requirements. See Trustees of Boston College, supra at 806-810. By the time that this case was "finally" decided by the Massachusetts Judiciary, after seven years, a change in regime at the educational institution had occurred, and the development plan, vindicated through the litigation, was abandoned. Too many Dover Amendment victories prove Pyrrhic.

[12] Ten of 33 or 30.3% of the binding authorities reversed, at least in part, the trial court decision. Seven of the 33 or 21.2% of the binding authorities resulted in complete reversals of trial court determinations. See McLean Hosp. Corp., 483 Mass. 215 (2019); Regis College, 462 Mass. 280 (2012); Rosenfeld, 78 Mass. App. Ct. 677 (2011); Martin, 434 Mass. 141 (2001); Prime, 42 Mass. 796 (1997); Henry v. Board of Appeals of Dunstable, 418 Mass. 841 (1994); Tufts, 415 Mass. 753 (1993); Gardner-Athol Area Mental Health Assoc., 401 Mass. 12 (1987); Whitinsville Retirement Soc. v. Northbridge, 394 Mass. 757 (1985); Commissioner of Code Inspection, 11 Mass. App. Ct. 97 (1980).

extended not only to what it means to be an exempt use under Section 3, *i.e.*, what is reasonable municipal regulation, see Martin, 434 Mass. at 147-153 (reversing Superior Court), but, also, to what qualifies as exempt uses, in the first place. See McLean Hospital, 483 Mass. at 219-226 (reversing Land Court); Regis College, 462 Mass. at 284-394 (reversing Land Court). This court, too, has been repeatedly split, when construing Section 3. See Rogers, 432 Mass. at 377-383, 385-389 (Ireland, J., Dissenting); Gardner-Athol Area Mental Health Assoc., 401 Mass. at 15-16, 17-19 (Lynch, J., Dissenting). The binding authorities also directly contradict themselves about whether exempt uses, protected by Section 3, may be made subject to (generally discretionary) permitting requirements.[13]

[13] Compare Rogers, 432 Mass. at 378 (claimant "may prove claim" for facial challenge under the Dover Amendment "by showing that [local zoning] requires a special permit (or other local approval) for" protected "child care facilities"); Tufts, 415 Mass. at 802 ("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"); Petrucci, 45 Mass. App. Ct. at 824 n. 9 (trial judge ruled "exempt use could not be made subject to either variance procedures or site plan review, a conclusion in accord with Trustees of Tufts College v. Medford, 415 Mass. [at] 760, 765"); with Trustees of Boston College, 58 Mass. App. Ct. at 800 ("We agree with the judge that the special permit

All of this discussion demonstrates the need for clarification and greater consistency in the application of Section 3's protections. There is nothing clearer, or which better promotes predictability and consistency, than a bright-line rule. And, for the reasons that follow, a bright-line rule would be consonant with the plain text of, legislative intent in enacting, and legal context surrounding Section's 3 exemption from local zoning for solar energy facilities.

III. A Bright Line Rule Is Needed to Protect Exempt Solar Energy Systems.

The plain language of the G. L. c. 40A, §3 calls for a bright-line rule.[14] Under the ninth paragraph of G. L. c. 40A, §3:

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procedure, in itself, cannot be declared invalid in all circumstances involving educational institutions"). Despite the clear language of Section 3 and pronouncements from the appellate courts, cities and towns routinely force applicants to go through discretionary permitting proceedings. See, e.g., Bateman v. Board of Appeals of Georgetown, 56 Mass. App. Ct. 236, 242-243 (2002) (stables and riding academy required to obtain special permit and variance).

[14] For purposes of summary judgment, the trial court assumed, as the City-Appellant argues, that solar energy facilities are allowed by right in the City's four industrial zoning districts. It is undisputed that Waltham's four industrial zoning districts constituted less than two percent of the City's total land area. The trial court easily concluded that Waltham's "categorical exclusion of the vast majority

> 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.

(emphasis added). The statute bars two types of local zoning regulations: (i) the outright prohibition of solar energy systems and (ii) the unreasonable regulation of such systems. To allow solar energy systems in only some zoning districts -- i.e., to prohibit them in some zoning districts -- runs afoul of the statute's plain language.

"The statute does not say that it may be satisfied by providing some availability of the protected solar use in certain parts of town but not in others." Northbridge McQuade, LLC v. Hanson, Mass. Land Ct. 18 MISC 000519 (Piper, C.J.) (June 17, 2019), [Add.87]. As with all uses protected by G. L. c. 40A,

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of the city's area from even consideration of solar energy facilities . . . unquestionably violates the requirement that municipalities not 'prohibit or unreasonably regulate' such facilities." Tracer Lane II Realty, LLC v. Waltham, Mass. Land Ct. No. 19 MISC 000289 (Speicher, J.)(Mar. 5, 2021), 2021 Mass. LCR LEXIS 29, *15. [Add.51]. Left unanswered was the question posed by this court to the amici: whether allowing solar energy facilities in certain areas of a municipality but prohibiting them in others constitutes unreasonable regulation in violation of G. L. c. 40A, § 3, ninth par.

§ 3, the protection against outright prohibition or unreasonable regulation is meant "to require some 'standing down' by municipalities to encourage and protect solar facilities". Id. (Emphasis added.)

The legislative history shows that the Legislature intended, as with other exempt uses, to afford solar facilities the same robust protection as other uses made exempt by the statute. In 1985, when Paragraph 9 was added to Section 3's roster of socially-productive -- albeit not always locally popular -- uses that warranted protection from unfettered Home Rule authority, the Commonwealth and the country were still reeling from the effect of the 1970's oil crisis.

The exemption for solar energy systems came on the tail of a series of tax incentives for renewable energy equipment. See, e.g., G. L. c. 64H, § 6(dd), Renewable Energy Equipment Sales Tax Exemption of 1977; G. L. c. 62, § 6(d), Residential Renewable Energy Income Tax Credit of 1979. Although part of a larger legislative effort to facilitate greater independence from foreign oil, paragraph 9 worked in concert with a newly-emerging climate consciousness that emphasized "conservation of

natural resources and the prevention of . . . pollution of the environment." 1975 Mass. Acts, c. 808, § 2A. Solar facilities, and other renewable energy developments, had the Legislature's full backing.

Accordingly, based on the legislative history, solar facilities are protected from the panoply of municipal regulations otherwise permissible under Home Rule authority because the Legislature determined that they were necessary to combat growing energy problems. Today, the problem has morphed into an existential crisis.[15] Global instability in oil-rich nations, such as Russia, underscores the reality that the concerns that motivated the Legislature's movement away from dependence on foreign oil are stronger than ever.

These policy circumstances support this court's adoption of a bright-line rule to keep municipal regulation in check, as the Legislature intended. See PLH LLC v. Ware, Mass. Land Ct., No. 18 MISC 000648

[15] In August 2021 the United Nations' Intergovernmental Panel on Climate Change (IPCC) issued a report that unequivocally concluded that human behavior, and in particular humans' reliance on fossil fuels, is the reason for the rising temperature of the planet. IPCC, Climate Change 2021: The Physical Basis, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf.

(Piper, C.J.) (Dec. 24, 2019) (the purpose of the inclusion of solar use in [G. L. c. 40A, § 3] 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") (emphasis added). [Add.82]. It would be a bitter, unacceptable and unnecessary irony for the United States to be incapable of meeting the present, urgent need to address climate change and energy independence because of an overactive and unreasonable view of Home Rule authority within the several States. See Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339, 352 (7th Cir. 2017)(Posner, J., Concurring) (advocating for and providing examples of "judicial interpretation—the form of interpretation that consists of making old law satisfy modern needs and understanding").

A bright-line rule would also be in keeping with the judicial practice of applying the law the same way to each of Section 3's exempt uses. See Martin, 434 Mass. at 151, 152, citing Rogers and Petrucci, supra; Rogers, 432 Mass. at 377-378, citing Campbell & Tufts, supra; Petrucci, 45 Mass. App. Ct. at 825 n. 10,

citing Prime, 42 Mass. App. Ct. at 802. While, to counsel's knowledge, no binding authority has directly considered the question presented by this appeal in relation to any other exempt use,[16] the appellate courts' view of the matter has been made clear, albeit in dicta, over the years: exempt uses are to be allowed, as-of-right in all zoning districts. See, e.g., Shirley Wayside Ltd. P'ship, 461 Mass. at 478 n. 10 (construing § 3 as "prohibiting municipalities from categorically barring certain uses of land but allowing them to impose on those uses reasonable density regulations"); McLaughlin v. Board of Selectmen of Amherst, 38 Mass. App. Ct. 162, 164 n.2

[16] The failure of prior litigation to result in binding judicial treatment of this issue, in relation to other exempt uses, is likely attributable to the reality that an overwhelming majority of cities and towns allow other exempt uses, as-of-right in all zoning districts. See infra, note 17. There is no principled reason why exempt solar uses should be treated worse than other uses made exempt by G. L. c. 40A, § 3. See Northbridge McQuade, LLC, Mass. Land Ct. 18 MISC 000519 (Piper, C.J.) (June 17, 2019) (the Court "does not see a sufficient distinction [in the language of G. L. c. 40A, § 3] to say that the solar facility provisions ought to be, as a matter of legislative intent and interpretation, the only protected use subsection under § 3 where the possibility exists to allow absolute prohibition within certain zoning districts. This is not the case under the statute and the jurisprudence under it . . . In no other case does § 3 countenance an absolute zoning district wide ban on a protected use."). [Add.87].

(1995) ("Under the 'Dover Amendment,' nonprofit educational uses within this, or any other, zone may not be limited or excluded") (emphasis added); Bible Speaks, 8 Mass. App. Ct. at 33 ("Legislature did not intend to impose the special permit requirements, designed under c. 40A, § 9, to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone") (emphasis added).

Despite the plain statutory language, the underlying legislative intent, and directly-relevant statements from the appellate courts, trial courts confronted with the question framed by this case have answered in conflicting ways. Compare, e.g., Briggs v. Zoning Board of Appeals of Marion, 22 LCR 45, 47-48 (Sands, J.)(Feb. 6, 2014); Duseau v. Szawlowski Realty, Inc., 23 LCR 5, 9 (Cutler, C.J.)(Jan. 2, 2015); with Tracer Lane II Realty, LLC v. Waltham, Mass. Land Ct. No. 19 MISC 000289 (Speicher, J.)(Mar. 5, 2021), 2021 Mass. LCR LEXIS 29, *18-*19, [Add.51]; Northbridge McQuade, LLC, Mass. Land Ct. 18 MISC 000519 (Piper, C.J.) (June 17, 2019). [Add.87]. The absence of a cohesive judicial approach to this

recurring question further demonstrates the need for a clear, bright-line rule. See generally, Taylor v. Martha's Vineyard Land Bank Commission, 475 Mass. 682, 687-691 (2016) (bright-line rules lead to stable and predictable results). A rule that mandates that solar facilities must be allowed in all zoning districts would create order in the face of conflicting judicial decisions, in an overall area of historic jurisprudential uncertainty and unpredictability.

These decisions and this litigation itself establish the need for a bright-line rule, since they also provide familiar examples of municipalities trying to thwart the operation of exempt solar uses in their territorial jurisdictions. The City-Appellant's post hoc classification of solar facilities as "power stations"[17] to claim that solar energy systems are allowed by right on two percent of the city's land area is but one example of the type of machinations municipalities will undertake to limit or exclude solar energy systems from within their borders.[18]

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[17] The City-Appellant's classification was a particular stretch where the lot in question would only provide access to an abutting lot in the adjacent town of Lexington where the actual solar project would be located.

[18] Of the 346 municipalities subject to G. L. c. 40A, § 3, only 20 allow ground-mounted solar installations

In the absence of a bright-line rule, solar developers will continue to face great uncertainty, unpredictability of outcomes, and years of litigation to get such unpredictable decisions. As discussed above, delay is frequently tantamount to denial of a proposed development project. However, here, delay poses even more particularized injury to solar facility developers than applicable to other exempt uses. Delay in obtaining the requisite permits and entitlements jeopardizes tax incentives, which often are critical to making these projects financially feasible. See Eccos Energy LLC v. Judson, Appeals Court Docket No. 2021-P-0294.[19]

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as of right in all zoning districts. Another six municipalities allow ground-mounted solar in all districts by special permit. In contrast, educational uses are allowed by right in all zoning districts in all but seven municipalities. Commonwealth of Massachusetts, Massachusetts City and Town Ordinances and Bylaws, https://www.mass.gov/guides/massachusetts-city-and-town-ordinances-and-bylaws. This court's decision in City Council of Springfield v. Mayor of Springfield, Supreme Judicial Court, No. SJC-13154, slip op., at 12-13 n.6 (February 22, 2022) allows this court to take judicial notice of municipal zoning bylaws and ordinances, which are widely publicly available online. The Amici encourage this Court to take such judicial notice here.

[19] Under the Commonwealth's regulations, solar facility proponents must have "permits" in hand to apply for state financial incentives -- an issue presently being litigated in the Appeals Court in the cited case. 225 Code Mass. Regs. 20.06(c)3 (2018). [Add.70]. By illegally prohibiting solar facilities, with unlawful

The adoption of a bright-line rule that ensures that solar facilities are allowed as of right in all zoning districts furthers the legislative intent embodied by G. L. c. 40A, § 3, ninth par. without undermining municipalities' legitimate zoning interests. Municipalities will still be able to adopt reasonable dimensional regulations narrowly tailored to the use, if the regulations are necessary to protect public health, safety, and welfare. Market forces will cull numerous lots from the list of available properties on which to site a future solar energy system.[20] A bright line rule will not open the

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special permit requirements and blanket prohibitions in broad swathes of municipalities, frequently by implication, instead of by express prohibition, see supra, note 18, many cities and towns are effectively proscribing these facilities outright in their territorial jurisdictions. This dynamic has the correlative effect of forcing solar facilities to be sited, in an artificially concentrated manner, only in those municipalities that happen to have honored Section 3's command. The Legislature, however, intended to promote the siting of solar facilities throughout the Commonwealth, with its 1985 amendment; not only in willing municipalities. Indeed, the amendment would make no sense and would be surplusage, had the Legislature's intent been to permit municipalities to site solar facilities, only if municipalities wish to do so. Cities and towns already had such power under the Home Rule Amendment.

[20] These projects need large spaces to make financial sense. A small house lot in a historic town center is not going to have a large ground-mounted solar energy system become its neighbor.

Pandora's box prophesied by the City-Appellant and some other municipalities. Rather, it would strike the appropriate balance between the legitimate interests of local governments in ensuring the harmonious co-existence of adjacent uses within a municipality, and the Commonwealth's interest as expressed by the Legislature in prohibiting unnecessary barriers to the proliferation of critical, solar energy systems.

CONCLUSION

For the reasons discussed above, the Amici respectfully request that the court find that G. L. c. 40A, § 3, para. 9 precludes zoning ordinances or bylaws that prohibit solar energy systems and structures that facilitate the collection of solar energy in any area or zoning district, even if such facilities are allowed in other areas or districts.

Respectfully submitted

Real Estate Bar Association
for Massachusetts, Inc., and
The Abstract Club,

By their attorneys,

/s/ Nicholas Shapiro
Nicholas P. Shapiro, Esq.
B.B.O. #673490
Phillips & Angley
One Washington Mall
Boston, MA 02108
Tel. No. (617) 367-8787
nshapiro@phillips-angley.com
rhopkins@phillips-angley.com

/s/ Kate Carter
Kate Moran Carter
B.B.O. #663202
Charles N. Le Ray
B.B.O. #600196
Dain, Torpy, Le Ray,
Wiest & Garner PC
745 Atlantic Ave.,
Suite 500,
Boston, MA 02111
Tel. No.: (617) 542-4800
kcarter@daintorpy.com
cleray@daintorpy.com

ADDENDUM

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Tracer Lane II Realty, LLC v. City of Waltham

Massachusetts Land Court

March 5, 2021, Decided

MISCELLANEOUS CASE No. 19 MISC 000289 (HPS)

Reporter

2021 Mass. LCR LEXIS 29 *; 2021 WL 861157

TRACER LANE II REALTY, LLC, Plaintiff, v. CITY OF WALTHAM and WILLIAM L. FORTE in his capacity as the INSPECTOR OF BUILDINGS for the CITY OF WALTHAM, Defendants.

Judges: **[*1]** Howard P. Speicher, Justice.

Opinion by: Howard P. Speicher

Opinion

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

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

The plaintiff, Tracer Lane II. **[*2]** Realty, LLC ("Tracer Lane") argues that it is entitled to build and use an access road over its property in a residentially zoned neighborhood to access its proposed solar energy facility next door in Lexington, notwithstanding the prohibition against any commercial uses in the residential district.

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

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

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

FACTS

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

1. The plaintiff, Tracer Lane, is the owner of a parcel of land located at 119 Sherbourne Place in Waltham. (the "Waltham Site") The Waltham [*3] Site is improved by a single-family dwelling at the end of a cul de sac on a street zoned for residential use and occupied entirely by single-family homes.

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

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

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

5. Tracer Lane has proposed the development of a+/-1.0 megawatt ground-mounted solar array on 9.5 acres[2] of the Lexington Site. Tracer Lane plans to install [*4] approximately 3,916 solar panels measuring approximately 6'-5" x 3'-3" each, to be placed in rows on the Lexington Site, along with supporting equipment to be placed in two areas on concrete pads, and to be enclosed by a 7-foot high fence. The solar panels would be placed in rows in two separate areas of the Lexington Site, on either side of the 250-foot wide NSTAR easement, which roughly bisects the property.

6. Tracer Lane proposes access to. and egress from the Lexington Site, for both construction purposes and for maintenance once constructed, by an access road to be constructed over the existing residential property it owns at the end of the cul de sac on Sherboume Place, from the end of the cul de sac to the north boundary of the property where it meets the Lexington Site. The access road is proposed to be 102 feet long and 12 feet wide.[3]

7. During construction, a period expected to last about eight months, there will be considerable truck traffic on Sherbourne Place and over the access road. Tracer Lane claims there will be an average of about twelve truck trips over the street per day during construction, with a maximum of thirty-two daily trips. Waltham disputes this estimate [*5] and claims the average number of trucks trips during construction is likely to be higher than twelve. Notwithstanding the dispute as to the exact number of truck trips, I do not find the exact number to be

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

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

material.

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

9. Once construction of the proposed solar **[*6]** energy facility is complete, Tracer Lane's proposal calls for the access road to be smoothed, graded, and surfaced with turf-blocking pavers.

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

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

DISCUSSION

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 643-644, 766 N.E.2d 864 (2002). "The moving party bears the burden of affirmatively demonstrating that there is no triable issue of fact." *Id.* at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See *Attorney Gen. v.. Bailey*, 386 Mass. 367, 371, 436 N.E.2d 139, cert. denied, 459 U.S. 970, 103 S. Ct. 301, 74 L. Ed. 2d 282 (1982). Whether **[*7]** a fact is material or not is determined by the substantive law, and "an adverse party may not manufacture disputes by conclusory factual assertions." *Ng Bros. Constr. v. Cranney*, supra, 436 Mass. at 648. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When appropriate, summary judgment may be entered against the moving party and may be limited to certain issues. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553, 340 N.E.2d 877 (1976).

Additionally, "a party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 714, 575 N.E.2d 734 (1991). To succeed, the party moving for summary judgment does not need to submit affirmative evidence to negate one or more elements of the opposing party's claim, but the motion must be supported by some material contemplated by Rule 56(c). *Id.* Though the supporting material offered does not need to disprove an element of the claim of the party who has the burden of proof at

trial, it "must demonstrate that proof of that element at trial is unlikely to be forthcoming." *Id.*

In the present action, there are no material facts in dispute. The question before the court **[*8]** in this declaratory judgment action brought pursuant to G. L. c. 240, § 14A, is whether, and to what extent, G. L. c. 40A, § 3 overrides the prohibition in the Waltham Zoning Code against the use of land in a residential zoning district for an access road to serve a solar energy facility located in a commercial zoning district in an adjacent municipality.

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

The plaintiff's argument is two-fold: (1) The Waltham Zoning Code does not allow solar energy facilities in any zoning district as a matter of right, even in the industrial **[*9]** zoning districts, and accordingly, the Ordinance does not accommodate solar energy facilities as required by G. L. c. 40A, § 3; and (2) even if solar energy facilities are permitted as of right in the industrial zoning districts, the blanket prohibition against such facilities in all other districts still runs afoul of G. L. c. 40A, § 3.

The parties agree, correctly, that the proposed access road would unquestionably be prohibited were it being proposed for access to a more conventional commercial or industrial facility. The property over which the access road is proposed is in a residential zoning district, and is in fact located at the end of a cul de sac in a completely residential neighborhood. The proposed solar energy facility, located behind the subject property and over the boundary line in the town of Lexington, is in a commercial/manufacturing zoning district. An access road in a residential zoning district for a use located in another zoning district, is not permitted if the use is itself not permitted in the residential zoning district. *Bruni v. Planning Board of Ipswich*, 73 Mass. App. Ct. 663, 900 N.E.2d 904 (2009), citing *Beale v. Planning Bd.*, 423 Mass. 690, 694, 671 N.E.2d 1233 (1996); *Dupont v. Dracut*, 41 Mass. App. Ct. 293, 295-296, 670 N.E.2d 183 (1996).

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

> No zoning ordinance or by-law shall prohibit or unreasonably regulate the **[*10]** installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.

The extent of the regulation of solar energy systems permitted to municipalities under this provision has not been the subject of any appellate decision, but other exemptions from local zoning contained in G. L. c. 40A, § 3 have been the subject of considerable appellate litigation. G. L. c. 40A, § 3 provides exemption from local zoning for religious uses, non-profit educational uses, agricultural uses, child care facilities and handicap accommodations. See, e.g., *Steege v. Bd. of Appeals of Stow*, 26 Mass. App. Ct. 970, 527 N.E.2d 1176 (1988), (horse barn and riding school in residential zoning district is a protected agricultural use exempt from local

zoning); *Bible Speaks v. Bd. of Appeals of Lenox*, 8 Mass. App. Ct. 19, 31, 391 N.E.2d 279 (1979) (town may not use bulk and dimensional regulations to nullify use exemption permitted to educational institutions); *Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc.*, 421 Mass. 106, 115, 653 N.E.2d 589 (1995) (use of a renovated barn to house and educate mentally handicapped adults in a residential zoning district is an exempt use protected under § 3); *Petrucci v. Bd. of Appeals of Westwood*, 45 Mass. App. Ct. 818, 702 N.E.2d 47 (1998) (use of barn as child care facility in residential zoning district protected under § 3, and dimensional regulations could not be used to effectively prohibit the use); *Gardner-Athol Area Mental Health Ass'n, Inc. v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12, 513 N.E.2d 1272 (1987) (municipality may not prohibit **[*11]** or restrict the operation of an adult educational facility in a single family residential district pursuant to the Dover Amendment); *McLean Hospital Corp. v. Town of Lincoln*, 483 Mass. 215, 131 N.E.3d 240 (2019); (residential program for adolescent males was educational in character, and not medical, and was therefore exempt pursuant to G. L. c. 40A, § 3).

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

"Unreasonable" regulation has generally been determined to be regulation that as a practical matter amounts to a prohibition or otherwise unduly restricts the protected use. There are several ways in which an applicant may demonstrate "unreasonableness." A zoning requirement is unreasonable if it detracts **[*12]** from usefulness of a structure, imposes excessive costs on the applicant, or impairs the character of a proposed structure. *Trustees of Tufts College v. Medford*, 415 Mass. 753, 759-760, 616 N.E.2d 433 (1993). Further, "proof of cost of compliance is only one way" to show unreasonableness, and courts must consider other aspects such as use or character of property. *Rogers v. Norfolk*, 432 Mass. 374, 385, 734 N.E.2d 1143 (2000).

Even dimensional regulations that do not strictly prohibit a protected use may impair it to an impermissible degree. Instructive is *Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 747 N.E.2d 131 (2001), where a neighboring landowner challenged a decision by Belmont's zoning board of appeals approving a steeple on a Mormon temple that exceeded the bylaw height restriction. In its initial application, the church proposed a temple that would be 94,100 square feet, fifty-eight feet high, with six steeples, the tallest of which would be 156 feet high. After review, the board suggested alterations to the church's plan, namely a decrease in the steeple height (though still over the requirements set by the zoning bylaw). The church later submitted a revised plan that reduced the size of the proposed temple to 68,000 square feet, a height of fifty-six feet, and a single steeple of eighty-three feet. Abutters sued to enjoin the church from exceeding the height restrictions set forth **[*13]** in the bylaw. The Supreme Judicial Court agreed that a rigid application of Belmont's height restrictions for uninhabited projections would impair the character of the temple as a whole without advancing any legitimate municipal interest. Further, while the board's revision of the church's original plan was appropriate, the revision did not have a significant

impact on the character of the church as a whole, whereas strict adherence to the bylaw would have violated the Dover Amendment, as codified in G. L. c. 40A, § 3. Similarly in *Petrucci v. Bd. of Appeals of Westwood*, supra, 45 Mass. App. Ct. at 826-827, the court determined that a bylaw that would "disturb the sense of the building's continuity" and ruin its "architectural integrity" is "unreasonable" per the Dover Amendment. In *Prime v. Zoning Bd. of Appeals of Norwell*, 42 Mass. App. Ct. 796, 680 N.E.2d 118 (1997) the court was confronted with a proposed farm stand on land that was determined to be entitled to agricultural use protection under § 3. Ultimately, the Appeals Court determined that the board's special permit requirement would be unreasonable if applied in a way that amounted to an arbitrary denial or an undermining of the protected use. *Id.* at 802. However, in none of these cases was an appellate court asked to consider whether regulation limiting a protected use to specified zoning districts is a reasonable **[*14]** regulation consistent with the exemption from local prohibition or unreasonable regulation contained in G. 1. c. 40A, § 3.

In the present case, the city of Waltham argues that it has not prohibited or unreasonably regulated solar energy facilities in violation of G. 1. c. 40A, § 3, because it "arguably" allows such facilities as a matter of right in its industrial zoning districts. Pursuant to Sections 3.245 and 3.4 (Table of Uses) of the Ordinance, "power stations" are allowed as a matter of right in Waltham's four zoning districts labelled as "Industrial," and Waltham argues that solar energy systems are "arguably" power stations within the meaning of the Ordinance. By allowing solar energy facilities in specified parts of the city, Waltham argues, it has complied with the injunction in Section 3 against prohibition or unreasonable regulation of the use.

I need not, and do not, decide whether solar energy systems like the one proposed by Tracer Lane, are allowed as a matter of right, as "power stations," in Waltham's industrial zoning districts, because I do not accept the premise of the argument that if they are allowed as a matter of right in the industrial zoning districts, then Waltham may prohibit solar energy **[*15]** systems in all other districts, as it undisputedly does. Furthermore, whether a municipality may in some circumstances prohibit solar energy facilities in some districts while permitting them in others without running afoul of G. L. c. 40A, § 3, is also a question I need not answer categorically, because under the facts of this case, it is not a close question.

If one accepts Waltham's premise that solar energy systems are allowed as a matter of right in Waltham's four industrial zoning districts, while they are prohibited in the rest of the city, then solar energy facilities are allowed as a matter of right on less than 2% of Waltham's approximately 13.6 square miles of land area, and are prohibited on more than 98% of the city's land area.[4] This categorical exclusion of the vast majority of the city's area from even consideration of solar energy facilities, regardless of the surrounding built environment, the topography, and other considerations typically considered in site plan review or special permit review, unquestionably violates the requirement that municipalities not "prohibit or unreasonably regulate" such facilities. An outright

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[4] The parties submitted a copy of the Waltham Zoning Map as an agreed exhibit in this case. Using the GIS tools on Waltham's website, I determined that the four industrial zoning districts together occupy approximately 160 acres, or just under one quarter of a square mile, thereby comprising about 1.8 percent of Waltham's roughly 13.6 square miles of land area. I take judicial notice of this fact as a matter of public record. See *Porter v. Bd. of Appeal of Boston*, Mass. App. Ct. No. 19-P-1701, 99 Mass. App. Ct. 240, 243 (February 24, 2021) (facts appearing on map are appropriate subject of judicial notice).

prohibition in 98% of the municipality, or for that matter in **[*16]** any large segment of the municipality, without a showing that the prohibition is "necessary to protect the public health, safety or welfare," runs afoul of this statutory injunction, and it is irrelevant that such solar energy facilities may be permitted in four small pockets of the city.

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

In *Duseau v. Szawlowski Realty, Inc.*, 23 LCR 5 (2015) (Cutler, C.J.), another judge of the Land Court accepted the argument of abutters opposed to a solar energy facility proposed in a residential district that the use was allowed in other, nonresidential districts, and was therefore prohibited in the residential district. However, the court acknowledged that the G. L. c. 40A, § 3 **[*17]** exemption would invalidate such a prohibition "if it can be demonstrated that restricting solar energy systems only to the Industrial districts is an 'unreasonable' regulation, and that such a regulation is not necessary to protect the public health and welfare." *Id.* at 9.

More recent decisions of the Land Court have recognized explicitly that the protective provisions of G. L. c. 40A, § 3 preclude municipalities from prohibiting solar energy facilities except in "that narrow ambit" where a denial is necessary to protect the public health, safety and welfare. In *PLH LLC v. Town of Ware*, Mass. Land Ct., No. 18 MISC 000648, 2019 Mass. LCR LEXIS 246 (Piper, C.J.) (Dec. 24, 2019), the court upheld a special permit requirement applicable to solar energy projects, but only provided that "the review of the municipality conducted under the bylaw's special permit provisions must be limited and narrowly applied in a way that is not unreasonable, is not designed or employed to prohibit the use or the operation of the protected use, and exists where necessary to protect the health, safety or welfare." 2019 Mass. LCR LEXIS 246 at *12.

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

Like the judge in *Northbridge McQuade*, I reject the city of Waltham's argument that the prohibition of solar energy facilities on a categorical basis over entire districts (actually, over nearly the entire city) can be reconciled with the protective provisions of G. L. c. 40A, § 3. Waltham has not argued or shown any overriding health, safety or welfare justification for the near-total ban on solar energy facilities in the city. Further, as noted by Chief Justice Piper in *Northbridge McQuade*, the purpose of the solar energy facility protections of G.L. c. 40A, § 3, is "to require some 'standing down' by municipalities to encourage and **[*19]** protect solar facilities - a use that might be seen as unwelcome in

municipalities at a local level - by abutters, neighbors, and by town government." *Id.* This purpose is not complied with by categorically prohibiting solar energy systems in large swaths of a city or town, and by doing so without any demonstration that the prohibition is necessary to protect the public health, safety or welfare.

Having determined that the Ordinance violates the stricture in G. L. c. 40A, § 3 against prohibition or unreasonable regulation of solar energy facilities, it remains to determine a remedy. The plaintiff argues that the use is permitted, and the municipality must be ordered to simply allow the construction of the proposed access road. The city, having initially determined that the proposed road was prohibited, did not consider any aspect of the proposed construction. The court has determined that the proposed road is a protected exempt use pursuant to G. L. c. 40A, § 3, ¶ 9, but one that under certain circumstances is subject to "reasonable" regulation.

Regulation in the nature of site plan review that does not unreasonably interfere with the plaintiff's right to conduct the use, is consistent with the protections contemplated **[*20]** by the statute, but only where mechanisms for such review are in place. "[A] special permit cannot unreasonably regulate, cannot impose conditions that go beyond statutory limits provided under § 3, cannot be used either directly or pretextually as a way to prohibit or ban the use, and cannot be used to allow the board any measure of discretion on whether the protected use can take place in the district, because to do so would be at odds with the protections provided under § 3." *PLH LLC v. Ware*, supra, at *9; see also, *Dufault v. Millennium Power Partners, L.P.*, 49 Mass. App. Ct. 137, 727 N.E.2d 87 (2000); *Y. D. Dugout, Inc. v. Bd. of Appeals of Canton*, 357 Mass. 25, 255 N.E.2d 732 (1970).

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

"In the administration of controls limiting the use of **[*21]** land—as with any exercise of the police power—uniformity of standards and enforcement are of the essence. If the laws are not applied equally they do not protect equally." *Fafard v. Conservation Comm'n of Reading*, 41 Mass. App. Ct. 565, 569, 672 N.E.2d 21 (1996). A review not based on an appropriately adopted bylaw or regulation is inherently arbitrary. *Fieldstone Meadows Development Corp. v. Conservation Comm'n of Andover*, 62 Mass. App. Ct. 265, 268, 816 N.E.2d 141 (2004) (regulation of work in wetlands buffer zone by unwritten policy was arbitrary and capricious). Review of a solar energy proposal, even for the permissible purpose to "protect the public health, safety and welfare," cannot occur in the absence of legislatively defined standards, because such an undefined review would confer on local authorities "a roving and virtually unlimited power to discriminate between different applications." *SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 108, 472 N.E.2d 269 (1994).

Accordingly, the court will issue a declaration pursuant to G. L. c. 240, § 14A declaring that the prohibition in the Waltham Zoning Code of access road as proposed by Tracer Lane to facilitate access to its Lexington solar energy facility is invalid. The building inspector and the

city of Waltham will be ordered to allow the construction of the proposed access road notwithstanding the prohibition in the Waltham Zoning Code against the installation of solar energy systems and structures relating thereto in residential [*22] zoning districts.

CONCLUSION

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

Judgment will enter in accordance with this decision.

/s/ Howard P. Speicher

Howard P. Speicher

Justice

Dated: March 5, 2021

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ARTICLE LXXXIX

(Home Rule Amendment)

Article II of the Articles of Amendment to the Constitution of the Commonwealth, as amended by Article LXX of said Articles of Amendment, is hereby annulled and the following is adopted in place thereof:

ARTICLE II. SECTION 1. RIGHT OF LOCAL SELF-GOVERNMENT. It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article.

SECTION 2. LOCAL POWER TO ADOPT, REVISE OR AMEND CHARTERS. Any city or town shall have the power to adopt or revise a charter or to amend its existing charter through the procedures set forth in sections three and four. The provisions of any adopted or revised charter or any charter amendment shall not be inconsistent with the constitution or any laws enacted by the general court in conformity with the powers reserved to the general court by section eight.

No town of fewer than twelve thousand inhabitants shall adopt a city form of government, and no town of fewer than six thousand inhabitants shall adopt a form of government providing for a town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town.

SECTION 3. PROCEDURE FOR ADOPTION OR REVISION OF A CHARTER BY A CITY OR TOWN. Every city and town shall have the power to adopt or revise a charter in the following manner: A petition for the adoption or revision of a charter shall be signed by at least fifteen per cent of the number of legal voters residing in such city or town at the preceding state election. Whenever such a petition is filed with the board of registrars of voters of any city or town, the board shall within ten days of its receipt determine the sufficiency and validity of the signatures and certify the results to the city council of the city or board of selectmen of the town, as the case may be. As used in this section, the phrase "board of registrars of voters" shall include any local authority of different designation which performs the duties of such registrars, and the phrase "city council of the city or board of

selectmen of the town" shall include local authorities of different designation performing the duties of such council or board. Objections to the sufficiency and validity of the signatures on any such petition as certified by the board of registrars of voters shall be made in the same manner as provided by law for objections to nominations for city or town offices, as the case may be.

Within thirty days of receipt of certification of the board of registrars of voters that a petition contains sufficient valid signatures, the city council of the city or board of selectmen of the town shall by order provide for submitting to the voters of the city or town the question of adopting or revising a charter, and for the nomination and election of a charter commission.

If the city or town has not previously adopted a charter pursuant to this section, the question submitted to the voters shall be: "Shall a commission be elected to frame a charter for (name of city or town)?" If the city or town has previously adopted a charter pursuant to this section, the question submitted to the voters shall be: "Shall a commission be elected to revise the charter of (name of city or town)?"

The charter commission shall consist of nine voters of the city or town, who shall be elected at large without party or political designation at the city or town election next held at least sixty days after the order of the city council of the city or board of selectmen of the town. The names of candidates for such commission shall be listed alphabetically on the ballot used at such election. Each voter may vote for nine candidates.

The vote on the question submitted and the election of the charter commission shall take place at the same time. If the vote on the question submitted is in the affirmative, the nine candidates receiving the highest number of votes shall be declared elected.

Within [ten months] after the election of the members of the charter commission, said commission shall submit the charter or revised charter to the city council of the city or the board of selectmen of the town, and such council or board shall provide for publication of the charter and for its submission to the voters of the city or town at the next city or town election held at least two months after such submission by the charter commission. If the charter or revised charter is approved by a majority of the voters of the city or town voting thereon, it shall become effective upon the date fixed in the charter. [See Amendments, Art. CXIII.]

SECTION 4. PROCEDURE FOR AMENDMENT OF A CHARTER BY A CITY OR TOWN. Every city and town shall have the power to amend its charter in the following manner: The legislative body of a city or town may, by a two-thirds vote, propose amendments to the charter of the city or town; provided, that [1] amendments of a city charter may be proposed only with the concurrence of the mayor in every city that has a mayor, and [2] any change in a charter relating in any

way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager or the board of selectmen or town manager shall be made only by the procedure of charter revision set forth in section three.

All proposed charter amendments shall be published and submitted for approval in the same manner as provided for adoption or revision of a charter.

SECTION 5. RECORDING OF CHARTERS AND CHARTER AMENDMENTS. Duplicate certificates shall be prepared setting forth any charter that has been adopted or revised and any charter amendments approved, and shall be signed by the city or town clerk. One such certificate shall be deposited in the office of the secretary of the commonwealth and the other shall be recorded in the records of the city or town and deposited among its archives. All courts may take judicial notice of charters and charter amendments of cities and towns.

SECTION 6. GOVERNMENTAL POWERS OF CITIES AND TOWNS. Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

SECTION 7. LIMITATIONS ON LOCAL POWERS. Nothing in this article shall be deemed to grant to any city or town the power to (1) regulate elections other than those prescribed by sections three and four; (2) to levy, assess and collect taxes; (3) to borrow money or pledge the credit of the city or town; (4) to dispose of park land; (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power; or (6) to define and provide for the punishment of a felony or to impose imprisonment as a punishment for any violation of law; provided, however, that the foregoing enumerated powers may be granted by the general court in conformity with the constitution and with the powers reserved to the general court by section eight; nor shall the provisions of this article be deemed to diminish the powers of the judicial department of the commonwealth.

SECTION 8. POWERS OF THE GENERAL COURT. The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters.

Subject to the foregoing requirements, the general court may provide optional plans of city or town organization and government under which an optional plan may be adopted or abandoned by majority vote of the voters of the city or town voting thereon at a city or town election; provided, that no town of fewer than twelve thousand inhabitants may be authorized to adopt a city form of government, and no town of fewer than six thousand inhabitants may be authorized to adopt a form of town government providing for town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town.

This section shall apply to every city and town whether or not it has adopted a charter pursuant to section three.

SECTION 9. EXISTING SPECIAL LAWS. All special laws relating to individual cities or towns shall remain in effect and have the force of an existing city or town charter, but shall be subject to amendment or repeal through the adoption, revision or amendment of a charter by a city or town in accordance with the provisions of sections three and four and shall be subject to amendment or repeal by laws enacted by the general court in conformity with the powers reserved to the general court by section eight.

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 40A ZONING

Section 3 SUBJECTS WHICH ZONING MAY NOT REGULATE; EXEMPTIONS; PUBLIC HEARINGS; TEMPORARY MANUFACTURED HOME RESIDENCES

Section 3. No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products, provided that either during the months of June, July, August and September of each year or during the harvest season of the primary crop raised on land of the owner or lessee, 25 per cent of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, or at least 25 per cent of such products for sale,

based on either gross annual sales or annual volume, have been produced by the owner or lessee of the land on which the facility is located and at least an additional 50 per cent of such products for sale, based upon either gross annual sales or annual volume, have been produced in Massachusetts on land other than that on which the facility is located, used for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, whether by the owner or lessee of the land on which the facility is located or by another, except that all such activities may be limited to parcels of 5 acres or more or to parcels 2 acres or more if the sale of products produced from the agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture use on the parcel annually generates at least $1,000 per acre based on gross sales dollars in area not zoned for agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as 1 parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to the General Laws. For the purposes of this section, the term "agriculture" shall be as defined in section 1A of chapter 128, and the term horticulture shall include the growing and keeping of nursery stock and the sale thereof; provided, however, that the terms agriculture, aquaculture, floriculture and horticulture shall not include the growing, cultivation, distribution or dispensation of marijuana as defined in section 2 of chapter 369 of the acts of 2012, marihuana as defined in section 1 of chapter 94C or marijuana or marihuana as defined in section 1 of chapter 94G; and provided further, that nothing in this section shall preclude a municipality from establishing zoning by-laws or ordinances which allow commercial marijuana growing and cultivation on land used for

commercial agriculture, aquaculture, floriculture, or horticulture. Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.

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. Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and cable or the department of public utilities shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public; provided however, that if lands or structures used or to be used by a public service corporation are located in more than one municipality such lands or structures may be exempted in particular respects from the operation of any zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and cable or the department of public utilities shall after notice to all affected communities and public hearing in one of said municipalities, determine

the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public. For the purpose of this section, the petition of a public service corporation relating to siting of a communications or cable television facility shall be filed with the department of telecommunications and cable. All other petitions shall be filed with the department of public utilities.

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. As used in this paragraph, the term "child care facility" shall mean a child care center or a school-aged child care program, as defined in section 1A of chapter 15D.

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

Family child care home and large family child care home, as defined in section 1A of chapter 15D, shall be an allowable use unless a city or town prohibits or specifically regulates such use in its zoning ordinances or by-laws.

No provision of a zoning ordinance or by-law shall be valid which sets apart districts by any boundary line which may be changed without adoption of an amendment to the zoning ordinance or by-law.

No zoning ordinance or by-law shall prohibit the owner and occupier of a residence which has been destroyed by fire or other natural holocaust from placing a manufactured home on the site of such residence and residing in such home for a period not to exceed twelve months while the residence is being rebuilt. Any such manufactured home shall be subject to the provisions of the state sanitary code.

No dimensional lot requirement of a zoning ordinance or by-law, including but not limited to, set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person, as defined in section thirteen A of chapter twenty-two.

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.

No zoning ordinance or by-law shall prohibit the construction or use of an antenna structure by a federally licensed amateur radio operator. Zoning ordinances and by-laws may reasonably regulate the location and height of such antenna structures for the purposes of health, safety, or

aesthetics; provided, however, that such ordinances and by-laws reasonably allow for sufficient height of such antenna structures so as to effectively accommodate amateur radio communications by federally licensed amateur radio operators and constitute the minimum practicable regulation necessary to accomplish the legitimate purposes of the city or town enacting such ordinance or by-law.

Code of Massachusetts Regulations
225 CMR - DEPARTMENT OF ENERGY RESOURCES
Title 225 CMR 20.00 - Solar Massachusetts Renewable Target (SMART) Program
Section 20.06 - Qualification and Block Reservation Process for Solar Tariff Generation Units

Universal Citation: 225 CMR 20.00 MA Code of Regs 20.06

Current through Register 1459, December 24, 2021

(1) Statement of Qualification Application. A Statement of Qualification Application shall be submitted to the Solar Program Administrator by the Owner of the prospective Solar Tariff Generation Unit or by the Authorized Agent of the Owner. The applicant must use the most current forms and associated instructions provided by the Department, and must include all information, documentation, and assurances required by such forms and instructions.

(a) Authorization to Interconnect. In order to retain a Statement of Qualification issued prior to a project's Commercial Operation Date, all Solar Tariff Generation Units must provide the Solar Program Administrator with a copy of the authorization to interconnect issued by the applicable Distribution Company.

(b) Required Documentation for Solar Tariff Generation Units with Rated Capacities of 25 kW or Less. A prospective Solar Tariff Generation Unit with a capacity of 25 kW or less must submit the following documentation as part of its Statement of Qualification Application in order to obtain a Statement of Qualification:

1. Executed Contract. The Owner or their Authorized Agent must submit a copy of an executed contract between the Primary Installer and the Customer of Record. For a Solar Tariff Generation Unit for which the Owner is a Third-party Owner and the Primary Installer is a subcontractor to the Owner, an executed contract between the Owner and the Primary Installer will satisfy this requirement. The contract must identify a project manager, and must include Statement of Qualification Application preparation, equipment procurement and installation, site preparation, permitting and interconnection support, Statement of Qualification Application completion paperwork, training, operations and maintenance, and compliance with all applicable state and local laws. The contract shall include a budget that identifies key project components and a timeline and corresponding payment schedule for installation of the project. Contract service must include responsibility for the Statement of Qualification Application process, including submittal of authorization to interconnect, securing required permits and engineering approvals, installation of the project, scheduling and participation in all required inspections, and providing warranty services, as required.

2. Special Provisions for Third-party Ownership. If the Owner of a Solar Tariff Generation Unit is a Third-party Owner, the Owner or his or her Authorized Agent must also submit a copy of an executed contract power purchase agreement or lease with the Customer of Record.

3. Special Provisions for Low Income Generation Units. Prospective Solar Tariff Generation Units with capacities less than or equal to 25 kW that are seeking Statements of Qualification as Low Income Generation Units must provide evidence that the Customer of Record is classified as a Low Income Customer.

4. Customer Disclosure Form. Prospective Solar Tariff Generation Units with a capacity of 25 kW or less must submit a copy of a customer disclosure form signed by the Owner as part of its Statement of Qualification Application.

The customer disclosure form will be developed by the Department to provide consumer information including, but not limited to, contract pricing for the length of the agreement, complete system cost information, operation and

maintenance responsibilities, disposition of associated RECs and tariff terms, and anticipated production. If the Solar Tariff Generation Unit Owner is a Third-party Owner, the form must be signed by the Customer of Record.

(c) Required Documentation for Solar Tariff Generation Units with Rated Capacities Larger than 25 kW. All Generation Units with a capacity larger than 25 kW must provide evidence of the following in order to obtain a Statement of Qualification:

1. an executed Interconnection Service Agreement, as tendered by the Distribution Company;

2. demonstrate a sufficient interest in real estate or other contractual right to construct the Solar Tariff Generation Unit at the location specified in the Interconnection Service Agreement; and

3. all necessary governmental permits and approvals to construct the Solar Tariff Generation Unit with the exception of ministerial permits, such as a building permit, and notwithstanding any pending legal challenge(s) to one or more permits or approvals.

(d) Special Provisions for Agricultural Solar Tariff Generation Units. In order to qualify as an Agricultural Solar Tariff Generation Unit, a Solar Tariff Generation Unit must submit documentation itemized in 225 CMR 20.06(1)(d). All final determinations regarding the eligibility of such facilities will be made by the Department, in consultation with MDAR. An Agricultural Solar Tariff Generation Unit must also submit satisfactory documentation to the Department as detailed in the Department's Guideline Regarding the Definition of Agricultural Solar Tariff Generation Units.

1. the Solar Tariff Generation Unit will not interfere with the continued use of the land beneath the canopy for agricultural purposes;

2. the Solar Tariff Generation Unit is designed to optimize a balance between the generation of electricity and the agricultural productive capacity of the soils beneath;

3. the Solar Tariff Generation Unit is a raised structure allowing for continuous growth of crops underneath the solar photovoltaic modules, with height enough for labor and/or machinery as it relates to tilling, cultivating, soil amendments, harvesting, etc. and grazing animals;

4. crop(s) to be grown to be provided by the farmer or farm agronomist in conjunction with UMass Amherst agricultural extension services, including compatibility with the design of the agricultural solar system for such factors as crop selection, sunlight percentage, etc.;

5. annual reporting to the Department and MDAR of the productivity of the crop(s) and herd, including pounds harvested and/or grazed, herd size growth, success of the crop, potential changes, etc., shall be provided after project implementation and throughout the SMART incentive period; and

6. other system design information, which shall include, but not be limited to:

a. dual-use type, e.g., ground mount racking, pole towers, tracking, etc.;

b. total gross acres of open farmland to be integrated with the project;

c. type of crop(s) to be grown, including grazing crops;

d. pounds of crop(s) projected to be grown and harvested, or grazed;

e. animals to be grazed with herd size(s); and

f. design drawing including mounting system type (fixed, tracking), panel tilt, panel row spacing, individual panel spacing, for pole tower spacing and mounting height, etc.

(e) Special Provisions for Energy Storage Systems. Solar Tariff Generation Units co-located with an Energy Storage System will be eligible to receive an energy storage adder under 225 CMR 20.07(4)(c), provided it meets the following eligibility criteria:

1. Minimum and Maximum Nominal Rated Power. The nominal rated power capacity of the Energy Storage System paired with the Solar Tariff Generation Unit must be at least 25%. The nominal rated power capacity of the Energy Storage System paired with the Solar Tariff Generation Unit may be more than 100% of the rated capacity, as measured in direct current, of the Solar Tariff Generation Unit, but the Solar Tariff Generation Unit will receive credit for no nominal rated power capacity greater than 100% in the calculation of its Energy Storage Adder, pursuant to 225 CMR 20.07(4)(c).

2. Minimum and Maximum Nominal Useful Energy. The nominal useful energy capacity of the Energy Storage System paired with the Solar Tariff Generation Unit must be at least two hours. The nominal useful energy capacity of the

Energy Storage System paired with the Solar Tariff Generation Unit may be more than six hours, but the Solar Tariff Generation Unit will receive credit for no nominal useful energy capacity greater than six hours in the calculation of its Energy Storage Adder, pursuant to 225 CMR 20.07(4)(c).

3. Minimum Efficiency Requirement. The Energy Storage System paired with the Solar Tariff Generation Unit must have at least a 65% round trip efficiency in normal operation.

4. Data Provision Requirements. The Owner of the Energy Storage System must provide historical 15-minute interval performance data in a manner established by the Department for the first year of operation, and upon request, for the first five years of operation.

5. Operational Requirements. The Energy Storage System must discharge at least 52 complete cycle equivalents per year, or must participate in a demand response program, and must remain functional and operational in order for the Solar Tariff Generation Unit to continue to be eligible for the energy storage adder. If the Energy Storage System is decommissioned or nonfunctional for more than 15% of any 12-month period, the Department may disqualify the Solar Tariff Generation Unit from continuing to receive the energy storage adder.

6. Metering and Reporting Requirements. The Department shall develop a Guideline Regarding Metering of Solar and Energy Storage Systems that shall include acceptable metering and reporting capabilities for Solar Tariff Generation Units co-located with Energy Storage Systems.

(f) Special Provisions for Low Income Community Shared Solar Tariff Generation Units. In order to qualify as a Low Income Community Shared Solar Tariff Generation Unit, a Solar Tariff Generation Unit must meet the following criteria:

1. No more than two participants may receive bill credits in excess of those produced annually by 25 kW of nameplate capacity, and the combined share of said participants' capacity shall not exceed 50% of the total capacity of the Generation Unit, except in the case of Generation Units smaller than 100 kW.

2. The Owner or Authorized Agent of a prospective Low Income Community Shared Solar Tariff Generation Unit must submit a copy of a customer disclosure form signed by each Customer of Record receiving electricity or bill credits generated by the Low Income Community Shared Solar Tariff Generation Unit as

part of its Statement of Qualification Application, with the exception of those participants receiving bill credits in excess of those produced annually by 25 kW of nameplate capacity. The customer disclosure form will be developed by the Department to provide consumer information including, but not limited to, contract pricing for the length of the agreement, complete system cost information, operation and maintenance responsibilities, disposition of associated RECs and tariff terms, and anticipated production. The Low Income Community Shared Solar Tariff Generation Unit Owner or Authorized Agent must provide updated customer disclosure forms for any new Customers of Record that receive electricity or bill credits generated by the Low Income Community Shared Solar Tariff Generation Unit after it is granted its Statement of Qualification. These updates must be provided annually by no later than December 31st.

3. The Solar Tariff Generation Unit must demonstrate that no individual or distinct legal entity will receive bill credits or electricity in an amount that exceeds the applicable limitations noted in 225 CMR 20.06(1)(f)1., even if the credits are allocated across multiple utility accounts.

4. Electricity or bill credits may be allocated through a municipal load aggregation program established pursuant to M.G.L. c. 164, § 134, or through a low income community shared solar program established and administered by a Distribution Company. Low Income Community Shared Solar Tariff Generation Units that qualify through such eligible programs must submit satisfactory documentation to the Department as detailed in the Department's Guideline Regarding Low Income Generation Units and Guideline Regarding Alternative Programs for Community Shared Solar Tariff Generation Units and Low Income Community Shared Solar Generation Units.

(g) Special Provisions for Low Income Property Generation Units. In order to qualify as a Low Income Property Generation Unit, a Solar Tariff Generation Unit must submit satisfactory documentation to the Department as detailed in the Department's Guideline Regarding Low Income Generation Units.

(h) Special Provisions for Community Shared Solar Tariff Generation Units. In order to qualify as a Community Shared Solar Tariff Generation Unit, a Solar Tariff Generation Unit must meet the following criteria:

1. No more than two participants may receive bill credits in excess of those produced annually by 25 kW of nameplate capacity, and the combined share of

said participants' capacity shall not exceed 50% of the total capacity of the Generation Unit, except in the case of Generation Units smaller than 100kW.

2. The Owner or Authorized Agent of a prospective Community Shared Solar Tariff Generation Unit must submit a copy of a customer disclosure form signed by each Customer of Record receiving electricity or bill credits generated by the Community Shared Solar Tariff Generation Unit as part of its Statement of Qualification Application, with the exception of those participants receiving bill credits in excess of those produced annually by 25 kW of nameplate capacity noted in 225 CMR 20.06(1)(i)1. The customer disclosure form will be developed by the Department to provide consumer information including, but not limited to, contract pricing for the length of the agreement, complete system cost information, operation and maintenance responsibilities, disposition of associated RECs and tariff terms, and anticipated production. The Community Shared Solar Tariff Generation Unit Owner or Authorized Agent must provide updated customer disclosure forms for any new Customers of Record that receive electricity or bill credits generated by the Community Shared Solar Tariff Generation Unit after it is granted its Statement of Qualification. These updates must be provided at least annually by no later than December 31st.

3. A Solar Tariff Generation Unit seeking a Community Shared Solar adder must allocate at least 90% of bill credits or electricity by the Incentive Payment Effective Date.

i. Failure to do so will result in the Solar Tariff Generation Unit going to the last position of the application queue for the applicable service territory as established pursuant to the Statement of Qualification Reservation Period Guideline.

ii. Within 60 days following the Publication Date, a previously qualified Community Shared Solar Tariff Generation Unit may elect to remove their application for the adder and retain its queue position. Any capacity that is made available during this 60-day time period shall be reallocated to the remaining qualified Community Shared Solar Tariff Generation Units, and tranches reassigned as necessary according to the available capacity established pursuant to the Guideline on Capacity Blocks, Base Compensation Rates, and Compensation Rate Adders.

4. The Solar Tariff Generation Unit must demonstrate that no individual or distinct legal entity will receive bill credits or electricity in an amount that

exceeds the applicable limitations noted in 225 CMR 20.06(1)(h)1., even if the credits are allocated across multiple utility accounts.

5. Electricity or bill credits may be allocated through a municipal load aggregation program established pursuant to M.G.L. c. 164, § 134, or through a community shared solar program established and administered by a Distribution Company. Community Shared Solar Tariff Generation Units that qualify through such eligible programs must submit satisfactory documentation to the Department as detailed in the Department's Guideline Regarding Alternative Programs for Community Shared Solar Tariff Generation Units and Low Income Community Shared Solar Tariff Generation Units.

(i) Special Provisions for Floating Solar Tariff Generation Units. In order to qualify as a Floating Solar Tariff Generation Unit, a Solar Tariff Generation Unit must submit documentation itemized in 225 CMR 20.06(1)(i)1. through 7. All final determinations regarding the eligibility of such facilities will be made by the Department, in consultation with MassDEP and the Massachusetts Department of Fish and Game, or other state agencies as necessary.

1. the Solar Tariff Generation Unit will not interfere with the continued use of the water body for its designed purposes;

2. the racking system shall be made of materials that have been tested for water quality impact;

3. the Solar Tariff Generation Unit will not be permitted in wetland resource areas and natural waterbodies such as salt ponds, or freshwater lakes and great ponds, as defined in M.G.L. c. 91;

4. the ratio of the total surface area covered by the Floating Solar Tariff Generating Unit divided by the total surface area of the water body under standard conditions shall not exceed 50%;

5. the Solar Tariff Generation Unit shall be designed to minimize potential interaction with native species;

6. the Solar Tariff Generation Unit is a floating structure allowing for continued use and maintenance of the water body while generating electricity; and

7. other system design information which shall include, but not be limited to:

a. total gross acres of open water to be integrated with the project;

b. designated function of water body;

c. anchoring system design and materials; and

d. design drawing including mounting system type, panel tilt, panel row spacing, individual panel spacing, etc.

(j) Special Provisions for Canopy Solar Tariff Generation Units. In order to qualify as a Canopy Solar Tariff Generation Unit, a Solar Tariff Generation Unit must submit documentation itemized in 225 CMR 20.06(1)(j)1. and 2. All final determinations regarding the eligibility of such facilities will be made by the Department, in consultation with other state agencies including, but not limited to, the Massachusetts Department of Transportation, MassDEP, Massachusetts Department of Conservation and Recreation, and the Massachusetts Department of Fish and Game, as necessary.

1. The Solar Tariff Generation Unit will have 100% of its nameplate capacity of the solar photovoltaic modules used for generating power installed on top of a parking surface, pedestrian walkway, or canal; or

2. The Solar Tariff Generation Unit will have 100% of its nameplate capacity of the solar photovoltaic modules used for generating power installed over certain roadways or highways or adjacent parcels owned or controlled by the Massachusetts Department of Transportation; and

3. The Solar Tariff Generation Unit will maintain the function of the area beneath the canopy.

(k) Special Provision for Serving Low Income Customers. After the Publication Date, a Solar Tariff Generation Unit that services eligible Low Income Customers must demonstrate to the Department's satisfaction that any such customers shall receive a net savings by enrolling in the solar contract, as detailed in the Department's Guideline Regarding Low Income Generation Units.

(l) Special Provisions for Public Entity Solar Tariff Generation Units. A Public Entity Solar Tariff Generation Unit may apply for a Statement of Qualification pursuant to 225 CMR 20.06(1)(c) by providing satisfactory evidence to the Department that a Municipality or Other Governmental Entity has awarded a contract to develop a Solar Tariff Generation Unit.

(m) Auditing of Customer Disclosure Forms. The Department shall conduct periodic audits of the customer disclosure forms submitted subject to the requirements of 225 CMR 20.06(1)(b)3. 225 CMR 20.06(1)(f) and 225 CMR 20.06(1)(h) pursuant to the Guideline on SMART Consumer Protection. If the Department audit identifies material defects in the information provided including, but not limited to, discrepancies between the information provided on the customer disclosure form and the customer contract, or if the audit finds the application does not meet the criteria for a Low Income Solar Tariff Generation Unit or a Low Income Community Shared Solar Generation Unit, the applicant shall be issued a warning by the Department. If a single applicant is issued three warnings by the Department, the Department shall notify the applicant that, effective upon date of issuance of the third warning, that applicant may not submit any further Statement of Qualification Applications for a period of 12 months.

(n) Customer Disclosure Form Exception. Prospective Solar Tariff Generation Units seeking to qualify as a Low Income Community Shared Solar Tariff Generation Unit or Community Shared Solar Tariff Generation Unit may be exempt from the customer disclosure form requirements in 225 CMR 20.06(1)(f) and 20.06(1)(h) if the applicant can demonstrate to the Department's satisfaction that the Customers of Record are enrolled without a customer contract. In these instances, Solar Tariff Generation Units may be required to demonstrate that the Customer(s) of Record have received an explanation of benefits, pursuant to the documentation outlined in the Guideline Regarding Alternative Programs for Community Shared Solar Tariff Generation Units and Low Income Community Shared Solar Tariff Generation Units, or further Department guidance.

(2) Application Review Procedures.

(a) The Solar Program Administrator will notify the applicant when the Statement of Qualification Application is administratively complete or if additional information is required pursuant to 225 CMR 20.06(2).

(b) The Department may, at its sole discretion, provide an opportunity for public comment on any Statement of Qualification Application.

(3) Issuance or Non-issuance of a Statement of Qualification.

(a) If the Department finds that a Generation Unit meets the requirements for eligibility as a Solar Tariff Generation Unit pursuant to 225 CMR 20.00, the Solar

Program Administrator will provide the Owner of such Unit or the Authorized Agent of the Owner with a Statement of Qualification.

(b) The Statement of Qualification shall include any applicable restrictions and conditions that the Department deems necessary to ensure compliance by a particular Solar Tariff Generation Unit with the provisions of 225 CMR 20.00.

(c) If a Generation Unit does not meet the requirements for eligibility as a Solar Tariff Generation Unit under 225 CMR 20.00, the Solar Program Administrator shall provide written notice to the Owner or to the Authorized Agent of the Owner, including the reasons for such finding.

(4) RPS Effective Date. The RPS Effective Date shall be the earliest date on or after the Commercial Operation Date on which electrical energy output of a Solar Tariff Generation Unit can result in the creation of RPS Class I Renewable Generation Attributes.

(5) Notification Requirements for Change in Eligibility Status. The Owner or Authorized Agent of a Solar Tariff Generation Unit shall notify the Solar Program Administrator of any changes that may affect the continued eligibility of the Generation Unit as a Solar Tariff Generation Unit. The Owner or Authorized Agent shall submit the notification to the Solar Program Administrator no later than five days following the end of the month during which such changes were implemented. The notice shall state the date the changes were made to the Solar Tariff Generation Unit and describe the changes in sufficient detail to enable the Solar Program Administrator and the Department to determine if a change in eligibility is warranted.

(6) Notification Requirements for Change in Ownership, Generation Capacity, or Contact Information. The Owner or Authorized Agent of a Solar Tariff Generation Unit shall notify the Solar Program Administrator of any changes in the ownership, capacity, or contact information for the Solar Tariff Generation Unit. The Owner or Authorized Agent shall submit the notification to the Solar Program Administrator no later than five days following the end of the month during which such changes were implemented.

(7) Statement of Qualification Reservation Period. A Solar Tariff Generation Unit may retain its Statement of Qualification pursuant to the procedures set forth in the Statement of Qualification Reservation Period Guideline.

225 CMR 20.06

Adopted by Mass Register Issue 1346, eff. 8/25/2017.

Amended by Mass Register Issue 1416, eff. 4/14/2020.

Amended by Mass Register Issue 1422, eff. 7/24/2020.

Amended by Mass Register Issue 1423, eff. 7/24/2020.

This section was updated on 8/8/2020 by overlay.

PLH LLC v. Town of Ware

Massachusetts Land Court

December 24, 2019, Decided

MISCELLANEOUS CASE No. 18 MISC 000648 (GHP)

Reporter

2019 Mass. LCR LEXIS 246 *; 2019 WL 7201712

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

Judges: **[*1]** Piper, C.J.

Opinion by: Piper

Opinion

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

On December 5, 2018, plaintiff PLH LLC ("Plaintiff") initiated this action by filing a four-count complaint pursuant to G. L. c. 240, § 14A claiming, among other things, that the special permit requirement imposed by defendant Town of Ware ("Town" or "Defendant") on plaintiff's proposed ground-mounted solar energy project violated both G. L. c. 40A, § 3 and the public trust doctrine. On December 17, 2018, plaintiff filed in this court a separate action[1] pursuant to G. L. c. 40A, § 17 appealing a decision issued by the Town of Ware Planning Board ("Board") denying plaintiff's application for a special permit. On January 4, 2019, defendant removed the G. L. c. 240, § 14A action to the United States District Court for the District of 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 **[*2]** 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:

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

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The court concludes that the motion [*3] 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, 809 N.E.2d 1079 (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. [*4] This is certainly far from the classic case, one in which either the owner of the land who wishes to develop it, or a neighbor whose land is directly affected by someone else's planned land development, needs instruction from the court about the validity and interpretation under G. L. c. 240, § 14A of the bylaw provisions that are in doubt before the development can proceed.

Even so, the analysis here tips ever so slightly in favor of allowing the court to reach the question put before it by the plaintiff. Colloquy between counsel and the court at the start of the hearing showed there to be some possibility that the ultimate ability of the plaintiff to carry out its project may turn - for financial, rather than regulatory, licensing, or land use permitting reasons - on the interpretation that is given to the bylaw. The interpretive questions posed in this case possibly may guide plaintiff's litigation result in the pending Superior Court case, in which plaintiff is seeking redress for alleged wrongful denial of full SMART Program funding. Plaintiff contends in that suit that the municipality's insistence on its special permit requirement, and the resulting delay, cost plaintiff a favorable position in [*5] 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 [*6] 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 **[*7]** 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, 680 N.E.2d 118 (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 **[*8]** requirement of a special permit for certain aspects of a protected agricultural use, the *Prime* court was very clear in deciding that special permits are not something which are categorically prohibited or intrinsically unavailable for an agricultural use protected under § 3. In that case, the board had required that the construction of a farmstand on the locus be subject to two special permits, and the Land Court judge (Kilborn, J.) nullified the special permit requirements for that particular use. The Appeals Court did not adopt that view of the law. It "conclude[d] that the board may require that Simons obtain special permits for the farm stand, but only upon reasonable conditions ... ." *Id.* at 800. The substance of the Appeals Court's holding is that the special permit requirement was not *per se* or intrinsically unavailable or legally invalid, and the Land Court's judgment invalidating that requirement for the agricultural use under review there was incorrect and needed to be reversed.

The Appeals Court did not leave it there, and its opinion clarifies the answer to the question now before this court. The bottom line of the *Prime* holding was that the board may not apply the special permit requirement **[*9]** 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 **[*10]** 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 **[*11]** 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 **[*12]** 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, **[*13]** but only where the project presents intractable problems, such as those that jeopardize public health, safety, and welfare. Requirements of a special permit granting authority, including conditions imposed on a special permit, which are too far outside the limited, narrow scope of regulation allowed by the solar energy provisions of § 3, would be improper.

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

So Ordered.

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

Attest:

Deborah J. Patterson

Recorder

Dated: December 24, 2019

End of Document

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

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

Property Information

McQuade's Lane
Northbridge

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

Docket Information

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

Docket Date	Docket Text	Amount Owed	Image Avail.
02/28/2019	Defendants' Statement of Undisputed Material Facts, filed.		
02/28/2019	Defendants' Memorandum of Law in Support of Summary Judgment, filed.		
03/11/2019	Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 05/20/2019 Time: 11:30 AM Notice to: Attorneys Henry Lane and David Doneski		
03/28/2019	Assented-to Motion to Enlarge Time for Filing Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed.		
04/12/2019	Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed.		
04/12/2019	Defendants' Statement of Undisputed Material Facts with Plaintiff's Responses thereto and Plaintiff's Statement of Additional Undisputed Material Facts, filed.		
04/12/2019	Affidavit of Christopher Clark, filed.		
05/20/2019	Event Resulted: Summary Judgment Hearing scheduled on: 05/20/2019 11:30 AM has been resulted: Case Taken Off of the List. Hon. Gordon H. Piper, Presiding		
06/11/2019	Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 06/17/2019 Time: 02:15 PM Notice to: Attorneys Henry Lane and David Doneski		
06/17/2019	Appearance of Michael Dana Rosen, Esq. for Northbridge McQuade, LLC, filed		
06/17/2019	Event Resulted: Summary Judgment Hearing scheduled on: 06/17/2019 02:15 PM has been resulted: June 17, 2019. Hearing held on defendants' motion for summary judgment. Attorneys Henry Lane and Michael Rosen appeared for the plaintiff. Attorney David Doneski appeared for the defendant members of the Northbridge Zoning Board of Appeals. Following argument, the court DENIED defendants' motion for summary judgment pursuant to Mass. R. Civ. P. 56. The plaintiff filed no cross-motion for summary judgment, but the court nevertheless GRANTED partial summary judgment, as it is able to do so, in favor of plaintiff for the reasons laid upon the record from the bench and summarized as follows. The court concludes that the Board proceeded on a legally untenable ground and acted in error when it made the categorical determination that the board lacked power to entertain the request to authorize plaintiff's solar project. This was based on the use violation that flows under conventional zoning from the necessary passage across the residentially zoned land on a private way to serve the solar energy facility to be physically installed, as it would be by right but for the access issue, on the industrially zoned property. The Board based on its erroneous reading of the solar facility provisions of G.L. c. 40A, § 3, relied improperly on (1) the use prohibition arising from using a private way across residentially- zoned land to provide access to the solar facility in the industrial district and (2) on the bylaw's prohibition of the grant of any use variance. As a consequence, the board did not have the opportunity, as the court now concludes it ought, to consider the reasonableness or not of the various levels of regulation (or in an appropriate case, prohibition) that would be necessary to protect the public health, safety, or welfare if this solar project is to proceed. The language of G. L. c. 40A, § 3 is clear on its face: "No zoning ordinance or bylaw should prohibit or... unreasonably regulate." That language does not include additional words that indicate that what the statute forbids is only a town- wide prohibition. The statute does not say that it may be satisfied by providing some availability of the protected solar use in certain parts of town but not in others. In reaching this conclusion, the court has taken into account the difference in the wording that is used for the various uses in the various protective and indulgent provisions of § 3, but does not see a sufficient distinction to say that the solar facility provisions ought to be, as a matter of legislative intent and interpretation, the only protected use subsection under § 3 where the possibility exists to allow absolute prohibition within certain zoning districts. This is not the case under the statute and the jurisprudence under it for the longstanding § 3 protected uses including for religious, educational, child care, amateur radio facilities, and the variety of other uses the legislature has chosen to bring under the protective umbrella of § 3. In no other case does § 3 countenance an absolute zoning district wide ban on a protected use. The purpose of this remedial provision was to require some "standing down" by municipalities to encourage and protect solar facilities- a use that might be seen as unwelcome in municipalities at a local level- by abutters, neighbors, and by town government. Fulfillment of this remedial purpose requires the town entertain and where appropriate, issue permits and approvals for solar facilities even in a residential district where the zoning bylaw purports to ban the use. The court sees nothing in the statutory language or purpose that would countenance carving out large areas of land by district in the town and making them immune from the remedial indulgent protections of § 3 with respect to this solar use. Before there is any regulation or prohibition of any given proposed solar development on any site in the town, there must be an analysis and a balancing of the need to prohibit or regulate measured against the legislatively determined public interest in allowing facilities for the collection of solar		

Docket Date	Docket Text	Amount Owed	Image Avail.
	energy. The need for regulation for even prohibition must in all districts be weighed against the need to protect the public health, safety, or welfare. The court does not accept the town's argument that the prohibition could exist as a matter of district wide fiat and this is particularly true given the facts of this case- where the nature of the site, without too much dispute in the record, is set up so that the solar use itself takes place physically entirely on industrial zoned land where the use is as of right. Only the issue of access across residential land prevents as of right development of the solar facility. Plaintiff should receive, for the first time, the opportunity to demonstrate to the board that it is not likely there is going to be a great deal of impact flowing from the passage across the private, residentially zoned land to access the proposed site. The court recognizes that there is not a lot of appellate guidance on the issues briefed by counsel. The court takes some comfort in the decision reached in Duseau v. Szawlowski Realty, Inc., 23 LCR 5 (2015) (Misc. Case No. 12 MISC 470612) (Cutler, C.J.). The decision reached in Briggs v. Zoning Board of Appeals of Marion, 22 LCR 45 (2014) (Misc. Case No. 13 MISC 477257) (Sands, J.) does not persuade this court that it is merely a matter of whether as a town wide matter, there is some reasonableness to a zone by zone approach. Rather, the court now concludes that the correct municipal analysis of a solar facility project must be made on a micro (site specific) level rather than on a macro (town-wide) level. The legislative intent is best served by having that analysis conducted, as it is on all the other Dover Amendment and § 3 cases, on a very site specific basis, use by use, parcel by parcel, neighborhood by neighborhood. Given that the board proceeded on this legal untenable ground it, never had the occasion to weigh in and hear the parties, neighbors and the others who are interested parties, on the question whether some regulation, or indeed an outright prohibition, ought to be applied here. The touchstone has to be whether a level of regulation is reasonable or not, as necessary to protect the public health, safety, or welfare. This court will retain jurisdiction of this case. The court will annul the decision of the Board and remand the matter back to the board for a newly noticed full public hearing to consider the application that was before it with the understanding, based on the courts' order, that the Board cannot categorically rely on the prohibition of use here as it did in the first instance. There is no reason to require the project proponent to submit any application for variance because the purpose of the protective language of § 3 is to override prohibitions on use unless they are justified based on necessity to protect public health, safety, or welfare. That is a legislative override on what would otherwise be the applicable variance standards that would be indicated where there is a use that is prohibited in a given district but is not protected under § 3. The Board will hear the applicant, and others interested, on the question of the reasonableness or not of a prohibition or a regulation. The board would then have an opportunity, after hearing, to make its findings and to issue a decision on the application that was originally before it after engaging in the weighing § 3 requires. By July 12, 2019, counsel to confer with their respective clients and each other and submit a form of an order of remand that is specific as to the scope and the timing of remand providing specific milestones for noticing, convening, opening, and closing the remand hearing before the board. (Piper, C.J.) (Notice of Docket Entry sent to Attorneys Henry Lane, Michael Rosen, and David Doneski)		
07/12/2019	[Proposed] Order of Remand, filed.		Image
07/18/2019	Remand Order Issued. (Copies Sent to Attorneys Henry J. Lane, Michael Dana Rosen, David J. Doneski) Judge: Piper, Hon. Gordon H.		Image
11/18/2019	Joint Status Report, filed.		Image
11/25/2019	Motion to Amend Complaint, filed.		Image
12/04/2019	December 4, 2019. Plaintiff's Motion to Amend Complaint ALLOWED. Status Conference scheduled for December 23, 2019 at 11:00 A.M. Parties to file a joint written report with the court by December 18, 2019 recommending the next steps that should take place in this case to progress plaintiff's renewed appeal promptly, including proposed dates for the close of discovery and proposed deadlines for the filing of dispositive motions. (Piper, C.J.) (Notice of Docket Entry sent to Attorneys Henry Lane, Michael Rosen, and David Doneski) Judge: Piper, Hon. Gordon H.		
12/04/2019	Amended Complaint, filed.		Image
12/04/2019	Scheduled Judge: Piper, Hon. Gordon H. Event: Status Conference Date: 12/23/2019 Time: 11:00 AM Notice to: Attorneys Henry Lane, Michael Rosen, and David Doneski		
12/04/2019	Affidavit of Service, filed.		Image
12/19/2019	Joint Report, filed.		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
12/23/2019	Event Resulted: Status Conference scheduled on: 12/23/2019 11:00 AM December 23, 2019. Status conference held. Attorneys Henry Lane and Michael Rosen appeared for the plaintiff. Attorney David Doneski appeared for the defendant members of the Northbridge Zoning Board of Appeals. Following colloquy with counsel, court is convinced that at this stage of the case, the matter must be either: (1) remanded again to the Northbridge Zoning Board of Appeals so that the Board may make a determination as to whether plaintiff is entitled to a frontage variance, (2) proceed forward for a second round of limited summary judgment practice, or (3) move forward with de novo review and have the court hear evidence at a trial on the merits. By January 17, 2020, parties are to file joint written report, confirming that the parties have by their counsel conferred, and outlining how they would like to proceed. Court to act on report without further hearing unless otherwise ordered. Unless the court orders otherwise based on the parties' submission, case is to proceed to trial on the merits. A pre-trial conference is scheduled for February 20, 2020 at 11:00 a.m. (Piper, C.J.) (Notice of Docket Entry sent to Attorneys Henry Lane, Michael Rosen, and David Doneski)		
12/27/2019	Scheduled Judge: Piper, Hon. Gordon H. Event: Pre-Trial Conference Date: 02/20/2020 Time: 11:00 AM Notice to: Attorneys Henry Lane, Michael Rosen, and David Doneski		
01/17/2020	January 21, 2020. Joint Report, filed. The parties' joint request for an extension of time to report to the court on next steps is ALLOWED. Parties to confer and submit a further joint report on or before February 14, 2020. (Piper, C.J.) Judge: Piper, Hon. Gordon H.		Image
02/18/2020	Joint Pre-Trial Conference Memorandum, filed.		Image
02/20/2020	Event Resulted: Pre-Trial Conference scheduled on: 02/20/2020 11:00 AM February 20, 2020. Pre-Trial Conference held. Attorneys Shane Picard and Michael Rosen appeared for plaintiff. Attorney David Doneski appeared for defendant. After colloquy with counsel, court noted that the prior ruling on summary judgment indicated that plaintiff need not apply for a use variance because the purpose and effect of the relevant protective language of G. L. c. 40A, § 3 is to override prohibitions on use unless they are justified based on necessity to protect public health, safety, or welfare, and that constitutes a legislative override of what would otherwise be the applicable variance standard; however, this ruling did not explicitly the question of whether the need for a dimensional variance from frontage requirements of the bylaw is subject to the same legislative override. The motion for summary judgment did not present the question of the effect of § 3 on the need for plaintiff to have sought or received a frontage variance, and so the court's ruling did not directly reach that issue. Parties agreed that this is a purely legal question that may properly be resolved on summary judgment. The court had earlier invited the parties to submit further summary judgment motions on this question, but they have not done so. Nevertheless, the court is convinced that resolution of this issue on summary judgment, if possible, is preferable to proceeding now to trial de novo with that issue unresolved. By March 5, 2020, Plaintiff to file motion for summary judgment addressing the effect of the protective language of G. L. c. 40A, § 3 on the form of relief, if any, that plaintiff must acquire from the Board concerning plaintiff's frontage insufficiency, and what standard the Board properly should apply when evaluating that request for relief. Defendant to file any opposition by March 19, 2020. (Piper, C.J.) (Notice of Docket Entry sent to Attorneys Henry Lane, Michael Rosen, and David Doneski)		
03/05/2020	Plaintiff's Motion for Partial Summary Judgment, filed.		Image
03/05/2020	Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, filed.		Image
03/05/2020	Joint Statement of Material Facts, filed.		Image
03/09/2020	Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 04/29/2020 Time: 11:15 AM Notice to: Attorneys Henry Lane, Michael Rosen, and David Doneski		
03/19/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Summary Judgment Hearing scheduled on: 04/29/2020 11:15 AM Has been: Rescheduled-Covid-19 emergency Hon. Gordon H. Piper, Presiding Email Notice to Attorneys Henry Lane, Michael Rosen, and David Doneski		
04/06/2020	Defendants' Response to Plaintiff's Statement of Material Facts, filed (by email).		Image
04/06/2020	Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed (by email).		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
04/06/2020	Defendants' Motion to Strike Affidavit of Eric J. Las, filed (by email).		Image
05/29/2020	Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 06/22/2020 Time: 02:30 PM		
06/22/2020	Event Resulted: Summary Judgment Hearing scheduled on: 06/22/2020 02:30 PM Has been: Held via video June 22, 2020. Hearing held by teleconference on plaintiff's motion for partial summary judgment and defendants' motion to strike. Attorneys Shayne Picard and Michael Rosen appeared for plaintiff. Attorney David Doneski appeared for defendants. Defendants' motion to strike is DENIED, as the affiant's role as the engineer involved in plaintiffs' project is an adequate basis for the statements within the affidavit. Even had the motion to strike been allowed, however, the court's ruling on summary judgment would not have been different. 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 GRANTED IN PART summary judgment in favor of plaintiff, for the reasons laid upon the record from the bench following argument, and for substantially those reasons set forth in the moving papers, which are summarized as follows. The question presented by plaintiff's motion for partial summary judgment is whether, in light of the protection afforded by G. L. c. 40A, § 3 to plaintiff's proposed solar energy use, the Board may impose the bylaw's 150-foot frontage requirement upon the plaintiff's application, and (given plaintiff's land's undisputedly insufficient frontage as required generally in this residential district) require plaintiff to meet the standard for a dimensional variance. Pursuant to G. L. c. 40A, § 3, a municipality is prohibited from unreasonably regulating the installation of solar energy systems. This legislative override applies equally to a municipality's dimensional regulations as it does to use restrictions, see Rogers v. Town of Norfolk, 432 Mass. 374, 383-384 (2000), and there is no need to satisfy the standard for a dimensional variance where, as viewed through the lens of § 3, application of the regulation in question would be unreasonable when applied to the protected solar use project in question. The inquiry into whether a bylaw's typical requirements are unreasonable when imposed upon a protected use is dependent on the specific factual circumstances of the particular property and proposal under consideration. See Trustees of Tufts College v. City of Medford, 415 Mass. 753, 759 (1993). A board may not categorically rely on those requirements without regard to their reasonableness in the context of the particular proposal before it. The Board here failed meaningfully to consider or make any determination as to the contextual reasonableness of the frontage requirement in light of the specifics of plaintiff's solar project and the mandate of § 3, and in this regard, the Board fell into error. That analysis remains, however, one that properly should be conducted in the first instance by the Board, rather than this court. The Board must be afforded an opportunity first to undertake the necessary analysis on remand, and the court therefore declines to make at this point the ultimate substantive determination requested by plaintiff concerning the reasonableness of the bylaw's frontage requirement as applied to this project on this site in this case. The court will remand the matter back to the board for a newly noticed full public hearing to consider the application that was before it, with the understanding, based on the court's order, that the Board must consider whether satisfaction of the bylaw's 150-foot frontage requirement by this particular project is in whole or in part reasonable or not, giving due consideration to whether imposition of the frontage requirement, in whole or in part, is necessary to protect the public health, safety, or welfare, as the statute commands. By July 6, 2020, plaintiff to send its proposed remand order to defendants, and by July 20, 2020, defendants to send their proposed remand order to plaintiff; parties then to confer through counsel, who are to file a joint proposed remand order with the court, or, if the parties are unable to reach agreement on the form of the proposed order, each party is to file separately a proposed order, with a brief memorandum outlining argument for its adoption. The proposed form or forms of order are to include the scope of the hearing on remand, the analysis the Board will be directed to apply on remand, and a set of dates for the conduct of the remand, including dates for the giving of notice of the remand hearing, the opening and closing of the hearing, and the filing of the Board's decision on remand. (Piper, C.J.) (Notice of Docket Entry sent by email to Attorneys Henry Lane, Michael Rosen, and David Doneski)		
08/14/2020	Joint Report with Proposed Order of Remand, filed (by email).		Image
08/17/2020	Remand Order, issued. Judge: Piper, Hon. Gordon H.		Image
11/17/2020	Motion to Further Amend Complaint, filed (by email).		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
11/18/2020	November 18, 2020. The plaintiff's motion to file second amended complaint, received November 17, 2020, is ALLOWED, without objection from counsel for the municipal defendants. The Second Amended Complaint proffered by plaintiff with its emailed motion is accepted for filing this date; a physical copy is to be mailed to the court forthwith. Counsel promptly are to confer, and to file by email and first class mail, a joint written report, to be received via email by the court not later than December 1, 2020; in the report the parties are to provide the court with their respective (and ideally collective) views on the steps the court now ought to take to bring this matter to adjudication. (Piper, C.J.) (Notice of Docket Entry sent by email to Attorneys Henry Lane, Michael Rosen, and David Doneski) Judge: Piper, Hon. Gordon H.		
11/18/2020	Second Amended Complaint, filed.		Image
12/02/2020	Joint Report, filed.		Image
12/04/2020	December 4, 2020. Upon review of the joint report filed with the court December 1, 2020, the report is APPROVED. Plaintiff is to file and serve a motion for summary judgment on or before January 8, 2021, with Rule 4 of the Land Court rules to govern the content of that filing and the content and timing of the ensuing summary judgment filings. Upon receipt of a summary judgment motion compliant with Rule 4, the court will establish a date for hearing. The motion for summary judgment (and any cross-motion) are limited to the issue(s) set up by the court's last remand order and the Board's action on that remand, and, in particular, on the decision of the Board on the last remand, concerning whether or not the 104.32 foot frontage available to serve the plaintiff's site was or was not sufficient to protect the public health, safety and welfare in accordance with the provisions of the penultimate paragraph of G.L. c. 40A, s. 3, and whether or not the Board's most recent decision, as matter of law, is or is not congruent with the law applicable to facilities protected under that paragraph. (Piper, C.J.) (Notice of Docket Entry sent by email to Attorneys Henry Lane, Michael Rosen, and David Doneski) Judge: Piper, Hon. Gordon H.		
01/13/2021	Plaintiff's Motion for Summary Judgment, filed.		Image
01/13/2021	Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed.		Image
01/13/2021	Joint Statement of Material Facts, filed.		Image
01/13/2021	Appendix, filed.		Image
02/03/2021	Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 03/31/2021 Time: 10:00 AM Notice by email to Attorneys Henry Lane, Michael Rosen, and David Doneski		
02/10/2021	Defendants' Response to Plaintiff's Statement of Material Facts, filed.		Image
02/10/2021	Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed.		Image
03/23/2021	Reply in Support of Plaintiff's Motion for Summary Judgment, filed (by email).		Image
03/23/2021	Affidavit of Christopher Clark, filed (by email).		Image
03/23/2021	Event Resulted: Summary Judgment Hearing scheduled on: 03/31/2021 10:00 AM Has been: Rescheduled Hon. Gordon H. Piper, Presiding		
03/23/2021	Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 04/07/2021 Time: 02:45 PM		
04/07/2021	Event Resulted: Summary Judgment Hearing scheduled on: 04/07/2021 02:45 PM Has been: Held via video Hon. Gordon H. Piper, Presiding		

Docket Date	Docket Text	Amount Owed	Image Avail.
04/29/2021	Hearing held on Plaintiff's Motion for Summary Judgment. Attorneys Henry Lane and Michael Rosen appeared for plaintiff. Attorney David Doneski appeared for the municipal defendants. 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 GRANTED summary judgment in favor of plaintiff for the reasons laid upon the record from the bench following argument, and for substantially those reasons set forth in the moving papers, which are summarized as follows. The court is convinced that plaintiff's summary judgment motion should be allowed, and that, resting on both the allowance of the current motion as well as the prior rulings the court has made on summary judgment in this case, judgment ought to enter now in favor of the plaintiff. On this most recent motion, the court finds no dispute of fact that is material to the question before it, which is whether satisfaction of the zoning bylaw's 150-foot frontage requirement by this particular project is reasonable or not under the framework of G. L. c. 40A, § 3, and its provisions, in paragraph 9, affording certain protections to solar energy facilities. Those statutory provisions require the court to give due consideration to whether imposition of the frontage requirement, in whole or in part, to plaintiff's project, is necessary to protect the public health, safety, or welfare. The court concludes that, given the uncontested facts concerning the project and the complete lack of support in the record for the Board's position, there was no proper lawful rational basis for this Board to have required the site to comply with the zoning bylaw's 150 foot minimum frontage requirement. In particular, the residentially-zoned portion of that site subject to the frontage requirement does nothing more than supply the location of the driveway that connects the public street to the industrial-zoned rear land on which the actual solar facility will be constructed and located. The Board failed to articulate, either in its decision or in argument on summary judgment, any connection between the requirement of 150 feet of frontage with the legitimate concerns laid out in the governing paragraph of § 3. Indeed, on the record presented, there is no basis to conclude that there exists any rational reasoning that this Board could have announced or relied upon for its decision, as the undisputed facts disclose no possible legitimate concern regarding health, safety, or welfare that would be served by insisting upon the full 150 feet of frontage under the particular circumstances shown for this project. This is particularly demonstrated by the fact that the project here has 104 feet of frontage, and 100 feet of frontage was deemed adequate in the view of the town meeting when it enacted the bylaw governing streets serving sites where there is public sewer available. Though the lack of public sewer here elevates the frontage requirement to 150 feet, the usual distinction between these two requirements is one without a difference in this circumstance, as this is a solar facility use which all agree requires no waste disposal at all by its very nature. If the concern that drove the town meeting to increase the frontage requirement from 100 feet to 150 feet arose from the need to accommodate on-site septic waste under 310 Code Mass. Regs. §§ 15.00, that concern is utterly irrelevant to this particular use. This court previously issued rulings granting partial summary judgment in favor of plaintiff on June 17, 2019 and June 22, 2021. In those rulings, the court determined (1) that a categorical district-wide prohibition on a solar use in a residential district is not lawful given the need to yield to the overarching framework of G. L. c. 40A, § 3, and (2) that there is no need to satisfy the standard for a dimensional variance where, viewed through the lens of § 3, application of the regulation in question would be unreasonable as applied to the particular protected solar use project. Combining these prior orders with today's grant of summary judgment on the most recent motion filed on January 13, 2021, judgment will enter establishing that the Board's decision was in error and contrary to law, that the project as proposed is not in violation of zoning, and that plaintiff's solar energy facility may be permitted and constructed lawfully as a matter of municipal zoning regulation in the town without the imposition of any further zoning requirement, other than the completion of the site planning process by the Planning Board. That site planning process also must take place under the umbrella of protection supplied by § 3, and with the understanding that it is a nondiscretionary review to be undertaken in the manner dictated by Prudential Ins. Co. v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278 (1986): the Planning Board may identify issues related to site planning that, if not adequately addressed, would raise legitimate concerns as to health, safety, and welfare, but unless it finds a truly intractable problem of that sort, the Planning Board must proceed to work out those issues with the applicant and grant the site plan approval. By May 12, 2021, plaintiff to serve on defendants a proposed form of judgment for defendants' review, and by May 21, 2021, parties to file joint proposed form of judgment with the court. If parties are unable to agree, each to file a separate proposed form of judgment with a memorandum outlining argument for its adoption. The court then will settle the final form of judgment without further hearing, unless otherwise ordered. (Piper, C.J.)		
05/28/2021	Agreed Upon Proposed Judgment, filed (by email).		Image
06/10/2021	Judgment entered. Judge: Piper, Hon. Gordon H.		Image

CERTIFICATION PURSUANT TO MASS. R. A. P. 16(k) & 17(c)

We, Nicholas P. Shapiro, Esq. and Kate M. Carter, Esq., attorneys of record for the Real Estate Bar Association for Massachusetts, Inc. and The Abstract Club, do hereby certify that this Brief of Amici Curiae complies with the rules of this court that pertain to the filing of briefs of an amicus curiae and briefs, to the extent applicable to this Brief of Amici Curiae, including, but not limited to: Mass. R. A. P. 16(a)(13)(Addendum); Mass. R. A. P. 17(c)(Cover, length, and content of Brief of an amicus curiae; Mass. R. A. P. 20(Form and length of Brief, Appendices, and other documents); and Mass. R. A. P. 21 (Redaction). We further certify that the foregoing Brief of Amici Curiae complies with the applicable length limitation in Mass. R. A. P. 20, because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and contains 39 total non-excluded pages.

/s/ Nicholas Shapiro
Nicholas P. Shapiro, Esq.
B.B.O. #673490
Phillips & Angley
One Washington Mall
Boston, MA 02108
Tel. No. (617) 367-8787
nshapiro@phillips-angley.com
rhopkins@phillips-angley.com

/s/ Kate Carter
Kate Moran Carter
B.B.O. #663202
Charles N. Le Ray
B.B.O. #600196
Dain, Torpy, Le Ray, Wiest
& Garner PC
745 Atlantic Ave.,
Suite 500,
Boston, MA 02111
Tel. No.: (617) 542-4800
kcarter@daintorpy.com
cleray@daintorpy.com

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO. SJC-13195

TRACER LANE II REALTY, LLC,
Plaintiff – Appellee

vs.

CITY OF WALTHAM, ET AL.,
Defendants – Appellants

CERTIFICATE OF SERVICE

I, Nicholas P. Shapiro, counsel for the Real Estate Bar Association of Massachusetts, Inc., and The Abstract Club, hereby certify that I have made service of this Brief of Amici Curiae upon the attorney of record for each party by the Electronic Mail as follows:

Counsel for Plaintiff-Appellee Tracer Lane Realty, LLC
John J. Griffin, Jr., Esq.
griffinj@gtlaw.com
David C. Fixler, Esq.
fixlerd@gtlaw.com
John F. Farraher, Jr., Esq.
Farraherj@gtlaw.com
Greenberg Traurig, LLP
One International Place
20th Floor
Boston, MA 02110

Counsel for Defendant-Appellee City of Waltham
Bernadette D. Sewell, Esq.
bsewell@city.waltham.ma.us
City of Waltham Law Dept
119 School Street
Waltham, MA 02451

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/s/ Nicholas P. Shapiro
Nicholas P. Shapiro, Esq.
B.B.O. # 673490
nshapiro@phillips-angley.com PHILLIPS & ANGLEY
One Washington Mall
7th Floor
Boston, Massachusetts 02108
Tel.: (617) 367-8787
Fax: (617) 227-8992