Solar Energy/Planning Board: Massachusetts Court Addresses Preemption/Screening Issues

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A Massachusetts Land Court (Worcester County) ("Court") addressed in a February 18th Decision the denial by a Planning Board ("Board") of a special permit for a solar array. See *Summit Farms, LLC, et al. v. Planning Board for the Town of New Braintree, Massachusetts*, 2022 WL 522438.

The issues considered were whether the Board's denial of the special permit for the proposed solar array was either preempted by Massachusetts law or otherwise exceeded its authority.

The Court noted, prior to addressing the substantive issues, why solar energy facilities sometimes generate siting conflicts despite their relative environmental benefits:

Notwithstanding the inoffensiveness of ground-mounted solar arrays in terms of traditional impact issues such as noise, traffic, shadow and odor that arise when new commercial or industrial facilities are proposed, the proliferation of solar energy facilities has raised concerns among some neighbors to such facilities and municipalities because of the large amount of real estate they often occupy and because of their visibility. Commercial solar energy facilities generate no noise, no odor, and virtually no additional traffic, and cast no long shadows, but a moderately sized facility will take up as much as ten or even twenty-five acres of land that otherwise might be devoted to farming or open space.

Dennis P. Long entered into a lease with Summit Farm Solar, LLC ("Summit") to permit, build, and operate a solar array on the eastern portion of a 43 acre property. The solar array would compromise roughly 8.3 acres of the site. Ground-mounted solar panels associated with the array would be, at their peak, about 10 and one-half feet off the ground.

Summit's application for a special permit to operate the solar array was denied by the Board. The Court subsequently remanded the decision to the Board for reconsideration after an appeal by Summit. The Board was required to reconsider the project in light of additional screening proposed by Summit to make the solar array less visible to the community.

The Board subsequently asserted, in again denying the special permit, that the proposed solar array was:

- In too prominent of a location
- The solar array would have too much of a visible impact notwithstanding the additional screening

Summit again appealed to the Court.

The Court undertook a detailed discussion of the applicable facts generated by the testimony, including a viewing of the subject property by the presiding judge.

The New Braintree, Massachusetts, zoning bylaw has a number of siting requirements. The relevant conditions addressed included the following:

- The location of the facility, due to topography, tree lines, and/or vegetation, cannot reasonably be seen from a residence or public way during all seasons of the year, or
- The location of the facility is so distant from a residence or public way, and/or so obscured by topography, tree lines and/or vegetation, that the visual impact of the facility is rendered negligible, as determined by the Planning Board, during all seasons of the year

The Court first held that the Board's decision was legally untenable because it violated the exempted provisions of G. L. c. 40A, § 3 which provides:

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

There apparently had been no appellate decisions in the State specifically addressing to what extent Massachusetts municipalities could regulate solar arrays. However, the Court looked to a number of other decisions considering exemptions from zoning contained in G. L. c. 40A, §3. It concluded from this review that the appellate decisions considering other such uses had interpreted G. L. c. 40A as prohibiting municipalities from subjecting them to "unreasonable" regulations.

Unreasonable regulation had generally been determined to be one that:

. . . as a practical matter amounts to a prohibition or otherwise unduly restricts the protected use.

Further, dimensional regulations that do not strictly prohibit a protected use had been held to impair it to an impermissible degree.

The Court therefore held that the Board violated the exemptive provision of G. L. c. 40A, § 3 through its denial of the special permit for the solar array. However, the Court also held that the Board exceeded its authority in denying the special permit because, regardless, the effects of the proposed screening measures in reducing the visible impact of the array to negligible levels could not rationally support the denial of the special permit.

A copy of the Decision can be downloaded here.