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

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

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

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

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

***1** On December 5, 2018, plaintiff PLH LLC ("Plaintiff") initiated this action by filing a four-count complaint pursuant to G. L. c. 240, § 14A claiming, among other things, that the special permit requirement imposed by defendant Town of Ware ("Town" or "Defendant") on plaintiff's proposed ground-mounted **solar energy** project violated both G. L. c. 40A, § 3 and the public trust doctrine. On December 17, 2018, plaintiff filed in this court a separate action [1] pursuant to G. L. c. 40A, § 17 appealing a decision issued by the Town of Ware Planning Board ("Board") denying plaintiff's application for a special permit. On January 4, 2019, defendant removed the G. L. c. 240, § 14A action to the United States District Court for the District of Massachusetts. On April 8, 2019, upon the joint motion of the parties, the United States District Court ordered that this case be remanded to the Land Court, after which it was consolidated with plaintiff's c. 40A, § 17 zoning appeal. On May 9, 2019, the court issued an order in plaintiff's § 17 appeal, remanding the zoning decision to the Board. The Board subsequently granted plaintiff's requested special permit; with that appeal now moot, the parties filed on September 26, 2019 a stipulation of dismissal of the § 17 appeal. Following dismissal of that case, the only remaining dispute before this court is the plaintiff's claim, in the pending case pursuant to G. L. c. 240, § 14A, that requiring plaintiff to obtain a special permit for its proposed **solar energy** installation was improper.

Plaintiff filed a motion for summary judgment on October 31, 2019, and defendant filed its opposition on December 3, 2019. A hearing was held on plaintiff's motion on December 12, 2019, at which Attorney Thomas Melone appeared for plaintiff, and Attorney John Davis appeared for defendant. Following argument, pursuant to Mass. R. Civ. P. 56, giving every reasonable inference to the party opposing summary judgment, based on the summary judgment record, there being no material facts in dispute, the court DENIED plaintiff's motion for summary judgment and GRANTED summary judgment in favor of defendant, for the reasons laid upon the record from the bench following argument, and for substantially those reasons set forth in the opposing papers, and which are summarized as follows in this Order:

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The court concludes that the motion for summary judgment brought by the plaintiff is to be denied, and that judgment is to enter in favor of the municipality on the sole issue before the court in this action brought pursuant to G. L. c. 240, § 14A.

The preliminary question that must be addressed is that of justiciability, and whether, even under the liberal standards of § 14A, this case properly is before the court. This is a close question. The court is aware of the long history of § 14A, the purposes for which it was enacted, and the expansive manner in which courts have determined it is to be applied, allowing cases to proceed under § 14A which might not be justiciable under G. L. c. 231A, see *Hansen & Donahue, Inc. v. Norwood*, 61 Mass. App. Ct. 292 (2004). This case sits right at the cusp of being appropriate for decision by the Land Court under G. L. c. 240, § 14A. This is not an instance where there is before the court any pending or prospective municipal zoning permitting or approvals–approvals which might be the basis for future development, depending on the court's application of the zoning bylaw to the particular piece of property owned by the plaintiff. To the contrary, here, following favorable Board action on remand, plaintiff already is in possession of the municipal approvals which will allow it to move forward with its solar project. This is certainly far from the classic case, one in which either the owner of the land who wishes to develop it, or a neighbor whose land is directly affected by

someone else's planned land development, needs instruction from the court about the validity and interpretation under G. L. c. 240, § 14A of the bylaw provisions that are in doubt before the development can proceed.

***2** Even so, the analysis here tips ever so slightly in favor of allowing the court to reach the question put before it by the plaintiff. Colloquy between counsel and the court at the start of the hearing showed there to be some possibility that the ultimate ability of the plaintiff to carry out its project may turn – for financial, rather than regulatory, licensing, or land use permitting reasons – on the interpretation that is given to the bylaw. The interpretive questions posed in this case possibly may guide plaintiff's litigation result in the pending Superior Court case, in which plaintiff is seeking redress for alleged wrongful denial of full SMART Program funding. Plaintiff contends in that suit that the municipality's insistence on its special permit requirement, and the resulting delay, cost plaintiff a favorable position in the advantageous government financing program which plaintiff otherwise would have received. Given that there is some possibility that the question whether plaintiff ever was subject to a valid municipal requirement to get a special permit at all, may have a meaningful impact on the plaintiff to proceed with this project, given the financial consequences of that requirement, the court will err on the side of exercising its jurisdiction under G. L. c. 240, § 14A and reaching the question that has been put before it.

It is worth noting that even with a successful outcome in the current case, plaintiff still needs to knit together a number of arguments and steps to establish effectively that, but for the town's handling of plaintiff's permit requests under the town's reading of the bylaw, plaintiff would hold an advanced and more favorable position in the SMART Program queue, and therefore a more advantageous funding position with the Department of Energy and Resources. The ultimate resolution of those issues properly and respectfully is left for the Superior Court to decide in the related action pending before it.

This leads the court to the principal question raised by the summary judgment motion, which is whether it is appropriate or not for the town to apply the special permit provision in its bylaw to a use protected under the penultimate paragraph of G. L. c. 40A, § 3. That paragraph states: "No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of **solar energy** systems or the building of structures that facilitate the collection of **solar energy**, except where necessary to protect the public health, safety or welfare." In contrast with many of the other protected use paragraphs that are found in § 3, the solar provision is succinct. It does not include some of the other apparatus that was included by the legislature in the provisions dealing with religious, educational, agricultural, and childcare issues. Notably, there is no express statutory treatment of the question of special permit requirements for solar uses, and that is something which is found in certain other paragraphs of G. L. c. 40A, § 3 protecting different "sibling" § 3 uses. This legislative omission is highly significant.

The purpose of the inclusion of solar use in this section of Chapter 40A is clear: there is no doubt that it is to be protective and encouraging of these kinds of uses, and the court acknowledges the urgency of some of the reasons why the legislature has given favored treatment to this category of use. The question before the court is, when crafting § 3, just how far did the legislature go in restraining the hand of municipalities in the way in that they enact, interpret, and carry out their bylaw provisions, as they are applied to this particular favored solar use?

The court is unaware of any case, either at the trial court level or certainly at the appellate level, holding that a special permit requirement is *per se* invalid for uses that fall under the **solar energy** protection provisions of § 3. The court certainly acknowledges that there is strong dictum in some earlier cases having to do with other provisions of § 3 (principally the so-called Dover Amendment paragraph dealing with educational and religious uses) suggesting that the requirement of a special permit could not lawfully be imposed. However, the court finds far more relevant the holding in *Prime v. Zoning Bd. of Appeals of Norwell*, 42 Mass. App. Ct. 796 (1997), in which the panel was confronted with a proposed farmstand to be constructed on land that was determined to be entitled to agricultural use protection under § 3. Mindful that the agricultural use provision of § 3 included some explicit legislative prohibition on the requirement of a special permit for certain aspects of a protected agricultural use, the *Prime* court was very clear in deciding that special permits are not something which are categorically prohibited or intrinsically unavailable for an agricultural use protected under § 3. In that case, the board had required that the construction of a farmstand on the locus be subject to two special permits, and

the Land Court judge (Kilborn, J.) nullified the special permit requirements for that particular use. The Appeals Court did not adopt that view of the law. It "conclude[d] that the board may require that Simons obtain special permits for the farm stand, but only upon reasonable conditions ...." *Id*. at 800. The substance of the Appeals Court's holding is that the special permit requirement was not *per se* or intrinsically unavailable or legally invalid, and the Land Court's judgment invalidating that requirement for the agricultural use under review there was incorrect and needed to be reversed.

***3** The Appeals Court did not leave it there, and its opinion clarifies the answer to the question now before this court. The bottom line of the *Prime* holding was that the board may not apply the special permit requirement in a way that is tantamount to an arbitrary denial or an unwillingness to allow the protected use. The Appeals Court said that unless there is some pretext about whether the use qualifies for § 3 protection – which certainly was not the case in *Prime*, and is not the case here – then "bona fide proposals for new structures may be reasonably regulated, and a special permit may be required. The provision of § 3 precluding a requirement of a special permit for existing agricultural structures remains intact .... Essentially the same reasoning applies, and the same conclusions obtain," with respect to any manner of special permit. *Id*. at 802. Thus, a special permit cannot unreasonably regulate, cannot impose conditions that go beyond statutory limits provided under § 3, cannot be used either directly or pretextually as a way to prohibit or ban the use, and cannot be used to allow the board any measure of discretion on whether the protected use can take place in the district, because to do so would be at odds with the penumbral protections that are provided under § 3. As the Appeals Court said, "the special permit may not be imposed unreasonably and in a manner designed to prohibit the operation of the farm stand, nor may the permit be denied merely because the board would prefer a different use of the locus, or no use." *Id*. at 802-803.

That is the correct outcome here, and as noted in colloquy with counsel for both sides, there are policy reasons which support this outcome. To conclude otherwise, first of all, would result in the invalidation of a special permit provision of the bylaw as applied to an entire category of protected use under § 3. This would leave **solar energy** use in the Town without any effective regulation, at least as an interim matter, until there was some municipal legislative solution that supplied a more tailored special permit provision. This is an issue that applies not just to this one project, but would carry over to all similar solar uses in the Town. If the court now decided that no special permit could be required in any case in any district for a proposed solar use, it would leave all those projects outside this traditional method of municipal review. It is not the right approach to invalidate categorically the Ware zoning law's special permit provision (and to do so in effect retroactively) for all **solar energy** projects, leaving this aspect of municipal zoning in the Town unregulated until corrective legislative action were to occur.

Secondly, there is no good support in the cases or in the court's experience for an absolute legal requirement that a municipality--which wishes to regulate by special permit a § 3 protected use--may do so only by the enactment of a particularly drafted special permit bylaw provision which is focused just on the specific use protected under a particular paragraph of § 3. Plaintiff suggested in argument that, at most, a municipality could require a special permit for a § 3 use only if the municipality had enacted a special permit provision limited to that particular use, and which applies only the amount of regulation proper under that one paragraph of § 3, with use-specific standards, conditions, and restrictions. There is no basis for such an assertion in the decisional law or the language of § 3. The difficulty, of course, is that every paragraph of § 3 speaks to its own particular use, and the particular provisions which in that paragraph benefit a given § 3 use are different than the provisions for all the other uses. The legislature obviously had its reasons for singling out one type of protected § 3 use for one particular manner of regulation as opposed to the rules set up for another § 3 protected use. The legislature did not intend a framework where, if there is to be any special permit requirement at all (particularly, as here, for a use as to which there is no statutory prohibition on special permit regulation), there can only be a hand-crafted version that is tailored just to that one § 3 use.

The proper result in this case is the issuance of a declaration consistent with the above language from the *Prime* decision. The court will issue a judgment declaring that the bylaw's requirement of a special permit in this district is not invalid, but that the review of the municipality conducted under the bylaw's special permit provisions must be limited and narrowly applied in a way that is not unreasonable, is not designed or employed to prohibit the use or the operation of the protected use, and exists where necessary to protect the health, safety or welfare. Operating within that ambit, it is

appropriate for a special permit granting authority to receive and act upon a special permit for a **solar energy** use in a district where required, and indeed, in an appropriate case within that narrow ambit, to issue a denial of a special permit, but only where the project presents intractable problems, such as those that jeopardize public health, safety, and welfare. Requirements of a special permit granting authority, including conditions imposed on a special permit, which are too far outside the limited, narrow scope of regulation allowed by the **solar energy** provisions of § 3, would be improper.

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

So Ordered.

Attest:

Deborah J. Patterson Recorder

All Citations

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

Footnotes

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