2022 WL 522438
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Massachusetts Land Court,
Department of the Trail Court.
Worcester County.

SUMMIT FARM SOLAR, LLC,
and DENIS P. LONG, Plaintiffs,
v.
PLANNING BOARD for the TOWN OF
NEW BRAINTREE, MASSACHUSETTS,
And
JASON AYER; JEFFREY HOWLAND; DAVID THOMPSON; JODY KABLACK; GENEVIEVE STILLMAN; and ANDREW MAY as they constitute the New Braintree Massachusetts Planning Board,
And
RANDALL WALKER; WILLIAM C. HOWLAND; and JOSEPH CHENEVERT as they constitute the Town of New Braintree, Massachusetts Select Board, Defendants.

MISCELLANEOUS CASE
No. 18 MISC 000367 (HPS)
|
Dated: February 18, 2022

WORCESTER,

DECISION

Howard P. Speicher, Justice

***1** 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. This has led to disputes like the one presently before the court, in which the planning board of the rural town of New Braintree ("Planning Board") denied a special permit for a solar array proposed for about eight acres of a forty-three-acre farm located near prominent roadways and intersections in the center of this bucolic town and near its town hall. The special permit provision of the New Braintree Zoning Bylaw pertaining to **solar energy** facilities is predicated on minimization of their visibility, and the Planning Board denied the present proposal, twice, because of its conviction that the visual impact of the proposed facility had not been rendered sufficiently negligible.

This case was originally scheduled for a trial commencing on February 2, 2021. I conducted a view of the subject property as well as the locations of other **solar energy** facilities in New Braintree on January 11, 2021. Following the view, and prior to the scheduled trial, the parties informed the court of a tentative settlement and jointly requested that the court remand the matter so that the Planning Board could consider revisions to the site plan for the proposed **solar energy** facility. On remand, the Planning Board, following a public hearing to consider the proposed revisions, again denied the application for a special permit. The plaintiffs filed an amended complaint challenging the denial following the remand, and the case was restored to the trial list. The matter was tried before me in person, utilizing Covid-19 protocols, on November 9 and 10, 2021. Upon the filing of post-trial submissions by the parties, I took the case under advisement on February 7, 2022.

Based on the findings of fact and rulings of law below, I find and rule that the Planning Board violated the exemptive provisions of G. L. c. 40A, § 3 by its denial of a special permit for the proposed **solar energy** facility and otherwise exceeded its authority in denying the requested special permit.

FACTS

Based on the facts stipulated by the parties, the documentary and testimonial evidence admitted at trial, my view of the subject property, and my assessment as the trier of fact of the credibility, weight and inferences reasonably to be drawn

from the evidence admitted at trial, I make the following factual findings:

***2** 1. Plaintiff Denis P. Long owns the property at 40 Hardwick Road in New Braintree (the "Long property") that is the subject of this action. The Long property is a roughly 43-acre parcel of farmland in the center of the rural town of New Braintree. The property, roughly rectangular in shape, is bordered on the west by Hardwick Road, on the east by a densely wooded area along the property line of two abutting owners, on the north by Barre Cutoff Road, and on the south by Oakham Road. [1]

2. The Long property generally slopes downward from Hardwick Road on the west to its eastern boundary approximately 1400 feet, or more than a quarter of a mile away. The property slopes most steeply from its western boundary along Hardwick Road, and then more gently on the eastern half of the property. From a pond in the middle of the property moving east, the property slopes gently, and its eastern third, where the solar array is proposed, is almost flat, and is generally at an elevation 40 to 45 feet below the elevation of the property where it meets Hardwick Road. [2]

3. The Long property is naturally screened to some extent by trees, hedgerow and brush that sporadically border its entire perimeter along Oakham, Hardwick and Barre Cutoff Roads. [3]

4. The Long property is improved by a single-family home in which the owner lives, as well as by a bam, both of which are located near the western boundary of the property at Hardwick Road. The New Braintree Congregational Church is located just off the southwestern comer of the property at the comer of Hardwick and Oakham Roads. [4] There is also property of a residential abutter along Barre Cutoff Road that cuts into the rectangle of the Long property's boundaries on the north side of the property. [5]

5. The Long property is an active farm. Farming activities include the raising and milking of goats, growing of hay, and on the eastern end of the property, where the solar array that is the subject of this action is planned, the growing of pumpkins. [6]

6. Across Oakham Road, near the southeastern comer of the property, is the New Braintree Town Hall and an elementary school. The southern boundary of the Long property in the vicinity of the town hall and the elementary school is screened to some extent by brush and a stand of trees. [7]

7. There are at least two neighbors across Hardwick Road, at 85 Hardwick Road and 171 Hardwick Road, who live in two-story houses. [8] The home at 85 Hardwick Road is directly across the road from the property, and the home at 171 Hardwick is north of the intersection of Barre Cutoff Road and is separated from the Long property by Hardwick Road and other abutting property on the comer of Hardwick and Barre Cutoff Roads. The Long property is partially visible from their houses through the hedgerow and trees that partially line the western and northern border of the Long property, but the view is obscured by trees that are as high as 60 to 70 feet in height. [9] From parts of their respective properties, the neighbors across the road can see, through the trees and hedgerows, parts of the eastern end of the Long property in the distance to the east or southeast. [10]

***3** 8. The owner of the Long property, Denis Long, entered into a lease with Summit Farm Solar LLC ("Summit") to permit, build and operate a **solar** **energy** array on the eastern portion of the 43-acre property, [11] on a site to comprise roughly 8.23 acres. [12]

9. Summit is a single purpose entity owned by Nexamp, Inc., a **solar** **energy** developer. Nexamp owns or operates several other solar facilities in New Braintree and nearby towns. [13]

10. The location on the Long property is suitable for the installation of a **solar** **energy** facility because it is in close proximity to a three-phase power line that it could be tied into, a necessity for a commercial solar array, and because the land is roughly level and in an area that provides unobstructed access to the sun. [14] Other solar arrays owned or operated by Nexamp in New Braintree meet these same requirements. [15]

11. Summit proposes to install a solar array covering 8.23 acres at the eastern end of the Long property. The ground-mounted solar panels would be, at their peak, about 10 and

one-half feet off the ground. [16] The solar array is proposed to generate about 2.29 MW of power. [17]

12. Following a disapproval by the Planning Board of Summit's application for a special permit to allow the **solar energy** facility proposed for the Long property, [18] and an appeal to this court, the parties agreed to a remand so that the Planning Board could reconsider the project in light of additional screening proposed by Summit to make the proposed array less visible to the community. [19]

13. On remand, the Planning Board, asserting that the proposed solar facility was in too prominent a location in town and would have too much of a visual impact notwithstanding the proposed additional screening, denied the requested special permit for a second time, resulting in a renewed appeal to this court. [20]

14. As proposed after the remand, Summit proposes to screen the solar array as follows:

a. The 8.23-acre array would be bordered on the north, west, and south by a 7-foot high chain link fence with privacy slats woven into the chain links; [21]

b. On the east the array would be screened by the existing dense stand of trees that runs the entire length of the eastern boundary of the Long property; [22]

c. Additionally, the perimeter of the array on the north, west, and south, just outside the chain link fence, would be screened with arborvitae trees and eastern red cedar trees, spaced 10-15 feet apart. [23] These trees, when planted, would range from 6 - 8 feet in height. [24] After a year to establish themselves, the arborvitaes grow on average, 1-3 feet per year, and the cedar trees at a rate of about 1 foot per year. [25] The arborvitaes and cedar trees can be expected to grow to a maximum size of approximately 20-25 feet tall and 10-12 feet wide. [26]

***4** d. At the western boundary of the Long property, where it bounds Hardwick Road, two earthen berms would be added, at an additional elevation of approximately 3 feet each, to block the view into the Long property from Hardwick Road and at the intersection of Hardwick Road and Barre Cutoff Road where the view is not already obstructed by the existing hedgerows and trees. [27]

e. At the northeast comer of the property, near Barre Cutoff Road between the fence and a wetland, additional plantings will include staggered arrangements of gray dogwoods, a large shrub that can grow up to 10 to 15 feet tall and wide. [28]

f. On top of the newly built berms, eastern white pines, eastern red cedar, witch hazel, and shadblow serviceberry trees would be added in staggered rows, at a typical height of 6 to 8 feet at the time of planting. These trees, after a year to establish themselves, grow at a rate of approximately 1 foot per year, and in the case of the white pines, can be expected to reach a maximum height of approximately 60 to 70 feet, while the remaining three species grow to a lower height but wider diameter, thus filling in the space below the branches of the pines. [29]

15. Immediately upon installation of the proposed solar array and the proposed screening by fence with privacy slats, the arborvitaes and cedars around the perimeter of the array, and the addition of the berms and staggered rows of trees on top of the berms, visibility of the array will be limited to a partial view of the tops of the solar panels above the new chain link fence with privacy slats, and between the trees. This view will be slight, and will be further obscured from Oakham Road by the existing brush and trees on the south side of Oakham Road; [30] the tops of the solar panels in the array from Hardwick Road will be barely visible in the distance, obscured by the existing hedgerow and trees, the new berms and staggered rows of trees on top of the berms, and as further obscured by the considerable distance from Hardwick Road of more than 900 feet from all points. [31] From cars passing by on Hardwick Road there is likely to be no view that is not, at most, negligible. There is likely to be a partially blocked view, from a considerable distance, of the tops of the solar panels in the array from the properties of the abutters on Hardwick Road or from the second floors of their houses. [32] From most of Barre Cutoff Road, given the existing trees along the road, the fence and the additional perimeter trees, there is likely to be no view at all, or only a negligible view of the tops of the solar panels. [33]

16. Once the plantings described above have had a chance to grow in, within two to five years, the arborvitaes and cedars on the immediate perimeter of the array will be several feet taller and will be higher (and within a few more years, considerably higher) than the array, as will the trees planted on the two new berms along Hardwick Road. [34] The growth of these trees will also fill in the open space between them. The result will be that within two to five years, there will be no view at all of the solar panels in the array from Oakham or Barre Cutoff roads, with perhaps, at most, a negligible glimpse from some points along Hardwick Road, a glimpse that will diminish and disappear or almost disappear as the trees continue to grow in height and width. [35]

***5** 17. I credit the testimony of Ms. Regan Andreola, the landscape architect who designed the screening as described above, that there will be nothing but, at most, a negligible view of the array from any point on the surrounding public ways or from the Hardwick Road neighbors' properties once the trees have grown in, and that even before the trees have grown in, the view will be negligible.

The Bylaw

18. Section 8 of the New Braintree Zoning Bylaw provides that ground-mounted **solar energy** facilities of the type and size proposed by Summit (classified as a "large facility") may be permitted to be installed upon the issuance of a special permit by the Planning Board. With the exception of one location in town, on town-owned land, where a **solar energy** facility of no more than five acres may be erected as a matter of right, a special permit is required for a "large" **solar energy** facility anywhere in town.

19. In general, the Bylaw requires that site plan review by the Planning Board be part of the special permit consideration; that the number of such facilities in operation at any one time is limited to six; and that facilities must meet certain dimensional requirements.

20. In addition, under the heading of "Siting Requirements," the Bylaw requires, in Section 8.C.4.A.2, as follows: [36]

> One of the following conditions must be met.
>
> a. 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
>
> b. 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.

Other Facilities

21. There are several other **solar energy** facilities either permitted or permitted and constructed and operating in New Braintree. Two of them were shown to the court by the parties on a view prior to trial. One of the facilities viewed was partially visible from the road as one drove by, with a substantial number of solar panels viewable from the road, which became hidden by trees as one passed. The other was largely hidden from the road by trees, and was not visible from the road, except for a view from the road of the fence surrounding the array past a driveway and parking arrea, with the tops of the panels slightly in view. [37]

The Board's Decision on Remand

22. The Board denied Summit's application for a special permit for the proposed array in a decision dated April 30, 2018. The decision was premised on the Board's conclusion that the proposed array does not meet the siting provisions of the Bylaw requiring that "the location of the facility is so distant from a residence or public way, and so obscured by topography, tree lines, and/or vegetation, that the visual impact of the facility is rendered negligible during all seasons of the year." In finding that the proposal did not meet this requirement, the Planning Board impliedly found that the array was not adequately screened and would be visible in greater than negligible fashion from the three surrounding roads and from the homes of abutters on Hardwick Road. The Board made no other findings in support of its denial. [38] Following Summit's appeal to this court, the parties agreed to a remand for the purpose of having the Planning Board reconsider its decision based on additional screening to be proposed by Summit.

***6** 23. Following a new hearing held on April 5, 2021, the Planning Board issued a new decision on the same date, in which it again denied Summit's application for a special permit. The Planning Board reasoned that the proposed array, even with the additional screening proposed by Summit, would not meet the requirements of Section 8 of the Bylaw that the array could not reasonably be seen from a public way or residences during all seasons of the year, or that the location of the array be 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. [39]

DISCUSSION

Summit appeals from the Planning Board's denial of its application for a special permit with respect to the special permit provision for **solar** **energy** facilities in Section 8 of the New Braintree Zoning Bylaw. General Laws 40A, § 17 provides that "any person aggrieved by the decision of...any special permit granting authority.. .may appeal to the land court department...." The court's inquiry in reviewing the decision of a board of appeals or a special permit granting authority is a hybrid requiring the court to find the facts de novo, and, based on the facts found by the court, to affirm the decision of the board "unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). This involves two distinct inquiries, the first of which looks to whether the special permit granting authority's decision applied incorrect standards or criteria. See *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003).

Only after determining that the decision was not based on a legally untenable ground does the court then proceed to the second, more deferential inquiry, in which "the [special permit granting authority] 's discretionary power of denial extends up to those rarely encountered points where no rational view of the facts the court has found supports the [special permit granting authority]'s conclusion that the applicant failed to meet one or more of the relevant criteria found in the governing statute or by-law." *Id.* at 74-75. Those "rarely encountered points" include those occasions where there are no facts to support a special permit granting authority's conclusion that one or more of the factors required to be considered by the local bylaw or ordinance have not been met. Moreover, a special permit granting authority "may not conclude the proposed use is not in harmony [with the intent of the bylaw] in the absence of credible evidence." *Tresca Brothers Sand and Gravel, Inc. v. Bd. of Appeals of Wilmington*, 97 Mass. App. Ct. 1128 (July 8, 2020) slip op. at 6 (Rule 1:28 Unpublished Decision); see also *Shirley Wayside Ltd. Partnership v. Bd. of Appeals of Shirley*, 461 Mass. 469, 485 (2012) (board must apply its own criteria rationally and may not deny special permit for expansion of nonconforming use "in the absence of credible evidence").

A special permit granting authority is required to make detailed findings in support of its decision. *MacGibbon v. Bd. of Appeals of Duxbury*, 347 Mass. 690, 692 (1964) (board's decision must contain "definite statement of rational causes and motives, founded upon adequate findings"), citing *Prusik v. Bd. of Appeal of Boston*, 262 Mass. 451, 458 (1928). Notwithstanding the requirement for detailed findings in general, perhaps somewhat paradoxically, "the refusal of a board to grant a special permit...does not require detailed findings by the board." *Schiffone v. Zoning Bd. of Appeals of Walpole*, 28 Mass. App. Ct. 981, 984 (1990). But this does not mean that the special permit granting authority is relieved of the requirement to state its reasons for the denial. Rather, it means that in the case of a denial of a special permit, "the requirement that the [special permit granting authority] provide reasons supporting its decision, is less demanding than if the [special permit granting authority] had acted affirmatively." *Bd. of Aldermen of Newton v. Maniace*, 429 Mass. 726, 732 (1999). See also *Gamache v. Town of Acushnet*, 14 Mass. App. Ct. 215, 220 (1982) (less rigorous findings required when denying relief).

***7** When the reasons given by a special permit authority in support of a denial are merely conclusory, that is, "[w]hen a decision contains conclusions that do nothing more than repeat regulatory phrases, and are unsupported by any facts in the record, [the court is] constrained to conclude that the decision is 'unreasonable, whimsical, capricious or arbitrary,' and therefore invalid." *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica,* 454 Mass. 374, 386 (2009).

I. THE BOARD'S DECISION WAS LEGALLY UNTENABLE BECAUSE IT RAN AFOUL OF THE EXEMPTIVE PROVISIONS OF G. L. c. 40A, § 3.

Turning to the first inquiry, a decision is based on legally untenable grounds when premised "on a standard, criterion or consideration not permitted by the applicable statutes or by-laws. Here, the approach is deferential only to the extent that the court gives 'some measure of deference' to the local board's interpretation of its own zoning by-law. In the main, though, the court determines the content and meaning of statutes and by-laws and then decides whether the board has chosen from those sources the proper criteria and standards to use in deciding to grant or to deny the variance or special permit application." *Britton v. Zoning Bd. of Appeals of Gloucester*, supra, 59 Mass. App. Ct. at 73 (internal citations omitted).

The Planning Board's decision denying a special permit for the **solar energy** facility proposed by Summit rests entirely on the premise, embodied in Section 8 of the Bylaw and reflected in the Planning Board's decision, that if a **solar energy** facility is visible from any public way or residence during any season of the year, unless such visibility is so limited as to be negligible in the opinion of the Board, then a special permit for the proposed **solar energy** facility should not be issued. Were this an application for a use that was not the subject of a limited zoning exemption for **solar energy** facilities, and if it were of general application instead of singling out a protected use, then the concern embodied in Section 8 of Bylaw with respect to visual impact generally might be a fair subject of regulation by special permit. See *Monks v. Zoning Bd. of Appeals of Plymouth*, 37 Mass. App. Ct. 685, 688 (1994) (bylaw expressly protected visual character of the neighborhood). However, where the exemptive provisions of G. L. c. 40A, § 3 come into play, zoning bylaw provisions protecting residents from potentially intrusive visual impact of protected uses may have to give way. See *Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 146-147 (2001) (landowner abutting property on which church sought to build a tall steeple on temple had standing, but height provisions of bylaw were unenforceable in light of the exemptive provisions of G. L. c. 40A, § 3 for religious uses). In the present case, the protection from view impact afforded by the Bylaw deserves special scrutiny, because, ironically, it establishes view impact as a basis for denial only with respect to **solar energy** facilities, while leaving all other uses, which are not the subject of special zoning protection, unregulated with respect to view impact. The Planning Board points to no other use that can be prohibited unless it can be rendered invisible or nearly so.

The particular exemptive provision for **solar energy** facilities is found in paragraph 9 of G. L. c. 40A, § 3, and provides as follows:

> ***8** No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of **solar energy** systems or the building of structures that facilitate the collection of **solar energy**, except where necessary to protect the public health, safety or welfare.

The extent of the regulation of **solar energy** systems permitted to municipalities under this provision has not yet 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 (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 (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 (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 (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 (1987) (municipality may not prohibit 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 (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 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 reasonable 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" short of outright prohibition. A zoning requirement is unreasonable if it detracts 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 (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 (2000).

***9** 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*, supra, 434 Mass. 141, 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 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 requirement 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 (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 a denial or an undermining of the protected use. *Id.* at 802.

There is little nuance required in the present case in analyzing whether the degree of regulation imposed by the Planning Board is reasonable, because the Board opted for outright prohibition of the use as the only option to address its concerns with respect to visual impact. The Planning Board defends as reasonable regulation the prohibition of a protected use on the basis of visual impact that the Board determined to be more than "negligible" under the provisions of Section 8 of the Bylaw. On its face then, the Board's decision amounted not to regulation, but to prohibition, and prohibition, at that, simply because the structure of the protected use can be seen. G. L. c. 40A, § 3 countenances prohibition, as opposed to regulation, only "where necessary to protect the public health, safety or welfare." The Planning Board offered no evidence or argument that the proposed **solar energy** facility poses a threat to public health or safety, nor could any such suggestion be made with any plausibility. Rather, the Planning Board justifies prohibition based on visual impact as being necessitated to protect the public welfare, which it argues is inclusive of protecting the rural character of the neighborhood and town in which the facility is proposed to be located.

The meaning of "public welfare" has not been considered in the context of G. L. c. 40A, § 3, but it has been examined by the courts in other contexts. Attempts to characterize excessive collection of sales taxes by retailers as a violation of the public welfare, and therefore a violation of G. L. c. 93A, §§ 2 and 9, as defined by 940 C.M.R. § 3.16(3), have been rejected. *McGonagle v. Home Depot, U.S.A., Inc.,* 75 Mass. App. Ct. 593, 601 (2009) (excessive collection of sales tax not a "violation of the public welfare" within meaning of attorney general's regulations defining as a G. L. c. 93A violation any violation of a statute intended for the "public health, safety or welfare"); *Klairmont v. Gainsboro Restaurant, Inc.*, 465 Mass. 165, 173 (2013) (State building code "may qualify as a regulation 'meant for the protection of the public's health, safety or welfare" under 940 C.M.R. 3.16(3)). The term "public welfare" has been defined as "a society's well-being in matters of health, safety, order, morality, economics, and politics." Black's Law Dictionary 1588 (7th ed. 1999) quoted in *McGonagle v. Home Depot, U.S.A., Inc.* 22 Mass. L. Rptr. 708 (Mass. Superior Court, 2007). The term also "has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts, but not to include 'mere expediency.' " *Opinion of the Justices*, 333 Mass. 773, 778 (1955). Aesthetic considerations may to some extent be included in the concept of the public welfare but have been so included only in the establishment of historic districts and regulation of billboards, neither of which involve prohibition of uses subject to zoning exemptions. *Id.* at 779. "[The term 'public welfare'] should be defined with some strictness, so as not to include everything that might be enacted on grounds of mere expediency." *Smith v. New England Aircraft Co.*, 270 Mass. 511, 522-523 (1930).

***10** Thus defined, a concern for view impact of the proposed facility goes beyond the permissible scope of consideration for public welfare afforded by G. L. c. 40A, § 3 to the town and the Planning Board, as it implicates none of the concerns reserved to municipalities when considering what regulation of **solar energy** facilities may be considered reasonable, or when considering when municipalities may outright prohibit **solar energy** facilities. To the extent the town's or the Planning Board's concern about visual impact is, as it appears to be, a purely aesthetic concern, it is not an appropriate subject of zoning regulation prohibiting, rather than regulating, a protected use. In crafting zoning regulations, "aesthetic considerations alone are not enough, but...they may be taken into account, if the primary objects of the regulation are sufficient to justify 11" *Opinion of the Justices*, supra, 333 Mass. at 778. Here, the "primary object of the regulation" is not justified in the Bylaw, nor did the Planning Board attempt to justify it at trial, as anything other than a concern for aesthetics. There is no suggestion from the Planning Board that the proposed **solar energy** facility unduly impacts the public welfare in any way other than by its slight visibility. The Planning Board does not contend, nor could it, that its denial was based on any factor related to noise, traffic, odor, shadow, damage to water or air quality, or any other factor that might impact the public health, safety or welfare. Thus, the purely aesthetic concerns upon which the Planning Board's decision prohibiting the facility was based violated the protections afforded **solar energy** facilities by G. L. c. 40A, § 3. See *Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 493 (1989) (aesthetic impacts provide insufficient basis to establish standing in zoning appeal).

The better, and correct, view of the limits of local regulation of **solar energy** facilities allowed by G. L. c. 40A, § 3 is that such local regulation may not extend to prohibition except under the most extraordinary circumstances, and that special permits regulating **solar energy** facilities must be treated like site plan approval, which allows for regulation but not for prohibition. The language of a site plan approval provision in a zoning bylaw "implies regulation of a use rather than its prohibition." *Y.D. Dugout, Inc. v. Board of Appeals of Canton,* 357 Mass. 25, 31 (1970). Likewise, "[w]hile § 3 does not necessarily bar subjecting a **solar energy** system to a special permit, it does limit the scope of any required special permit." *NextSun Energy LLC v. Fernandes*, Land Court Case No. 19 MISC 230 (February 22, 2021) (Foster, J.), 2021 WL 669059 at *14 (denial of special permit annulled). "In particular, a special permit for a solar generation facility, 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.' " *Id.* at 15, quoting *PLH LLC v. Ware*, Land Court Case No. 18 MISC 000648 (Dec. 24, 2019) (Piper, J.), 2019 WL 7201712, at *3.

II. NO RATIONAL VIEW OF THE FACTS SUPPORTS THE BOARD'S DENIAL OF THE SPECIAL PERMIT.

Having established that the Planning Board's denial was not legally tenable because it violated the exemptive provisions of G. L. c. 40A, § 3, I need not consider whether any rational view of the facts supports the Planning Board's conclusions. See *Sedell v. Zoning Bd. of Appeals of Carver*, 74 Mass. App. Ct. 450, 454 (2009). However, even under this more deferential part of the court's inquiry, the Planning Board's decision does not withstand scrutiny. This inquiry looks to "whether the Board has denied the application by applying those criteria and standards in an 'unreasonable, whimsical, capricious or arbitrary' manner." *Britton v. Zoning Bd. of Appeals of Gloucester*, supra, 59 Mass. App. Ct. at 74. "On review, the judge's role is to determine 'whether the reasons given' by the board, 'had a substantial basis in fact, or were, on the contrary, mere pretexts for arbitrary action or veils for reasons not related to the purposes of the zoning law.' " *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica,* supra, 454 Mass at 387, quoting in part, *Vazza Properties, Inc. v. City Council of Woburn,* 1 Mass. App. Ct. 308, 312 (1973).

In its decision following remand, the Planning Board generally found that even with the additional screening proposed by Summit, the project still did not meet the siting requirements of Section 8.C.A.2 of the Bylaw that the facility be so distant or otherwise obscured that it cannot reasonably be seen from any public way or residence, or that it be so distant or obscured by topography or vegetation that its visual impact is "negligible" during all seasons in the determination of the Planning Board. After making its general findings that the project did not meet the Bylaw siting requirements, the Planning Board made the following specific factual findings in support of its conclusion:

> ***11** 4) The Planning Board found that due to the location of the subject property, abutting three public ways with over 3,500 linear feet of frontage along the public ways, the ability to render the visual impact of the facility negligible during all seasons of the year has not been demonstrated.
>
> 5) The Planning Board found that due to the location of the subject property, in close proximity to several private residences and the open nature of the property, the ability to render the visual impact of the facility negligible during all seasons of the year has not been demonstrated.
>
> 6) The Planning Board found that the existing vegetation on the subject property consists predominantly of deciduous trees and shrubs and does not offer significant screening of the proposed facility, and the proposed planning plan does not adequately enhance the existing vegetation so as to comply with the Bylaw to render the visual impact of the facility negligible during all season of the year.
>
> 7) The Planning Board determined that the size of the proposed plantings, and the spacing of the plantings is not sufficient to render the visual impact of the facility negligible during all seasons of the year, even with certain additional screenings that the Applicant agreed to add in addition to those on the revised plans (5(h) and 5(i)) when the applicant was questioned at the public hearing. The request by the Planning board to revise the planting plan to add additional plantings, staggering plants instead of planting in a straight line, and creating more berms and screening in additional locations along the road frontages of the Property was not acceptable to the Applicant. [40]

No evidence admitted at trial provides any rational basis for the Planning Board's findings listed above, and in fact the credible evid4nce at trial supports only a finding that the siting standards of the Bylaw were met by the Summit proposal as revised following the remand. The project, even as originally designed and sited, was well-located to minimize its visual impact from surrounding roads and properties by its siting on the eastern end of the farm property next to a dense stand of trees, far from Hardwick Road, and well-screened by existing vegetation along Oakham Road, Barre Cutoff Road and Hardwick Road. [41] Photographs looking from the Town Hall and elementary school shared driveway near Oakham Road toward the project site show the project site to be well screened by existing vegetations and topography even without the additional screening proposed by Summit. [42] Similarly, even the western end of the field on the Long property, more than 900 feet west of the proposed array, is screened from Hardwick Road by existing topography and vegetation, by the bam and house on the property, and by the lower elevation of Hardwick Road compared to the western edge of the property. [43] The same is true for parts of Barre Cutoff Road. [44]

Summit's revised site plan proposes to add additional screening of the solar array from both the nearby roads, Oakham and Barre Cutoff, which are close to the array and at about the same elevation, and from Hardwick Road, which is at a higher elevation, by about 45 feet, but is lower in elevation than the immediate part of the property it abuts and is also more than 900 feet distant from the array. To do so, Summit's landscape architect proposes a perimeter fence with privacy slats, and to surround the fence with two types of fast-growing evergreens, arborvitaes and cedars. In addition, berms raising the elevation of parts of the property near Hardwick Road will further raise the elevation and block the view from Hardwick Road; the berms will be planted with additional staggered rows of evergreens that will further screen the array from Hardwick and the neighbors across Hardwick.

***12** This additional screening, in combination with the existing stands of trees and brush and hedgerow along the nearby roads, will make all but the top of the array invisible at its inception. After the trees have had time to grow in, within two to five years, the array will be virtually unseeable from either Oakham Road or Barre Cutoff Road. From Hardwick Road, given the existing hedgerows and tree cover along the road, given the considerable distance to the already-screened array, and given the proposed addition of two additional earthen berms, both of which will have staggered rows of evergreens atop them, there will be no more than what can only be described fairly and reasonably as a negligible view of any part of the array off in the distance a quarter mile away.

I have found these to be the facts based on the uncontradicted testimony of Summit's landscape architect as informed by my view of the subject property, which was conducted in January 2021, when there was no deciduous tree cover. Additionally, I find that it would be unreasonable to require additional screening from Hardwick Road, as the screening necessary to make the field, and the array, completely invisible from all points along the road would require construction of a high wall or other barrier along the entire length of the frontage of the property, thus walling off the existing farmhouse and bam, and unnecessarily screening a view of the array off in the distance that is already negligible. [45]

The Planning Board offered no competent evidence, credible or otherwise, to counter the uncontradicted evidence presented by Summit, which I have credited, that the proposed solar array, with the revisions proposed by Summit on remand, will not reasonably be seen from nearby residences or public ways during all seasons of the year, or that the proposed array is so distant from residences and public ways that the visual impact of the facility will be negligible during all seasons of the year. The Planning Board presented two neighbors across Hardwick Road who testified that they can see from their properties and from the nearby ways all or parts of the field on the Long property, including the part of the field where the array is proposed to be located. A member of the Planning Board also testified that the proposed site of the array can be seen from parts of the nearby public ways. Even crediting this testimony, none of it addressed in any competent manner whether the view of the proposed array, once constructed and once the screening vegetation has grown in, would or would not be sufficiently screened so as to render any view of the array itself negligible. [46]

Thus, I find Ms. Andreola's testimony to the effect that the proposed array will be screened by existing topography and vegetation, and by additional screening as proposed by Summit, to an extent so as to render any view of the array negligible from the abutting ways and nearby properties, to be uncontradicted by any competent evidence to the contrary. There was no rational support for the Planning Board's findings based on the facts as I have found them following trial.

The Planning Board's finding that Summit had not demonstrated how it could screen the array due to the 3,500 feet of frontage along the field was not supported by the facts and was contradicted by the proof at trial that the site is largely screened by existing topography and vegetation, and that the added berms, plantings and fence with privacy slats, combined with the distance from Hardwick Road would render negligible any view of the array. The Planning Board's finding that because of proximity to other properties and the “open” nature of the field Summit had been unable to adequately screen the proposed array was also not supported by the evidence at trial, as the uncontradicted evidence supports the finding that views of the array from the nearby properties and roads will be rendered negligible. The Planning Board's findings that the existing vegetation and topography in combination with the proposed additional plantings and other screening would be inadequate to screen the array was

contradicted by the credible and unchallenged testimony of Ms. Andreola, and the Planning Board offered absolutely no admissible evidence to counter Ms. Andreola's conclusions or to otherwise support its findings.

***13** Ms. Andreola undertook a thorough analysis of the effects of the proposed screening measures in reducing the visual impact of the array to negligible levels. This testimony corroborated and explained the contents of the Layout and Materials Plan that was developed as part of the special permit application materials and revised following this court's remand order. [47] The revised plans reflected additional plantings, two additional earthen berms, and an increased number of privacy panels in the fence bordering the array. [48] The testimony of Ms. Andreola addressed the appropriateness of the selected plant species, their respective sizes at the time of installation and at maturity, and their respective growth rates.

Her testimony also addressed the proposed plant spacing identified in the special permit plans, which is 10-15 feet apart for all species with the exception of the shadowblow serviceberry trees, which will be spaced 20-25 feet apart. [49] As Ms. Andreola explained in testimony that I credit, the proposed spacing accomplished the goal of screening the array while preventing overcrowding which can inhibit plant growth, "[y]ou want to give them room to grow and not be crowded. [...] [The plants] are not going to thrive as well when they are crowded." Andreola Testimony, Deposition Transcript pp. 44-45. Despite the Planning Board having found in the Remand Decision that the size and spacing of the plantings was insufficient to screen the array, there was no evidence presented by the Planning Board at trial to support this contention.

CONCLUSION

For the reasons stated above, I conclude that the Planning Board's Remand Decision is both legally untenable and that the Planning Board's findings are unsubstantiated and cannot rationally support the denial of the special permit and site plan, and therefore its Remand Decision was arbitrary and capricious.

Furthermore, this being one of "those rarely encountered points where no rational view of the facts the court has found supports the [special permit granting authority]'s conclusion that the applicant failed to meet one or more of the relevant criteria found in the governing statute or bylaw," *Britton v. Zoning Bd. of Appeals of Gloucester*, supra, 59 Mass. App. Ct. at 74-75, an order requiring the issuance of the requested special permit is appropriate. An order for the issuance of a special permit is "appropriate where remand is futile or would postpone an inevitable result." *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica*, supra, 454 Mass. 374 at 388; see also *Shirley Wayside Limited Partnership v. Bd. of Appeals of Shirley,* supra, 461 Mass. at 474, 485.

Judgment will enter annulling the decision of the Planning Board and ordering the approval of the site plan and issuance of the special permit.

All Citations

Not Reported in N.E. Rptr., 2022 WL 522438

Footnotes

1 Exhibit ("Exh.") 4, Application for Special Permit and Site Plan Review and supporting documentation for "Summit Farm Solar Array, 40 Hardwick Road, New Braintree, MA" dated September 2017, prepared by Beals and Thomas, Inc.; Exh. 20, Plans titled "Summit Farm Solar Array (2.29 MW), 40 Hardwick Road" as revised and dated February 19, 2021, sheets TP-1, 4: Topographic and Boundary Plan.

2 Exh. 20.

3 Testimony of Donalyn Schofield, (Schofield Testimony"), Trial Transcript ("Tr.") Vol. II, p. 114; View.

4 Testimony of Benjamin Axelman ("Axelman Testimony"), Tr. Vol. I, pp. 36, Exh. 20, sheet TP-1.
5 Testimony of Jeffrey Murphy ("Murphy Testimony"), Tr. Vol. I, pp. 78-79; Exh. 20, sheet TP-2.
6 Axelman Testimony, Tr. Vol. I, p. 31; Testimony of Nancy Lee ("Lee Testimony'), Tr. Vol. II, pp. 150-151.
7 Axelman Testimony, Tr. Vol. I, p. 44; Exh. 25, photographs 1 – 10; View.
8 Schofield Testimony, Tr. Vol. II, p. 113; Lee Testimony, Tr. Vol. II, p. 149.
9 Schofield Testimony, Tr. Vol. II, p. 125-126; Lee Testimony, Tr. Vol. II, pp. 149-150.
10 Murphy Testimony, Tr. Vol. I, pp. 74-77.
11 Axelman Testimony, Tr. Vol. I, pp. 37-39.
12 Exh. 20, sheets C301-C302, Layout and Materials Plan.
13 Axelman Testimony, Tr. Vol. I, p. 50.
14 Axelman Testimony, Tr. Vol. I, pp. 38-39.
15 Axelman Testimony, Tr. Vol. I, pp. 22-23.
16 Murphy Testimony, Tr. Vol. I p. 84; Exh. 20, sheet C501.
17 Exh. 20.
18 Exh. 18, Decision of the Planning Board for the Town of New Braintree dated April 2, 2018 and filing of Decision with the Town Clerk dated June 11, 2018.
19 See Order on Stipulation and Agreement for Remand issued by the court on February 2, 2021 in the present action.
20 Decision of the Planning Board dated April 5, 2021 ("Remand Decision") denying the special permit for the proposed project, as revised. The Remand Decision was not introduced into evidence during the trial but was instead attached to the First Amended Complaint filed in the present action on May 5, 2021.
21 Andreola Testimony, Deposition Transcript ("Dep. Tr.") pp. 40-41.
22 Andreola Testimony, Dep. Tr. pp. 39-40.
23 Exh. 20, sheets C301-C302, Layout and Materials Plan.
24 Andreola Testimony, Dep. Tr. pp. 46-48.
25 Andreola Testimony, Dep. Tr. pp. 50, 85-86.
26 *Id.* pp. 49-50.
27 Exh. 20, sheet C301; Andreola Testimony, Dep. Tr. pp. 34-35.
28 Andreola Testimony, Dep. Tr. pp. 51, 54.
29 *Id.* pp. 54-57.
30 Andreola Testimony, Dep. Tr. pp. 26, 52; Exh. 25, photographs 1 – 10..
31 *Id.* pp. 63, 78.
32 *Id.* pp. 76, 78.
33 *Id.* pp. 63, 81.
34 *Id.* p. 76.
35 Andreola Testimony, Dep. Tr. pp. 36, 81; see also Exhs. 22, 23 (Cross-Section Views, North to South and West to East).
36 Exh. 19, Zoning Bylaw of the Town of New Braintree.
37 The court took a view of the subject property located at 40 Hardwick Road and the surrounding vicinity in New Braintree, on January 11, 2021.
38 Exh. 18, [Original] Decision of the Town of New Braintree Planning Board denying the special permit of the Summit Farm solar project, per vote on April 30, 2018.
39 Decision issued by the Town of New Braintree Planning Board denying the special permit for the Summit Farm Solar array, filed with the Town Clerk on April 17, 2021 ("Remand Decision"). The Remand Decision is attached as Exhibit A to the First Amended Complaint filed in the present action on May 5, 2021.
40 Remand Decision, p. 4.
41 Axelman Testimony, Tr. Vol. I, p. 43; Murphy Testimony, Tr. Vol, I, pp. 67-68.

42 Exh. 25, photographs 1 – 10.
43 Exh. 25, photographs 17 – 19.
44 Exh. 25, photograph 20.
45 Andreola Testimony, Dep. Tr. pp. 62-64. A 20-40 foot wall would be required to completely screen the site; this would be unreasonably intrusive.
46 An objection to the attempt by the Planning Board to offer such testimony through one member of the Planning Board, who has a degree in landscape architecture, was sustained because the witness had not been identified as an expert witness in the joint pre-trial conference submitted by the parties. Tr. Vol. II, pp. 172-174.
47 Exh. 20
48 Andreola Testimony p. 31; Exh. 20 pages C301 and C302, Layout and Materials Plan.
49 Exh 20, sheet C-301-C302, Layout and Materials Plan