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The Commonwealth Needs Solar Power: After Kearsarge and Tracer Lane, Massachusetts Cities and Towns Consider the Limits of Local Zoning

BY AMANDA ZURETTI • OCTOBER 21, 2024

In its unpublished M.A.C. Rule 23.0 decision affirming the Land Court’s ruling, the Massachusetts Appeals Court concluded in *Kearsarge Walpole LLC vs. Zoning Bd. of Appeals of Walpole*, Mass. App. Ct., No. 23-P-128 (2024) that under *Tracer Lane II Realty, LLC v. Waltham*, 489 Mass. 775, 781 (2022) (“Tracer Lane”), the Town of Walpole’s Large-Scale Ground-Mounted Solar Photovoltaic Overlay District (SPOD) zoning bylaw violates the solar energy provision in M.G.L. c. 40A, § 3, ninth par.

The Appeals Court’s ruling is the most recent decision examining the extent to which local zoning requirements (e.g., overlay districts and special permitting requirements) might unreasonably restrict the installation of solar energy systems. *Kearsarge* is particularly interesting in that the solar developer was a contractor for a public entity, Norfolk County.

In September of 2017, Kearsarge Walpole LLC (“Kearsarge”) was awarded a contract solicited by Norfolk County to install and operate solar facilities on property owned by the County and used by Norfolk County Agricultural High School (“Norfolk Aggie”) for educational purposes. The “Solar Array RFQ” issued by Norfolk County sought two things from an applicant: that the bidder design, procure, install, test, commission, own, operate, maintain, and decommission a solar photovoltaic (PV) power generating system (the “PV System”) with guaranteed on-site electricity generation at one or more of the sites identified in the Solar Array RFQ; and that it develop a ninth through twelfth grade curriculum in solar energy for Norfolk Aggie that conforms to Common Core and Next Generation State Science Standards.

From 2017 to 2020, Kearsarge worked with the County and with Norfolk Aggie to obtain permits for parking lot and rooftop solar installations. On May 25, 2021, however, the Building Commissioner denied Kearsarge’s application for a building permit to construct a 5.0 Megawatt AC ground-mounted canopy solar facility on North Street, finding that (i) . .

. a Large Scale Ground Mounted Solar Photovoltaic use as defined by [Zoning Bylaw Section 15], which use is not permitted in the Rural Residential zoning district; (ii) the Dover Amendment zoning exemption for an education use is not applicable; and (iii) the application of the Bylaw will only negligibly affect Norfolk Aggie's essential government function.

The Walpole Zoning Board of Appeals upheld the Building Commissioner's decision that Kearsarge may not, by right, construct and operate a 5.0 Megawatt AC ground-mounted canopy solar facility on property owned by Norfolk County and currently used as part of Norfolk Aggie's campus.

Walpole's SPOD Bylaw was enacted under Article 17 of the Walpole Fall Annual Town Meeting of October 15, 2012, ten years prior to the *Tracer Lane* decision. In its letter dated December 6, 2012 – Case # 6540, however, the Attorney General's Municipal Law Unit cautioned the Town that "[t]he SPOD by-law cannot be applied in a manner that prohibits or unreasonably regulates solar energy or the building of structures that facilitate the collection of solar energy systems in violation of G.L. c. 40A, § 3."

The Municipal Law Unit's prophetic decision letter also included a reminder to the Town that its decommissioning surety provision should be exercised with care:

We remind the Town that it must apply any surety proceeds in a manner consistent with state law. Surety or bond proceeds do not become Town funds unless and until the applicant defaults on the obligation under the by-law. Moreover, if the Town must use the surety or bond to pay for compliance with the removal or restoration, an appropriation is required before expenditure is made to do the work. General Laws Chapter 44, Section 53, provides that "[a]ll moneys received by a city, town or district officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury." Under Section 53 all moneys received by the Town become a part of the general fund, unless the Legislature has expressly made other provisions that are applicable to such receipt. In the absence of any general or special law to the contrary, performance security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of the Town's general fund, pursuant to G.L. c. 44, § 53. The Town must then appropriate the money for the specific purpose of removal of the solar facility or restoration of the landscape.

Kearsarge signals to Massachusetts cities and towns that in light of the Commonwealth's drive toward a clean energy future, it's time to consider the limits of existing solar zoning requirements.