489 Mass. 775
Supreme Judicial Court of Massachusetts,
Suffolk.

TRACER LANE II REALTY, LLC
v.
CITY OF WALTHAM & another.[1]

SJC-13195
|
Argued March 7, 2022
|
Decided June 2, 2022

LOWY, J.

**1009 *776 Tracer Lane II Realty, LLC (developer), seeks to build a solar energy system centered in Lexington and an access road to the facility through Waltham. Although the solar energy system would be centered on property zoned for commercial use, the access road would be on property zoned for residential use. Waltham officials indicated to the developer that the developer could not construct the access road because the road would constitute a commercial use in a residential zone. However, a Land Court judge determined on cross motions for summary judgment that this prohibition was improper because G. L. c. 40A, § 3, ninth par., which protects solar energy systems from local regulation that is not "necessary to protect the public health, safety or welfare," allowed the developer to lay the access road. We affirm.[2]

Background. 1. Facts and procedural history. The following facts are undisputed. The developer owns land in Lexington and in Waltham. The Lexington property is in an area zoned for commercial and manufacturing use, whereas the Waltham property is in an area zoned for residential use. The developer intends *777 to construct a one-megawatt solar energy system centered on the Lexington property that will cover an area of approximately 413,600 square feet and contribute solar energy to the electrical grid. To access the part of the solar energy system that is on the Lexington property, the developer intends to build an access road over its Waltham property. Construction vehicles would use the access road while the solar energy system was being built, and maintenance trucks would periodically use the access road thereafter. The access road would include overhead wires and utility poles connecting the structure in Lexington to the electrical grid.

Waltham officials indicated informally to the developer that the developer could not lay the access road because, according to Waltham, the road was not permitted in a residential zone. The developer then brought a complaint against Waltham and its building inspector in the Land Court pursuant to G. L. c. 240, § 14A, seeking a declaration that Waltham could not prohibit the developer from building the access road.[3] The parties cross-moved for summary judgment.

**1010 A Land Court judge allowed the developer's motion and declared that any prohibition on constructing the access road was improper pursuant to G. L. c. 40A, § 3, portions of which are often referred to as the Dover Amendment. That section states, in relevant part: "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." G. L. c. 40A, § 3, ninth par.

Waltham and its building inspector appealed, and we transferred the case to this court on our own motion.

2. Waltham's zoning code. The parties dispute the extent to which Waltham's zoning code permits solar energy systems. According to the developer, the zoning code does not permit solar energy systems at all because, according to the code, "Any use of any building, structure or premises, not expressly permitted ..., is hereby prohibited." Because the zoning code does not mention solar energy systems, the developer argues, it prohibits them.

*778 Waltham asserts that the zoning code expressly permits solar energy systems in industrial zones, which encompass approximately one to two percent of Waltham's total area.[4] According to the zoning code, industrial zones may include "[e]stablishments for the generation of power for public or private consumption purposes that are further regulated by Massachusetts General Laws."

Waltham also argues that the zoning code permits "accessory" solar energy systems in residential and commercial zones. The zoning code defines "accessory use" as the "[u]se of land, building or part of building that is customarily incidental and clearly subordinate to the principal use of the premises." The zoning code also defines accessory use as applied to residential and commercial zones.[5]

Discussion. 1. Standard of review and legal background. "Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Boelter v. Selectmen of Wayland, 479 Mass. 233, 237, 93 N.E.3d 1163 (2018), quoting Boazova v. Safety Ins. Co., 462 Mass. 346, 350, 968 N.E.2d 385 (2012). See Mass. R. Civ.

P. 56 (c), as amended, 436 Mass. 1404 (2002). "We review **1011 a decision on a motion for summary judgment de novo and, thus, 'accord no deference to the decision of the motion judge.' " Boelter, supra, quoting Drakopoulos v. U.S. Bank Nat'l Ass'n, 465 Mass. 775, 777, 991 N.E.2d 1086 (2013).

The statute at issue here, G. L. c. 40A, § 3, "was originally enacted to prevent municipalities from restricting educational and religious uses of land, but the Legislature has expanded [the statute] over time to ensure that other land uses would be free *779 from local interference" (citation omitted). Crossing Over, Inc. v. Fitchburg, 98 Mass. App. Ct. 822, 829, 161 N.E.3d 432 (2020). The Legislature demonstrated its intent to protect solar energy systems from local regulation when it passed "An Act promoting solar energy and protecting access to sunlight for solar energy systems." St. 1985, c. 637. See Berriault v. Wareham Fire Dist., 365 Mass. 96, 97, 310 N.E.2d 110 (1974) (statute's title evidence of legislative intent). That statute added a paragraph to G. L. c. 40A, § 3, that 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." G. L. c. 40A, § 3, ninth par., inserted by St. 1985, c. 637, § 2. When interpreting this paragraph, we keep in mind that it was enacted to help promote solar energy generation throughout the Commonwealth. Cf. Watros v. Greater Lynn Mental Health & Retardation Assoc., Inc., 421 Mass. 106, 113-114, 653 N.E.2d 589 (1995) (interpreting G. L. c. 40A, § 3, second par., in light of Legislature's "over-all intent ... to prevent local interference with the use of real property for educational purposes").

2. Whether the access road is governed by G. L. c. 40A, § 3, ninth par. The solar energy provision applies to "solar energy systems" and "structures that facilitate the collection of solar energy." G. L. c. 40A, § 3, ninth par.[6] Waltham acknowledges that the structure proposed to be built on the Lexington property is a "solar energy system." It argues, however, that the access road proposed to be built on the Waltham property is not governed directly by G. L. c. 40A, § 3, ninth par. We disagree.

Because we have not yet analyzed the ninth paragraph of G. L. c. 40A, § 3, we turn to the abundant case law interpreting that section's other paragraphs. See Rogers v. Norfolk, 432 Mass. 374, 377-378, 734 N.E.2d 1143 (2000) (looking to other paragraphs of G. L. c. 40A, § 3, for guidance when interpreting third paragraph for first time). In those cases, we have considered ancillary structures to be part of the protected use at issue. See Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 149, 747 N.E.2d 131 (2001) (church steeple need not have *780 independent religious function to be considered part of religious use); Watros, 421 Mass. at 113-114, 653 N.E.2d 589 ("No distinction is made by the statute regarding its applicability to 'principal' or 'accessory' buildings, and it is clear that the over-all intent of the Legislature was to prevent local interference with the use of real property for educational purposes"); Trustees of Tufts College v. Medford, 415 Mass. 753, 754-755, 763-764, 616 N.E.2d 433 (1993) (applying statute to college's parking garage). **1012 See also Henry v. Board of Appeals of Dunstable, 418 Mass. 841, 844, 641 N.E.2d 1334 (1994) ("the scope of the agricultural or horticultural use exemption encompasses related activities"). We reach the same conclusion here. Given the access road's importance to the primary solar energy collection system in Lexington -- it will facilitate the primary system's construction, maintenance, and connection to the electrical grid -- we conclude that the access road is part of the solar energy system. Cf. Beale v. Planning Bd. of Rockland, 423 Mass. 690, 694, 671 N.E.2d 1233 (1996) (access road in one zoning district leading to another zoning district "is considered to be in the same use as the parcel to which the access leads"). Therefore, G. L. c. 40A, § 3, ninth par., applies to the access road.

3. Whether G. L. c. 40A, § 3, ninth par., prohibits Waltham's decision. The solar energy provision provides that a municipality shall not "prohibit or unreasonably regulate the installation of solar energy systems ... except where necessary to protect the public health, safety or welfare." G. L. c. 40A, § 3, ninth par. That statutory language provides municipalities with more flexibility than statutory protections for land use for education, religion, and child care, which allow only for reasonable regulations on such matters as bulk and height. See G. L. c. 40A, § 3, second par. ("No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes ...; 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"), third par. ("No zoning ordinance or bylaw ... shall prohibit, or require a special permit for, the use of land or 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").

*781 The case law addressing these other protected uses is nevertheless helpful in deciding whether a prohibition or regulation of solar energy systems is valid. When evaluating an ordinance or bylaw's facial validity under

other sections of G. L. c. 40A, § 3, we have balanced the interest that the ordinance or bylaw advances and the impact on the protected use. See Rogers, 432 Mass. at 379, 734 N.E.2d 1143 ("The proper test for determining whether the provision in issue contradicts the purpose of G. L. c. 40A, § 3, third par., is to ask whether the footprint restriction furthers a legitimate municipal interest, and its application rationally relates to that interest, or whether it acts impermissibly to restrict the establishment of child care facilities in the town, and so is unreasonable").

The interest that Waltham's zoning code presumably advances -- preservation of each zone's unique characteristics -- is legitimate. See Rogers, 432 Mass. at 380, 734 N.E.2d 1143 ("preservation of the residential character of neighborhoods is a legitimate municipal purpose to be achieved by local zoning control"). And, as just discussed, municipalities have more flexibility in restricting solar energy systems than they do, for instance, in the context of education, religion, or child care. Nevertheless, Waltham's zoning code unduly restricts solar energy systems.

Assuming Waltham is correct that the zoning code permits solar energy systems at all, it allows large-scale systems like the ****1013** one at issue here in at most one to two percent of its land area. These standalone, large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth. See Executive Office of Energy and Environmental Affairs, Massachusetts 2050 Decarbonization Roadmap, at 4, 59 n.43 (Dec. 2020) ("the amount of solar power needed by 2050 exceeds the full technical potential in the Commonwealth for rooftop solar, indicating that substantial deployment of ground-mounted solar is needed under any circumstance in order to achieve [n]et [z]ero [greenhouse gas emissions by 2050]").[7] Nothing in the record suggests that this stringent limitation is "necessary to protect the public health, safety or welfare." G. L. c. 40A, § 3, ninth par. Where Waltham has prohibited solar energy systems like the one here in all but one to two percent of its land area, its zoning code violates the solar energy provision.

***782** Like all municipalities, Waltham maintains the discretion to reasonably restrict the magnitude and placement of solar energy systems. An outright ban of large-scale solar energy systems in all but one to two percent of a municipality's land area, however, restricts rather than promotes the legislative goal of promoting solar energy. In the absence of a reasonable basis grounded in public health, safety, or welfare, such a prohibition is impermissible under the provision.

Conclusion. Because G. L. c. 40A, § 3, ninth par., prohibits Waltham from banning the solar energy system here, including its access road, from all but one to two percent of Waltham's land area, we affirm the judgment below.

Judgment affirmed.

All Citations

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Footnotes

1 Inspector of buildings for Waltham.

2 We acknowledge the amicus briefs submitted by Allco Renewable Energy Limited; New England Legal Foundation; First Parish in Bedford, Unitarian Universalist; Michael Pill; the Commonwealth; Save the Pine Barrens, Inc., select board of Pelham, select board of Wendell, planning board of Buckland, planning board of Pelham, planning board of Shutesbury, planning board of Wendell, conservation commission of Wendell, Save Massachusetts Forests, Wareham Land Trust, Jones River Watershed Association, Concerned Citizens of Franklin County, and RESTORE: The North Woods; town of Charlton and town of Warren; and the Real Estate Bar Association for Massachusetts, Inc., and the Abstract Club.

We do not address in this opinion arguments made by amici that are not "sufficiently related" to the arguments raised by the parties. Police Dep't of Salem v. Sullivan, 460 Mass. 637, 640 n.6, 953 N.E.2d 188 (2011).

3 General Laws c. 240, § 14A, states, in pertinent part: "The owner of a freehold estate in possession in land may bring

a petition in the land court against a city or town wherein such land is situated ... for determination as to the validity of a municipal ordinance, by-law or regulation ... which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land ...."

[4] The Waltham zoning map is in the record. To determine the percentage of Waltham that is in an industrial zone, we, like the Land Court judge, used the geographic information system version of the zoning map, available at https://web-gis.city.waltham.ma.us/GPV51/Viewer.aspx [https://perma.cc/WDX3-4CS4?type=image]. See Bask, Inc. v. Borges, Mass. Land Ct., No. 19 MISC 000529, 28 LCR 568, 575 n.48, 2020 WL 7688035 (Dec. 23, 2020) (where zoning map was in record, court took judicial notice of geographic information system version of map).

[5] According to the zoning code, an accessory use in a residential zone is an "[a]ccessory use[ ] customarily incidental to any residential use permitted herein, provided that such use shall not include any activity conducted for gain, or any private walk or way giving access to such activity or any activity prohibited under this chapter." An accessory use in a commercial zone is an "[a]ccessory use[ ] customarily incidental to commercial uses allowed by this chapter, including but not limited to day care, cafeteria and health club facilities for employees only, and further including satellite dish antennas and similar transmission devices used for private business purposes of businesses located on the lot."

[6] For purposes of G. L. c. 40A, § 3, ninth par., a "solar energy system" is "a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating." G. L. c. 40A, § 1A.

[7] Available at https://www.mass.gov/doc/ma-2050-decarbonization-roadmap/download [https://perma.cc/J593-CVNM].