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POWER DYNAMICS

Solar Power, Wetlands Projects Face Changing Legal Context

Inclusion in Dover Amendment Uses Butts Up Against Municipal Muscle-Flexing

BY COURTNEY SIMMONS

SPECIAL TO BANKER & TRADESMAN



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“What do you mean I need permission from both the Zoning Board and the Conservation Commission?”

Land use attorneys frequently hear this question from developer clients. The question arises because regulatory controls of development have become more widespread and complex, requiring compliance with multiple laws and regulations administered by a variety of local authorities, such as zoning boards, planning boards, conservation commissions, historical commissions, and health boards.

Land use regulations have become highly decentralized since the 1960s as enabling legislation authorized municipalities to exercise their own police powers to establish and implement standards for land development. These regulatory regimes have only become more comprehensive and complex, and in recent years, several cases have addressed the scope of a municipality's authority to regulate property development.

Towns Face Limits on Regulatory Authority

In 1966 the Massachusetts Constitution was amended to provide for Home Rule –



A recent Supreme Judicial Court case found Waltham's zoning laws unreasonably restricted solar energy developments, which are protected under the Dover Amendment.

granting legislative power to local governments over any subject that the legislature could lawfully delegate. With the Home Rule Amendment, municipalities had the authority to address local concerns by adopting ordinances or bylaws to better the community's health, safety and general welfare, including establishing controls on land use development.

Under the Home Rule Amendment, as well as the authority granted by the Zoning Enabling Act, municipalities are given broad license to establish zoning districts

with use and dimensional requirements on property within those districts, thus impacting the type and scope of proposed development. Likewise, many municipalities have adopted local wetland regulations that, independent of and in addition to the Wetlands Protection Act, protect wetland resources from development activities. Local wetlands regulations describe the type and extent of development activities permitted in resource areas, assisting developers in planning proposed projects.

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A municipality's authority to regulate is not unfettered. The primary constraint is that no ordinance or bylaw may be inconsistent with the state Constitution or laws enacted by the legislature. For example, the so-called Dover Amendment to the Zoning Act prevents municipalities from implementing zoning regulations that prohibit or unreasonably regulate certain uses the legislature has determined are valuable as a matter of public policy and deserve protection, such as religious, educational or agricultural uses, and most recently, solar energy systems.

Another limitation on local regulatory authority is that a municipality desiring to regulate wetlands more stringently than under the Wetlands Protection Act must do more than merely recite additional protected interests or resource areas. It must also promulgate standards and requirements to evaluate a proposed activity's impact on that interest or resource area. Simply listing a resource area or an interest without also enumerating any standards has been found insufficient to create more demanding wetland protection than set forth in the Wetlands Protection Act.

Recent Decisions Examine Limitations

Two recent decisions from the Massachusetts Supreme Judicial Court examine these limitations.

In *Tracer Lane II Realty, LLC v. City of Waltham*, a developer filed suit in seeking a declaration that Waltham's zoning bylaw unreasonably restricted solar energy systems in conflict with the Dover Amendment.

The Land Court found that, at best, solar energy systems are permitted in industrial districts, which comprised less than 2 percent of the land in Waltham, making it "unquestionably" an unreasonable regulation. The SJC affirmed the Land Court, finding that Waltham's zoning unduly restricted solar energy systems, stating: "An outright ban of large-scale solar energy systems in all but one to two percent of a municipality's land area... restricts rather than promotes the legislative goal of promoting solar energy."

Municipalities are adopting or rewriting bylaws and ordinances to regulate land in new ways.

In *City of Boston v. Conservation Commission of Quincy*, Boston appealed the Quincy Conservation Commission's denial of its application to build a bridge connecting Quincy to Long Island pursuant to the Wetlands Protection Act and its local ordinances. The Massachusetts Department of Environmental Protection issued a superseding order of conditions allowing the project to proceed under the Wetlands Protection Act.

In concurrent proceedings in Superior Court, the city's Conservation Commission argued that its decision could stand despite DEP's order because its local wetlands ordinance that referenced "cumulatively ad-

verse effect[s] upon wetland values," was more stringent than the Wetlands Protection Act.

The Superior Court disagreed and found DEP's decision superseded that of the Quincy Conservation Commission. The SJC affirmed and held that the local wetlands regulations were not more rigorous than the Wetlands Protection Act because the ordinance failed to specify what cumulative impacts the commission should consider, nor did it establish standards for analyzing those impacts above and beyond the analysis done under the Wetlands Protection Act. Accordingly, the SJC affirmed that DEP's ruling superseded that of the Quincy Conservation Commission.

These decisions reflect the limitations placed on municipal regulation of land development. However, they also reflect the fact that municipalities are extending, or attempting to extend, their regulatory authority over the use and development of land within their communities.

It is important for developers to recognize that as a result of cases like *Tracer Lane* and *City of Boston*, municipalities are adopting or rewriting bylaws and ordinances to regulate land in new ways, particularly when it comes to environmental impacts on wetlands or alternative energy uses of property, in order to flex their regulatory muscles. Developers need to consider local regulations when planning their projects and ensuring compliance, as failing to do so may pose significant risks. ◀

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