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Appeals Court of Massachusetts.

PLH, LLC
v.
TOWN OF WARE.

22-P-347
|
Entered: December 8, 2022

By the Court (Meade, Singh & D'Angelo, JJ. [1])

MEMORANDUM AND ORDER
PURSUANT TO RULE 23.0

***1** The plaintiff, PLH, LLC (PLH), appeals from the Land Court's grant of summary judgment in favor of the defendant, the town of Ware (town). PLH sought to invalidate the town's bylaw requiring a special permit for large ground-mounted solar energy facilities in certain zoning districts. On appeal, PLH claims summary judgment was improper because the special permit requirement violates G. L. c. 40A, § 3, 9th par., the statute that bars municipalities from unreasonably regulating solar installations. We affirm.

Discussion. We review a grant of summary judgment de novo. See Williams v. Board of Appeals of Norwell, 490 Mass. 684, 689-690 (2022). "[S]ummary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law" (citation and quotation omitted). Id. at 689.

In 2018, PLH sought approval for two large ground-mounted solar energy installations in a rural-residential zoning district in Ware. The Ware zoning bylaw requires both a site plan review and a special permit for large solar facilities in a residential zone. The town's planning board (board) initially approved PLH's site plan but denied it a special permit. PLH then filed two actions in the Land Court: an administrative appeal from the board's special permit decision, and this case, seeking to invalidate the special permit requirement of the zoning bylaw. See G. L. c. 40A, § 17; G. L. c. 240, § 14A. In the administrative appeal, the judge remanded the special permit determination to the board, which granted the permit. The administrative appeal was subsequently dismissed as moot and no aspect of that matter is before us. In the present case, the judge granted summary judgment for the town, finding that the special permit requirement was valid, provided the town applied it narrowly.

On appeal, PLH claims the town's special permit requirement violates the ninth paragraph of G. L. c. 40A, § 3. That paragraph provides that: "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. To evaluate the validity of a bylaw under § 3, we balance "the interest that the ordinance or bylaw advances and the impact on the protected use." Tracer Lane II Realty, LLC v. Waltham, 489 Mass. 775, 781 (2022). See also Trustees of Tufts College v. Medford, 415 Mass. 753, 758 (1993) (limitations on § 3 land uses enforceable if related to legitimate municipal concern and applied in manner rationally related to perceived concern).

PLH claims the town's special permit requirement is unreasonable under § 3, ninth par., because it addresses no material or legitimate municipal interests beyond those the

site plan review already addresses. To begin with, we note that the ninth paragraph gives municipalities more flexibility than other paragraphs in § 3. See Tracer Lane, 489 Mass. at 778-779, citing G. L. c. 40A, § 3, second & third pars. The paragraphs protecting land use for education, religion, and childcare allow regulation only of matters such as the bulk and height of structures. See id. at 780. The ninth paragraph allows a broader scope of reasonable regulation, "where necessary to protect the public health, safety or welfare." Id., quoting G. L. c. 40A, § 3, ninth par. Section 3 also specifically bars special permit requirements for agricultural or childcare uses. See G. L. c. 40A, § 3, first & third pars. The ninth paragraph contains no such prohibition. If the Legislature intended to prohibit special permits for solar installations, it would have indicated as such in the ninth paragraph. See Commonwealth v. Gagnon, 439 Mass. 826, 833 (2003), quoting 2A N.J. Singer, Sutherland Statutory Construction § 46.06 at 194 (6th ed. rev. 2000) ("Where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded").

***2** PLH's claim that the special permit requirement serves no legitimate municipal interest is unconvincing. Preservation of the character and environment of a zoning district is a legitimate municipal interest. See Tracer Lane 489 Mass. at 781 ("[t]he interest that Waltham's zoning code presumably advances -- preservation of each zone's unique characteristics -- is legitimate"); Rogers v. Norfolk, 432 Mass. 374, 378 (2000) (legitimate municipal purposes served by local zoning include public health, safety, and preserving character of adjacent neighborhood). Here, the town requires a special permit only for large solar installations in the "Residential Business" and "Rural" districts. Site plan review is the only requirement for large solar installations in the commercial and industrial districts.[2] There is some degree of overlap between the site plan review factors and the special permit criteria. See Ware Zoning Bylaw, §§ 7.2.4 & 7.4.7. However, as the Land Court judge noted when denying PLH's motion for reconsideration, the site plan review is non-discretionary and considers a limited set of factors. See id., § 7.4.7. At the special permit stage, the board considers a broader set of criteria and has discretion to grant the permit, deny it, or grant it with conditions. See id., § 7.2.4. When reviewing PLH's special permit application, the board asked PLH for site plan revisions to address erosion, grading, drainage, and other issues. The special permit requirement therefore gives the town a second opportunity to ensure large solar installations are appropriate for their location. This is a legitimate municipal purpose.[3] See Tracer Lane 489 Mass. at 781; Rogers, 432 Mass. at 378.

The special permit requirement also does not unreasonably burden or restrict solar installations. See Tracer Lane, 489 Mass. at 781. It is undisputed that Ware's solar bylaw allows large solar installations on more than seventy-two percent of its land area, either with a special permit or after site plan review. Solar installations that are small, mounted on buildings, used for agriculture, or used for one- and two-family dwellings are exempt from the bylaw. In Tracer Lane, the first case in which the Supreme Judicial Court interpreted § 3, ninth par., the court invalidated a bylaw that allowed solar energy installations in only one to two percent of the town's land area. See Tracer Lane, 489 Mass. at 781. Ware's solar bylaw is far less stringent. Nothing suggests the town has used the special permit requirement to prohibit solar installations or as a pretext for mere preferences regarding land use. See Prime v. Zoning Bd. of Appeals of Norwell, 42 Mass. App. Ct. 796, 803 (1997) (special permit may not be applied to prohibit protected use or impose board's preferences). PLH asserts that the special permit requirement adds unnecessary cost and delay to the approval process. "Excessive cost of compliance with a requirement ... without significant gain in terms of municipal concerns, might ... qualify as unreasonable regulation." Rogers, 432 Mass. at 383. Here, the town conceded at oral argument that the special permit prolongs the approval process. However, the planning board reviews both site plans and special permit applications, and applicants can file for both at the same time. The site plan review process already involves the submission of extensive planning documents and the participation of several municipal departments. See Ware Solar Bylaw, §§ 7.4.3-7.4.4. In this context, the additional burden of the special permit application is reasonable considering the municipal interests it serves. The special permit requirement therefore does not violate G. L. c. 40A, § 3, ninth par., and the judge properly granted summary judgment for the town.

***3** Judgment affirmed.

All Citations

Slip Copy, 2022 WL 17491278 (Table)

Footnotes

1 The panelists are listed in order of seniority.

2 The bylaw prohibits ground-mounted solar energy facilities in the four most densely developed zoning districts.

3 PLH relies on several cases to support the propositions that regulation of a G. L. c. 40A, § 3 use must be rationally related to a legitimate municipal concern and may not prohibit the protected use itself. See Tufts, 415 Mass. at 760; Rogers, 432 Mass. at 380; Trustees of Boston College v. Aldermen of Newton, 58 Mass. App. Ct. 794, 801-802 (2003) (invalidating special permit requirement that applied to any new construction on college campus because it would impede educational use without advancing municipal goals). These cases support PLH's stated propositions, however they provide no grounds to invalidate the special permit requirement because we find that the requirement serves a valid municipal purpose.