

## Supreme Judicial Court Finds Local Zoning Prohibition on Solar Energy Systems Unlawful

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Earlier this year, the Massachusetts Supreme Judicial Court issued a decision in Tracer Lane II Realty v. City of Waltham, concluding that the City's broad zoning regulation of large-scale solar energy systems constituted an "outright ban" on such systems in violation of G.L. c. 40A, § 3, ninth para. That paragraph provides, in pertinent part, that "[n]o 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." Our analysis of this case over the last few months suggests that it has significant implications for municipalities seeking to regulate large-scale solar energy systems.

The developer in Tracer Lane owned property in Lexington and Waltham and proposed construction of a large-scale solar energy system covering 413,600 s.f. in Lexington, in a commercial zoning district. Access to the solar facility would be over the portion of the property in Waltham located in a residential district. The Waltham Zoning Code appeared to authorize such facilities in approximately one to two percent of the City's industrial district. Because the access road for the solar facility was proposed in the residential district, Waltham officials concluded that the use was not permitted under the Zoning Code. The developer appealed from that decision, contending that the zoning ordinance for such systems was equivalent to a prohibition, contrary to the statutory protections afforded solar energy production. A judge of the Land Court agreed with the developer and the Supreme Judicial Court affirmed the lower court's decision.

The Tracer Lane court first evaluated whether the Waltham access road was part of the "buildings or structures that facilitate collection of solar energy." Consistent with similar conclusions interpreting other paragraphs of G.L. c. 40A, § 3, the Tracer Lane court considered the road an "ancillary structure" that was properly "part of the protected use at issue." The Court concluded further that because the access road would "facilitate the primary [solar energy] system's construction, maintenance, and connection to the electrical grid," use of the access road, too, would be covered by G.L. c. 40A, § 3, ninth para.

Additionally, the Court recognized that the statutory language "provides municipalities with more flexibility" to regulate solar facilities than they have with education, religion, and child care uses," which allow regulations only for bulk, height, setbacks and like matters expressly specified by law, and observed that the interest presumably protected by Waltham's zoning code – the preservation of each zoning district's unique characteristics – was legitimate.

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Importantly, however, the Court held that Waltham’s zoning “unduly restricts solar energy systems” because Waltham’s code effectively contained an “outright ban” on large-scale ground-mounted solar systems. As discussed, the Court concluded that, because Waltham prohibited such systems on all but one to two percent of its total land area, the zoning decision was the equivalent of a prohibition or unreasonable regulation of solar, contrary to the protections afforded such systems under the statute. Where the City’s Zoning Code “restricts rather than promotes” the legislative goal of promoting solar energy, the Court determined that portion of the zoning code was unlawful, emphasizing that there was no showing of the City’s reasonable basis for such regulations grounded in public health, safety, or welfare. Notably, due to a dispute as to whether the Waltham Zoning Code authorized small scale and residential solar facilities, the Court did not directly address whether the existence of such a bylaw or ordinance would have affected its decision.

This decision is the SJC’s first ruling on the extent of the exemptions under the solar provisions of the Zoning Act. The Court’s holding is limited to the specific facts before it, *i.e.*, a zoning code which allows commercial-scale solar systems in only one to two percent of a city. Considering the risk of creating a Tracer Lane “outright ban” on solar facilities, municipalities may be well served to proactively review their zoning ordinances and bylaws to ensure that they adequately authorize the siting of large-scale and other solar energy systems. Conducting, documenting, and regularly updating municipal planning efforts in this regard will allow a municipality to better demonstrate a strong connection between its promotion, rather than restriction, of the siting of solar energy facilities so as to properly protect the legitimate goals of zoning to protect the public health and safety.

Please contact your KP Law Attorney at 617.556.007 with any specific questions concerning regulation of large-scale solar facilities.

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