

COMMONWEALTH OF
MASSACHUSETTS

TOWN OF LENOX ZONING BOARD OF
APPEALS

In re Petition of PLH Vineyard Sky LLC)
) **BRIEF IN SUPPORT OF**
) **PETITION**
)

As requested by the Chair of the Lenox Zoning Board of Appeals (“ZBA”), the petitioner, PLH Vineyard Sky LLC (“PLH”), submits this brief in support of its petition for a variance.

INTRODUCTION

The day after the June 1, 2022, ZBA meeting, the Massachusetts Supreme Judicial Court affirmed the Land Court’s decision holding that the Town of Wilbraham’s Zoning Bylaw that prohibited the installation of an access drive to access a solar energy project in an adjoining town was unlawful under M.G.L. c. 40A, § 3 (“Section 3”), para. 9. *See, Tracer Lane II Realty, LLC v. City of Waltham*, Case No. SJC-13195 (June 2, 2022). *Tracer Lane* is relevant here both because it is a Section 3 case, and because some ZBA members have expressed consternation at the prospect of the parcel hosting a solar energy system. At the June 1, 2022, ZBA meeting, PLH’s representative made it clear that solar was a possibility for the parcel, but that the requested variance related only to the agricultural use of the property and that PLH would be fine with that as a condition in the variance. As a result, PLH asked the ZBA to consider the facts of the current application on its own because an application for a solar use would involve a different proceeding.

I. STATEMENT OF THE ISSUES PRESENTED.

- a. Should the ZBA grant the variance requested by PLH?
- b. If the ZBA does not grant the variance requested by PLH, is that an unreasonable regulation of PLH’s agricultural use of the property and unlawful under Section 3?

II. FACTUAL BACKGROUND.

PLH seeks a permit to make a curb cut on Willow Creek Road which is on the eastern side of PLH's property. Willow Creek Road is a dead-end street with little traffic and industrial uses. The superintendent of public works refused to process the application and informed PLH that it would need a variance, based upon his interpretation of the Town's zoning bylaws relating to "parking facilities." PLH seeks the curb cut to have direct access to its farm field that is, and has been, in agricultural use. The farm field is currently planted with hay that has been sold to Vineyard Sky Farms Corp. for use in that company's commercial sheep agricultural business. PLH's land is used for the primary purpose of commercial agriculture and the agricultural use exceeds 5 acres. As such PLH's agricultural use is a protected use under Section 3. Under Section 3, the Town of Lenox may not prohibit and may not unreasonably regulate Petitioner's use.

The Town has engaged in an active campaign to prevent PLH's agricultural use of the property since the Town failed in its attempts to acquire the Property and it was instead acquired by PLH. The Town has blocked access through the municipal cemetery, which was the access usually used by the farmer that has been engaged by PLH. The Town has also actively worked to prevent PLH from using the farm access drive on the property that connects the residence to the farm field. The Town's active attempts to prevent PLH's use of the farm access drive from Housatonic is the subject of litigation in Massachusetts Superior Court. That case is docketed as *PLH Vineyard Sky LLC v. Town of Lenox Conservation Comm'n*, Case No. CA 2176CV00173. The Town officials have also repeatedly engaged questionable conduct in order to surveil PLH's property. The chairman of the Conservation Commission with the permission of abutter Selectman Dave Roche has obtained access to the Roche's land to the south of PLH's property on multiple occasions in order to surveil PLH's property including the residence, all without probable cause

or a warrant.

The variance request before the ZBA is for a direct access from Willow Creek Road, a dead-end town road with little vehicular traffic, so that PLH can access its farm field notwithstanding the Town's active attempts to block other access.

PLH sought a permit to make a curb cut on Willow Creek Road which is on the eastern side of PLH's property. The superintendent of public works refused to process the permit application based upon his interpretation of the Town's zoning bylaws. The zoning officer concluded that the request for a curb cut was governed by the one curb cut limitation in section 7.1.8(8). Zoning bylaws section 7.1.8 relates to "Parking Design Standards," and applies when a building or structure is proposed to be erected or enlarged. Assuming the building commissioner's conclusion was correct, a variance is needed from Zoning bylaws section 7.1.8.

III. ARGUMENT.

A. PLH Meets The Requirements For A Variance.

M.G.L. ch. 40A, sec. 10 authorizes the ZBA to grant a variance with respect to particular land or structures from the terms of the applicable zoning ordinance or by-law where such permit granting authority specifically finds "that [(1)] owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, [(2)] a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and [(3)] that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law." The ZBA "may impose conditions, safeguards and limitations both of time and of use."

1. Soil Condition, Shape, or Topography of the Land.

In order to satisfy Section 10 of G. L. c. 40A, an applicant seeking a variance must prove that their situation is due “to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located.” G. L. c. 40A, § 10. The statute therefore requires the circumstances affecting the land to be unique to the plaintiff's land in particular.

The Town has claimed that the soil condition of the access drive between the farm field and the residence prevents the access drive from being used to access the farm field. Therefore, the Town has taken the position that the farm field can no longer be accessed by the property owner. That circumstance relates to the soil conditions especially affecting such land but not affecting generally the zoning district in which it is located.

2. Literal Enforcement of the Provisions Involve Substantial Hardship.

Statutory hardship is usually present when landowner cannot reasonably make use of his property for purposes or in manner allowed by zoning ordinance. *Guiragossian v. Board of Appeals*, 21 Mass. App. Ct. 111, 485 N.E.2d 686, 1985 Mass. App. LEXIS 1966 (Mass. App. Ct. 1985). Here, the landowner cannot reasonably make use of its property for agriculture without an as-of-right access to the farm field. The Town's position is that the landowner has no such as-of-right access to the farm field. Therefore, the lack of an as-of-right access constitutes substantial hardship.

3. Relief May Be Granted Without Substantial Detriment to the Public Good or Without Derogating the Intent and Purpose of the By-Law.

Petitioner sought a permit to make a curb cut on Willow Creek Road which is on the eastern side of Petitioner's property. The Superintendent of Public Works denied the permit based upon

his interpretation of the Town's zoning bylaws. The Superintendent of Public Works concluded that the request for a curb cut was governed by the one curb cut limitation in section 7.1.8(8). Zoning bylaws section 7.1.8 relates to "Parking Design Standards," and applies when a building or structure is proposed to be erected or enlarged.¹

The building commissioner's conclusion concluded that section 7.1.8 applied even though no structure would be constructed or enlarged as part of the access off Willow Creek Road. See, Zoning Bylaw section 4: "Structure: Any construction or any production or piece of work artificially built up or composed of parts joined together in some definite manner including but not limited to tents, reviewing stands, platforms, stagings, towers, display signs, fences, and swimming pools, but not including those fences which delineate property lines."

The variance may relief may be granted without substantial detriment to the public good or without derogating the intent and purpose of the By-Law. First, it is not clear what public good is served by not allowing a second curb cut for PLH's farm field. Second, it is not clear what the purpose of the By-law is outside of a town center. In any case, allowing the second curb cut would have no detriment to the public good and whatever the intent and purpose of the by-law is. The access would be on Willow Creek Road, a dead-end town road with little vehicular traffic and no pedestrian traffic. There is no valid municipal purpose in preventing a second cut curb for PLH's

¹ "The following standards shall apply to all parking facilities.

7.1. OFF-STREET PARKING AND LOADING REQUIREMENTS

7.1.1. General. No building or structure shall be erected or enlarged unless the off-street parking and loading space requirements are provided as specified in this section. For the purpose of this section, an enlargement of any building shall require the provision of off-street parking for the existing building as if it were newly constructed.

7.1.8. Parking Design Standards

8. Curb cuts on town ways shall comply with the following standards:

No more than 1 curb cut per lot. The Board of Appeals may allow an additional curb cut if it finds that an additional curb cut would materially improve safety for vehicular traffic or pedestrians using the site or traveling on adjacent public ways, or a secondary curb cut for emergency vehicular access only is desirable and the cut shall be secured for that purpose."

property.

B. The Denial Of The Second Curb Cut Is An Unreasonable Regulation Of PLH's Agricultural Use.

Under Section 3, the Town of Lenox may not prohibit and may not unreasonably regulate PLH's agricultural use.² Denial of a curb cut off Willow Creek Road would be an unreasonable regulation of PLH's agricultural use.

1. PLH's Crop And Forestry Activities Constitute Agricultural Uses.

M. G. L. ch. 128, § 1A states:

"Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

PLH's growing and harvesting of hay, and harvesting of forest products constitutes agriculture under M. G. L. ch. 128, § 1A.

2. Lenox May Not Prohibit Or Unreasonably Regulate PLH's Agricultural Uses.

M. G. L. c. 40A, § 3, first par., imposes two constraints on municipal land use regulation:

1. A municipality may not prohibit a commercial agricultural use, and
2. A municipality may not unreasonably regulate a commercial agricultural use.

Entitled "*Limitations on Subject Matter of Zoning Ordinances*," Section 3 addresses

² "No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture."

“[s]ubjects which zoning may not regulate...” As the plain language states, Section 3 describes several uses that cannot be regulated in the same manner as typical residential, commercial or other uses. Section 3 imposes limits on the ability to regulate agricultural uses (§3, ¶1), religious uses (§3, ¶2), educational uses (§3, ¶2), child-care uses (§3, ¶3), solar energy uses (§3, ¶9), and radio antennas for amateur radio operators (§3, ¶10).

The “over-all intent of the Legislature [in Section 3 is] to prevent local interference with the use of real property for [section 3 protected] purposes.” *Watrov v. Greater Lynn Mental Health & Retardation Ass'n*, 421 Mass. 106, 113 (1995). The protected uses in Section 3 constitute “as-of-right” uses in every zoning district. *See, e.g., Bible Speaks v. Bd. of Appeals*, 8 Mass. App. Ct. 19, 33 (Mass. App. Ct. 1979) (Section 3 “educational uses [in residential districts] have been expressly authorized to exist as of right in any zone.”); *Bldg. Inspector of Mansfield v. Curvin*, 22 Mass App. Ct. 401, 402-403 (1986) (“The obvious purpose of the Act ... is to promote agricultural use within *all zoning districts* in a municipality.) Towns cannot even require a special permit for protected Section 3 agricultural uses. *Trustees of Tufts College v. Medford*, 415 Mass. 753, 765, 616 N.E.2d 433 (1993) (“*Tufts*”) (“A local zoning law that improperly restricts an educational use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances.”)

The approach taken by appellate courts has been to provide an expansive interpretation of the exemptions in order to promote the protected uses. *See, e.g., Town of Sturbridge v. McDowell*, 35 Mass. App. Ct. 924, 925 (1993) (“Since the enactment of G. L. c. 40A, § 3, inserted by St. 1975, c. 808, § 3, we have given “agriculture” as used therein an expansive construction.”) *See also, Watrov v. Greater Lynn Mental Health & Retardation Ass'n*, 421 Mass. 106, 113-114 (1995):

General Laws c. 40A, § 3, speaks not once, but twice, of “land or structures” as the focus of the exemption. ... 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. If we were to construe G. L. c. 40A, § 3, as the plaintiffs argue we should, a nonprofit educational corporation could be prevented by zoning restrictions from leasing a suite of rooms for an educational purpose within a larger building. Only those nonprofit educational corporations with sufficient financial resources to lease or purchase an entire property would enjoy the protection of G. L. c. 40A, § 3. Such a constrictive result is neither required by the language of the statute nor consistent with its purpose.

Section 3 generally known as the “Dover Amendment is intended to encourage ‘a degree of accommodation between the protected use ... and matters of critical municipal concern.’” *Tufts* at 760 (internal citations omitted) (emphasis added). The common theme in *Tufts*, *Rogers v. Town of Norfolk*, 432 Mass. 374, 380 (2000) (“*Rogers*”) and *Trustees of Boston College v. Board of Aldermen of Newton*, 58 Mass. App. Ct. 794, 801 (2003) (“*Boston College*”) is that each specific aspect of a town’s regulation of a Section 3 use must be related to a legitimate municipal concern (other than allowing the use itself), its application must bear a rational relationship to the perceived concern, and it must appreciably advance that legitimate concern without imposing excessive cost sufficient to justify it. The Town’s prohibition of a second curb cut on Petitioner’s property adds no gain in terms of legitimate municipal concern on the current factual record because there is little vehicle traffic and no pedestrian traffic on Willow Creek Road and PLH’s use would add *de minimus* traffic. Prohibition of a second curb cut simply imposes costs on PLH without justification.

The *Tufts* court also focused on the specific facts and noted that “[t]he central question is whether application of the requirements to a specific project in a particular setting furthers legitimate municipal concerns to a sufficient extent” to justify it. *Id.* at 764. (Emphasis added.) That is a standard that is failed by the Lenox one-curb cut rule in this case. The Town’s prohibition of a second curb cut on PLH’s property adds no gain in terms of legitimate municipal concern on the current factual record because there is little traffic on Willow Creek Road and PLH’s use would add minimal traffic, but the prohibition would impose costs on Petitioner without justification.

Rogers discussed two tests that the Lenox one-curb cut bylaw fails. *First*, the SJC stated that a provision regulating a Section 3 use must be “shown to be related to a legitimate municipal concern, and [that] its application bears a rational relationship to the perceived concern.” *Rogers* at 378. Here, the prohibition of a second curb cut on PLH’s property adds no gain in terms of legitimate municipal concern on the current factual record because there is little traffic on Willow Creek Road and PLH’s use would add minimal traffic. *Second*, the Town’s the prohibition of a second curb cut on PLH’s property violates the second *Rogers* rule that a requirement is invalid if it imposes an “[e]xcessive cost of compliance . . . without significant gain in terms of municipal concerns,” *Rogers* at 383-384 (emphasis added). Here, the Town’s prohibition of a second curb cut on Petitioner’s property adds no significant gain in terms of legitimate municipal concern and imposes excessive costs because the Town is seeking to prevent Petitioner from continuing with its agricultural use.

IV. CONCLUSION.

For the reasons set forth above, PLH asks the ZBA to issue the variance to permit the second-curb cut to be located on Willow Creek Road, or declare that the denial of the requested curb-cut would be an unreasonable regulation of PLH’s agricultural use, and direct the superintendent of public works to process and issue the permit for the requested curb-cut.

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