NOTICE OF DOCKET ENTRY	DOCKET NUMBER 18 MISC 000519	Commonwealth of Massachusetts Land Court Department of the Trial Court

CASE NAME

Northbridge McQuade, LLC, Plaintiff(s)

v.

Thomas Hansson Member of the Northbridge Zoning Board of Appeals , et al., Defendant(s)

NOTICE ISSUED TO	COURT ADDRESS & PHONE NUMBER
Michael Dana Rosen, Esq. Ruberto, Israel & Weiner 255 State St 7th Floor Boston, MA 02109	Land Court Three Pemberton Square Room 507 Boston, MA 02108 (617)788-7470

Notice is hereby given that the following docket entry has been made in the above captioned matter:

Event Resulted: Summary Judgment Hearing scheduled on:
06/17/2019 02:15 PM has been resulted:
June 17, 2019. Hearing held on defendants' motion for summary judgment. Attorneys Henry Lane and Michael Rosen appeared for the plaintiff. Attorney David Doneski appeared for the defendant members of the Northbridge Zoning Board of Appeals. Following argument, the court DENIED defendants' motion for summary judgment pursuant to Mass. R. Civ. P. 56. The plaintiff filed no cross-motion for summary judgment, but the court nevertheless GRANTED partial summary judgment, as it is able to do so, in favor of plaintiff for the reasons laid upon the record from the bench and summarized as follows.

The court concludes that the Board proceeded on a legally untenable ground and acted in error when it made the categorical determination that the board lacked power to entertain the request to authorize plaintiff's solar project. This was based on the use violation that flows under conventional zoning from the necessary passage across the residentially zoned land on a private way to serve the solar energy facility to be physically installed, as it would be by right but for the access issue, on the industrially zoned property.

The Board based on its erroneous reading of the solar facility provisions of G.L. c. 40A, § 3, relied improperly on (1) the use prohibition arising from using a private way across residentially- zoned land to provide access to the solar facility in the industrial district and (2) on the bylaw's prohibition of the grant of any use variance. As a consequence, the board did not have the opportunity, as the court now concludes it ought, to consider the reasonableness or not of the various levels of regulation (or in an appropriate case, prohibition) that would be necessary to protect the public health, safety, or welfare if this solar project is to proceed.

The language of G. L. c. 40A, § 3 is clear on its face: "No zoning ordinance or bylaw should prohibit or... unreasonably regulate." That language does not include additional words that indicate that what the statute forbids is only a town- wide prohibition. The statute does not say that it may be satisfied by providing some availability of the protected solar use in certain parts of town but not in others. In reaching this conclusion, the court has taken into account the difference in the wording that is used for the various uses in the various protective and indulgent provisions of § 3, but does not see a sufficient distinction to say that the solar facility provisions ought to be, as a matter of legislative intent and interpretation, the only protected use subsection under § 3 where the possibility exists to allow absolute prohibition within certain zoning districts. This is not the case under the statute and the jurisprudence under it for the longstanding § 3 protected uses including for religious,

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educational, child care, amateur radio facilities, and the variety of other uses the legislature has chosen to bring under the protective umbrella of § 3. In no other case does § 3 countenance an absolute zoning district wide ban on a protected use.

The purpose of this remedial provision was to require some "standing down" by municipalities to encourage and protect solar facilities- a use that might be seen as unwelcome in municipalities at a local level- by abutters, neighbors, and by town government. Fulfillment of this remedial purpose requires the town entertain and where appropriate, issue permits and approvals for solar facilities even in a residential district where the zoning bylaw purports to ban the use. The court sees nothing in the statutory language or purpose that would countenance carving out large areas of land by district in the town and making them immune from the remedial indulgent protections of § 3 with respect to this solar use. Before there is any regulation or prohibition of any given proposed solar development on any site in the town, there must be an analysis and a balancing of the need to prohibit or regulate measured against the legislatively determined public interest in rolling out facilities for the collection of solar energy. The need for regulation for even prohibition must in all districts be weighed against the need to protect the public health, safety, or welfare.

The court does not accept the town's argument that the prohibition could exist as a matter of district wide fiat and this is particularly true given the facts of this case- where the nature of the site, without too much dispute in the record, is set up so that the solar use itself takes place physically entirely on industrial zoned land where the use is as of right. Only the issue of access across residential land prevents as of right development of the solar facility. Plaintiff should receive, for the first time, the opportunity to demonstrate to the board that it is not likely there is going to be a great deal of impact flowing from the passage across the private, residentially zoned land to access the proposed site.

The court recognizes that there is not a lot of appellate guidance on the issues briefed by counsel. The court takes some comfort in the decision reached in Duseau v. Szawlowski Realty, Inc., 23 LCR 5 (2015) (Misc. Case No. 12 MISC 470612) (Cutler, C.J.). The decision reached in Briggs v. Zoning Board of Appeals of Marion, 22 LCR 45 (2014) (Misc. Case No. 13 MISC 477257) (Sands, J.) does not persuade this court that it is merely a matter of whether as a town wide matter, there is some reasonableness to a zone by zone approach. Rather, the court now concludes that the correct municipal analysis of a solar facility project must be made on a micro (site specific) level rather than on a macro (town-wide) level. The legislative intent is best served by having that analysis conducted, as it is on all the other Dover Amendment and § 3 cases, on a very site specific basis, use by use, parcel by parcel, neighborhood by neighborhood. Given that the board proceeded on this legal untenable ground it, never had the occasion to weigh in and hear the parties, neighbors and the others who are interested parties, on the question whether some regulation, or indeed an outright prohibition, ought to be applied here. The touchstone has to be whether a level of regulation is reasonable or not, as necessary to protect the public health, safety, or welfare.

This court will retain jurisdiction of this case. The court will annul the decision of the Board and remand the matter back to the board for a newly noticed full public hearing to consider the application that was before it with the understanding, based on the courts' order, that the Board cannot categorically rely on the prohibition of use here as it did in the first instance. There is no reason to require the project proponent to submit any application for variance because the purpose of the protective language of § 3 is to override prohibitions on use unless they are justified based on necessity to protect public health, safety, or welfare. That is a legislative override on what would otherwise be the applicable variance standards that would be indicated where there is a use that is prohibited in a given district but is not protected under § 3. The Board will hear the applicant, and others interested, on the question of the reasonableness or not of a prohibition or a regulation. The board would then have an opportunity, after hearing, to make its findings and to issue a decision on the application that was originally before it after engaging in the weighing § 3 requires.

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By July 12, 2019, counsel to confer with their respective clients and each other and submit a form of an order of remand that is specific as to the scope and the timing of remand providing specific milestones for noticing, convening, opening, and closing the remand hearing before the board. (Piper, C.J.)

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cc:

Lane, Esq., Henry J

Doneski, Esq., David J

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