

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

Plymouth, ss

MISC. CASE NO.

Matthew Buckingham and Richard Rogers,)
Plaintiffs)
v.)
George Barrett, Michael King,)
Richard Swenson,)
Michael Baptiste and Russell Motto)
in their capacity)
as Members of the Planning Board of the)
Town of Wareham, Massachusetts,)
AD Makepeace Company and)
Borrego Solar Systems, Inc.,)
Defendants)

VERIFIED COMPLAINT

Appeal under G.L. c. 40A, § 17

Introduction

This Complaint seeks to make Defendant AD Makepeace Company (“Makepeace”), the largest private property owner in Eastern Massachusetts, play by the rules. For years, it has avoided proper regulatory reviews for its industrial sand mining, earth removal, and land development activities in the Town of Wareham, Massachusetts.

Pursuant to G.L. c. 40A, § 17, Plaintiffs appeal the Decision of the Planning Board of the Town of Wareham filed with the Town Clerk on March 30, 2021 granting Site Plan Review Approval (“the Decision”) to clear-cut and strip mine 76-acres of globally rare Pine Barrens forest, extract over one million cubic yards of topsoil, sand and gravel, and install an industrial

energy utility facility on land zoned Residential 60 (R60) (“the Project”). The Decision was in the name of Makepeace as landowner and Borrego Solar Systems, Inc. as the Project applicant (“Borrego”). The Project is located on Tihonet Pond which was created by damming the Wankinko River. A copy the Decision is attached hereto as **Exhibit 1**. Plaintiffs have made a good faith effort to secure a certified copy of the Decision by asking the Town Clerk, Town Counsel and Town Planner for a certified copy three times. None has been provided. iThe Decision requires an appeal within 20 days.

The Decision is arbitrary and capricious, ultra vires and beyond the Board’s authority, and not otherwise in accordance with the law, including the Wareham Zoning Bylaw, Articles 14 and 15. The Wareham Zoning Bylaws (2019) and General Bylaws (2019) are attached as **Exhibit 2A and 2B**.

THE PARTIES

1. Plaintiff Matthew Buckingham owns real estate and resides with his family at their home at 11 Crane Landing Road, Wareham, Massachusetts.
2. Plaintiff Buckingham was raised in the Town of Wareham and is a lifelong resident. Throughout his life he has fished, walked, traveled and recreated on contiguous Pine Barrens lands, ponds, rivers and streams that will be impacted by the Project. He enjoys photographing nature locally, is an avid fisherman and teaches young children in the community about fishing.
3. Plaintiff Buckingham runs an organization that stewards, protects and cares for open space and public lands in the community.
4. In January 2016, Plaintiff Buckingham and his wife purchased from Makepeace Lot 21 in the private homeowner association named “Crane Landing at Tihonet Pond” and have built their home on this Lot.

5. Plaintiff Buckingham's health and wellbeing are directly tied to the wellbeing and sustainability of the natural world in his community.
6. Plaintiff Richard Rogers owns his home and resides at 13 Crane Landing Road, Wareham, Massachusetts in the private homeowner's association named "Crane Landing at Tihonet Pond."
7. Plaintiff Rogers purchased the land for his home from Makepeace. He purchased this land in order to live close to nature and to enjoy the quiet and natural surroundings of this location.
8. Plaintiffs' homes on Crane Land Road are subject to and have legal rights arising from the following granted by Makepeace: (1) Covenant dated March 24, 2003; (2) "Crane Landing at Tihonet Pond Rights, Reservations and Restrictions" dated December 22, 2003, Plymouth County Registry of Deeds, Book 27275, Page 266 (Amended by Book 28462, Page 292); and (3) Crane Landing Owners Association Trust, Plymouth County Registry of Deeds, Book 3291, Page 104 (the "Makepeace Covenants").
9. The construction and operation of the Project will harm Plaintiffs' rights to the natural beauty and scenic use of their homes and common lands guaranteed by the Makepeace Covenant.
10. Plaintiffs use and enjoy the waters of Tihonet Pond, including the fish, wildlife, insects and plants that live in and depend upon the Pond migration, life cycle and habitat.
11. Plaintiffs will suffer direct and specific harm from the Project including but not limited to:

- (a) noise, dust, truck traffic and air pollution caused by Defendant Makepeace's forest clear-cut, industrial logging, stump grinding and earth removal at the Project site;
 - (b) noise from heavy construction equipment required for construction of the solar utility;
 - (c) damage to the quality of the water in Tihonet Pond and impacts to wildlife and aquatic life from the loss of upland forest cover;
 - (d) damage to the Plymouth Carver Sole Source Aquifer from the strip mining of 76 acres;
 - (e) substantial diminution in property value by Makepeace's industrial mining operation and the Borrego's construction and operation of the Project;
 - (f) visual blight that destroys their scenic view and use and enjoyment of Tihonet Pond resulting from the glare, light pollution and loss of forested landscape; and
 - (g) construction of a chain link fence around the 76- acre Project site that will interfere with the ability of wildlife enjoyed by Plaintiffs to travel, hunt, migrate and survive.
12. Each Plaintiff is a person aggrieved within the meaning of G.L. c. 40A § 17.
13. Each Plaintiff will or may suffer particularized injury in fact to their health, safety, welfare and/or the economic value of their real estate, interests the Bylaws seek to protect.
14. The Defendants' actions will harm the Plaintiffs' rights that are protected under the Makepeace Covenants and/or the Bylaw, Section 1461.

DEFENDANTS

15. Defendant George Barrett resides at 348 Main Street, Wareham MA and is the Chairman of the Wareham Planning Board.
16. Defendant Michael King resides at 15 White Pine Avenue, Wareham MA and is a member of the Wareham Planning Board.
17. Defendant Richard Swenson resides at 9 Churchill Avenue, Wareham MA and is a member of the Wareham Planning Board.
18. Defendant Michael A. Baptiste, Sr. resides at 35 Longboat Drive and is Vice Chairman of the Wareham Planning Board.
19. Defendant Russell Motto resides at 21 Glen Charlie Road, Wareham MA and is a member of the Wareham Planning Board.
20. Defendant Borrego Solar Systems, Inc. is a California corporation registered to conduct business in Massachusetts, is the applicant for the Site Plan Review and maintains its principal place of business in Massachusetts at 55 Technology Drive, #102, Lowell, Massachusetts (“the Applicant”).
21. Defendant AD Makepeace Company (“Makepeace”) is a Massachusetts corporation and maintains its principal place of business at 158 Tihonet Road, Wareham, Massachusetts. Makepeace owns land where the Project will be located and plans to conduct an earth removal operation at the site.

JURISDICTION

22. This Court has jurisdiction pursuant to G.L. c. 40A, § 17.

FACTS

23. On March 8, 2021, the Board issued the Decision granting Site Plan Approval subject to thirteen conditions.
24. The Decision Condition 11 conditions it on the Board of Selectmen's issuance of an Earth Removal Permit under Article III, Division IV of the General Bylaws for the removal of about 1.3 million cubic yards of sand alleged to be "necessary for grading the site."
25. Defendants have not received an Earth Removal Permit.
26. The Planning Board has not issued and Defendants have not received a Special Permit for the Project.
27. On December 28, 2020, Defendant Planning Board granted Site Plan Review Approval for a large ground mounted solar utility on land owned by Makepeace at 150 Tihonet Road (67 acres, filed with Town Clerk 12/29/20) and also across Tihonet Pond from Plaintiffs' homes.
28. On October 29, 2020 Defendant Planning Board granted Site Plan Review Approval on for a large grounded mounted solar project on Makepeace land at 27 Charge Pond Road (about 44 acres).
29. The two solar projects at 150 Tihonet Road and 27 Charge Pond Road entail the removal of upland globally rare Pine Barrens forest, removal of topsoil removing vegetation and soils that filter the Plymouth Carver Sole Source Aquifer.
30. Defendant Planning Board's Site Plan Review Approval for the solar projects at 150 Tihonet Road and 27 Charge Pond Road, Wareham MA violated the Zoning Bylaw.

COUNT I

Violation of Articles 14 and 15 of the Zoning Bylaw

31. Plaintiffs hereby restate and incorporate by reference the allegations and statements contained in the preceding paragraphs of this Complaint.
32. Under the Zoning Bylaw Section 1520, a “Special Permit for Site Plan Review” from the Planning Board is required for development over 30 acres.
33. Under Article 15, Site Plan Review Special Permits “shall be granted only in conformance with this Section 1510 and Section 1450 of the Wareham By-Law and the requirements of MGL Chapter 40A, Section 9.”
34. Zoning Bylaw Article 14 controls where it imposes a greater restriction on a use under Section 1451.
35. Zoning Bylaw Section 1461 states that the Planning Board shall not approve any application for a Special Permit unless it finds that in its judgement, all of the following conditions are met:
 - 1.The Use as developed will not adversely affect the neighborhood.
 - 2.The specific site is an appropriate location for such a Use, structure, or condition.
 - 3.There will be no nuisance or serious hazard to vehicles or pedestrians.
 - 4.Adequate and appropriate facilities will be provided for the proper operation of the proposed Use. This includes the provision of appropriate sewage treatment facilities which provide for denitrification, when the permit granting authority deems such facilities necessary for protection of drinking water supply wells, ponds, or saltwater embayments.
 - 5.The Use or structure as proposed does not pose a substantial detriment to the town or neighborhood in which it is proposed.
 - 6.The proposal, as approved, conforms to all other applicable provisions of the Wareham Zoning By-law.

37. The Board did not make affirmative findings required by Section 1461 in the Decision.
38. The Board's failure to make the affirmative findings required by Section 1461 exceeded its authority, constituted an error of law, was arbitrary and capricious.
39. The Board's failure to comply with Section 1461 will adversely affect and cause direct and concrete harm to interests of the Plaintiffs that the Bylaw is intended to protect.

COUNT II

Makepeace Violations of the Makepeace Covenant

40. The Makepeace Covenants grant Plaintiffs the right to the "natural beauty and scenic use" of their homes and the common lands within the Association including the use and enjoyment of the waters of Tihonet Pond and the view from Tihonet Pond of adjacent upland forest.
41. The Project is about 1,000 feet across Tihonet Pond from Crane Landing at Tihonet Pond and the common lands to which Plaintiffs have legal rights under the Makepeace Covenants.
42. Plaintiffs have the right to enforce the Makepeace Covenants.
43. Makepeace provided Plaintiff Buckingham and his wife marketing materials containing a wooded view of the Project site and 150 Tihonet Road to induce them to purchase their homes.
44. Makepeace's marketing materials for Crane Landing at Tihonet Pond contain a view Tihonet Pond with pristine forested upland bordering the Pond.

45. The view and use and enjoyment of the natural beauty promised by Makepeace to Plaintiffs and guaranteed by the Makepeace Covenants will be destroyed by the Project and Makepeace's abutting 150 Tihonet Road project.
46. Makepeace's marketing materials and the Makepeace Covenants grant Plaintiffs' right to access to Tihonet Pond for boating, fishing and recreation.
47. Makepeace is violating and will continue to violate the Makepeace Covenants and promises made to Plaintiffs by proposing and building the Project and the abutting 150 Tihonet Road project.
48. Makepeace's proposal to build the Project is harming Plaintiffs' wellbeing and interfering with their use and enjoyment of their homes and the common Association land by causing stress and time in an effort to protect their rights.
49. The construction and operation of the Project violates Plaintiffs rights granted under the Makepeace Covenants.

COUNT III

Constitutional Right to a Clean Environment

50. Plaintiffs hereby restate and incorporate by reference the allegations and statements contained in the preceding paragraphs of this Complaint.
51. Under Article 97 of the Massachusetts Constitution,

“The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.”
52. The Decision violates Plaintiffs' rights to clean air, and water, and the esthetic qualities

of their environmental and violates Article 97.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court:

- A) Enter Judgment for Plaintiffs on Counts One through Three;
- B) Remand the matter to the Planning Board with an order that the Board require a new site plan review special permit application from Defendants Makepeace and Borrego and hold public hearings under Section 1461 on the application;
- C) Enforce the Makepeace Covenants to protect the Plaintiffs' rights thereunder;
- D) Enter a preliminary and permanent injunction prohibiting the issuance of building permits for the Project and the related projects at 150 Tihonet Road and 27 Charge Pond Road, Wareham, until final judgment of this Court from which no appeal is or has been taken, as provided by the Decision and G.L. c. 40A, §§ 15 and/or 17, including the prohibiting the further removal of trees, removal of earth, disturbance of vegetation and topsoil; and
- E) Grant such other and further relief as the Court shall deem to be just and proper.

Respectfully Submitted,

PLAINTIFFS

By their attorney,

Margaret E. Sheehan, Esq.

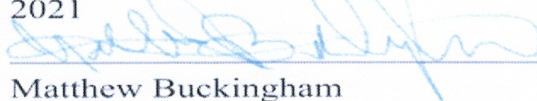
Margaret E. Sheehan, Esq.
BBO# 456915
Save the Pine Barrens, Inc.
158 Center Hill Road
Plymouth MA 02360
Tel. 508 259 9154

April 20, 2021

VERIFICATION OF MATTHEW BUCKINGHAM

I, Matthew Buckingham, do hereby depose and say that I have read the contents of the foregoing Verified Complaint, know the contents thereof, and aver that the factual allegations asserted contained herein are true and accurate based upon my personal knowledge or my review of the documentation available to me, except where stated on information and belief, and there I believe the allegations to be true.

Signed under the penalties of perjury this 18th day of April, 2021



Matthew Buckingham