Citation: 490 Mass. 747
Parties: GREENROOTS, INC. vs. ENERGY FACILITIES SITING BOARD & another.[1] SJC-13233
County: Suffolk
Hearing Date: September 7, 2022
Decision Date: November 4, 2022
Judges: BUDD, C.J., GAZIANO, LOWY, CYPHER, KAFKER, WENDLANDT, & GEORGES, JJ.
Energy Facilities Siting Board. Administrative Law, Decision, Record, Substantial evidence. Public Utilities, Electric company. Environment.

In approving a petition to move the boundaries of an electric substation from a location previously approved, the Energy Facilities Siting Board (board) did not abuse its discretion in declining to reopen its previous determination that the substation was needed, where the board considered the new data submitted in conjunction with the request to reopen the previous determination, but concluded that the new data, which was regional in scope, would not invalidate the previous finding that another substation was needed to serve local load [750-752]; further, the board complied with the Commonwealth's environmental justice requirements, and a claim that the board failed to abide by requirements to hold a hearing in each locality in which a facility would be located was waived [752-756]; finally, the board's adoption of a forty-year planning horizon based on the design life of substation equipment, combined with ongoing reporting requirements, was a reasonable approach to handling the uncertainty of sea level rise and was supported by substantial evidence [756-758].

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on March 17, 2021. The case was reported by Kafker, J.

Joshua M. Daniels for the petitioner.
Adam M. Ramos, Special Assistant Attorney General (Sara J. Stankus also present) for the respondent.

David S. Rosenzweig (Catherine J. Keuthen & Cheryl A. Blaine also present) for the intervener.

Anxhela Mile, Phelps Turner, & Heather Friedman, for Conservation Law Foundation, amicus curiae, submitted a brief.

KAFKER, J. GreenRoots, Inc. (GreenRoots), a nonprofit dedicated to improving the urban environment, challenges the approval by the Energy Facilities Siting Board (board) of a project change petition filed by NSTAR Electric Company, doing busi-

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ness as Eversource Energy (Eversource), that would move the boundaries of an electric substation 190 feet from the location previously approved. GreenRoots argues that the board should have reopened its initial determination that the substation was needed. GreenRoots also contends that the community was denied meaningful participation in the decision in violation of statutory and regulatory requirements and the Commonwealth's commitment to environmental justice. Finally, GreenRoots argues that the substation's location puts it at risk from sea level rise due to climate change.

We conclude that the board did not err in approving the project change. We discern no error in the board's determination that GreenRoots did not satisfy the applicable legal standard for the reopening of a completed adjudicatory proceeding. The board considered the new evidence GreenRoots submitted, and the board's determination, based in particular on location-specific needs, that the new evidence would not have a significant impact on its prior conclusion that there was a need for an additional substation in the load area for Chelsea and the East Boston neighborhood of Boston is entitled to deference. The board also complied with the statutory and regulatory requirements regarding public participation and environmental justice. Finally, the board's determination that Eversource reasonably addressed risks from future sea level rise, considering the forty-year design life of the substation equipment, is supported by substantial evidence. Accordingly, we affirm the board's order.[2]
1. Background. a. Board's approval process. Board approval is required before a utility can construct a

new facility. G. L. c. 164, § 69J. The board reviews "the need for, cost of, and environmental impacts" of such facilities in order "to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost." G. L. c. 164, § 69H.

As part of the approval procedures, anyone "substantially and specifically affected by the proceeding" may intervene as a party. 980 Code Mass. Regs. § 1.05(1) (2010). In addition, the board must provide opportunities for public involvement. G. L. c. 164, § 69J ("a public hearing shall be held in each locality in which a facility would be located"). Public comment hearings are held "in one or more of the affected cities or towns … as soon as

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practicable after the commencement of a proceeding." 980 Code Mass. Regs. § 1.04(5) (2010). The board must also comply with environmental justice requirements. In this case, the board was subject to the 2017 Environmental Justice Policy issued by the Executive Office of Energy and Environmental Affairs (EEA).

b. Procedural history. On December 23, 2014, Eversource petitioned the board to build a substation at 338 East Eagle Street in East Boston (East Eagle substation) and two transmission lines to connect the site to substations in Everett and Chelsea. The project was intended to resolve reliability and capacity issues arising from the region's dependence on the Chelsea substation.[3]

The board held a public comment hearing regarding the project at the Chelsea Senior Center on July 29, 2015. Subsequently, Channel Fish, a fish-processing company just east of the proposed site, intervened to contest the location of the substation. GreenRoots did not intervene, as it was organized during the pendency of the proceeding. Another environmental group, the Chelsea Collaborative, whose associate executive director would later become the executive director of GreenRoots, was given limited participant status,[4] as were four East Boston residents, including several who would become members of GreenRoots. As the review of the project continued, GreenRoots submitted written comments on the proposed decision. At the final hearing on November 30, 2017, the executive director of GreenRoots and two of its employees spoke. The board issued its final decision on December 1, 2017, approving the project, but subject to a condition that the company "enter into discussions with the City of Boston" to "relocate the East Eagle [s]ubstation" to the other side of the parcel, away from Channel Fish. The board extended the period for appeal until June 1, 2018, to allow Channel Fish and Eversource to negotiate over the location. No one appealed.

Pursuant to the condition, Eversource swapped its property on the east side of the parcel for the city's property on the west side. The two sites were separated by 190 feet, and the new site is about sixty percent larger — 27,389 square feet rather than 16,800 square feet. The company filed a project change petition on November 15, 2018, regarding the new location.

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The board held a public comment hearing to receive feedback on the change at East Boston High School on February 5, 2019. On April 5, 2019, the presiding officer granted intervener status to GreenRoots. In doing so, she limited the scope of the proceeding to "potential impacts of the proposed change" and other issues relating to the board's statutory mandate.

On July 5, 2019, GreenRoots moved to "reopen or reconsider" the finding in the initial decision that the substation was needed, due to more recent regional projections showing lower peak electricity demand. Later that month, the presiding officer denied the motion. GreenRoots renewed its request for reopener in its briefing before the board and in comments on the board's tentative decision.

As explained more fully infra, the board approved the change at a public meeting on February 22, 2021. In the final decision, the board denied GreenRoots's motion to reopen.

GreenRoots sought judicial review of the board's February 2021 decision pursuant to G. L. c. 164, §

69P, and G. L. c. 25, § 5. A single justice allowed Eversource to intervene in the appeal and reserved and reported the case to the full court.

2. Discussion. We will sustain the board's decision if it is constitutional, in accordance with the statute and applicable regulations, "supported by substantial evidence of record in the board's proceedings," and not "arbitrary, capricious or an abuse of the board's discretion." G. L. c. 164, § 69P. In this inquiry, we "defer[ ] to the board's expertise and experience." Sudbury v. Energy Facilities Siting Bd., 487 Mass. 737, 747 (2021), quoting Brockton Power Co. v. Energy Facilities Siting Bd., 469 Mass. 215, 223 (2014).

GreenRoots makes three arguments in support of its contention that the board's order should be overruled. First, it argues that the board abused its discretion by declining to reopen its 2017 determination that the project was needed. Second, it argues that the order is invalid because of the inadequacy of the board's public process, including subpar efforts to address environmental justice. Third, GreenRoots argues that the board's determination that Eversource's plans adequately mitigate risk from sea level rise was unsupported by substantial evidence. We address each in turn.

a. Declining to reopen need determination. The board decided in 2017 that the substation was needed. Recognizing that the determination of need was separate from the location-change

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issue raised by the project change petition, the board considered the issues separately. This was appropriate, as GreenRoots's challenge to the determination of need addressed an issue that had already been decided in a completed proceeding from which no appeal had been taken, while the project change proceeding relating to substation site location presented both new legal issues and new evidence.

Movants who seek to reopen a record after a final decision face a high bar on review. Ordinarily, "absent compelling circumstances, the Department [of Public Utilities] will not reopen a proceeding after a final decision has been rendered." National Grid, D.P.U. 10-54A, at 13 (2011) (interlocutory order on motion to reopen record). See Alliance to Protect Nantucket Sound, Inc. v. Department of Pub. Utils. (No. 2), 461 Mass. 190, 195 (2011), quoting Covell v. Department of Social Servs., 42 Mass. App. Ct. 427, 433 (1997), S.C., 439 Mass. 766 (2003) ("agencies have inherent power to reopen their concluded proceedings in compelling situations as justice may require").

However, in this case, the board, in its discretion, applied a more lenient standard to GreenRoots's request to revisit the need determination, requiring GreenRoots only to show "good cause" to reopen the record. 980 Code Mass. Regs. § 1.09(1) (2010). Expressly applicable only before the board issues a final decision, id., the "good cause" standard requires that new evidence "would be likely to have a significant impact on the board's decision," Sudbury, 487 Mass. at 744.

To support its request, GreenRoots offered a report from ISO New England, the regional transmission operator, showing declining peak loads in the region. The board found that those forecasts would "not likely have a significant impact" on its determination that the East Eagle substation was necessary for reliable electricity in the area. The board determined that Eversource's "more granular … substation-specific assessment" was more relevant to the question of substation need than the projected regional decline in peak loads. GreenRoots also provided evidence that commercial development since the approval added less load than expected, but the board determined that it was not "substantially less than predicted."

We discern no error here. The evaluation of various data sources to determine need for energy facilities is squarely within the board's "expertise and experience," so we give it "great deference." MCI Telecomm. Corp. v. Department of Telecomm. & En-

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ergy, 435 Mass. 144, 150-151 (2001), quoting Stow Mun. Elec. Dep't v. Department of Pub. Utils., 426 Mass. 341, 344 (1997). In Sudbury, 487 Mass. at 745, we affirmed the board's decision to deny a reopener regarding the need for an approved transmission line based on updated forecast data, because the board considered the "materials … submitted by both parties" and determined that "the new data did not change the fact there was already a need for additional energy supply." In so doing, the court in Sudbury focused on the needs of the particular location at issue, rather than the whole region. Id. at 748-749 ("existing transmission lines were insufficient to provide the subarea with the necessary energy supply in the event of certain contingencies"). Likewise, here, the board considered the data and determined that they would not invalidate the previous finding that another substation was needed to serve local load, because the new data were regional in scope.[5]

b. Public engagement. GreenRoots argues that deficiencies in the board's public engagement warrant setting aside the order as not founded on "substantially accurate and complete" information. G. L. c. 164, § 69J. It contends that the board did not comply with environmental justice principles and neglected to hold a hearing in East Boston in the first proceeding, which GreenRoots argues was mandated by the requirement to hold a hearing "in each locality in which a facility would be located." Id. We conclude that the board complied with the Commonwealth's environmental justice requirements and that the argument regarding the "locality" requirement was waived.

i. Environmental justice. The change proceeding was governed by the 2017 Environmental Justice Policy issued by EEA. Executive Office of Energy and Environmental Affairs, Environmental Justice Policy (Jan. 31, 2017), https://www.mass.gov/doc
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/2017-environmental-justice-policy/download [https://perma.cc/R3JH- SRYU] (EJ policy). As explained in the EJ policy: "Environmental justice is based on the principle that all people have a right to be protected from environmental hazards and to live in and enjoy a clean and healthful environment regardless of race, color, national origin, income, or English language proficiency." Id. at 3. Environmental justice is further defined as "the equal protection and meaningful involvement of all people and communities with respect to the development, implementation, and enforcement of energy, climate change, and environmental laws, regulations, and policies and the equitable distribution of energy and environmental benefits and burdens." Id. The policy expressly applies to proceedings of the board. Id.

The EJ policy is based on a recognition that disadvantaged communities have historically borne disproportionate environmental burdens of projects that benefit the entire Commonwealth. Id. at 7. In response to this history, the EJ policy establishes both general principles and more specific requirements that apply to projects that exceed certain thresholds.

As to the specific requirements, agencies must provide "enhanced public participation" and "[e]nhanced analysis of impacts and mitigation" for a project (1) "that exceeds an Environmental Notification Form (ENF) threshold for air, solid and hazardous waste (other than remediation projects),[6] or wastewater and sewage sludge treatment and disposal"; and (2) where "[t]he project site is located within one mile of an [Environmental Justice (EJ)] Population (or in the case of projects exceeding an ENF threshold for air, within five miles of an EJ Population)." Id. at 10. An EJ Population is a neighborhood that meets one or more of the following criteria: (i) the annual median household income of twenty-five percent of households is not more than sixty-five percent of the Statewide annual median; (ii) twenty-five percent

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or more of residents are racial or ethnic minorities; or (iii) twenty-five percent or more of households are English isolated (that is, they lack a member over fourteen years old with English language proficiency). Id. at 3-4.

Below the ENF thresholds, each agency is bound by "a general, but affirmative, requirement" to "promote environmental justice" in a manner consistent with its mission. Brockton v. Energy Facilities

Siting Bd. (No. 1), 469 Mass. 196, 204 n.17 (2014) (quoting parallel provisions of previous EJ policy). In particular, "all EEA agencies [including the board] shall establish an inclusive, robust public participation program for key agency actions that … affect EJ populations." EJ policy, supra at 9. As part of that robust public participation process, agencies must consider (but are not mandated to adopt) a number of strategies, including scheduling meetings at convenient times and places for "neighborhood stakeholders," translation of key documents, providing interpreters "at public meetings … upon request," outreach to "community-specific local media," and using "collaborative approaches to problem-solving … to address public concerns." Id.

In the instant case, EEA found that the neighborhood that includes the substation meets all three requirements for an EJ population. However, it is undisputed that the project does not exceed an ENF threshold. Therefore, the more general standard described above applies to the decision.

We conclude that the board complied with the general environmental justice principles required by the policy. The board offered significant opportunities for community participation. It published notices in multiple languages in local media outlets. In addition to the initial public comment hearing, the board heard public comments over four days as part of the hearing for final approval, at which it provided simultaneous translation in Spanish. These hearings included evening hours to accommodate more participants. The board also experimented with "collaborative approaches to problem solving": it required Eversource to hold focus groups regarding the aesthetic design of the substation and to negotiate a community benefits agreement with community groups. Via the agreement, Eversource committed to fund improvements to a nearby park, a playground, and the Boys and Girls Club facility. These results are consistent with the EJ policy, which calls on agencies to "increase access to open space and parks" and to engage in the "cleanup and redevelopment of

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[b]rownfield sites" such as the East Eagle parcel.[7] EJ policy, supra at 4, 7.

GreenRoots argues that the board's translation efforts fell short, contending that interpretation at the evidentiary hearings was substandard, the Spanish translation of the tentative decision was delayed (leading to a shorter time period for Spanish speakers to submit written public comments), and dial-in participants on the first day of the final hearing, conducted over Zoom (an online video conferencing platform), could not access interpretation services. Although the process could have been improved, it satisfied the general requirement set out in the order.[8]

ii. Locality. In the initial proceeding, the board held a public comment hearing in Chelsea, but not in East Boston. GreenRoots argues that this contravened the requirement to hold a public hearing "in each locality in which a facility would be located." G. L. c. 164, § 69J. In response, the board contends that the issue is not properly before the court because no appeal was taken from the initial decision, and that the locality requirement was satisfied by holding the hearing in Chelsea, which is close to East Boston.

We conclude that the issue was waived. See Conservation Comm'n of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 741 (2000) (failure to seek judicial review of agency order precludes litigation of claims). No one appealed from the 2017 order on this or any other ground.[9] Furthermore, the Chelsea hearing was located less than two miles from East Boston, and East Boston

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residents were notified of the hearing.[10]

c. Sea level rise. In its order, the board "accept[ed] as reasonable" Eversource's decision to design the substation to be "resilient" to sea level rise through 2070. The board determined that 2070 was a "reasonable planning horizon" because the equipment in the substation has a "40-year design life" and "because of increased uncertainty about electrical system needs and sea level trends further into the future." In addition, the board required Eversource to periodically reevaluate "the necessity,

appropriateness, and cost of implementing additional flood mitigation measures" in light of the most recent sea level rise projections. Eversource was required to report its findings to the board every five years from the date the substation is put in operation.

We discern no error in the board's analysis. The board's adoption of a forty-year planning horizon based on the design life of substation equipment is reasonable, given the uncertainties in long-term predictions of sea level rise and electricity demand. See Mederi, Inc. v. Salem, 488 Mass. 60, 67 (2021), quoting Garrity v. Conservation

Comm'n of Hingham, 462 Mass. 779, 792 (2012) ("A decision is not arbitrary and capricious unless there is no ground which reasonable persons might deem proper to support it" [quotation and alteration omitted]). Cf. Bensenville v. Federal Aviation Admin., 457 F.3d 52, 71 (D.C. Cir. 2006) (finding agency's use of particular planning time frame reasonable where "predictions any further along would be of questionable reliability"). The five-year reviews that require updated analysis of flood mitigation measures further assure the reasonableness of the board's approach. See id. ("The method that the [agency] chose, creating its models with the best information available when it began its analysis and then checking the assumptions of those models as new information became available, was a reasonable means of balancing those competing considerations …").

GreenRoots argues that the board's decision is not supported by substantial evidence because it should have used a planning

horizon based on the sixty-year average age of Eversource's substations that are currently in use, rather than the forty-year design life of substation equipment. We will not substitute our judgment for the board's on whether it is more appropriate to use average age of substations or the design life of equipment for long-term planning purposes. This is the type of decision on which the board is entitled to deference due to its experience and expertise. Alliance to Protect Nantucket Sound, Inc. v. Department of Pub. Utils. (No. 1), 461 Mass. 166, 178 (2011) (Alliance I), quoting Cambridge v. Department of Telecomm. & Energy, 449 Mass. 868, 875 (2007) (explaining that court defers to agency's "expertise in areas where the Legislature has delegated its decision making authority").
The board's forty-year planning horizon combined with ongoing reporting requirements is a reasonable approach to handling the uncertainty of climate change. An agency's selection of an appropriate planning horizon hinges on technical determinations, which are entitled to deference. Alliance I, 461 Mass. at 178. Thus, courts will not disturb agencies' reasonable decisions that are adequately explained based on the project proposed and the planning data available. For example, courts have approved agencies' planning horizons where "predictions any further along would be of questionable reliability." Bensenville, 457 F.3d at 71. See National Audubon Soc'y v. United States Army Corps of Eng'rs, 991 F.3d 577, 585 (4th Cir. 2021). This is not a case where the time frame selected by the agency fails to reasonably consider the project proposed and reliable projections. See Northern Plains Resource Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1077-1079 (9th Cir. 2011) (five-year time frame was unreasonable where project would clearly not be completed within that time frame and agency had firm projections for next twenty years).

Other courts have approved similar schemes with regard to sea level rise. For example, in reviewing an agency's approval of certain fisheries for a ten-year term, the United States District Court for the District of Columbia concluded that the agency was required to consider "potential short-term impacts caused by sea-level rise" within the ten-year term, but it approved the agency's determination that the long-term effects were "too indeterminate to yield clearly articulable conclusions," and it required the agency to reevaluate its determinations by the end of the ten-year term. Oceana, Inc. v. Pritzker, 125 F. Supp. 3d 232, 250-252

(D.D.C. 2015). See Markell, Emerging Legal and Institutional Responses to Sea-Level Rise in Florida

and Beyond, 42 Colum. J. Envtl. L. 1, 25-26 (2016) (describing new Florida rules that require local governments to use at least ten-year planning horizon to evaluate impacts from sea level rise, but suggesting that longer time frame may be appropriate).

In sum, the board's planning decisions are reasonable and supported by substantial evidence. The board has carefully considered and balanced cost, reliability, and environmental concerns as required by the statute. Cf. Sudbury, 487 Mass. at 747.

3. Conclusion. For the reasons explained above, we affirm the decision of the board.

So ordered.

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[1]NSTAR Electric Company, doing business as Eversource Energy, intervener.

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[2]We acknowledge the amicus brief submitted by the Conservation Law Foundation.
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[3]The dependence on the Chelsea substation also created a risk of voltage falling below “minimm requirements” in some operating conditions.

[4]A limited participant may file a brief and file comments on a tentative decision, but cannot obtain judicial review of an order. 980 Code Mass. Regs. § 1.05(2) (2010). See G. L. c. 164, § 69P (right to judicial review restricted to parties).

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[5]GreenRoots contends that it has been placed at a disadvantage in challenging local need because the most relevant forecasts were not made available to it. The initial need determination was predicated on Eversource's independent forecast for the Chelsea substation, based on proprietary data. In the project change proceeding, Eversource did not provide GreenRoots with a forecast incorporating more recent peak load data. However, GreenRoots did not file a motion to compel production of such updated forecasts — nor did its requests for information to Eversource specifically seek Eversource's independent forecasts, but merely forecasts that incorporated newer ISO New England projections. In these circumstances, we discern no abuse of discretion on the part of the board. Commercial Wharf E. Condominium Ass'n v. Department of Envtl. Protection, 93 Mass. App. Ct. 425, 433 (2018), quoting Zachs v. Department of Pub. Utils., 406 Mass. 217, 227 (1989) (where “discovery ruling is bound up with matters of agency procedure, ‘agencies have broad discretion’ ”).

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[6]The ENF thresholds are indicators that a project is likely to cause environmental damage because of its “nature, size or location” and thus requires further review under the Massachusetts Environmental Policy Act. 301 Code Mass. Regs. § 11.03 (2021). There is no threshold specifically applicable to electric substations (as there is for high-voltage transmission lines, generating facilities, and fuel pipelines), but a substation may exceed size- or location-based thresholds. For example, because the East Eagle substation will be located within filled tidelands, it would have exceeded a threshold if the Department of Environmental Protection (DEP) had found that it was not a water-dependent use. 301 Code Mass. Regs. § 11.03(3)(a)(5). However, DEP found that the project was a water dependent use.

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[7]GreenRoots and amicus Conservation Law Foundation point to environmental justice defects in the initial proceeding as well. In the initial proceeding, the board determined that it was not bound by the EJ policy because the project did not exceed ENF thresholds. This was incorrect, as the board was still bound by the "general" requirement. Brockton, 469 Mass. at 204 n.17. However, despite this determination, the board implemented enhanced public participation procedures consistent with the policy, including notice in multiple languages and some translation services, although such procedures were less robust than those provided in the project change proceeding. Therefore, to the extent that these claims were not waived due to failure to appeal from the initial decision and are relevant to the denial of the request for reopener, we discern no basis to conclude that further enhanced public participation "would [have been] likely to have a significant impact" on the initial decision. Sudbury, 487 Mass. at 744.

[8]We also note that this was the first time the board was asked for translation in an evidentiary hearing and the first time the board held a public meeting on Zoom.

[9]GreenRoots was not a party in the initial decision, but it could have petitioned to intervene to appeal. See NSTAR Electric Co., EFSB 15-04, at 6 (2016) (ruling on petition to intervene; late-filed petitions to intervene are allowed if petitioner shows good cause).

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[10]We note that the scope of the term "locality" is not self-evident. See Black's Law Dictionary 1125 (11th ed. 2019) (defining "locality" as "[a] small area of a city, county, or state; vicinity; neighborhood; community"). We encourage the board to provide further clarification of its understanding of the meaning of "locality" by regulation or other guidance. Cf. Citrix Sys., Inc. v. Commissioner of Revenue, 484 Mass. 87, 91 n.9 (2020), quoting Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 646 (2000) ("regulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate").