



THE COMMONWEALTH OF MASSACHUSETTS
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 CENTRAL MASSACHUSETTS DIVISION
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TOWN OF SOUTH HADLEY
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November 29, 2018

Carlene C. Hamlin, Town Clerk
 Town of South Hadley
 116 Main Street
 South Hadley, MA 01075

**Re: South Hadley Annual Town Meeting of May 9, 2018 -- Case # 9030
 Warrant Articles # 17, 18, 19, 20, 21, and 22 (Zoning)
 Warrant Article # 11 (General)**

Dear Ms. Hamlin:

Articles 11, 17, 18, 19, 20, 21, and 22 - We approve Articles 11, 17, 18, 19, 20, 21, and 22, and the map pertaining to Article 22, from the May 9, 2018 South Hadley Annual Town Meeting. Our comments regarding Articles 17, 20, 21, and 22 are provided below.

Article 17 - Article 17 amends the Town's zoning by-laws to allow for solar photovoltaic installations (solar installations) in the Town. Specifically, Article 17 adds new definitions pertaining to solar installations, amends the Town's Use Regulations Schedule by adding new uses related to solar installations, and adds a new Section 255-48, "Solar Photovoltaic Installations," that imposes requirements on solar installations in the Town. More specifically, the by-law amendments allow: (1) large scale solar installations by special permit in certain zoning districts; (2) medium scale solar installations by special permit in all zoning districts; and (3) small scale installations as of right in all zoning districts

General Laws Chapter 40A, Section 3, protects solar energy systems and the building of structures that facilitate the collection of solar energy, and provides in pertinent part as follows:

No zoning ordinance or bylaw 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.

There are no appellate level judicial decisions to guide the Town or this Office in determining what qualifies as an unreasonable regulation of solar uses under G.L. c. 40A, § 3. However, a Land Court decision provides some guidance. In Briggs v. Zoning Board of Appeals of Marion, 2014 WL 471951 * 5 (2014), the Land Court determined that a zoning board of appeals'

decision maintaining a division between commercial solar energy and residential accessory solar energy was reasonable and did not violate G.L. c. 40A, 3. In addition, as a general principle, we recognize that the Town may utilize its zoning power to impose reasonable regulations on solar uses based upon the community's unique local needs. *See Burnham v. Board of Appeals of Gloucester*, 333 Mass. 114, 116-117 (1955) ("Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions."). The reasonableness of a regulation is a fact-dependent determination that includes a consideration whether a regulation substantively diminishes or detracts from a project's usefulness or imposes an excessive cost that outweighs legitimate municipal concerns. *See e.g., Duseau v. Szawlowski Realty Inc.*, 2015 WL 59500, * 8 (2015) (solar project proponent failed to demonstrate that restricting a solar energy project to the Town's Industrial Districts was an unreasonable regulation and not necessary to protect the public health and welfare).

In applying the amendments adopted under Article 17 the Town should consult closely with Town Counsel to ensure that the Town does not run afoul of the solar use protections in G.L. c. 40A, § 3. In light of the above, we offer comments on certain specific portions of the new Section 255-48.

A. Section E "General Requirements.

1. Section E (6) "Safety Environmental Standards."

Section E (6) (e) pertains to vegetation management for solar installations. The first sentence in Section E (6) (e) prohibits herbicide, pesticide, or chemical fertilizers to manage vegetation at ground mounted solar installations. However, the last sentence in Section E (6) (e) provides that "[h]erbicides shall be applied only by properly licensed personal in conformance with all applicable state regulations." The Town may wish to amend Section E (6) (e) to make it clear whether herbicide use is allowed or prohibited.

Regardless of whether the Town intends to allow or prohibit herbicide use, Section E (6) (e) must be applied consistent with the Pesticide Control Act, which establishes the Department of Agricultural Resources' "exclusive authority in regulating the labeling, distribution, sale, storage, transportation, *use and application*, and disposal of pesticides in the commonwealth." *See* G.L. c. 132B, § 2, as amended by Chapter 264 of the Acts of 1994 (emphasis supplied). Herbicides are included in the definition of pesticides under G.L. c. 132B, § 2.¹ The Town should consult with Town Counsel regarding any questions on this issue.

2. Section E (7) "Abandonment & Decommissioning Plan (Medium and Large Scale Solar Photovoltaic Installations."

¹ The definition of "pesticide" in G.L. c. 132B, § 2 includes herbicides, as follows "a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant..."

Section E (7) requires the proponent of the large or medium scale solar facility to provide financial security including a bond or other surety to cover the cost of removing the facility. General Laws Chapter 44, Section 53, requires that performance security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of the Town's general fund (and subject to future appropriation), unless the Legislature has expressly made other provisions that are applicable to such receipt. General Law c. 44, Section 53G ½ does allow the deposit of surety proceeds into a special account under certain circumstances, as follows:

Notwithstanding section 53, in a...town that provides by by-law...rule, regulation or contract for the deposit of cash, bonds, negotiable securities, sureties or other financial guarantees to secure the performance of any obligation by an applicant as a condition of a license, permit or other approval or authorization, the monies or other security received may be deposited in a special account. Such by-law...rule or regulation shall specify: (1) the type of financial guarantees required; (2) the treatment of investment earnings, if any; (3) the performance required and standards for determining satisfactory completion or default; (4) the procedures the applicant must follow to obtain a return of the monies or other security; (5) the use of monies in the account upon default; and (6) any other conditions or rules as the...town determines are reasonable to ensure compliance with the obligations. Any such account shall be established by the municipal treasurer in the municipal treasury and shall be kept separate and apart from other monies. Monies in the special account may be expended by the authorized board, commission, department or officer, without further appropriation, to complete the work or perform the obligations, as provided in the by-law...rule or regulation. This section shall not apply to deposits or other financial surety received under section 81U of chapter 41 or other general or special law.

For the Town to deposit surety proceeds into a special account, the Town must comply with the requirements of G.L. c. 44, § 53G ½. Otherwise, surety proceeds must be deposited into the Town's general fund, pursuant to G.L. c. 44, § 53. The Town should consult with Town Counsel with any questions regarding the proper application of Section E (7).

Articles 20, 21, and 22 - Article 20 makes several changes to Section 255-23, pertaining to the Town's Smart Growth Districts. Articles 21 and 22 create a new Smart Growth District entitled, "Newton Street Smart Growth District," and amend the Town's zoning map to show the District's boundaries. Articles 20, 21, and 22 are adopted pursuant to G.L. c. 40R, which encourages "smart growth" zoning. Chapter 40R establishes the procedure by which a municipality may establish and amend a Smart Growth Zoning District. By-laws adopted pursuant to Chapter 40R must be approved by this Office and by the Department of Housing and Community Development (DHCD).

We approve Articles 20, 21, and 22. However, the Town must still comply with the provisions of G.L. c. 40R, § 4² by obtaining approval from DHCD. The Town may not be eligible for financial and other incentives until it receives final approval from DHCD. The Town should

² General Laws Chapter 40R, Section 4 (b), provides that "[a]fter issuance of a letter of eligibility and upon application of the town with proof of adoption of the smart growth zoning district ordinance or by-law included in the application for a letter of eligibility, along with any amendment required by the department in the letter of eligibility, the department shall confirm its approval within 30 days of receipt of the application.

send the by-law amendments to the: Office of Sustainable Communities, MA Dept. of Housing & Community Development, 100 Cambridge Street, Suite 300, Boston, MA 02114. We suggest that the Town discuss this issue with Town Counsel.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,
MAURA HEALEY
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