



THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

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March 11, 2019

Leis Phinney, Town Clerk
Town of Wales
P.O. Box 843
Wales, MA 01081

Re: Wales Special Town Meeting of August 6, 2018 -- Case # 9123
Warrant Article # 2 (Zoning)
****CORRECTED DECISION**¹**

Dear Ms. Phinney:

Article 2 - We approve Article 2 from the August 6, 2018 Wales Special Town Meeting.²

Article 2 amends the Town's zoning by-law, Section 7.10, "Large-Scale Ground-Mounted Solar Photovoltaic Installations" by making several specific changes to certain identified sections. One change adds to Section 7.16.2, "Land Clearing, Soil Erosion, and Habitat Impacts," three new sub-sections numbered 7.16.2 (a), 7.16.2 (b) and 7.16.2 (c).

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.

¹ This "corrected decision" fixes a typographical error in our decision issued January 4, 2019. Specifically, on page 2 of our decision pertaining to Section 7.16.2 (c) we noted the fence height as 6 feet where it should have said 6 inches.

² On November 20, 2018, we placed Article 2 on "hold" pursuant to Chapter 299 of the Acts of 2000 because of procedural defects in the planning board hearing notice. The Town Clerk has now certified that the Town has followed all of the notice and publishing requirements of Chapter 299, and no claims were received. The Attorney General is authorized to, and does so, waive the procedural defects.

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 2 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 the amended Section 7.16.2.

1. Section 7.16.2 (b)

Section 7.16.2 (b) requires a project that proposes to convert forestland to a solar installation, to designate "an area of unprotected forested land on [the] same lot of a size equal to the total area of such installation." Section 7.16.2 (b) further provides that "[t]his is not appealable."³ The new Section 7.16.2 (b) cannot be applied in a manner that would limit or prohibit the applicant from exercising any appeal rights they may have, including the right to challenge that the mitigation requirements as applied to a particular solar installation are an unreasonable regulation of solar energy. The Town should consult with Town Counsel with any questions on this issue.

2. Section 7.16.2 (c)

Section 7.16.2 (c) requires all fencing to be placed at a minimum of 6 inches above ground level to facilitate wildlife movement "or to adhere to the National Electric Code (NEC) whichever is more facilitative." The Massachusetts Electrical Code, 527 C.M.R. § 12.00, is the electrical code for the Commonwealth. It is unclear what the Town means by the "National Electrical Code." The Town may wish to amend this Section to reference the Massachusetts Electrical Code rather than the National Electrical Code.

³ Section 7.16.2 (b) also provides that "The special permit may be conditioned [to] make this requirement enforceable." However, the Town's existing by-law, Section 7.10, contains only a requirement that large-scale ground-mounted solar installations obtain site plan approval; Section 7.10 does not contain a Special Permit requirement for solar installations. The Town should consult with Town Counsel to determine if an amendment to this Section is needed at a future Town Meeting.

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 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 approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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cc: Town Counsel Michael Siddall