



THE COMMONWEALTH OF MASSACHUSETTS
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March 13, 2019

Naida L. Parker, Town Clerk
Town of Rochester
One Constitution Way
Rochester, MA 02770

Re: **Rochester Special Town Meeting of November 19, 2018 -- Case # 9272**
Warrant Articles # 1, 2, 3, 5, 6, 7, and 8 (Zoning)
Warrant Articles # 4 and 9 (General)

Dear Ms. Parker:

Articles 1, 2, 3, 4, 5, 6, 7, 8, and 9 - We approve Articles 1, 2, 3, 4, 5, 6, 7, 8, and 9 from the Rochester November 19, 2018, Special Town Meeting. Our comments on Articles 2 and 3 are provided below.

Article 2 - Article 2 amends the Town's zoning by-laws to add a new Section 21.40, "Ground-Mounted Solar Photovoltaic Installations Overlay District" ("GMSP"). The new Section 21.40 allows solar installations as-of-right in the GMSP Overlay District. The new Section 21.40 also imposes certain conditions and requirements on solar installations.

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 uses 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 certain specific portions of the new Section 21.40.

Section 21.40.22 establishes the location of the GMSP Overlay District as follows:

The GMSP Overlay Districts shall be comprised of Town Assessors Map 21, Lots 5A and 5B, and the land identified as 0 High Street. The GMSP Overlay District is shown on a map entitled “Town of Rochester,” which map is hereby incorporated by reference in and made part of this Zoning Bylaw.

We approve the creation of the GMSP Overlay District; however, the Town must still comply with the provisions of G.L. c. 40A, §§ 4 and 5. General Laws Chapter 40A, Section 4, provides that all districts shall be shown on a zoning map in a manner sufficient for identification and that such map shall be part of the town’s zoning by-laws. Overlay districts are zoning districts for purposes of G.L. c. 40A, § 4. Therefore, the creation of new overlay districts must be shown on the zoning map of the town, and that map shall be part of the town’s zoning by-laws. As part of the town’s zoning by-laws, any amendments to the zoning map must follow the procedures set out in G.L. c. 40, § 32, and c. 40A, § 5. This means that the town must amend its zoning map to show the boundaries of the GMSP Overlay District and must submit that map to the Attorney General’s Office for review and approval. We suggest that the Town submit a certified copy of the updated zoning map that shows the boundaries of the Overlay District to our Office for review and approval in accordance with G.L. c. 40, § 32 and G.L. c. 40A, §§ 4 and 5.

Article 3 - Article 3 amends the Town’s zoning by-laws by adding a new Section 21.50 “Renewable or Alternative Energy Research and Development Facilities and/or Manufacturing Facilities Overlay District (RDMOD).” The purpose of the RDMOD is to allow certain uses involving renewable and alternative energy as-of-right subject to certain requirements. The RDMOD is comprised of the Town’s entire Industrial District and the RDMOD’s district boundaries are shown on the Town’s zoning map.

We approve the creation of the Overlay District; however, the Town must still comply with the provisions of G.L. c. 40A, §§ 4 and 5. As provided in more detail above, overlay districts are zoning districts for purposes of G.L. c. 40A, § 4. Therefore, the creation of new overlay districts must be shown on the zoning map of the town, and that map shall be part of the town’s zoning by-laws. This means that the town must amend its zoning map to show the boundaries of the RDMOD Overlay District and must submit that map to the Attorney General’s Office for review and

approval. We suggest that the Town submit a certified copy of the updated zoning map that shows the boundaries of the Overlay District to our Office for review and approval in accordance with G.L. c. 40, § 32 and G.L. c. 40A, §§ 4 and 5.

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,
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