



January 20, 2011

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BOARD OF SELECTMEN

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL.
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY
PLANNING BOARD
ZONING BOARD OF APPEALS

Re: Siting Solar and Wind Energy Facilities Under the State Zoning Act and the Green Communities Act

With the growing interest in renewable and alternative energy, many communities are considering applications for solar and/or wind energy projects. Additionally, under the state's Green Communities Act, G.L. c.25A, §10, one criterion for designation as a Green Community is a local zoning by-law or ordinance that allows "as-of-right siting" for renewable or alternative energy generating, research and development, and manufacturing facilities. This Memorandum addresses the applicability of the State Zoning Act, G.L. c.40A, to solar and wind energy facilities and the Green Communities Act's by-right zoning requirement for eligibility as a Green Community.

The Zoning Act, G.L., c.40A, §1A, defines "Solar energy system" as:

a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating.

General Laws, c.40A, §3, provides, regarding solar energy:

No zoning ordinance or by-law 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.

This statutory language is different from other provisions in c.40A, §3, such as those regulating agricultural or religious and certain educational uses (see below), in that the statute does not flatly state that a special permit may not be required for the solar energy use. The statute also does not expressly state that solar facilities must be permitted anywhere in a community.

The Zoning Act is silent on wind energy. Thus, a special permit requirement could be applied to a wind energy project, subject to the Green Communities eligibility factors. No case law yet interprets the c.40A provisions regarding solar energy or zoning issues associated with wind energy.

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Solar Energy

Since c. 40A, §3 states that local zoning regulations cannot “prohibit or unreasonably regulate the installation of solar energy systems” and structures, the issue becomes what kinds of zoning requirements may qualify as reasonable regulations. First, administrative site plan review of a proposed solar installation clearly is permissible. It is less clear whether requiring a special permit will be considered an unreasonable regulation under the statute.

Chapter 40A, §3 contains numerous paragraphs protecting or exempting various uses or activities from local zoning regulation. One of the broadest protections applies to agriculture, which, in relevant part, states: “nor shall any such ordinance or by-law prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture...” Section 3 also includes the so-called “Dover Amendment,” which broadly protects religious and nonprofit educational uses. That provision states, in part, “nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for [nonprofit] educational purposes...” Under this exemption, a by-law or ordinance cannot “regulate or restrict the use of land,” which means that a special permit may not be required for the use.

In comparison, the solar energy provision does not contain the explicit prohibition against special permits found in the agriculture language or the absolute prohibition against regulating or restricting the use of land found in the Dover Amendment. The fact that the solar energy text allows reasonable regulation should therefore be interpreted to mean that a special permit may be required for a solar energy facility. However, the language stating that the ordinance or by-law may not “unreasonably regulate” the use likely would be interpreted to limit the discretion of the special permit granting authority. In other words, ultimately, the solar energy use may not be denied unless the special permit granting authority finds specific facts to support the conclusion that such denial is “necessary to protect the public health, safety or welfare.”

In considering an application for a special permit for a solar energy system or structure, a special permit granting authority could treat the application as, in effect, an application for site plan review. Under well-established case law, site plan review may be used to regulate, but not to prohibit, a use. Prudential Insurance Co. of America v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278 (1986). Such review typically involves reasonable regulation of access, site layout and design, and similar aspects of a project, and thus would be consistent with the appropriate level of review for a solar energy system or facility under G.L. c.40A, §3.

Wind Energy

Since nothing in the Zoning Act prohibits requiring a special permit for a wind energy system, such a use may be regulated through the special permit process, including site plan review. The Department of Energy Resources (“DOER”) has prepared a model wind energy by-law/ordinance which includes a special permit provision. The model, which you may want to review and tailor to the conditions in your city or town, is available at www.mass.gov/Eoca/docs/doer/renew/allow-wind-by-permit-companion.pdf.

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You also should be aware of the proposed Wind Energy Siting Reform Act. The Act was debated in the Legislature in 2010 and is likely to be considered again this year. If passed, the Act could significantly change how wind energy facilities are regulated under zoning. It is thus important to be aware of possible changes in this rapidly developing area.

Green Communities Act

Designation as a "Green Community" under the Green Communities Act, G.L. c. 25A, § 10, involves meeting several minimum requirements, including so-called "Criterion 1," which requires the municipality in its zoning by-law or ordinance to allow as-of-right siting for at least one of the following: renewable or alternative energy generating facilities, renewable or alternative energy research and development ("R&D") facilities, or renewable or alternative energy manufacturing facilities. As-of-right siting requires that the allowed use not be unreasonably regulated or require a special permit. However, the by-law or ordinance can impose reasonable environmental and public health and safety standards, and provide for site plan review, so long as the review is not the equivalent of a special permit.

It is important to note that eligible facilities do not have to be allowed by-right throughout the municipality to meet Criterion 1. According to the most recent information from the DOER, Green Communities Division, website, the "key questions" for qualification are: whether the development is permitted as-of-right in at least one zoning district; whether "construction of the qualifying R&D or manufacturing facility is allowed in the zoning district"; and "whether additional development is feasible in the district." In evaluating if additional development is feasible, DOER will look at: whether "land is available for the construction of a facility or facilities of 50,000 square feet or larger in the aggregate; or [whether] there is enough available vacant space in existing buildings to provide for a facility or facilities of 50,000 square feet or larger in the aggregate, with a minimum of 5,000 square feet per unit; or [whether] the combination of available land for new construction and existing available vacant space in existing buildings can accommodate a facility or facilities of 50,000 square feet or larger in the aggregate"(emphasis added).

The Green Communities Act thus offers a number of options for a municipality to meet the statutory requirements and many communities likely will be able to satisfy Criterion 1 without major changes in zoning requirements. Finally, as the "green energy" area of law develops, the expansion of solar and wind energy generating and R&D facilities presents both economic and environmental advantages to municipalities.

Very truly yours,


Patricia A. Cantor