



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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March 2, 2021

Beth R. Klein, Town Clerk
Town Sudbury
322 Concord Road
Sudbury, MA 001776

**Re: Sudbury Annual Town Meeting of September 12, 2020 -- Case # 9999
Warrant Articles # 37 and 38 (Zoning)
Warrant Articles # 12, 13, 55 and 57 (General)**

Dear Ms. Klein:

Articles 12, 37, 38, 55, and 57 - We approve Articles 12, 37, 38, 55, and 57 adopted at the Sudbury September 12, 2020, Annual Town Meeting. Our comments on Articles 37, 55, and 57 are provided below.

Article 13 - We take no action on Article 13 because it is not subject to the Attorney General's review and approval pursuant to G.L. c. 40, § 32. Under Article 13 the Town voted to set the spending limits for the various revolving funds the Town created pursuant to G.L. c. 44, § 53E ½. Because Article 13 was not a vote to amend the Town's by-laws, it is not subject to review and approval by this Office. The Town should consult with Town Counsel to determine whether Article 13 needs to be submitted to the Department of Revenue, Division of Local Services.

Article 37 - Under Article 37 the Town voted to delete Section 4800, "Temporary Moratorium on Marijuana Establishments," and insert a new Section 4800, "Solar Energy Systems." Section 4830 allows roof mounted solar energy systems by right subject to site plan review and imposes other requirements on roof mounted solar energy systems. Section 4840 allows ground mounted installations either by right subject to site plan review or by special permit with site plan review. Section 4840 also imposes other requirements on ground mounted installations. Specifically, Section 4840 (k) requires large scale ground mounted solar energy systems to provide a form of surety to cover the Town's cost in the event the Town must remove a solar energy system and restore the property.

In applying the amendments adopted under Article 37, the Town should be mindful of G.L. c. 40A, § 3, that 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 light of these protections, we offer the following comments to the Town for its consideration.

Section 4840 (k) requires the applicant for a large-scale ground mounted solar energy system to provide a form of surety to cover Town's cost of removing and restoring a site in the event the Town must do such work. 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 4840 (k).

Article 55 - Under Article 55 the Town voted to add a new Polystyrene Reduction Bylaw that bans food and retail establishments (as defined in the by-law) from using or selling polystyrene disposable food service containers, packing peanuts, coolers, and other similar items. Section III, "Regulated Conduct." The by-law includes exemptions from the by-law's prohibitions and authorizes fines for violations of the by-law. Section IV, "Exemptions," and Section V, "Enforcement."

Section III of the by-law pertaining to "Regulated Conduct" provides that "After February 1, 2021," food and retail establishment cannot sell polystyrene products as follows:

- a. After February 1, 2021, no Food Establishment in the Town of Sudbury may use, sell, offer for sale, or otherwise distribute disposable food service ware made from foam polystyrene or solid polystyrene,
- b. After February 1, 2021, no Retail Establishment in the Town of Sudbury may sell, offer for sale or other distribute:
 1. disposable food service ware made from foam polystyrene or solid polystyrene
 2. meat trays, fish trays, seafood trays, vegetable trays, or egg cartons made in whole or in any part
 3. packing materials, including packing peanuts and shipping boxes made in whole or in any part with foam polystyrene that is not wholly encapsulated within a more durable material.
 4. coolers, ice chests, or similar containers; pool or beach toys; and dock floats, mooring buoys, or anchor or navigation markers, which are made in whole or in any part with foam polystyrene that is not wholly encapsulated within a more durable material.

The effective date of a general by-law is governed by G.L. c. 40, § 32. Pursuant to Section 32, a by-law takes effect once it is approved by the Attorney General and the posting or publication requirements of the statute are satisfied. Thus, this by-law will not take effect until G.L. c. 40, § 32's requirements are satisfied, which will be after February 1, 2021. The Town should discuss this issue and the application of Section III's prohibitions in more detail with Town Counsel.

Article 57 - Under Article 57 the Town voted to add a new “Disposable Plastic Pollution Reduction Bylaw,” that bans food and retail establishments (as defined in the by-law) from providing, distributing, or selling disposable plastic straws, stirrers, or splash sticks. Section III, “Regulated Conduct.” The by-law provides exemptions from the by-law’s prohibitions, including an exemption for disability or medical reasons. Section IV, “Exemptions.” The by-law also authorizes fines for violations of the by-law. Section V, “Enforcement.”

Section III of the by-law, pertaining to “Regulated Conduct” provides that “After February 1, 2021,” food and retail establishment cannot sell disposable plastic straws, stirrers, or splash sticks. As provided in more detail above under Article 55, a by-law takes effect once it is approved by the Attorney General and the posting or publication requirements of G.L. c. 40, § 32, are satisfied. Thus, the by-law does not take effect until the statute’s requirements are satisfied, which will be after February 1, 2021. The Town should discuss this issue and the application of Section III’s prohibition in more detail 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 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 Jonathan M. Silverstein