



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

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January 6, 2022

Barbara Hancock, Town Clerk  
Town of Deerfield  
8 Conway Street  
South Deerfield, MA 01373

**Re: Deerfield Special Town Meeting of October 4, 2021 -- Case # 10331  
Warrant Articles # 7, 8, 9, 10, 11, and 12 (Zoning)**

Dear Ms. Hancock:

**Articles 7, 9, and 12** - We approve Articles 7, 9, and 12 from the October 4, 2021, Deerfield Special Town Meeting. Our comments on Article 12 are provided below.

**Article 8** - Because of a procedural defect in the adoption of Article 8, the Attorney General has elected to proceed under the authority conferred by G.L. c. 40, § 32, as amended by Chapter 299 of the Acts of 2000, and place Article 8 on “hold.”

In the materials submitted to us the Town has certified the following information pursuant to G.L. c. 40, § 32 and c. 40A, § 5. The Town held two planning board hearings on the zoning by-law change proposed under Article 8: one on September 13, 2021 and the second on September 30, 2021. The notice for the September 30, 2021 Planning Board hearing was not mailed to DHCD, the regional planning agency, and to the planning boards of each abutting city and town as required by G.L. c. 40A, § 5. Apart from this defect, the notices for the September 13, 2021 and September 30, 2021 Planning Board hearings satisfy the requirements of the statute.

A signed copy of Form 299 is enclosed. Once the procedures outlined in Form 299 are completed, and after the expiration of the 21-day period required by Chapter 299 of the Acts of 2000, please return a copy of Form 299 to us along with your certification that a true copy has been posted and published as required by Chapter 299. Please feel free to contact this Office with any questions about this procedure.

**Articles 10 and 11** - The Attorney General’s deadline for a decision on Articles 10 and 11 is extended for an additional 60 days under the authority conferred by G.L. c. 40, § 32, as amended by Chapter 299 of the Acts of 2000. The agreement with Town Counsel for a 60-day extension is attached hereto. We will issue our decision on Articles 10 and 11 on or before **March 7, 2022**

**Article 12** - Under Article 12 the Town voted to delete Section 3800 of the Town’s zoning by-laws, “Solar Energy Systems,” and insert a new Section 3800, “Solar Energy Systems.” We approve Article 12 because it does not present a clear conflict with state law or the Constitution. Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law). However, the Town must apply the amendments adopted under Article 12 consistent with the protections given to solar energy systems and the building of structures that facilitate the collection of solar energy under G.L. c. 40A, § 3 that provides as follows:

No zoning . . . 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, there are number of Land Court decisions that provide some guidance.

Most recently, the Land Court in Tracer Lane II Realty, LLC v. City of Waltham, 2021 WL 861157 \* 5 (March 5, 2021), concluded that a categorical prohibition of solar facilities in a majority of the city without a showing that the prohibition is “necessary to protect the public health, safety or welfare” of the city is inconsistent with G.L. c. 40A, § 3’s protections. In reaching its decision, the Land Court rejected as irrelevant the fact that solar energy facilities would be allowed as of right in four small areas of the city.<sup>1</sup> Similarly, in Northbridge McQuade, LLC v. Northbridge Zoning Bd. of Appeals, Mass. Land Ct., No. 18 Misc 000519 \* 2 (June 17, 2019) (Piper, C.J.), the court concluded that before a Town may regulate or prohibit a proposed solar installation on any site in the town, there must be an analysis of the need to prohibit or regulate the solar installation measured against the legislatively determined public interest in allowing the solar energy installation. (See Order Granting Partial Summary Judgment). In addition, in PLH LLC v. Ware, 2019 WL 7201712, at \*3 (December 24, 2019). (Piper, C.J.), the Land Court upheld a special permit requirement applicable to solar energy projects but ruled that “the review of the municipality conducted under the bylaw’s special permit provisions must be limited and narrowly applied in a way that is not unreasonable, is not designed or employed to prohibit the use or the operation of the protected use, and exists where necessary to protect the health, safety or welfare.”

However, in Duseau v. Szawlowski Realty Inc., 2015 WL 59500, \* 8 (January 2, 2015) the Land Court concluded that a 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 Duseau the court acknowledged that G. L. c. 40A, § 3’s exemption would invalidate such a prohibition “if it can be demonstrated that restricting solar energy systems only to the industrial districts is an ‘unreasonable’ regulation, and that such a regulation is not necessary to protect the public health and welfare.” See also Briggs v. Zoning

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<sup>1</sup> On April 5, 2021 the City filed a notice of appeal of this decision. While the appeal was pending in the Appeals Court (case # 2021-P-0429), the matter was taken sua sponte by Supreme Judicial Court and is now pending. See Supreme Judicial Court docket: <https://www.ma-appellatecourts.org/docket/SJC-13195>.

Board of Appeals of Marion, 2014 WL 471951 \* 5 (February 6, 2014) (a zoning board of appeals' decision upholding a division between commercial solar energy and residential accessory solar energy was reasonable and did not violate G.L. c. 40A, § 3).

Based upon the limited record available to us in our review of town by-laws we do not have the complete factual record necessary to determine if Section 3800 would satisfy the test in Tracer Lane and G.L. c. 40A, § 3. If Section 3800 is challenged, the Town would need to demonstrate that it has engaged in the requisite balancing of interests required by G.L. c. 40A, § 3. The Town should consult closely with Town Counsel when applying Section 3800 to ensure that the Town does not run afoul of the solar use protections in G.L. c. 40A, § 3.

In light of the protections provided to solar installations, we offer the following comments on certain provisions in the new Section 3800.

A. Section 3870 “Design and Performance Standards”

Section 3875 prohibits the use of herbicides to control vegetation at solar energy facilities. Section 3875 must be applied consistent with the Pesticide Control Act, which establishes the Act's “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.<sup>2</sup> The Town should consult with Town Counsel regarding any questions on this issue.

**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,  
MAURA HEALEY  
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<sup>2</sup> 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...”