

Memorandum to Municipal Clients
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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.