



# BELLINGHAM ZONING BOARD

10 MECHANIC STREET  
BELLINGHAM, MASSACHUSETTS 02019  
(508) 657-2893 ZoningBoard@bellinghamma.org

## SPECIFY TYPE OF APPLICATION

(circle)

*Appeal*

*Special Permit*

*Variance*

### APPEAL OF BUILDING INSPECTORS DECISION:

- ☐ Please attach a copy of the Building Inspector's letter/decision.

### SPECIAL PERMIT: (check all that apply)

- |   |   |  |
|---|---|--|
| <input type="checkbox"/> Principal Use        | <input type="checkbox"/> Non-Conforming Situation | <input type="checkbox"/> Flood Plain                                     |
| <input type="checkbox"/> Accessory Use        | <input type="checkbox"/> Home Occupation          | <input type="checkbox"/> Comprehensive Permit                            |
| <input type="checkbox"/> Multi-Family Housing | <input type="checkbox"/> Earth Removal            | <input type="checkbox"/> Family Apartment <input type="checkbox"/> Other |

### VARIANCE: (check all that apply)

- |   |   |  |
|---|---|--|
| <input type="checkbox"/> Rear Yard Setback  | <input type="checkbox"/> Area           | <input type="checkbox"/> Lot Width             |
| <input type="checkbox"/> Side Yard Setback  | <input type="checkbox"/> Lot Frontage   | <input type="checkbox"/> Percent Area Building |
| <input type="checkbox"/> Front Yard Setback | <input checked="" type="checkbox"/> USE |  |

**Petitioner:**(type/print) NextGrid Mescalbean, LLC

Signature [Signature]

Email daniel@nextgrid.com

Address 177 Huntington Ave, Suite 103, Unit 73069, Boston MA 02115 Phone 559-731-4645

**Property Owner:** Maple Gate Realty Trust c/o Brown Legal PLLC

Signature [Signature]

Email brown@brownlegalllc.com

Address 160 Maple Street, Bellingham, MA 02019 Phone 617-463-9133

Address of Subject Premises 160 Maple Street, Bellingham, MA 02019

If no address, description of  
property \_\_\_\_\_



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**Dimensions of Lot:**

Frontage: 452' Depth: 963'  
Area: 9.93 acres Lot Width: 535'

**Zoning District(s) subject premises located:** Suburban

**Assessor's Map:** 26 Lot: 0009

**Describe proposed activity:**

Utilize pre-existing driveway to access proposed solar farm located entirely in Franklin, MA.

**Are there any buildings on the premises (if so, please describe them including their dimension)?**

None.

**Describe the subject premises (terrain, septic system, description of area, etc.)**

Pre-existing asphalt access driveway. The rest of the lot will remain vegetative cover.

**How long have you owned the subject premises?** Approx. 32 years

**What is the present use of the subject premises?**

Access driveway to reach Maplegate Country Club

**State grounds for the Special Permit/Variance or Appeal: (please be specific)**

See attached memorandum

I attest that I, to the best of my knowledge have paid any and all real estate taxes, excise taxes, license and/or permit fees.

**Owner:** Maple Gate Realty Trust c/o Brown Legal PLLC

Signature [Signature] Date 2/13/2024

**Applicant:** NextGrid Mescalbean, LLC

Signature [Signature] Date 2/13/2024

Effective 8/2017

Please note: This application cannot be processed unless initialed by the Town Collector:

Town Collector: \_\_\_\_\_ Date: \_\_\_\_\_

**TOWN OF BELLINGHAM**  
**ZONING BOARD OF APPEALS**  
**MEMORANDUM IN SUPPORT OF APPLICATION**

**PROPERTY:** 160 Maple Street, Bellingham (Assessor's Map: 26, Lot 9)

**APPLICANT:** NextGrid Mescalbean, LLC

**BACKGROUND**

The Applicant proposes to construct a 15,000 ± KW ground mounted solar voltaic array project to be exclusively situated in Franklin. The site for the solar project contains approximately 64.2 acres of land in Franklin and approximately 9.8 acres of land in Bellingham. The solar array will be located entirely within the Town of Franklin (Zoned Industrial) with access through the *pre-existing accessway* over 160 Maple Street in Bellingham (Zoned Suburban). The pre-existing accessway at 160 Maple Street presently serves as the access to the Maplegate Country Club Golf Club located in Franklin. The Applicant proposes to continue using the already existing accessway over 160 Maple Street to access their proposed solar array project in Franklin.

On June 22, 2023, the Applicant filed an Application for Development Plan Review with the Bellingham Planning Board. The Planning Board approved the Applicant's Development Plan Review application on January 11, 2024, subject to the condition that the Applicant obtain a use variance from the Zoning Board based on the position that 160 Maple Street is Zoned Suburban – where solar is a prohibited use. *See* Planning Board Decision attached hereto as Exhibit A.

The Applicant's position is that a use variance is not required (nor can it be required) for their proposed solar project as solar is a protected use under M.G.L. c. 40A, § 3 ("Dover Amendment").<sup>1</sup> Alternatively, should the Zoning Board determine a variance is required, the Applicant requests the Board allow its Application for a use variance. Specifically, the Applicant seeks the following from the Board and submits this memorandum in support thereof:

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<sup>1</sup> *See* Applicant's submission to the Bellingham Planning Board dated October 12, 2023, attached hereto as Exhibit B.

Request No. 1: Vote that a use variance is not required for this project; **or**

Request No. 2: Vote that a use variance is granted pursuant to and because of the protections contained in the Dover Amendment; **or**

Request No. 3: Vote that a use variance is granted because this project meets the statutory conditions for granting a use variance given the unique circumstances of the Applicant's project, as held in Lapenas v. Zoning Board of Appeals of Brockton.

While the Board acting favorably on any of the three requests is agreeable to the Applicant, the Applicant does urge the Board to act favorably on either Request 1 or Request 2 so that the Town and this Board are fully compliant with the protections and provisions of the Dover Amendment relative to the proposed solar field development project.

### **ARGUMENT**

#### **I. NO USE VARIANCE IS REQUIRED FOR THE APPLICANT'S SOLAR PROJECT AS SOLAR IS A PROTECTED USE UNDER THE DOVER AMENDMENT**

The Applicant's proposed solar project is afforded the zoning protections of M.G.L. c. 40A § 3 ("Dover Amendment"). In a recent decision with analogous facts to the Applicant's solar project, the Supreme Judicial Court determined that the City of Waltham was barred by the Dover Amendment *from denying* a permit to a solar company to build an access road over property that it owned in Waltham to serve a solar project that was located in the neighboring Town of Lexington. *See Tracer Lane II Realty, LLC v. City of Waltham*, 489 Mass. 775 (2022).

##### *A. This Project is Governed by the Supreme Judicial Court's Tracer Lane II Decision.*

The Supreme Judicial Court rejected the City's argument that it could deny the permit because the zoning district over which the access road would be built was residential and it would be serving a commercial use in the Town of Lexington. *Id.* at 777. The Court concluded that the access to the solar project in Waltham was part of the protected solar facility in Lexington and was therefore protected by the Dover Amendment. *Id.* at 780. The Applicant's proposed project has the same facts with even more compelling circumstances because the Applicant is not seeking to build a new access road, but instead is *seeking to continue utilizing* the *pre-existing accessway* over their property (160 Maple Street) in Bellingham to access its solar project in the adjacent Town of Franklin.

##### *B. The Chief Justice of the Land Court Has Already Heard and Rejected the Argument Being Advanced by the Planning Board that a Use Variance Must be Applied for and Received When the Dover Amendment Protections Apply.*

Further supporting the Applicant's position is a recent Massachusetts Land Court case, also dealing with a solar project that was decided by Chief Justice Piper. Northbridge McQuade, LLC v. Town of Northbridge, 18 MISC 000519 (Land Court, February 20, 2020). In that case,



the Chief Justice specifically rejected an argument made by the Town that even if the Dover Amendment applied to the solar project, it did not make it an ‘as of right use,’ therefore meaning a variance would still be required. This argument is the same position the Bellingham Planning Board took with respect to the Applicant’s project here. Town Counsel provided an oral opinion to the Planning Board in the September 28, 2023, Board Meeting that included the following:

“... certainly the ninth paragraph of 40A section 3 still applies to this project but it is our opinion that it does not apply to make it an as of right project.” (Planning Bd. Meeting 9/28/23, at 11:44-12:12 video timestamp).

In rejecting this very same argument, Chief Justice Piper emphasized that the purpose of the Dover Amendment *is to obviate the need to obtain a use variance*. See Northbridge McQuade, LLC v. Town of Northbridge, 18 MISC 000519 (Land Court, February 20, 2020). Specifically, Chief Justice Piper stated as follows:

“.... After colloquy with counsel, Court noted that the prior ruling on summary judgment indicated that the *Plaintiff need not apply for a use variance because the purpose and effect of the relevant protective language of G.L. c. 40A § 3 is to override prohibitions on use unless they are justified based on necessity to protect public health, safety, or welfare, and that constitutes a legislative override of what would otherwise be the applicable variance standard...*”

See Exhibit C – Northbridge Litigation Land Court Docket Sheet Excerpt.

C. *Bellingham Correctly Followed Request No. 1 When it Was Faced with an Identical Situation in 2019 with the LMP Solar Development.*

While the *Northbridge* decision provides a clear direction for this Board, it does not need to go any further than to look at what the Town of Bellingham did for another solar array directly abutting the Applicant’s proposed solar site.

The Bellingham Planning Board got it right in 2019 when it recognized that a solar project next door and in the same zoning district as that of the Applicant’s (Suburban) was protected under the Dover Amendment and therefore allowed the developer’s (LMP) solar project without requiring a use variance. It is a well-settled principle that unless the laws are applied equally, they do not protect equally. See Fafard v. Conservation Commission of Reading, 41 Mass. App. Ct. 561, 569 (1996) (“In the administration of controls limiting the use of land – as with any exercise of the police power – uniformity of standards and enforcement are of the essence”).

Bellingham *did not require* a use variance of the LMP solar project *and cannot treat* the Applicant’s proposed solar project located in the same zoning district differently. The LMP project has both access and its operation of a solar array project in the Bellingham Suburban District. See Exhibit D at Page 1 – Bellingham Planning Board Decision for LMP Solar Project (property is in the “suburban district”). Bellingham did not require a use variance because it recognized the solar project was clearly protected by the Dover Amendment. See Exhibit E – Land Court Bellingham/LMP Land Court Litigation Filing at ¶¶ 3 & 6 (confirming the LMP

Solar Project was protected by the Dover Amendment and therefore allowed by right in the Suburban district).

“(6) For settlement purposes, the parties have agreed that Large-Scale Ground Mounted Solar Photovoltaic Installations *are allowed of right* on 186 Maple Street subject to the provisions of the Town of Bellingham Zoning Bylaws at Article XXIV (sections 240-162 to 240-171, *pursuant to the protections offered by G.L. c. 40A, § 3 (protections against prohibition or unreasonable regulation of solar)*” (emphasis added).

As the Applicant’s project is: (a) analogous to the project in the *Tracer Lane* decision where the Supreme Judicial Court confirmed the Dover Amendment applied; and (b) the *Northbridge* decision confirmed the effect of the Dover Amendment is to override the need to even apply for a use variance (much less obtain one); and (c) the Applicant’s proposed solar project is indistinguishable from the LMP solar project located next door to this site where the Town did not require a use variance, the Board should find that the Applicant’s proposed solar project also does not require a use variance before it can move forward. (i.e. acting favorably on Request No. 1).

## **II. REQUIRING THE APPLICANT TO OBTAIN A USE VARIANCE FOR ITS PROPOSED SOLAR PROJECT CONSTITUTES AN UNREASONABLE REGULATION IN DIRECT CONTRAVENTION OF THE PROTECTIONS AFFORDED BY CH. 40, § 3 UNLESS IT IS NECESSARY TO PROTECT THE PUBLIC HEALTH, SAFETY, OR WELFARE OF THE COMMUNITY**

The Supreme Judicial Court in *Tracer Lane* made it clear that any interpretation or implementation of a local zoning bylaw or ordinance could only be relied upon to prohibit a solar project where it was “necessary to protect the public health, safety or welfare.” *Id* at 780. (emphasis added). There is nothing associated with the Applicant’s solar project that in any way triggers any such concerns. This is confirmed by the Planning Board’s unanimous approval of the Applicant’s Development Plan Review application on January 11, 2024.

As the Applicant’s solar project does not pose a risk to the public health, safety, or welfare of the community, this Board should vote that a use variance is either not required (Request No. 1) or that a use variance is granted pursuant to the protections afforded by the Dover Amendment to solar projects (Request No. 2). Any denial of a use variance – if the Board decides one is required - would constitute an unreasonable regulation in direct contravention of the protections afforded by the Dover Amendment to solar projects.<sup>2</sup>

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<sup>2</sup> See *AG Opinion – Case No. 10547 (3/23/23)* at Exhibit F (stating that if a zoning regulation “is used to deny solar projects, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems, such application would run a serious risk of violating M. G. L. c. 40A, § 3”).

**III. ALTERNATIVELY, THE ZONING BOARD OF APPEALS SHOULD ALLOW THE USE VARIANCE AS A DENIAL WOULD EFFECTIVELY PRECLUDE THE APPLICANT FROM UTILIZING THE ONLY ACCESS TO THEIR SOLAR PROJECT LOCATED IN THE ADJACENT TOWN OF FRANKLIN**

The Applicant's sole access to the proposed solar array in Franklin is through their Bellingham parcel (160 Bellingham Street) which contains the existing accessway. The Town's zoning ordinance cannot be interpreted in a manner that would effectively bar any access to the Applicant's land in Franklin where solar is an allowed use. In Lapenas v. Zoning Board of Appeals of Brockton, the Massachusetts Supreme Judicial Court upheld a Superior Court's decision that *annulled the denial of a variance* from the City's Zoning Board to an Applicant that would have allowed them *to continue using a strip of their land located in Brockton* (zoned residential) as *access to their abutting land in Abington* (zoned for business). See Lapenas v. Zoning Board of Appeals of Brockton, 352 Mass. 530 (1967). The Court held that the statutory conditions for granting a variance were met because:

“(1) The condition especially affecting the \*\*\* (plaintiffs') land does not affect generally the other land in the zoning district \*\*\* all of the land other than the land on the easterly side of North Quincy Street being located entirely within the City of Brockton. (2) Literal enforcement of the provisions of the Zoning Ordinance would involve substantial hardship \*\*\* (in denying the plaintiffs) the right to use \*\*\* (the plaintiffs') land in Abington for the purposes for which it was zoned. (3) Granting variances would be without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Zoning Ordinance.”

The Court further stated that interpreting Brockton's zoning ordinance *“as operative to bar any access to the plaintiff's Abington land for lawful use, it would be arbitrary and invalid”* and that the Applicant was entitled to relief from the *“literal operation of the zoning ordinance.”* See Id. at 533. The same standards would apply in this matter and to the extent this Board determined that a use variance was required (rejecting Request No. 1), and that the requirements for the variance were not exclusively and fully met by the explicit dictates of the Dover Amendment (rejecting Request No. 2), then the use variance must still be granted for this Board to comply with the *Lapenas* precedent from the Massachusetts Supreme Judicial Court (granting Request No. 3).

This Applicant's position from the beginning has been that no use variance is required for their proposed solar project. Notwithstanding that position, it filed this variance application following the Planning Board's decision where it conditioned its approval of the project on the Applicant applying for and obtaining a use variance.

For the foregoing reasons, the Applicant respectfully requests the Zoning Board:

Request No. 1: Vote that a use variance is not required for this project; **or**

Request No. 2: Vote that a use variance is granted pursuant to and because of the protections contained in the Dover Amendment; **or**

Request No. 3: Vote that a use variance is granted because this project meets the statutory conditions for granting a use variance given the unique circumstances of the Applicant's project, as held in *Lapenas v. Zoning Board of Appeals of Brockton*.

Thank you for your time and attention with respect to this application.

Very truly yours,

/s/ Peter A. Brown

Peter A. Brown, Esq.

Brown@brownlegalllc.com

# **EXHIBIT A**



# BELLINGHAM PLANNING BOARD

10 MECHANIC STREET  
BELLINGHAM, MASSACHUSETTS 02019  
(508) 657-2892  
[PlanningBoard@bellinghamma.org](mailto:PlanningBoard@bellinghamma.org)

January 11, 2024

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BELLINGHAM TOWN CLERK

## 160 MAPLE STREET LARGE-SCALE GROUND MOUNTED SOLAR VOLTAIC ARRAY DEVELOPMENT PLAN APPROVAL AND DECISION

### A. BACKGROUND

**Applicant:** NextGrid Mescalbean, LLC  
177 Huntington Ave, Suite 1703  
Unit 73069  
Boston, Massachusetts 02115

**Owner:** Maplegate Realty Trust  
160 Maple Street  
Bellingham, MA 02019

**Public Hearing:** The Public Hearing opened August 10, 2023 at 7:00 PM. Notice for the public meeting was published in *The Milford Daily News* on July 27, 2023, and August 3, 2023. The Public Hearing was continued to September 28, 2023, October 12, 2023, November 9, 2023 and December 14, 2023, December 28, 2023. The Public Hearing was closed on December 28, 2023

**Date of Vote:** January 11, 2024

**The Premises:** The project location, also referred to herein as the "Site" or the "Premises", is located at 160 Maple Street, Assessors Map 26-9, approximately 62.8+/- acres of land, including all land in the Town of Franklin, 9.8 acres in Bellingham, zoned Suburban.

**The By-law** §240-16 Development Plan Review

**The Proposal:** To construct a 15,000+/- KW large ground mounted solar voltaic array with associated improvements at 160 Maple Street. The Approved Plan limits disturbance in the Town of Bellingham to new utility poles and overhead power lines



and a turn out area on a private way providing access to the project to be sited in the Town of Franklin.

The Proposal was documented with the following materials:

1. Application for Development Plan Review, submitted June 22, 2023, including a narrative and project description.
2. Certificate of Ownership Authorization, dated June 22, 2023.
3. Certified Abutter's List, Town of Bellingham, dated June 20, 2023.
4. Proposed Site Plan Documents, for Nextgrid Mescalbean, LLC, 160 Maple Street, by Bohler Engineering, last revised October 13, 2023 (also known as the Approved Plan).
5. Drainage Report, for Nextgrid Mescalbean, LLC, Proposed Solar Array – Parcel 1, 160 Maple Street, dated April 13, 2023
6. 160 Maple Street Battery Energy Storage System Fire Safety Plan, Nextgrid.
7. Decommissioning Plan, Ground-Mounted Solar Photovoltaic System, 160 Maple Street.
8. Eversource Interconnection Impact Study, dated May 4, 2022.
9. Letter from Attorney Peter Brown to the Planning Board entitled Maplegate Solar Development Project, dated August 17, 2023.
10. Letter from Nextgrid dated December 28, 2023.
11. Other miscellaneous documents on file at the Planning Board offices.

## **B. DETERMINATIONS**

Following its public hearing on the Applicant's proposal and requested relief, the Planning Board has made the following determinations:

1. The Applicant has filed an application for a proposed large-scale ground mounted solar voltaic development to be located in Franklin with access through Bellingham. Limited disturbance shall be created in the Town of Bellingham. Nevertheless Section 240-18 identifies the process for which a project is proposed in two municipalities:

Where a proposal is located in part in the Town of Bellingham and in part in an adjacent municipality, the provisions of development plan review shall apply as follows.

- A. Applicability of development plan review shall be determined by testing the entire proposal in both communities against the thresholds of § 240-16A.
  - B. Submittals for the portion lying in the Town of Bellingham shall be as specified at § 240-17. For portions lying outside the Town, only those items necessary for the determinations of Subsection C of this section need be submitted.
  - C. The proposal shall be approved, provided that the portion lying within the Town of Bellingham complies with the requirements of the Zoning Bylaw and provided that outcomes from the entire development for impacts limited by the terms of this bylaw, such as light overspill (§ 240-49B), comply as measured in Bellingham.
2. Pursuant to the Section 240-31 of the Town's Zoning Bylaw large-scale ground mounted solar voltaic arrays are prohibited in the Suburban Zoning District. Although it has indicated it intends to seek zoning relief, the Applicant has not obtained any zoning relief to allow that use on the property. The Board has agreed to condition this approval on the applicant obtaining the zoning relief necessary to use the property for a large-scale ground-mounted solar voltaic use.
  3. That the use proposed is limited to large-scale ground-mounted solar voltaic facility.
  4. That the Premises is located on Maple Street, which is a Scenic Road, however no disturbance is proposed within the public way.
  5. That the Premises is not located in a Water Resource District.

6. The performance requirements of the Zoning By-Law (e.g. Article IX Environmental Controls, Article X Parking and Loading Requirements, Article XI Landscaping Requirements) have been met.

- a) §240.49 Light and Glare: No lighting proposed in Bellingham. Any exterior lighting shall be consistent with "dark sky" standards, shielded and directed downward to maintain lighting on to the Site and shall comply with the Zoning By-law.
- b) § 240.50 Air Quality: Proposed uses do not involve emission of odorous gases in such quantities to be offensive and shall continue to adhere to the Zoning By-law.
- c) §240.51 Hazardous Materials: No hazardous materials, as defined in this section, are proposed to be used or stored on Site.
- d) §240.52 Vibration: The Applicant does not propose any use that produces vibration which is discernible to the human sense of feeling (except sound) at or beyond the boundaries of the premises for three minutes or more in any hour between 7:00 a.m. and 9:00 p.m. or for 30 seconds or more in any one hour between 9:00 p.m. and 7:00 a.m.
- e) §240.53 Electrical Disturbance: No electrical disturbance is proposed or will be permitted which adversely effects the operation of any equipment other than that of the creator of such disturbance.
- f) §240.54 Stormwater Management: The stormwater management shown on the Plan and drainage analysis has been designed to meet the Stormwater Management Standards set by the Massachusetts Department of Environmental Protection and Bellingham Zoning By-laws. The standards include removing solids from the stormwater, reducing rates of runoff from the site, and recharging the groundwater. No impervious surface is added in Bellingham.
- g) §240.58 Noise: The use proposed was determined to not add noise concerns in excess of the maximum allowable noise levels. The hours of operation have been conditioned hereinafter which shall limit any noise disturbance from vehicular sounds or HVAC systems.
- h) Town of Bellingham General Bylaws Chapter 154 – Scenic Roads of the Bellingham General Bylaws: the use proposed was determined to not add noise concerns in excess of the maximum allowable noise levels. In

addition no removal of vegetation or stone walls are proposed in the public right of way.

7. For the given location and type and extent of land use, the design, location, egress points, grading, and other elements of the development could not reasonably be altered to:
- a) improve pedestrian or vehicular safety which is limited during post/construction within the site and egressing which is limited to 160 Maple Street "access road" to Maple Gate Country Club in the Town of Bellingham, as circulation has been reviewed by the Planning Board and emergency services and was deemed adequate. The radius of the existing entrance was determined to accommodate emergency services largest vehicle and the private driveway was selected to minimize further disturbance;
  - b) reduce the visual intrusion of parking areas viewed from public ways or abutting premises, as a site walk was conducted and there appears to be no visual intrusion of the proposed project in Bellingham;
  - c) reduce the volume of cut or fill and the Site has been graded to match the cuts and fills, as much as possible and it is not anticipated that an Earth Removal Special Permit will be required;
  - d) reduce the number of removed trees 8" trunk diameter and larger, as no mature vegetation proposed to be disturbed in Bellingham.
  - e) reduce soil erosion; and reduce hazard or inconvenience to pedestrians from storm water flow and ponding by engineering the Site to be designed to comply with the DEP Stormwater Handbook and the Town of Bellingham Stormwater Regulations as well as the inclusion of a Stormwater Pollution Prevention Plan and Operation and Maintenance Plan consistent with the Town of Bellingham requirements;
  - f) provide adequate access as emergency services has reviewed and approved the plan as proposed and deemed access to be acceptable;
  - g) provide alternative utility service and drainage as shown on the Approved Plan and demonstrated in the Stormwater Management Report;
  - h) provide additional capacity on impacted streets to accommodate the proposed project as access to the Site will be approximately one vehicle

every three to four months that is serviced by a private driveway and not to be used for access beyond that of maintenance of the proposed use.

8. The Board finds that compliance with the below conditions are necessary to mitigate impacts related to the construction and use resulting from the project.

### **C. DECISION**

Based on the above determinations, the Planning Board finds that the proposal meets the requirements of the Zoning By-Law, and by a vote of 5 in favor to 0 opposed, accordingly, approves the Applicant's application for a Development Plan Approval subject to the following conditions:

1. This Approval is limited to the improvements as noted on the Approved Plan, and as may be conditioned herein. The Applicant shall construct the project in strict compliance with the Approved Plan. Any changes to such Approved Plan must be reviewed and approved in accordance with the Bellingham Zoning By-laws. All such changes shall be reviewed by the Board for determination as to whether or not the changes are considered minor or major. If the Planning Board determines that any change to the plan is a major alteration to the Approved Plan, a public hearing shall be required for a modification to this permit. A minor change shall be reviewed and approved at a regularly scheduled meeting.
2. Prior to the start of construction, sediment and erosion controls shall be installed and be subject to the inspection and approval by the Town Planner.
3. Construction hours for all construction or staging activities on-site shall be Monday through Friday, from 7:00 am to 5:00 pm. Construction activity shall also be permitted on Saturdays from 7:00 am to 4:00 pm. No construction activity shall take place outside the specified permitted hours or on Sunday or New Years' Day, Memorial Day, July Fourth, Labor Day, Thanksgiving, Christmas, or other legal holiday. Work outside of these hours may be considered upon review and approval by the Building Commissioner prior to any work outside of these hours commencing. Upon review and approval by the Building Commissioner the Applicant shall notify the Police Department of the time and date of work commencing.
4. All construction related parking shall be conducted on-site. No parking of any vehicle associated with the Project shall park on nearby parcels including those vehicles arriving early. There shall be no staging of vehicles on nearby parcels. And all vehicles associated with the Project shall enter into the

temporary construction entrance and park within the construction fencing at all times.

5. During construction, no run-off shall be directed down the proposed driveway onto Maple Street or onto abutting properties. The Applicant shall maintain any drainage or sediment controls in good working order and maintain the construction site free of dust that would create a hazard or nuisance to adjacent properties.
6. Prior to the issuance of a Certificate of Completion, the Applicant shall install a Knox-box on all applicable gates and provide the Bellingham Fire Department with a key to each.
7. Prior to the issuance of a Certificate of Completion, the Applicant shall provide the Fire Department with a detailed shut down procedure as well as any additional emergency response plans and up to date contact information.
8. All fencing to be installed on Site shall be constructed to allow for a minimum six (6) inch gap from the ground surface to the bottom of the fence to for wildlife passage.
9. As required in Section 240-170, the Decommissioning Plan, adequate security, bound by a suitable agreement is required to cover the cost of decommissioning the facility. The Applicant is to provide the amount in full to the Town prior to operation of the facility. The amount of such security must be approved by the Board, which may consult with an engineer or consultant for such purposes. The form of the agreement governing the deposit, payment, and/or release of such security is subject to the review and approval of Town Counsel.
10. The use proposed, large-scale ground mounted solar voltaic array is prohibited in the suburban zoning district. The premises is zoned suburban. The Applicant shall obtain the necessary zoning relief to use the property for said use prior to any disturbance on site associated with this approval.
11. The Applicant shall discontinue the use of the gravel way to pass and repass at 186 Maple Street to access 160 Maple Street including parcels 1 and 2 except for emergency access.
12. A comprehensive signage plan shall be presented to the Board for approval prior to Building Permit for the Site signage including but not limited to



monument signage and wayfinding signage. The Site shall be limited to one monument sign.

13. The Stormwater Management Operation and Maintenance Plan (O&M), included as part of the Drainage Report, is hereby referenced and made part of this decision. The Applicant shall permit the Board or its agent to inspect the premises on reasonable notice to determine compliance with said O&M plan.
14. Snow and ice removal shall be the responsibility of the Applicant or a successor and shall be performed in accordance with the approved O&M.
15. Phosphorous-based fertilizer shall not be used on the Site.
16. All exterior lighting at the Site shall be dark sky compliant and shall not allow spillover of light onto adjoining properties, in accordance with the Approved Plans and the Town's Zoning By-laws.
17. Prior to issuance of a Certificate of Occupancy, the Applicant or Tenant shall deliver to the Town Planner a complete list of hazardous materials proposed to be used or stored on site to the extent required under §240.51 of the Bellingham Zoning Bylaws or other applicable law.
18. Prior to the commencement of construction, the Applicant shall schedule a preconstruction meeting with the Town Planner and the Board's designated inspector. The Board's inspector shall be permitted to conduct routine inspections, as may be reasonably determined by said inspector, while construction is ongoing relative to this permit and all corresponding Decisions for this Site. The Applicant shall deposit with the Town, sums necessary to fund the inspections contemplated hereunder. Such inspectional fund shall be governed under M.G.L. c. 44 §53G or such other applicable statutory method as may be appropriate.
19. Prior to beginning operations, the applicant shall provide adequate training to the Town of Bellingham Fire and Police Departments relative to the proposed battery storage system to be used as part of the project.
20. As agreed to by the applicant, to the greatest extent practicable, local vendors will be utilized in the construction and maintenance of Solar Farm to be located of Parcel I.
21. As referenced in the December 28, 2023 letter to the Board, the applicant will work with the Bellingham Fire Department and Police Department to improve

the “repeater station” donating \$50,000.00 for enhanced communication to be located in the Maple Street/Maplegate golf Course area since the Town of Bellingham will be responding.

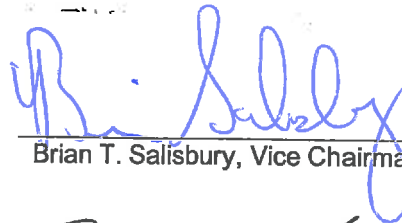
22. As agreed to by the applicant, the applicant shall name the “Town of Bellingham to be listed as an Additional Named Insured ATIMA” on the de-commissioning bond issued to the Town of Franklin.
23. As required by the Bellingham Department of Public Works, any and all access and utility easements that may be necessary shall be in a form approved by Town Counsel prior to the issuance of the Certificate of Completion, such approval shall not be unreasonably withheld.
24. The applicant shall make improvements, acceptable to the Town's Department of Public Works, to the existing fire hydrant system to the access road.
25. This Decision is binding on the Applicant's successors, assigns, agents, managers, members and employees. This approval shall insure to the benefit of and binding upon NextGrid Mescalbean, LLC provided there is no change in use for the Premises. The Planning Board shall be notified in writing of any changes in affiliates and successors in title and additional users of the Premises.
26. Any change of use or increase of intensity of the permitted use shall require a public hearing to either modify the existing permit, additional any change of use to parcel 2 shall require a new application and public hearing.
27. The Applicant shall comply with §240-16B(5) and (6) regarding As-Built Plans and follow the policies of the As-Built handbook.
28. This Decision shall not be effective until it is recorded by the Applicant at the Registry of Deeds, with proof of such recording to be supplied to the Board and the Building Inspector.
29. The applicant shall update December 28, 2023 letter to reflect the payment for Parcel 1 & 3 will be made at the commencement of site work.

**Bellingham Planning Board**

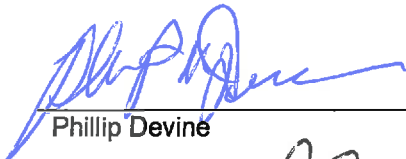
**January 11, 2024**



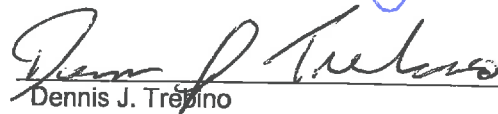
William F. O'Connell, Jr., Chairman



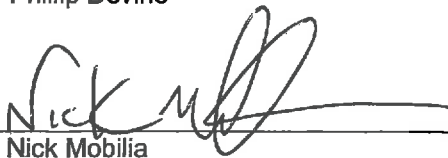
Brian T. Salisbury, Vice Chairman



Phillip Devine



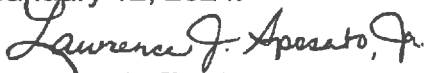
Dennis J. Trebino



Nick Mobilia

Appeals of this Decision may be made within thirty days, in accordance with Section 260-16(B)(2) of the Zoning Bylaw.

This Decision, together with all plans referred to in it, was filed with the Town Clerk on January 12, 2024.



Lawrence J. Sposato, Jr.  
Bellingham Town Clerk

# **EXHIBIT B**



Brown Legal PLLC  
2 Oliver Street, Suite 501  
Boston, MA 02109  
617.463.9133  
www.brownlegalllc.com

October 12, 2023

**Via Electronic Delivery (ASutherland@bellinghamma.org)**

Town of Bellingham  
Atten: Amy Sutherland, Assistant Town Planner  
10 Mechanic Street  
Bellingham, MA 02019

**RE: Maple Gate Solar Development Project  
Parcel 1 – North Project (NextGrid Mescalbean LLC)  
Parcel 3 – South Project (Maple Street LLC)**

**Applicants' Response to Town Counsel's Oral Legal Opinion Relative to a Planning Board Potential Condition Requiring the Applicant to Obtain a Use Variance by the Zoning Board of Appeals**

Dear Ms. Sutherland:

At the September 28<sup>th</sup> Public Hearing for the above-described "North Project" the Applicants were informed that the Planning Board received a legal opinion from Town Counsel a month prior on August 28, 2023. Counsel from KP Law attended the meeting and relayed an oral opinion to the Board, the Applicants, and the Public. That oral opinion related to: (1) whether the Town could require the Applicants to obtain a use variance; and (2) what effect, if any, that determination would have on the Development Review Applications currently pending before the Planning Board.

The Planning Board has not released the written legal opinion due to attorney-client privilege. The Planning Board has referred the Applicants to the oral statements made by Counsel at the hearing which were recorded on video. The key statements of that oral legal opinion are as follows:

A. Whether the Town Could Require the Use Variance?

- "In our opinion they will need to make a zoning board application because the use is not allowed under the bylaws in this district, that is separate in my opinion from the application that is pending before you that you will still need to act on in some way." (9/28/23 Planning Bd. Meeting, at 5:00–5:16 video timestamp)
- "And just to clarify, when you say the Dover Amendment, we're talking about the traditional protections in 40A section 3 that apply to religious, educational, childcare facilities, certainly the ninth paragraph of 40A section 3 still applies to this project but it is our opinion that it does not apply to make it an as of right project. Because some people talk about the Dover Amendment as all of 40A section 3 and I just want

to make that distinction we are talking about the religious, educational protections being different than the solar protections.” (9/28/23 Planning Bd. Meeting, at 11:44-12:12 video timestamp)

- “So, obviously we’re all aware of the Tracer Lane decision uh the Tracer Lane decision that distinguish the protections that are protected to, that are applicable to um educational, and religious, and child care uses under chapter 40A 3 which you can’t prohibit um and said that while there are heightened protections for solar, solar is not an as of right use in the same way those uses are considered an as of right use. There was a subsequent case decided by the Appeals Court, the PLH case, in which they agreed that a special permit, which is a discretionary approval, can be required for a solar project. We certainly don’t disagree that um as to the access road issue there are similar facts in this case, zoning certainly applies to access roads, and um whether or not its unlawfully prohibitive of a solar project is a different question. My understanding is that this project is not located in a zone where solar is allowed as of right and accordingly zoning relief will be needed to allow the access road. It can be applied for and the case can be made to the zoning board but there is nothing in Tracer Lane decision that says if you want to access solar over a residential property where it’s not allowed the Town simply has to allow it, there’s guidance in that case and we intend to follow that guidance but the Court respected the boundaries and the differences between the types of protections that are attributed to educational and religious uses and the first and second and the third paragraph and the types of protections that apply to a solar use. And so again, no one is saying um anything other than its not allowed in the zone and use variance are allowed under the bylaws and we think an application should be made to seek that relief they can make their case to the zoning board as to why it’s appropriate to grant it. Um but I don’t agree with the statement that this is an as of right use or that other zoning relief can’t be required, special permit can be required, you have a process to allow this, they should follow the process in my opinion. Um I’m certainly happy to have additional conversations offline but that’s essentially you know with Counsel whoever you’d like us to talk to here, but that is essentially our position...” (9/28/23 Planning Bd. Meeting, at 14:45-16:51 video timestamp)

B. What Effect, if Any, Does Such Determination and Requirement have on the Planning Board and this Development Review Process?

- “... you do have an application before you that is separate from what is going to the zoning board that needs final action at some point.” (9/28/23 Planning Bd. Meeting, at 5:30-5:39 video timestamp)
- “...It’s a separate issue frankly from what’s before this Board . . . but it’s a different application.” (9/28/23 Planning Bd. Meeting, at 16:51-16:54 and 16:55-17:05 video timestamp)



- “Um but again, I don’t think it necessarily implicates this application other than how you may condition it and what you may choose to do with it relative to that it’s still a separate application that gets reviewed within a different scope, right, there is difference standards for development permit than a variance it’s just that a separate application totally understandable the question came up during this process, however.” (9/28/23 Planning Bd. Meeting, at 17:41-18:00 video timestamp)
- “But I also think you have to act on the application before you whether that is tonight or another night.” (9/28/23 Planning Bd. Meeting, at 4:48-4:53 video timestamp)

The summary of this opinion is two-fold:

1. Town Counsel has advised the Planning Board that a Use Variance should be applied for and obtained from the ZBA.
2. Town Counsel has advised the Planning Board that it could issue a condition to its Decision on these projects that the Applicants obtain a Use Variance but cannot defer action on these Applications or deny these Applications on that basis.

As was noted during the September 28<sup>th</sup> meeting, the Applicants respectfully disagree with the first part of the oral opinion that has been provided to the Planning Board (ie. that a use variance can be and is required for the solar project).

We would like to take the opportunity through this correspondence to respectfully request that the Planning Board reconsider its position. As has been previously expressed to the Planning Board, we strongly disagree with its position for the following reasons:

**(1) No use variance was required of LMP Properties (“LMP”):**

- Bellingham did not require a use variance of the LMP solar project and cannot treat these applicants located in the same zoning district differently. It is a well-settled principle that unless the laws are applied equally, they do not protect equally. *See Fafard v. Conservation Commission of Reading*, 41 Mass. App. Ct. 561, 569 (1996) (“In the administration of controls limiting the use of land – as with any exercise of the police power – uniformity of standards and enforcement are of the essence. If the laws are not applied equally they do not protect equally”).
- The LMP project has both access and its operation of a solar project in the Bellingham Suburban District. *See Exhibit 1* at p. 1 – Bellingham Planning Board Decision for LMP Solar Project (property is in the suburban district). Bellingham did not require a use variance because the solar project was clearly protected by the Dover Amendment. *See Exhibit 2* – Land Court Bellingham/LMP Land Court Litigation Filing at ¶ 3 & ¶ 6 (confirming the LMP Solar Project was protected by the Dover Amendment and therefore allowed by right in the suburban district).

(2) **Northbridge McQuade, LLC v. Town of Northbridge**, 18 MISC 000519 (Land Court, February 20, 2020):

- Bellingham's Town Counsel, KP Law, representing another municipality with respect to the same issue, the Town of Northbridge, lost this exact argument in the Land Court just three years ago. Chief Justice Piper rejected the argument and stated: "...After colloquy with counsel, Court noted that the prior ruling on summary judgment indicated that the **Plaintiff need not apply for a use variance because the purpose and effect of the relevant protective language of G.L. c. 40A § 3 is to override prohibitions on use unless they are justified based on necessity to protect public health, safety, or welfare, and that constitutes a legislative override of what would otherwise be the applicable variance standard...**" See Exhibit 3 – Northbridge Litigation Land Court Docket Sheet Excerpt).

(3) **Tracer Lane II Realty, LLC v. Waltham**, 489 Mass. 775 (2022):

- Facts in that case that protected new access to a solar system in adjoining town are identical to this situation. Just like Waltham could not utilize zoning to preclude access, neither can Bellingham by compelling the Applicants to apply for and obtain a use variance.

(4) **PLH LLC v. Town of Ware**, 102 Mass. App. Ct. 1103 \* 1 (2022):

- Upholding special permit review of a solar project but cautioned the Town to apply the requirement narrowly.
- The Appeals Court affirmed the decision of the Land Court which stated: "thus, a special permit cannot unreasonably regulate, cannot impose conditions that go beyond statutory limits provided under § 3, *cannot be used either directly or pretextually as a way to prohibit or ban the use, and cannot be used to allow the Board any member of discretion on whether the protected use can take place in the district. Because to do so would be at odds with the penumbral protections that are provided under § 3.*" PLH LLC v. Town of Ware, 2019 WL 7201712 \* 3 (Land Court).
- The narrowly tailored special permit review allowed by the PLH decision is a far cry from a variance which becomes about whether the use can be had at all. See Rogers v. Norfolk, 432 Mass. 374, 378 ("Excessive cost of compliance with a requirement . . . without significant gain in terms of municipal concerns . . . qualify as unreasonable regulation").
- While the Appeals Court in the PLH LLC case upheld the special permit it noted that the Planning Board reviews both the site plans and special permit applications and both applications could be filed simultaneously, thus the additional burden of the special permit application was reasonable. PLH LLC, 102 Mass. App. Ct. 1103 at \* 2-3. A variance is substantively different from a special permit and is certainly not reviewed by the Planning Board, nor is it simultaneously reviewed with a site plan review application. Any concerns the Planning Board has with Maplegate's project related to protecting the public health,

safety, and welfare can certainly be expressed and adequately addressed as part of the pending application without a need for a variance.

**(5) AG Opinion – Case No. 10547 (3/23/23):**

- The AG approved a zoning amendment in the City of Marlborough that required a special permit for solar systems. The AG, while approving the amendment, stated that the law must be applied consistent with the solar protections contained in G.L. c. 40A § 3.
- However, the AG expressly cautioned that:
  - “We cannot conclude that the amendments adopted under Article 46 constitute an unreasonable regulation of solar energy in contravention of G.L. c. 40A § 3.”
  - “However, the Town [City] must apply these amendments, and the existing provisions...consistent with G.L. c. 40A s. 3’s solar protections...”
  - “If subsection 8.9.5.2’s special permit requirements is used to deny solar projects, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems, such application would run a serious risk of violating M.G.L. c. 40A § 3.”

**(6) Without even applying the Dover Amendment, Bellingham cannot utilize zoning to preclude the only access to the land located in the adjacent municipality. See Lapenas v. Zoning Bd. of Appeals of Brockton, 352 Mass. 530, 533-534 (1967).**

Given the foregoing, the Applicants reiterates their position that their project is absolutely protected by the Dover Amendment and that requiring a variance is not allowed under the Dover Amendment as it would constitute an unreasonable regulation given it is not necessary to protect the public health, safety, and welfare.

I am happy to appear before the Board and discuss this further or to engage in a dialogue with Town Counsel. Thank you for your attention to this matter.

Very truly yours,

/s/ Peter A. Brown

Peter A. Brown, Esq.

Brown@brownlegalllc.com

# Exhibit 1



# BELLINGHAM PLANNING BOARD

RECEIVED  
TOWN OF BELLINGHAM  
10 MECHANIC STREET  
BELLINGHAM, MASSACHUSETTS 02019  
(508) 657-2892  
[PlanningBoard@bellinghamma.org](mailto:PlanningBoard@bellinghamma.org)  
2019 OCT 31 AM 8:52  
OFFICE OF THE  
TOWN CLERK

October 30, 2019

## 186 MAPLE STREET LARGE-SCALE GROUND MOUNTED SOLAR DEVELOPMENT PLAN APPROVAL AND STORMWATER MANAGEMENT PERMIT DECISION

### A. BACKGROUND

**Applicant:** Borrego Solar Systems  
55 Technology Drive  
Lowell, MA 01851

**Owner:** LMP Properties  
256 Summer Street  
PO Box 28  
Dover Fox Croft, Maine 04426

**Public Hearing:** The Public Hearing opened August 22, 2019 at 7:00 PM. Notice for the public meeting was published in *The Milford Daily News* on August 8, 2019 and August 15, 2019. The Public Hearing was continued to September 26, 2019, October 10, 2019, October 24, 2019 and October 30, 2019, when the Public Hearing was closed.

**Date of Vote:** October 30, 2019

**The Premises:** The project location, also referred to herein as the "Site" or the "Premises", is located at 186 Maple Street, Assessors Map 32-7, approximately 23.13 acres of which 10.14 acres is in Bellingham, in a Suburban Zoning District.

**The By-law** §240-16 Development Plan Review, and §240-54 Stormwater Management

**The Proposal:** To construct a 4 megawatt (MW) large ground-mounted photovoltaic solar array system with associated improvements accessed by a narrow private driveway.

The Proposal was documented with the following materials:

1. Application for Development Plan Review, dated July 17, 2019, including a narrative and project description.
2. Stormwater Management Permit Application, dated July 17, 2019.
3. Certificate of Ownership Authorization, dated August 7, 2018.
4. Certificate of Municipal Liens, issued July 31, 2019
5. Certified Abutter's List, Town of Bellingham, dated July 2, 2019.
6. Certified Abutter's List, Town of Franklin, dated July 8, 2019.
7. Site Use Plans, 186 Maple Street, by Borrego Solar, last revised October 25, 2019 (also known as the Approved Plan).
8. Stormwater Report, by Borrego Solar, last revised October 11, 2019.
9. Decommissioning Estimate Plan, dated July 22, 2019.
10. Option and Lease Agreement, dated August 13, 2018.
11. Land Title Survey, by Northeast Survey Consultants, dated November 1, 2018.
12. Staff Checklist, James Kupfer, Town Planner, dated August 16, 2019.
13. Soil Suitability Assessment, received August 6, 2019.
14. Email Comments, Mark Poirier, Deputy Fire Chief, dated August 23, 2019
15. Peer Review of Stormwater, by PSC Group, dated September 20, 2019.
16. Peer Review of Stormwater, by PSC Group, dated October 10, 2019.
17. Response to Peer Review, by Borrego Solar, dated October 11, 2019.
18. Other miscellaneous documents on file at the Planning Board offices.



**B. DETERMINATIONS**

Following its public hearing on the Applicant's proposal and requested relief, the Planning Board has made the following determinations:

1. The Applicant originally filed applications for a proposed development at 186 Maple Street, Assessors Map 32-7, approximately 23.13 acres of which 10.14 acres is in Bellingham, in a Suburban Zoning District. Prior to the current application, the land owner filed a Preliminary Subdivision Plan on or about November 8, 2018. On or about November 14, 2018 the Town held a Special Town Meeting during which the Town Meeting voted unanimously to approve a zoning bylaw amendment which changed the underlying zoning for the Premises from industrial to suburban. The Board issued a decision denying the owner's Preliminary Subdivision Plan Application on or about December 14, 2018. The owner appealed the Preliminary Subdivision Denial Decision to the Land Court which action is currently pending as LMP Properties, LLC v. Bellingham Planning Board, et al. (19MISC000003) (the "Land Court Action"). Subsequently, on or about June 6, 2019 the Applicant filed a Definitive Subdivision Plan Application with the Planning Board. Pursuant to the Joint Stipulation of the Parties' entered as an Order of the Land Court on or about July 9, 2019, the Owner/Applicant has agreed to dismiss the pending Land Court Action following issuance of this decision.
2. Upon withdrawal of the Definitive Subdivision Plan application stated above, the Owner/Applicant agrees that the underlying zoning for the Premises will lawfully become a Suburban Zoning District pursuant to the November 14, 2018 Special Town Meeting during which the Town Meeting voted unanimously to approve a zoning bylaw amendment which changed the underlying zoning for the Premises from industrial to suburban.
3. That the use proposed is limited to a large ground-mounted solar facility.
4. That the Premises is located on Maple Street, a Scenic Road.
5. That the Premises is not located in a Water Resource District.
6. That the Premises, currently has an established gravel private driveway that is shared with the Maple Gate Country Club for maintenance purposes by an easement.
7. That the current gravel driveway is sufficient width for the small vehicles that access the maintenance sheds at the golf course and that the solar facility will not need large vehicles for maintenance, therefore the width of the gravel access shall be no larger than the proposed 15 feet.

8. The performance requirements of the Zoning By-Law (e.g. Article IX Environmental Controls, Article X Parking and Loading Requirements, Article XI Landscaping Requirements) have been met or a waiver has been requested and granted.
- a) §240.49 Light and Glare: No lighting proposed. Any exterior lighting shall be consistent with “dark sky” standards, shielded and directed downward to maintain lighting on to the Site and shall comply with the Zoning By-law.
  - b) § 240.50 Air Quality: Proposed uses do not involve emission of odorous gases in such quantities to be offensive and shall continue to adhere to the Zoning By-law.
  - c) §240.51 Hazardous Materials: No hazardous materials, as defined in this section, are proposed to be used or stored on Site.
  - d) §240.52 Vibration: The Applicant does not propose any use that produces vibration which is discernible to the human sense of feeling (except sound) at or beyond the boundaries of the premises for three minutes or more in any hour between 7:00 a.m. and 9:00 p.m. or for 30 seconds or more in any one hour between 9:00 p.m. and 7:00 a.m.
  - e) §240.53 Electrical Disturbance: No electrical disturbance is proposed or will be permitted which adversely effects the operation of any equipment other than that of the creator of such disturbance.
  - f) §240.54 Stormwater Management: The stormwater management shown on the Plan and drainage analysis has been designed to meet the Stormwater Management Standards set by the Massachusetts Department of Environmental Protection and Bellingham Zoning By-laws. The standards include removing solids from the stormwater, reducing rates of runoff from the site, and recharging the groundwater.
  - g) §240.58 Noise: The use proposed was determined to not add noise concerns in excess of the maximum allowable noise levels.
  - h) Town of Bellingham General Bylaws Chapter 154 – Scenic Roads of the Bellingham General By-laws: The use proposed was determined to not add noise concerns in excess of the maximum allowable noise levels. The proposed plan also considers the preservation of the natural landscape along Maple Street and shall add replacement plantings along Maple Street where appropriate.

9. For the given location and type and extent of land use, the design, location, egress points, grading, and other elements of the development could not reasonably be altered to:
- a) improve pedestrian or vehicular safety within the site and egressing from it, as circulation has been reviewed by the Planning Board and emergency services and was deemed adequate. The radius of the entrance was designed to accommodate emergency services largest vehicle and the private driveway was minimized to allow for minimal vehicular traffic appropriate for the proposed use;
  - b) reduce the visual intrusion of parking areas viewed from public ways or abutting premises, by preserving vegetative buffers as well as landscaping added to priority areas;
  - c) reduce the volume of cut or fill and the Site has been graded to match the cuts and fills, as much as possible and it is not anticipated that an Earth Removal Special Permit will be required;
  - d) reduce the number of removed trees 8" trunk diameter and larger, as the proposal preserves vegetation along the Scenic Road;
  - e) reduce soil erosion; and reduce hazard or inconvenience to pedestrians from storm water flow and ponding by engineering the Site to be designed to comply with the DEP Stormwater Handbook and the Town of Bellingham Stormwater Regulations as well as the inclusion of a Stormwater Pollution Prevention Plan and Operation and Maintenance Plan consistent with the Town of Bellingham requirements.
  - f) provide alternative access as emergency services has reviewed and approved the plan as proposed and deemed access to be adequate;
  - g) provide alternative utility service and drainage as the Board's peer review engineer has reviewed and deemed the plan acceptable as proposed and demonstrated in the Stormwater Management Report;
  - h) provide additional capacity on impacted streets to accommodate the proposed project as access to the Site will be approximately one vehicle every three to four months that is serviced by a private driveway and not to be used for access beyond that of maintenance of the proposed use.

10. No other zoning violations were observed.

11. The Board finds that compliance with the below conditions are necessary to mitigate impacts related to the construction and use resulting from the project.

**C. DECISION**

Based on the above determinations, the Planning Board finds that the proposal meets the requirements of the Zoning By-Law, and by a vote of 4 to 0 in favor, accordingly, grants the Applicant and its successors and assigns as owner and/or operator of the premises, a Development Plan Approval and Stormwater Management Permit subject to the following conditions:

1. This Approval is limited to the improvements as noted on the Approved Plan, and as may be conditioned herein. Any changes to such Plan must be reviewed and approved in accordance with the Bellingham Zoning By-laws. All such changes shall be reviewed by the Board for determination as to whether or not the changes are considered minor or major. If the Planning Board determines that any change to the plan is a major alteration to the Approved Plan, a public hearing shall be required for a modification to this permit. A minor change shall be reviewed and approved at a regularly scheduled meeting.
2. Owner/applicant shall file a withdrawal with prejudice of the Definitive Subdivision Plan Application dated June 6, 2019, following issuance of this decision but under no circumstances later than five (5) days following the expiration of the appeal period for this decision.
3. Prior to commencement of any construction activity allowed under this permit and/or any subsequently issued Building Permit(s), confirmation by the Applicant shall be provided to the Building Inspector that the Applicant has withdrawn its pending Definitive Subdivision Plan Application and that written proof of such withdrawal has been recorded at the Registry of Deeds.
4. Prior to the start of construction, sediment and erosion controls shall be installed and be subject to the inspection and approval by the Town Planner and Conservation Agent.
5. Construction hours will adhere to §240-48 of the Zoning By-law.
6. All fencing to be installed on Site shall be constructed to allow for a minimum six (6) inch gap from the ground surface to the bottom of the fence to allow for wildlife.

7. The Stormwater Management Operation and Maintenance Plan (O&M), last revised October 11, 2019, included as part of the Drainage Report, is hereby referenced and made part of this decision. The Applicant shall permit the Board or its agent to inspect the premises on reasonable notice to determine compliance with said O&M plan.
8. Snow and ice removal shall be the responsibility of the Applicant or a successor and shall be performed in accordance with the approved O&M.
9. Phosphorous-based fertilizer shall not be used on the Site.
10. Prior to issuance of a Certificate of Completion, the Applicant or Tenant shall deliver to the Town Planner a complete list of hazardous materials proposed to be used or stored at the building to the extent required under §240.51 of the Bellingham Zoning Bylaws or other applicable law.
11. Prior to the issuance of a Certificate of Completion, the Applicant or Tenant shall provide the Fire Department with a detailed shut down procedure as well as any emergency response plans and contact information.
12. Prior to the issuance of a Certificate of Completion, the Applicant or Tenant shall install a Knox-Vault on all applicable gates and provide the Fire Department with a key to each.
13. The entry gate shall be opaque and a minimum eight feet in height and constructed of the same material as the proposed fence along Maple Street so that the gate provides a visual barrier and limits impacts of the project from the public way. The entry gate shall be closed at all times when not being used for entry to the Premises.
14. As required in §240-170, Decommissioning Plan, adequate security, bound by a suitable agreement is required to cover the cost of decommissioning the facility. The Applicant is to provide the amount in full to the Town prior to operation. The amount of such security must be approved by the Board, which may consult with an engineer or consultant for such purposes. The form of the agreement governing the deposit, payment, and/or release of such security is subject to the review and approval of Town Counsel.
15. Prior to the commencement of construction, the Applicant shall schedule a preconstruction meeting with the Town Planner and the Board's designated inspector. The Board's inspector shall be permitted to conduct routine inspections, as may be reasonably determined by said inspector, while construction is ongoing relative to this permit and all corresponding Decisions for this Site. The Applicant shall deposit with the Town, sums

necessary to fund the inspections contemplated hereunder. Such inspectional fund shall be governed under M.G.L. c. 44 §53G or such other applicable statutory method as may be appropriate.

16. As required by the Bellingham Department of Public Works, any and all access and utility easements that may be necessary shall be in a form approved by Town Counsel prior to the issuance of the Certificate of Completion, such approval shall not be unreasonably withheld.
17. This Decision is binding on the Applicant and its successors, assigns, agents, and employees. The Planning Board shall be notified in writing of any changes in affiliates and successors in title and additional users of the Premises.
18. This approved plan includes a 15 foot gravel private driveway that is shared with the Maple Gate Country Club for maintenance purposes by an easement. The gravel driveway is sufficient width for small vehicles that access the maintenance sheds of the golf course and the solar facility only. Further extension or alteration of use of the gravel driveway for purposes other than maintenance of a solar facility or golf course shall be considered a change of use and require a public hearing for a new development plan. The width of the gravel driveway shall remain 15 feet. Any expansion of width to the driveway shall require a public hearing for an amendment to the development plan.
19. Any change of use shall require a public hearing to either modify the existing Development Plan or to issue a new Development Plan permit.
20. The Applicant shall comply with §240-16B(5) and (6) regarding As-Built Plans and follow the policies of the As-Built handbook.
21. This Decision shall not be effective until it is recorded by the Applicant at the Registry of Deeds, with proof of such recording to be supplied to the Board and the Building Inspector.

**D. RECORD OF VOTE**

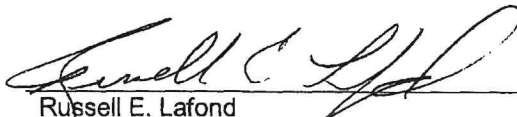
I vote to **APPROVE** the **186 MAPLE STREET LARGE-SCALE GROUND MOUNTED SOLAR DEVELOPMENT PLAN APPROVAL AND STORMWATER MANAGEMENT PERMIT**.

**Bellingham Planning Board**

**October 30, 2019**

  
\_\_\_\_\_  
William F. O'Connell, Jr., Chairman

  
\_\_\_\_\_  
Brian T. Salisbury, Vice Chairman

  
\_\_\_\_\_  
Russell E. Lafond

  
\_\_\_\_\_  
Dennis J. Trebino

\_\_\_\_\_  
Appeals of this Decision may be made within thirty days, in accordance with the provisions of G.L. c 40A, §17

This Decision, together with all plans referred to in it, was filed with the Town Clerk on October 31, 2019.

\_\_\_\_\_  
Lawrence J. Sposato, Jr.  
Bellingham Town Clerk

# Exhibit 2



COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

19 JUL -2 PM 1:11  
DEPARTMENT OF THE TRIAL COURT  
LAND COURT DIVISION  
Docket No. 19 MISC 000003-MDV

\_\_\_\_\_  
LMP PROPERTIES, LLC  
Plaintiff

v.

\_\_\_\_\_  
WILLIAM F. O'CONNELL, JR., BRIAN T.  
SALISBURY, PETER C. PAPPAS, DENNIS  
TREBINO, RUSSELL E. LAFOND and PHILIP  
DEVINE as they are members of the TOWN OF  
BELLINGHAM PLANNING BOARD and not  
not individually, and TOWN OF BELLINGHAM,  
Defendants.  
\_\_\_\_\_

**JOINT MOTION TO STAY THE PROCEEDINGS UPON STIPULATION  
REGARDING SOLAR APPLICATION FOR DEVELOPMENT PLAN APPROVAL**

NOW COME the Parties in the above-captioned matter and hereby request a stay in the captioned action for approximately six (6) months, to January 3, 2020, as set forth in the below stipulation between the Parties:

- 1) On January 3, 2019, counsel for the Plaintiff filed a Complaint in the Land Court appealing the decision by Defendant members of the Town of Bellingham Planning Board to disapprove the preliminary subdivision plan filed November 7, 2019, which decision was filed at the Town of Bellingham Clerk's office on December 14, 2018.
- 2) On November 7, 2018, the Plaintiff, by and through Borrego Solar Systems, Inc. ("Borrego"), filed a "Form B" Application for Approval of a Preliminary Plan with three sheets entitled "Preliminary Plan of Land in Bellingham, MA Prepared For Borrego Solar Systems, Inc." and a signed "Bellingham Planning Board Form K,

Document Submission Requirements” to the Bellingham Planning Board pertaining to the property at 186 Maple Street, Bellingham.

- 3) On November 14, 2018, the Town voted in favor of an amendment to its Zoning Bylaws that changed the zoning district for 186 Maple Street from Industrial, where Large-Scale Ground-Mounted Solar Photovoltaic Installations was allowed as of right, to Suburban, where the use is prohibited.
- 4) This action is also a petition under G.L. c. 240, § 14A, seeking a determination that Article 13 of the Town of Bellingham Special Town Meeting, Zoning Bylaw Amendment – Maple Street, which amended the zoning for 186 Maple Street and other properties from Industrial to Suburban districts, and was voted upon by the Town on November 14, 2018, is invalid.
- 5) Plaintiff or its assigns intend to apply for Development Plan Approval for all or part of the parcel known as 186 Maple Street, seeking authorization to use 186 Maple Street for a large ground-mounted solar energy facility.
- 6) For settlement purposes, the Parties have agreed that Large-Scale Ground-Mounted Solar Photovoltaic Installations are allowed of right on 186 Maple Street subject to the provisions of the Town of Bellingham Zoning Bylaws at Article XXIV (Sections 240-162 to 240-171), pursuant to the protections offered by G.L. c. 40A, § 3 (protections against prohibition or unreasonable regulation of solar) or pursuant to the Plaintiff’s filing of the preliminary plan before the Special Town Meeting on November 14, 2018.
- 7) The Parties agree to stay this litigation through January 3, 2020, during the anticipated period of pendency of Plaintiff’s application for Development Plan

Approval for a large ground-mounted solar facility on 186 Maple Street before the Bellingham Planning Board and hereby request that this Honorable Court grant the requested stay.

- 8) If Plaintiff is unable to obtain an acceptable Development Plan Approval allowing the operation of a large ground-mounted solar facility on 186 Maple Street, then the Plaintiffs or Defendants shall notify the Court and move to terminate the stay, and the Parties shall proceed with this action without having waived any rights thereto.
- 9) If Plaintiff is able to obtain an acceptable Development Plan Approval allowing the operation of a large ground-mounted solar facility on 186 Maple Street, then Plaintiff agrees to dismiss this action.
- 10) The Parties agree to file a Status Report on or before December 20, 2019 stating the status of Plaintiff's application for Development Plan Approval and whether the Parties anticipate either moving to extend the stay or filing a Stipulation of Dismissal on or before January 3, 2020.

WHEREFORE, the Parties request that the action set forth herein be stayed.

Plaintiff, LMP Properties, LLC.  
By its attorneys,

  
PAUL BARBADORO, ESQ. (BBO #028850)  
paulb@bbb-lawfirm.com  
KIMBERLY KROHA, ESQ. (BBO #687468)  
kimberlyk@bbb-lawfirm.com  
Baker, Braverman & Barbadoro, P.C.  
300 Crown Colony Drive, Suite 500  
Quincy, MA 02169  
(781) 848-9610

Defendants, William F. O'Connell, Jr., et  
al. By their attorneys,

  
George X. Pucci, Esq. (BBO # 555346)  
KP | LAW  
101 Arch Street, 12th Floor  
Boston, MA 02110  
O: (617) 654-1718  
F: (617) 654-1735  
gpucci@k-plaw.com

DATED: July 1, 2019

# Exhibit 3

# 18 MISC 000519 Northbridge McQuade, LLC v. Thomas Hansson Member of the Northbridge Zoning Board of Appeals , et al. PIPER

- Case Type:
- Miscellaneous
- Case Status:
- Closed
- File Date
- 10/09/2018
- DCM Track:
- 
- Initiating Action:
- ZAC - Appeal from Zoning/Planning Board, G.L. Chapter 40A, § 17
- Status Date:
- 10/09/2018
- Case Judge:
- Piper, Hon. Gordon H.
- Next Event:
- 
- 

## Property Information

McQuade's Lane  
Northbridge

All Information Party Event Docket Financial Receipt Disposition

## Party Information

Northbridge McQuade, LLC  
- Plaintiff

### Party Attorney

- Attorney
- Lane, Esq., Henry J
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- Attorney
- Rosen, Esq., Michael Dana
- Bar Code
- 561981
- Address
- Ruberto, Israel and Weiner
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- Boston, MA 02109
- Phone Number
- (617)742-4200

[More Party Information](#)

Hansson, Thomas  
- Defendant

### Party Attorney

- Attorney
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- Phone Number
- (617)556-0007

**More Party Information**

**Corkum, William**  
- Defendant

**Party Attorney**

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- Phone Number
- (617)556-0007

**More Party Information**

**Quinlan, Kevin**  
- Defendant

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**More Party Information**

**Kibbe, Randy**  
- Defendant

**Party Attorney**

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- Phone Number
- (617)556-0007

**More Party Information**

**Donati, Cindy**  
- Defendant

**Party Attorney**









- Attorney
- Doneski, Esq., David J
- Bar Code
- 546991
- Address
- KP Law, P.C.
- 101 Arch St 12th Floor
- Boston, MA 02110
- Phone Number
- (617)556-0007

**More Party Information**

**Events**

<u>Date</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
12/17/2018 11:35 AM	Case Management Conference	Piper, Hon. Gordon H.	Case Management Conference held
05/20/2019 11:30 AM	Summary Judgment Hearing	Piper, Hon. Gordon H.	Case Taken Off of the List.
06/17/2019 02:15 PM	Summary Judgment Hearing	Piper, Hon. Gordon H.	Held



<u>Docket Date</u>	<u>Docket Text</u>	<u>Amount Owed</u>	<u>Image Avail.</u>
02/20/2020	<p>Event Resulted: Pre-Trial Conference scheduled on: 02/20/2020 11:00 AM</p> <p>February 20, 2020. Pre-Trial Conference held. Attorneys Shane Picard and Michael Rosen appeared for plaintiff. Attorney David Doneski appeared for defendant. After colloquy with counsel, court noted that the prior ruling on summary judgment indicated that plaintiff need not apply for a use variance because the purpose and effect of the relevant protective language of G. L. c. 40A, § 3 is to override prohibitions on use unless they are justified based on necessity to protect public health, safety, or welfare, and that constitutes a legislative override of what would otherwise be the applicable variance standard; however, this ruling did not explicitly the question of whether the need for a dimensional variance from frontage requirements of the bylaw is subject to the same legislative override. The motion for summary judgment did not present the question of the effect of § 3 on the need for plaintiff to have sought or received a frontage variance, and so the court's ruling did not directly reach that issue. Parties agreed that this is a purely legal question that may properly be resolved on summary judgment. The court had earlier invited the parties to submit further summary judgment motions on this question, but they have not done so. Nevertheless, the court is convinced that resolution of this issue on summary judgment, if possible, is preferable to proceeding now to trial de novo with that issue unresolved. By March 5, 2020, Plaintiff to file motion for summary judgment addressing the effect of the protective language of G. L. c. 40A, § 3 on the form of relief, if any, that plaintiff must acquire from the Board concerning plaintiff's frontage insufficiency, and what standard the Board properly should apply when evaluating that request for relief. Defendant to file any opposition by March 19, 2020. (Piper, C.J.)</p> <p>(Notice of Docket Entry sent to Attorneys Henry Lane, Michael Rosen, and David Doneski)</p>		
03/05/2020	Plaintiff's Motion for Partial Summary Judgment, filed.		
03/05/2020	Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, filed.		
03/05/2020	Joint Statement of Material Facts, filed.		
03/09/2020	<p>Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 04/29/2020 Time: 11:15 AM Notice to: Attorneys Henry Lane, Michael Rosen, and David Doneski</p>		
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04/06/2020	Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed (by email).		
04/06/2020	Defendants' Motion to Strike Affidavit of Eric J. Las, filed (by email).		
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# **EXHIBIT C**



# 18 MISC 000519 Northbridge McQuade, LLC v. Thomas Hansson Member of the Northbridge Zoning Board of Appeals , et al. PIPER

- Case Type:
- Miscellaneous
- Case Status:
- Closed
- File Date
- 10/09/2018
- DCM Track:
- Initiating Action:
- ZAC - Appeal from Zoning/Planning Board, G.L. Chapter 40A, § 17
- Status Date:
- 10/09/2018
- Case Judge:
- Piper, Hon. Gordon H.
- Next Event:

## Property Information

McQuade's Lane  
Northbridge

All Information Party Event Docket Financial Receipt Disposition

## Party Information

Northbridge McQuade, LLC  
- Plaintiff

### Party Attorney

- Attorney
- Lane, Esq., Henry J
- Bar Code
- 285480
- Address
- Lane and Hamer, P.C.
- 100 Main St
- Whitinsville, MA 01588
- Phone Number
- (508)234-4400
- Attorney
- Picard, Esq., Shayne J
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- 666480
- Address
- Shayne J. Picard LLC
- 255 Main St
- 3d Floor
- Whitinsville, MA 01588
- Phone Number
- (508)579-3997
- Attorney
- Rosen, Esq., Michael Dana
- Bar Code
- 561981
- Address
- Ruberto, Israel and Weiner
- 255 State St 7th Floor
- Boston, MA 02109
- Phone Number
- (617)742-4200

## More Party Information

Hansson, Thomas  
- Defendant

### Party Attorney

- Attorney
- Doneski, Esq., David J
- Bar Code

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- Address
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- Phone Number
- (617)556-0007

[More Party Information](#)

**Corkum, William**  
- Defendant

- **Party Attorney**
- Attorney
- Doneski, Esq., David J
- Bar Code
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- Boston, MA 02110
- Phone Number
- (617)556-0007

[More Party Information](#)

**Quinlan, Kevin**  
- Defendant

- **Party Attorney**
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- Bar Code
- 546991
- Address
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[More Party Information](#)

**Kibbe, Randy**  
- Defendant

- **Party Attorney**
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- Bar Code
- 546991
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- Boston, MA 02110
- Phone Number
- (617)556-0007

[More Party Information](#)









**Donati, Cindy**  
- Defendant

- **Party Attorney**
- Attorney
- Doneski, Esq., David J
- Bar Code
- 546991
- Address
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[More Party Information](#)

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05/29/2020	<p>Scheduled Judge: Piper, Hon. Gordon H. Event: Summary Judgment Hearing Date: 06/22/2020 Time: 02:30 PM</p>		
06/22/2020	<p>Event Resulted: Summary Judgment Hearing scheduled on: 06/22/2020 02:30 PM Has been: Held via video</p> <p>June 22, 2020. Hearing held by teleconference on plaintiff's motion for partial summary judgment and defendants' motion to strike. Attorneys Shayne Picard and Michael Rosen appeared for plaintiff. Attorney David Doneski appeared for defendants. Defendants' motion to strike is DENIED, as the affiant's role as the engineer involved in plaintiffs' project is an adequate basis for the statements within the affidavit. Even had the motion to strike been allowed, however, the court's ruling on summary judgment would not have been different. Following argument, pursuant to Mass. R. Civ. P. 56, giving every reasonable inference to the party opposing summary judgment, based on the summary judgment record, there being no material facts in dispute, the court GRANTED IN PART summary judgment in favor of plaintiff, for the reasons laid upon the record from the bench following argument, and for substantially those reasons set forth in the moving papers, which are summarized as follows. The question presented by plaintiff's motion for partial summary judgment is whether, in light of the protection afforded by G. L. c. 40A, § 3 to plaintiff's proposed solar energy use, the Board may impose the bylaw's 150-foot frontage requirement upon the plaintiff's application, and (given plaintiff's land's undisputedly insufficient frontage as required generally in this residential district) require plaintiff to meet the standard for a dimensional variance. Pursuant to G. L. c. 40A, § 3, a municipality is prohibited from unreasonably regulating the installation of solar energy systems. This legislative override applies equally to a municipality's dimensional regulations as it does to use restrictions, see <i>Rogers v. Town of Norfolk</i>, 432 Mass. 374, 383-384 (2000), and there is no need to satisfy the standard for a dimensional variance where, as viewed through the lens of § 3, application of the regulation in question would be unreasonable when applied to the protected solar use project in question. The inquiry into whether a bylaw's typical requirements are unreasonable when imposed upon a protected</p>		

# **EXHIBIT D**





# BELLINGHAM PLANNING BOARD

RECEIVED  
TOWN OF BELLINGHAM  
10 MECHANIC STREET  
BELLINGHAM, MASSACHUSETTS 02019  
(508) 657-2892  
[PlanningBoard@bellinghamma.org](mailto:PlanningBoard@bellinghamma.org)  
2019 OCT 31 AM 8:52  
OFFICE OF THE  
TOWN CLERK

October 30, 2019

## 186 MAPLE STREET LARGE-SCALE GROUND MOUNTED SOLAR DEVELOPMENT PLAN APPROVAL AND STORMWATER MANAGEMENT PERMIT DECISION

### A. BACKGROUND

**Applicant:** Borrego Solar Systems  
55 Technology Drive  
Lowell, MA 01851

**Owner:** LMP Properties  
256 Summer Street  
PO Box 28  
Dover Fox Croft, Maine 04426

**Public Hearing:** The Public Hearing opened August 22, 2019 at 7:00 PM. Notice for the public meeting was published in *The Milford Daily News* on August 8, 2019 and August 15, 2019. The Public Hearing was continued to September 26, 2019, October 10, 2019, October 24, 2019 and October 30, 2019, when the Public Hearing was closed.

**Date of Vote:** October 30, 2019

**The Premises:** The project location, also referred to herein as the "Site" or the "Premises", is located at 186 Maple Street, Assessors Map 32-7, approximately 23.13 acres of which 10.14 acres is in Bellingham, in a Suburban Zoning District.

**The By-law** §240-16 Development Plan Review, and §240-54 Stormwater Management

**The Proposal:** To construct a 4 megawatt (MW) large ground-mounted photovoltaic solar array system with associated improvements accessed by a narrow private driveway.

The Proposal was documented with the following materials:

1. Application for Development Plan Review, dated July 17, 2019, including a narrative and project description.
2. Stormwater Management Permit Application, dated July 17, 2019.
3. Certificate of Ownership Authorization, dated August 7, 2018.
4. Certificate of Municipal Liens, issued July 31, 2019
5. Certified Abutter's List, Town of Bellingham, dated July 2, 2019.
6. Certified Abutter's List, Town of Franklin, dated July 8, 2019.
7. Site Use Plans, 186 Maple Street, by Borrego Solar, last revised October 25, 2019 (also known as the Approved Plan).
8. Stormwater Report, by Borrego Solar, last revised October 11, 2019.
9. Decommissioning Estimate Plan, dated July 22, 2019.
10. Option and Lease Agreement, dated August 13, 2018.
11. Land Title Survey, by Northeast Survey Consultants, dated November 1, 2018.
12. Staff Checklist, James Kupfer, Town Planner, dated August 16, 2019.
13. Soil Suitability Assessment, received August 6, 2019.
14. Email Comments, Mark Poirier, Deputy Fire Chief, dated August 23, 2019
15. Peer Review of Stormwater, by PSC Group, dated September 20, 2019.
16. Peer Review of Stormwater, by PSC Group, dated October 10, 2019.
17. Response to Peer Review, by Borrego Solar, dated October 11, 2019.
18. Other miscellaneous documents on file at the Planning Board offices.

## **B. DETERMINATIONS**

Following its public hearing on the Applicant's proposal and requested relief, the Planning Board has made the following determinations:

1. The Applicant originally filed applications for a proposed development at 186 Maple Street, Assessors Map 32-7, approximately 23.13 acres of which 10.14 acres is in Bellingham, in a Suburban Zoning District. Prior to the current application, the land owner filed a Preliminary Subdivision Plan on or about November 8, 2018. On or about November 14, 2018 the Town held a Special Town Meeting during which the Town Meeting voted unanimously to approve a zoning bylaw amendment which changed the underlying zoning for the Premises from industrial to suburban. The Board issued a decision denying the owner's Preliminary Subdivision Plan Application on or about December 14, 2018. The owner appealed the Preliminary Subdivision Denial Decision to the Land Court which action is currently pending as LMP Properties, LLC v. Bellingham Planning Board, et al. (19MISC000003) (the "Land Court Action"). Subsequently, on or about June 6, 2019 the Applicant filed a Definitive Subdivision Plan Application with the Planning Board. Pursuant to the Joint Stipulation of the Parties' entered as an Order of the Land Court on or about July 9, 2019, the Owner/Applicant has agreed to dismiss the pending Land Court Action following issuance of this decision.
2. Upon withdrawal of the Definitive Subdivision Plan application stated above, the Owner/Applicant agrees that the underlying zoning for the Premises will lawfully become a Suburban Zoning District pursuant to the November 14, 2018 Special Town Meeting during which the Town Meeting voted unanimously to approve a zoning bylaw amendment which changed the underlying zoning for the Premises from industrial to suburban.
3. That the use proposed is limited to a large ground-mounted solar facility.
4. That the Premises is located on Maple Street, a Scenic Road.
5. That the Premises is not located in a Water Resource District.
6. That the Premises, currently has an established gravel private driveway that is shared with the Maple Gate Country Club for maintenance purposes by an easement.
7. That the current gravel driveway is sufficient width for the small vehicles that access the maintenance sheds at the golf course and that the solar facility will not need large vehicles for maintenance, therefore the width of the gravel access shall be no larger than the proposed 15 feet.



8. The performance requirements of the Zoning By-Law (e.g. Article IX Environmental Controls, Article X Parking and Loading Requirements, Article XI Landscaping Requirements) have been met or a waiver has been requested and granted.
- a) §240.49 Light and Glare: No lighting proposed. Any exterior lighting shall be consistent with "dark sky" standards, shielded and directed downward to maintain lighting on to the Site and shall comply with the Zoning By-law.
  - b) § 240.50 Air Quality: Proposed uses do not involve emission of odorous gases in such quantities to be offensive and shall continue to adhere to the Zoning By-law.
  - c) §240.51 Hazardous Materials: No hazardous materials, as defined in this section, are proposed to be used or stored on Site.
  - d) §240.52 Vibration: The Applicant does not propose any use that produces vibration which is discernible to the human sense of feeling (except sound) at or beyond the boundaries of the premises for three minutes or more in any hour between 7:00 a.m. and 9:00 p.m. or for 30 seconds or more in any one hour between 9:00 p.m. and 7:00 a.m.
  - e) §240.53 Electrical Disturbance: No electrical disturbance is proposed or will be permitted which adversely effects the operation of any equipment other than that of the creator of such disturbance.
  - f) §240.54 Stormwater Management: The stormwater management shown on the Plan and drainage analysis has been designed to meet the Stormwater Management Standards set by the Massachusetts Department of Environmental Protection and Bellingham Zoning By-laws. The standards include removing solids from the stormwater, reducing rates of runoff from the site, and recharging the groundwater.
  - g) §240.58 Noise: The use proposed was determined to not add noise concerns in excess of the maximum allowable noise levels.
  - h) Town of Bellingham General Bylaws Chapter 154 – Scenic Roads of the Bellingham General By-laws: The use proposed was determined to not add noise concerns in excess of the maximum allowable noise levels. The proposed plan also considers the preservation of the natural landscape along Maple Street and shall add replacement plantings along Maple Street where appropriate.



9. For the given location and type and extent of land use, the design, location, egress points, grading, and other elements of the development could not reasonably be altered to:
- a) improve pedestrian or vehicular safety within the site and egressing from it, as circulation has been reviewed by the Planning Board and emergency services and was deemed adequate. The radius of the entrance was designed to accommodate emergency services largest vehicle and the private driveway was minimized to allow for minimal vehicular traffic appropriate for the proposed use;
  - b) reduce the visual intrusion of parking areas viewed from public ways or abutting premises, by preserving vegetative buffers as well as landscaping added to priority areas;
  - c) reduce the volume of cut or fill and the Site has been graded to match the cuts and fills, as much as possible and it is not anticipated that an Earth Removal Special Permit will be required;
  - d) reduce the number of removed trees 8" trunk diameter and larger, as the proposal preserves vegetation along the Scenic Road;
  - e) reduce soil erosion; and reduce hazard or inconvenience to pedestrians from storm water flow and ponding by engineering the Site to be designed to comply with the DEP Stormwater Handbook and the Town of Bellingham Stormwater Regulations as well as the inclusion of a Stormwater Pollution Prevention Plan and Operation and Maintenance Plan consistent with the Town of Bellingham requirements.
  - f) provide alternative access as emergency services has reviewed and approved the plan as proposed and deemed access to be adequate;
  - g) provide alternative utility service and drainage as the Board's peer review engineer has reviewed and deemed the plan acceptable as proposed and demonstrated in the Stormwater Management Report;
  - h) provide additional capacity on impacted streets to accommodate the proposed project as access to the Site will be approximately one vehicle every three to four months that is serviced by a private driveway and not to be used for access beyond that of maintenance of the proposed use.
10. No other zoning violations were observed.

11. The Board finds that compliance with the below conditions are necessary to mitigate impacts related to the construction and use resulting from the project.

**C. DECISION**

Based on the above determinations, the Planning Board finds that the proposal meets the requirements of the Zoning By-Law, and by a vote of 4 to 0 in favor, accordingly, grants the Applicant and its successors and assigns as owner and/or operator of the premises, a Development Plan Approval and Stormwater Management Permit subject to the following conditions:

1. This Approval is limited to the improvements as noted on the Approved Plan, and as may be conditioned herein. Any changes to such Plan must be reviewed and approved in accordance with the Bellingham Zoning By-laws. All such changes shall be reviewed by the Board for determination as to whether or not the changes are considered minor or major. If the Planning Board determines that any change to the plan is a major alteration to the Approved Plan, a public hearing shall be required for a modification to this permit. A minor change shall be reviewed and approved at a regularly scheduled meeting.
2. Owner/applicant shall file a withdrawal with prejudice of the Definitive Subdivision Plan Application dated June 6, 2019, following issuance of this decision but under no circumstances later than five (5) days following the expiration of the appeal period for this decision.
3. Prior to commencement of any construction activity allowed under this permit and/or any subsequently issued Building Permit(s), confirmation by the Applicant shall be provided to the Building Inspector that the Applicant has withdrawn its pending Definitive Subdivision Plan Application and that written proof of such withdrawal has been recorded at the Registry of Deeds.
4. Prior to the start of construction, sediment and erosion controls shall be installed and be subject to the inspection and approval by the Town Planner and Conservation Agent.
5. Construction hours will adhere to §240-48 of the Zoning By-law.
6. All fencing to be installed on Site shall be constructed to allow for a minimum six (6) inch gap from the ground surface to the bottom of the fence to allow for wildlife.



7. The Stormwater Management Operation and Maintenance Plan (O&M), last revised October 11, 2019, included as part of the Drainage Report, is hereby referenced and made part of this decision. The Applicant shall permit the Board or its agent to inspect the premises on reasonable notice to determine compliance with said O&M plan.
8. Snow and ice removal shall be the responsibility of the Applicant or a successor and shall be performed in accordance with the approved O&M.
9. Phosphorous-based fertilizer shall not be used on the Site.
10. Prior to issuance of a Certificate of Completion, the Applicant or Tenant shall deliver to the Town Planner a complete list of hazardous materials proposed to be used or stored at the building to the extent required under §240.51 of the Bellingham Zoning Bylaws or other applicable law.
11. Prior to the issuance of a Certificate of Completion, the Applicant or Tenant shall provide the Fire Department with a detailed shut down procedure as well as any emergency response plans and contact information.
12. Prior to the issuance of a Certificate of Completion, the Applicant or Tenant shall install a Knox-Vault on all applicable gates and provide the Fire Department with a key to each.
13. The entry gate shall be opaque and a minimum eight feet in height and constructed of the same material as the proposed fence along Maple Street so that the gate provides a visual barrier and limits impacts of the project from the public way. The entry gate shall be closed at all times when not being used for entry to the Premises.
14. As required in §240-170, Decommissioning Plan, adequate security, bound by a suitable agreement is required to cover the cost of decommissioning the facility. The Applicant is to provide the amount in full to the Town prior to operation. The amount of such security must be approved by the Board, which may consult with an engineer or consultant for such purposes. The form of the agreement governing the deposit, payment, and/or release of such security is subject to the review and approval of Town Counsel.
15. Prior to the commencement of construction, the Applicant shall schedule a preconstruction meeting with the Town Planner and the Board's designated inspector. The Board's inspector shall be permitted to conduct routine inspections, as may be reasonably determined by said inspector, while construction is ongoing relative to this permit and all corresponding Decisions for this Site. The Applicant shall deposit with the Town, sums

necessary to fund the inspections contemplated hereunder. Such inspectional fund shall be governed under M.G.L. c. 44 §53G or such other applicable statutory method as may be appropriate.

16. As required by the Bellingham Department of Public Works, any and all access and utility easements that may be necessary shall be in a form approved by Town Counsel prior to the issuance of the Certificate of Completion, such approval shall not be unreasonably withheld.
17. This Decision is binding on the Applicant and its successors, assigns, agents, and employees. The Planning Board shall be notified in writing of any changes in affiliates and successors in title and additional users of the Premises.
18. This approved plan includes a 15 foot gravel private driveway that is shared with the Maple Gate Country Club for maintenance purposes by an easement. The gravel driveway is sufficient width for small vehicles that access the maintenance sheds of the golf course and the solar facility only. Further extension or alteration of use of the gravel driveway for purposes other than maintenance of a solar facility or golf course shall be considered a change of use and require a public hearing for a new development plan. The width of the gravel driveway shall remain 15 feet. Any expansion of width to the driveway shall require a public hearing for an amendment to the development plan.
19. Any change of use shall require a public hearing to either modify the existing Development Plan or to issue a new Development Plan permit.
20. The Applicant shall comply with §240-16B(5) and (6) regarding As-Built Plans and follow the policies of the As-Built handbook.
21. This Decision shall not be effective until it is recorded by the Applicant at the Registry of Deeds, with proof of such recording to be supplied to the Board and the Building Inspector.


**D. RECORD OF VOTE**

I vote to **APPROVE** the **186 MAPLE STREET LARGE-SCALE GROUND MOUNTED SOLAR DEVELOPMENT PLAN APPROVAL AND STORMWATER MANAGEMENT PERMIT**.

**Bellingham Planning Board**

**October 30, 2019**

  
\_\_\_\_\_  
William F. O'Connell, Jr., Chairman

  
\_\_\_\_\_  
Brian T. Salisbury, Vice Chairman

  
\_\_\_\_\_  
Russell E. Lafond

  
\_\_\_\_\_  
Dennis J. Trebino

\_\_\_\_\_  
Appeals of this Decision may be made within thirty days, in accordance with the provisions of G.L. c 40A, §17

This Decision, together with all plans referred to in it, was filed with the Town Clerk on October 31, 2019.

\_\_\_\_\_  
Lawrence J. Sposato, Jr.  
Bellingham Town Clerk

# **EXHIBIT E**



COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

19 JUL -2 11:11  
DEPARTMENT OF THE TRIAL COURT  
LAND COURT DIVISION  
Docket No. 19 MISC 000003-MDV

LMP PROPERTIES, LLC  
Plaintiff

v.

WILLIAM F. O'CONNELL, JR., BRIAN T.  
SALISBURY, PETER C. PAPPAS, DENNIS  
TREBINO, RUSSELL E. LAFOND and PHILIP  
DEVINE as they are members of the TOWN OF  
BELLINGHAM PLANNING BOARD and not  
not individually, and TOWN OF BELLINGHAM,  
Defendants.

**JOINT MOTION TO STAY THE PROCEEDINGS UPON STIPULATION  
REGARDING SOLAR APPLICATION FOR DEVELOPMENT PLAN APPROVAL**

NOW COME the Parties in the above-captioned matter and hereby request a stay in the captioned action for approximately six (6) months, to January 3, 2020, as set forth in the below stipulation between the Parties:

- 1) On January 3, 2019, counsel for the Plaintiff filed a Complaint in the Land Court appealing the decision by Defendant members of the Town of Bellingham Planning Board to disapprove the preliminary subdivision plan filed November 7, 2019, which decision was filed at the Town of Bellingham Clerk's office on December 14, 2018.
- 2) On November 7, 2018, the Plaintiff, by and through Borrego Solar Systems, Inc. ("Borrego"), filed a "Form B" Application for Approval of a Preliminary Plan with three sheets entitled "Preliminary Plan of Land in Bellingham, MA Prepared For Borrego Solar Systems, Inc." and a signed "Bellingham Planning Board Form K,

Document Submission Requirements” to the Bellingham Planning Board pertaining to the property at 186 Maple Street, Bellingham.

- 3) On November 14, 2018, the Town voted in favor of an amendment to its Zoning Bylaws that changed the zoning district for 186 Maple Street from Industrial, where Large-Scale Ground-Mounted Solar Photovoltaic Installations was allowed as of right, to Suburban, where the use is prohibited.
- 4) This action is also a petition under G.L. c. 240, § 14A, seeking a determination that Article 13 of the Town of Bellingham Special Town Meeting, Zoning Bylaw Amendment – Maple Street, which amended the zoning for 186 Maple Street and other properties from Industrial to Suburban districts, and was voted upon by the Town on November 14, 2018, is invalid.
- 5) Plaintiff or its assigns intend to apply for Development Plan Approval for all or part of the parcel known as 186 Maple Street, seeking authorization to use 186 Maple Street for a large ground-mounted solar energy facility.
- 6) For settlement purposes, the Parties have agreed that Large-Scale Ground-Mounted Solar Photovoltaic Installations are allowed of right on 186 Maple Street subject to the provisions of the Town of Bellingham Zoning Bylaws at Article XXIV (Sections 240-162 to 240-171), pursuant to the protections offered by G.L. c. 40A, § 3 (protections against prohibition or unreasonable regulation of solar) or pursuant to the Plaintiff’s filing of the preliminary plan before the Special Town Meeting on November 14, 2018.
- 7) The Parties agree to stay this litigation through January 3, 2020, during the anticipated period of pendency of Plaintiff’s application for Development Plan

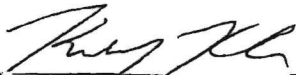


Approval for a large ground-mounted solar facility on 186 Maple Street before the Bellingham Planning Board and hereby request that this Honorable Court grant the requested stay.


- 8) If Plaintiff is unable to obtain an acceptable Development Plan Approval allowing the operation of a large ground-mounted solar facility on 186 Maple Street, then the Plaintiffs or Defendants shall notify the Court and move to terminate the stay, and the Parties shall proceed with this action without having waived any rights thereto.
- 9) If Plaintiff is able to obtain an acceptable Development Plan Approval allowing the operation of a large ground-mounted solar facility on 186 Maple Street, then Plaintiff agrees to dismiss this action.
- 10) The Parties agree to file a Status Report on or before December 20, 2019 stating the status of Plaintiff's application for Development Plan Approval and whether the Parties anticipate either moving to extend the stay or filing a Stipulation of Dismissal on or before January 3, 2020.

WHEREFORE, the Parties request that the action set forth herein be stayed.

Plaintiff, LMP Properties, LLC.  
By its attorneys,

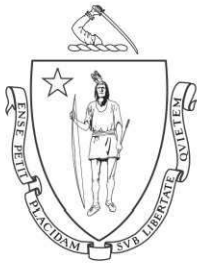
  
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300 Crown Colony Drive, Suite 500  
Quincy, MA 02169  
(781) 848-9610

Defendants, William F. O'Connell, Jr., et  
al. By their attorneys,

  
George X. Pucci, Esq. (BBO # 555346)  
KP | LAW  
101 Arch Street, 12th Floor  
Boston, MA 02110  
O: (617) 654-1718  
F: (617) 654-1735  
gpucci@k-plaw.com

DATED: July 1, 2019

# **EXHIBIT F**



# THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION

10 MECHANIC STREET, SUITE 301

WORCESTER, MA 01608

ANDREA JOY CAMPBELL

ATTORNEY GENERAL

(508) 792-7600

(508) 795-1991 fax

[www.mass.gov/ago](http://www.mass.gov/ago)

March 23, 2023

Katherine M. Chretien, Town Clerk  
Town of New Marlborough  
P.O. Box 99  
Mill River, MA 01244

**Re: New Marlborough Annual Town Meeting of May 2, 2022 -- Case # 10547**  
**Warrant Article # 46 (Zoning)**  
**Warrant Articles # 39, 43, 44 and 45 (General)**

Dear Ms. Chretien:

**Article 46** – Under Article 46 the Town amended the zoning by-laws, Section 8.9, “Solar Voltaic Installations” to make changes to subsection 8.9.5.1 and to insert a new subsection 8.9.5.2 regarding small-scale ground mounted solar installations.<sup>1</sup> We approve the amendments adopted under Article 46 because we cannot conclude that the by-law amendments present a clear conflict with state law, including the protections given to solar and energy related uses under G.L. c. 40A, § 3. 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 by-law consistent with the solar protections in G.L. c. 40A, § 3, as explained below.

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<sup>1</sup> On August 11, 2022 we issued a decision taking no action on Article 39 because it was not a by-law amendment and placing Articles 43, 44, 45 and 46 on “hold” until we received from the Town the documents necessary to conduct our review pursuant to G.L. c. 40, § 32 and G.L. c. 40A, § 5. On August 12, 2022, we received a complete by-law submission from the Town and notified the Town of our new 90-day deadline (November 10, 2022). In a decision issued on November 9, 2022, we approved Articles 43, 44 and 45 and placed Article 46 on “Chapter 299 hold” because of a procedural defect in the planning board hearing notice. On January 5, 2023, the Town Clerk certified that the Town had followed all notice and publishing requirements of G.L. c. 40, § 32, and no claims were received. The Attorney General is therefore authorized to, and does, waive Article 46’s procedural defects. Following the Town’s completion of the 299-hold process, our 90-day review period resumed and we notified the Town of our new deadline for Article 46 (January 14, 2023). On January 6, 2023, by agreement with Town Counsel under G.L. c. 40, § 32, we extended the deadline for review of Article 46 for 45-days until February 28, 2023. On February 22, 2023, by agreement with Town Counsel, we extended our deadline for review of Article 46 for an additional 45-days until April 14, 2023.

## **I. Summary of Article 46**

Under Article 46 the Town amended the zoning by-laws, Section 8.9, to substitute a new subsection 8.9.5.1 and add a new subsection 8.9.5.2 (and renumber the existing sub-sections accordingly), as follows:

8.9.5.1 A small-scale ground mounted solar photovoltaic installation is allowed by right only in the Rural Residential District after issuance of a Building Permit by the Building Inspector.

8.9.5.2 Small ground-mounted solar photovoltaic solar panels in the Village Residential District require a Special Permit.

Prior to the amendments adopted under Article 46, subsection 8.9.5.1's existing text allowed small-scale ground-mounted solar photovoltaic installation by-right in both the Rural Residential District and Village Residential District.<sup>2</sup> The Rural Residential and Village Residential districts appear to be the only two zoning districts in the Town. See Section 2.1, "Types of Districts."

Section 8.9.3.6 defines the term "Small-Scale Solar Photovoltaic Installation" as follows:

A ground-mounted solar photovoltaic installation that occupies 1/8<sup>th</sup> of an acre or less and generates electricity for the purpose of on-site use.

The existing by-law also imposes design requirements on small-scale installations including: a 20 foot height limit requirement (Section 8.9.5.2.A); setback requirements (Section 8.9.5.2.B); and screening and vegetation clearing requirements (Sections 8.9.5.2.C and 8.9.5.2.D). In addition, the existing by-law imposes abandonment and removal requirements on small-scale solar (Section 8.9.5.3).

## **II. Attorney General's Standard of Review of Zoning Bylaws**

Our review of Article 46 is governed by G.L. c. 40, § 32. Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst, 398 Mass. at 795-96, 798-99. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") Rather, to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). "The legislative intent to preclude local action must be clear." Id. at 155. Massachusetts has the "strongest type of home rule and

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<sup>2</sup> The existing text of Section 8.9.5.1 provided: "A small-scale ground-mounted solar photovoltaic installation may be allowed by-right after the issuance of a building permit by the Building Inspector."

municipal action is presumed to be valid.” Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 46, as an amendment to the Town’s zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) (“With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders.”). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General’s standard of review is equivalent to that of a court. “[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare.” Durand, 440 Mass. at 57 (2003). “If the reasonableness of a zoning bylaw is even ‘fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.’” Id. at 51 (quoting Crall, 362 Mass. at 101). However, a municipality has no power to adopt a zoning by-law that is “inconsistent with the constitution or laws enacted by the [Legislature].” Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

### **III. The By-law Amendments Must be Applied Consistent with G.L. c. 40A, § 3.**

The Town cannot apply Article 46 in a way that would interfere with any applicable protections in G.L. c. 40A, § 3. In adopting G.L. c. 40A, § 3, (“Section 3”), the Legislature determined that certain land uses are so important to the public good that the Legislature has found it necessary “to take away” some measure of municipalities’ “power to limit the use of land” within their borders. Attorney General v. Dover, 327 Mass. 601, 604 (1950) (discussing predecessor to G.L. c. 40A, § 3); see Cnty. Comm’rs of Bristol v. Conservation Comm’n of Dartmouth, 380 Mass. 706, 713 (1980) (noting that Zoning Act as a whole, and G.L. c. 40A, § 3, specifically, aim to ensure that zoning “facilitate[s] the provision of public requirements”). To that end, the provisions of Section 3 “strike a balance between preventing local discrimination against” a set of enumerated land uses while “honoring legitimate municipal concerns that typically find expression in local zoning laws.” Trustees of Tufts Coll. v. City of Medford, 415 Mass. 753, 757 (1993). Over the years, the Legislature has added to the list of protected uses, employing different language—and in some cases different methods—to limit municipal discretion to restrict those uses.

Solar energy facilities and related structures have been protected under Section 3 since 1985, when the Legislature passed a statute codifying “the policy of the commonwealth to encourage the use of solar energy.” St. 1985, c. 637, §§ 7, 8. Id. § 2. Section 3’s solar provision grants zoning protections to solar energy systems and the building of structures that facilitate the collection of solar energy 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.

The Supreme Judicial Court recently reaffirmed the Section 3 solar protections in Tracer Lane II v. City of Waltham, 489 Mass. 775 (2022). In ruling that Section 3’s protections required Waltham to allow an access road to be built in a residential district for linkage to a solar project



in Lexington, the Court explicitly noted that “large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth.” *Id.* at 782 (citing Executive Office of Energy and Environmental Affairs, Massachusetts 2050 Decarbonization Roadmap, at 4, 59 n.43 (Dec. 2020) (“the amount of solar power needed by 2050 exceeds the full technical potential in the Commonwealth for rooftop solar, indicating that substantial deployment of ground-mounted solar is needed under any circumstance in order to achieve [n]et [z]ero [greenhouse gas emissions by 2050]”)). The Court explained that whether a by-law facially violates Section 3’s prohibition against unreasonable regulation of solar systems and related structures will turn in part on whether the by-law promotes rather than restricts this legislative goal. *Id.* at 781. While municipalities do have some “flexibility” to reasonably limit where certain forms of solar energy may be sited, the validity of any restriction ultimately entails “balanc[ing] the interest that the . . . bylaw advances” against “the impact on the protected [solar] use.” *Id.* at 781-82.

We cannot conclude that the amendments adopted under Article 46 constitute an unreasonable regulation of solar energy in contravention of G.L. c. 40A, § 3. However, the Town must apply these amendments, and the existing provisions of Section 8.9, consistent with G.L. c. 40A, § 3’s solar protections. If subsection 8.9.5.2’s special permit requirement is used to deny solar projects, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems, such application would run a serious risk of violating G.L. c. 40A, § 3.<sup>3</sup> The Town should consult with Town Counsel with 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,

ANDREA JOY CAMPBELL  
ATTORNEY GENERAL

*Nicole B. Caprioli*

By: Nicole B. Caprioli  
Assistant Attorney General  
Municipal Law Unit  
10 Mechanic Street, Suite 301  
Worcester, MA 01608  
(508) 792-7600 ext. 4418

cc: Town Counsel Jeremia Pollard

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<sup>3</sup> The new subsection 8.9.5.2 refers to the undefined term “small ground-mounted solar photovoltaic solar panels” but the rest of the by-law uses the term “small-scale ground mounted solar photovoltaic installation.” The Town should consult with Town Counsel to determine if Section 8.9.5.2 should be further clarified at a future Town Meeting to address this issue.