

*Town of Peru
Massachusetts*



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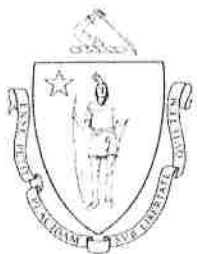
November 23, 2019

On the above date, I have posted copies of the bylaw amendment approval (*Article 2*) passed at the September 24, 2019 Special Town Meeting and approved by the Attorney General of Massachusetts on November 19, 2019 , at the following places in Peru:

Town Hall Bulletin Board (inside)
Town Hall Bulletin Board (outside)
Transfer Station
Community Center
Town of Peru Website : townofperuma.com



Peru Town Clerk



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November 19, 2019

Kim A. Leach, Town Clerk
Town of Peru
3 East Main Road
Peru, MA 01235

**Re: Peru Special Town Meeting of September 24, 2019 -- Case # 9624
Warrant Article # 2 (Zoning)**

Dear Ms. Leach:

Article 2 - We approve Article 2, and the related map amendment, from the September 24, 2019 Peru Special Town Meeting. We will return the approved map by regular mail. Our comments regarding Article 2 are provided below.

Article 2 amends the Town's zoning by-laws to: (1) create a new solar overlay district; (2) make related amendments to the zoning by-laws pertaining to the new solar overlay district; and (3) add a new Section 17, "Large Scale Ground Mounted Solar Photovoltaic System." (LGSPS). It appears that a LGSPS occupying up to 1.5 acres of land is allowed as-of-right in the Large Solar Overlay District (LSOD)¹ and a LGSPS occupying more than 1.5 acres is allowed by special permit in the LSOD.¹ Section 17.2. In addition, a LGSPS outside of the LSOD requires a special permit. Section 17.2. We offer the following comments on the new Section 17.

¹ There appears to be an internal inconsistency as to what LGSPS uses require a special permit and what uses may proceed as-of-right. Specifically, Section 3.9, "Definitions," defines a Large-Scale Ground Mounted Solar Photovoltaic System (LGSPS) as follows: "[a] solar system that is structurally mounted on the ground and is not roof mounted and has a minimum nameplate capacity of 250kw and occupies 1.5 acres or more of land. A solar system within the LSOD may proceed without the need for a special permit, variance, amendment, waiver or other discretionary approval. A LGSPS requires a Site Plan Review and Special Permit unless it is within the LSOD identified in Section 2 above." (emphasis added). In addition, Section 5.7, "Uses Permitted by Right," provides that a LGSPS "sited in the Large-Scale Overlay District (LSOD)" is permitted by right (without any size qualification).

However, Section 6.14 (a), "Uses Requiring a Special Permit," provides that a LGSPS "[s]ited within the Large-Scale Overlay District (LSOD) and occupying more than 1.5 acres" requires a special permit. In addition, Section 17.2 allows a LSGSP occupying up to 1.5 acres as-of-right within the LSOD but requires a special permit for a LSGSP occupying greater than 1.5 acres within the LSOD.

The Town may wish to consult with Town Counsel on this issue.

1. Section 17 Must be Applied by Applied Consistent with G.L. c. 40A, § 3

General Laws Chapter 40A, Section 3, protects solar energy systems and the building of structures that facilitate the collection of solar energy, and provides in pertinent part as follows:

No zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.

There are no appellate level judicial decisions to guide the Town or this Office in determining what qualifies as an unreasonable regulation of solar uses under G.L. c. 40A, § 3. However, a Land Court decision provides some guidance. In Briggs v. Zoning Board of Appeals of Marion, 2014 WL 471951 * 5 (2014), the Land Court determined that a zoning board of appeals' decision maintaining a division between commercial solar energy and residential accessory solar energy was reasonable and did not violate G.L. c. 40A, 3. In addition, as a general principle, we recognize that the Town may utilize its zoning power to impose reasonable regulations on solar uses based upon the community's unique local needs. See Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 116-117 (1955) ("Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions."). The reasonableness of a regulation is a fact-dependent determination that includes a consideration whether a regulation substantively diminishes or detracts from a project's usefulness or imposes an excessive cost that outweighs legitimate municipal concerns. See e.g., Duseau v. Szawlowski Realty Inc., 2015 WL 59500, * 8 (2015) (solar project proponent failed to demonstrate that restricting a solar energy project to the Town's Industrial Districts was an unreasonable regulation and not necessary to protect the public health and welfare).

In applying the amendments adopted under Article 2 the Town should consult closely with Town Counsel to ensure that the Town does not run afoul of the solar use protections in G.L. c. 40A, § 3.

2. Section 17.14 (f) - Surety

Section 17.14 (f) authorizes the Site Plan Review Authority to require a Project Proponent to provide a bond or other financial security to cover the cost of removal of the installation and/or remediation of the landscape. General Laws Chapter 44, Section 53, requires that performance security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of the Town's general fund (and subject to future appropriation), unless the Legislature has expressly made other provisions that are applicable to such receipt. General Law c. 44, Section 53G ½ does allow the deposit of surety proceeds into a special account under certain circumstances, as follows:

Notwithstanding section 53, in a...town that provides by by-law...rule, regulation or contract for the deposit of cash, bonds, negotiable securities, sureties or other financial guarantees to secure the performance of any obligation by an applicant as a condition of a license, permit or other approval or authorization, the monies or other security received may be deposited in a special account. Such by-law...rule or regulation shall specify: (1) the type of financial

guarantees required; (2) the treatment of investment earnings, if any; (3) the performance required and standards for determining satisfactory completion or default; (4) the procedures the applicant must follow to obtain a return of the monies or other security; (5) the use of monies in the account upon default; and (6) any other conditions or rules as the...town determines are reasonable to ensure compliance with the obligations. Any such account shall be established by the municipal treasurer in the municipal treasury and shall be kept separate and apart from other monies. Monies in the special account may be expended by the authorized board, commission, department or officer, without further appropriation, to complete the work or perform the obligations, as provided in the by-law...rule or regulation. This section shall not apply to deposits or other financial surety received under section 81U of chapter 41 or other general or special law.

For the Town to deposit surety proceeds into a special account, the Town must comply with the requirements of G.L. c. 44, § 53G ½. Otherwise, surety proceeds must be deposited into the Town's general fund, pursuant to G.L. c. 44, § 53. The Town should consult with Town Counsel with any questions regarding the proper application of Section 17.14 (f).

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

MAURA HEALEY
ATTORNEY GENERAL

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cc: Town Counsel Joel Bard