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February 2, 2012

Lynn M. Sibley, Town Clerk
218 Chestnut Plain Road
Whately, MA 01093

**RE: Whately Special Town Meeting of October 27, 2011 -- Case # 6181
Warrant Article # 1 (Zoning)**

Dear Ms. Sibley:

Article 1 - We approve the amendments adopted under Article 1 on the warrant for the Whately Special Town Meeting that convened on October 27, 2011. Our comments on the amendments adopted under Article 1 are provided below.

The amendments adopted under Article 1 make a number of changes to the Town's zoning by-laws pertaining to Solar Electric Generating Facilities. We approve the amendments adopted under Article 1, but caution the Town regarding the provisions of G.L. c. 40A, § 3, which protect solar energy systems and the building of structures that facilitate the collection of solar energy. General Laws Chapter 40A, Section 3, provides in pertinent part as follows:

No zoning ordinance or by-law 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.

General Laws Chapter 40A, Section 3, prohibits Towns from adopting zoning by-laws that 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. We caution the Town that the by-law amendments adopted under Article 1 cannot be applied in a manner that prohibits or unreasonably regulates solar energy or the building of structures that facilitate the collection of solar energy systems in violation of G.L. c. 40A, § 3. We suggest that the Town consult with Town Counsel to ensure that the application of the by-law amendments comply with G.L. c. 40A, § 3.

One change adopted under Article 1 adds a new Section 171-28.5, "Solar Electric Generating Facilities." In Section 171-28.5 Large-Scale Ground-Mounted Solar Electric Installation greater than 10kW up to 500 kW that occupy no more than 2 acres of land in the Town's Agricultural/Residential District 2, Commercial, Commercial-Industrial and Industrial

Districts (Solar Installations) are allowed by right subject to Site Plan Review. Our comments on portions of Section 171-28.5 are provided below.

1. Section C “Site Plan Review”.

Section C of the by-law requires a site plan review for Solar Installations. Subsection C (1) requires that all plans and maps of the Solar Installation shall be prepared, stamped, and signed by a Professional Engineer licensed to practice in the Commonwealth of Massachusetts.

We approve Subsection C (1), but caution the Town that Subsection C (1) must be applied in a manner consistent with G.L. c. 112, § 81R. General Laws Chapter 112, Section 81R, provides in pertinent part as follows:

Nothing in said sections shall be construed to prevent or to affect: –

* * *

(l) the performance of engineering work and services by a person, firm or corporation subject to the jurisdiction of the department of public utilities or the department of telecommunications and cable which work and services are performed as part of their employment and for the benefit of such person, firm, or corporation;

Section 81R exempts entities that are subject to the jurisdiction of DPU or DTC from the requirement of using a licensed professional engineer or registered engineer. *See New England Telephone & Telegraph Co. v. City of Lowell*, 369 Mass. 831 (1976) (city ordinance requiring use of registered engineers and land surveyors in projects involving city ways was inconsistent with and preempted by G.L. c. 112, § 81R(l)). Therefore, the Town must apply Subsection C (1)’s requirements of utilizing licensed professional engineers in a manner consistent with Section 81R. We suggest that the Town discuss the application of Subsection C (1) with Town Counsel.

2. Section K. “Abandonment or Decommissioning”.

Subsection K (3) requires proponents of Solar Installations to provide a form of surety either through an escrow account, bond, or otherwise to cover the cost of removing an installation and remediating the landscape, but in no event shall the surety exceed more than 125 percent of the cost of removal and compliance with the proposed by-law. We approve Subsection K (3), but caution the Town that the financial surety does not become Town funds unless and until the applicant defaults on the obligation under the proposed by-law. Moreover, if the Town must use the surety to pay for the performance of work required under the proposed by-law, an appropriation is required before expenditure is made to do the work. General Laws Chapter 44, Section 53, provides that “[a]ll moneys received by a city, town or district officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury.” Under Section 53 all moneys received by the Town become a part of the general fund, unless the Legislature has expressly made other provisions that are applicable to such receipt. In the absence of any general or special law to the contrary, performance security funds of the sort

contemplated here must be deposited with the Town Treasurer and made part of the Town's general fund, pursuant to G.L. c. 44, § 53. The Town must then appropriate the money for the specific purpose of completing work required under the proposed by-law. We suggest that the Town discuss the application of Subsection K (3) with Town Counsel.

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

Very truly yours,

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cc: Town Counsel (via email)