



Joint Meeting of the Planning Board and City Council Committee on Legislative Matters and the Northampton City Council

Members

Councilor William H. Dwight, Chair
Councilor Alisa F. Klein, Vice Chair
Councilor Maureen Carney
Councilor David A. Murphy

MEETING MINUTES

Date: February 11, 2019

Time: 5 p.m.

Location: City Council Chambers, 212 Main St., Northampton, Massachusetts

1. **Meeting Called to Order and Roll Call:** At 5 p.m., Acting Chair Alisa Klein called the meeting to order. On a roll call, the following councilors were present: Maureen Carney, Alisa Klein and David Murphy. **Absent:** William H. Dwight. Also present were City Solicitor Alan Seewald, City Councilor James Nash and Senior Planner Carolyn Misch.

Planning Board Members: Christa Grenat, George Kohout, Alan Verson, Janna White, Sam Taylor.

Councilor Klein announced that the meeting was being audio and video recorded for broadcast by Northampton Community Television.

3. **Minutes of January 14, 2019**
Councilor Carney moved to accept the minutes of January 14, 2019. Councilor Murphy seconded. The motion passed unanimously 3:0 with one absent (Councilor Dwight).

4. **Public hearing on proposed zoning change**
Public Hearing Notice published January 28, 2019 and February 4, 2019 per M.G.L. Chapter 40A, Section 5.

Councilor Klein introduced the public hearing and announced that she would read the amended version of the ordinance [with changes as recommended by the City Solicitor]. Councilor Klein read the text of the ordinance.

Councilor Murphy moved to open the public hearing. Councilor Carney seconded. The motion passed unanimously 3:0 by voice vote with one absent (Councilor Dwight). The public hearing was opened at 5:15 p.m.

Attorney Seewald noted that what is formally before the board is the original version as referred by City Council so there is a need to read this version into the record. Most of the changes were to the last section, he advised. Members agreed by consent to read just the portion of the original ordinance that was substantially changed. Councilor Klein proceeded to read this section.

A member of the audience said there was another version of the ordinance endorsed by the Tree Committee. Councilor Klein explained that this version was not formally before them because it was not referred by City Council to Legislative Matters and the Planning Board.

A. 18.231 An Ordinance Relative to Large-Scale Ground-Mounted Solar Arrays

As background, Ms. Misch explained that, in 2011, the city adopted specific provisions for solar installations particularly focused on ground-mounted systems. At that time, the ordinance differentiated between different types of ground-mounted systems: 1) those accessory to buildings and intended to provide electricity to private property, 2) utility-scale systems at a landfill or airport and 3) large-scale, ground-mounted systems not meant to provide energy for use at the site but to provide energy for selling to the grid or other users. (A special permit requirement was added for these large-scale systems.) At the time, a threshold was adopted providing that at no time could applicants clear-cut 25,000 board feet or greater and at no point would a special permit be granted for the city's primary agricultural areas: i.e., the Special Conservancy District in the flood plain along the Connecticut River.

The 25,000-board-foot threshold was based on the Massachusetts Department of Agriculture threshold for obtaining a Forest Cutting Plan, she noted.

Since 2001, planners have gradually tweaked the districts in which solar systems are allowed either by right or by site plan, tweaked setback requirements and revisited whether to allow solar systems in the flood plain on primary agricultural soils and food production areas. When this restriction was reevaluated, planners heard from the agricultural community that it didn't want to allow solar arrays on agricultural areas.

In the interim, Northampton has had more and more interest from private developers in installing large-scale, ground-mounted solar arrays, Ms. Misch continued. Three have been approved, including one at the former landfill, but it was discovered that there were some issues that the tweaks did not address. Primarily, there is a loophole in the restriction against tree removal in that someone could clear-cut property today and come in three or four months from now to apply for a special permit for a photovoltaic solar array.

In another issue, planners want to continue to protect agricultural lands but this means they are restricting development in the floodplain and so need to make other locations available for large-scale solar developments. City officials want to make sure they are creating a balance in all of the interests they are trying to protect, including the interest in promoting renewable energy sources, she observed.

The original version of the new solar ordinance submitted to the City Council maintained the special permit criteria but added conditions an applicant would have to meet. After further review with the City Solicitor, he raised concerns about the statutory exemption in state law around municipalities' ability to restrict solar development. In 1985, the state statute was amended to say municipalities cannot prohibit or unreasonably regulate solar installations to the point that it effectively restricts them altogether. It is generally agreed that the 1985 amendment was directed to rooftop solar systems that would support on-site uses because the technology wasn't there for large-scale installations at the time and nobody was building them. The law hasn't caught up to the technology, she suggested.

They now have large-scale five-megawatt systems that are definitely different than what was envisioned in 1985. However, it is an open question throughout the state as to whether the statute applies to these systems since court cases have not been decided about whether cities can actually say no to them. They thought it prudent not to put the city on the path of potential legal challenge by potentially restricting these installations. Further, the city solicitor advised that the 2011 language probably could not withstand legal challenge. This is what led to the proposed amendments to what was first introduced, she concluded.

The primary changes are to eliminate the special permit prohibition on removing 25,000 board feet of timber and instead create a threshold that's more understandable to most of the public; i.e. – based on the acreage of trees being removed; also, to create a Site Plan Review process that clearly states that these systems are allowed as of right but that certain criteria must be met. The amendment changes the board foot calculation to five acres of tree clearing and creates a standard of review that would require that at least 50% of the land be protected from development for the duration of the time the system is be in place. Also, new language requires that stumps remain in place on site to address concern about maintaining carbon in the ground. Recent information indicates that, in New England, carbon is sequestered mainly in the ground so that, when stumps are removed, that is when most of the carbon is released. Leaving stumps in place and mounting solar panels on top provides some element of protection, she suggested.

Other special permit criteria related to clearing within the 200-ft Riverfront Area or 100-foot buffer were proposed to be deleted because that area is already under the jurisdiction of the Conservation Commission, Ms. Misch related. The city solicitor suggested that the Planning Board can't really override and work in the jurisdiction of the Conservation Commission since its job is to determine if there's an impact to those areas regulated by the Wetlands Protection Act (WPA). Doing so falls into the category of an additional burden that may be challenged under the Chapter 40A, Section 3 exemption for solar.

The rest of the language contains small tweaks that planners feel will make it a little easier to permit systems they want to encourage, such as those over landfills and parking lots and at airports.

Attorney Seewald began by reading aloud the section of the Zoning Act that protects solar uses 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 and welfare.”***

The term 'necessary to protect' is a very strict, stringent standard, he stressed. He agreed that, being decades old, the law is completely out of date and should be revised. However, the legislature knows this and has chosen not to change it, so they are stuck with it and this is what they have to apply.

In addition to being city solicitor he has represented solar companies. Most solar arrays go on farmland because large solar arrays need multi-acre parcels of flat open space most often found on farms. The legislature has put a heavy thumb on the scale in favor of solar and in order to prohibit it, municipal officials have to be able to show and prove that it's necessary to protect the public health, safety and welfare, he explained.

When he read the first iteration, he saw “no work or disturbance [allowed] within 100 feet of any state-protected bordering vegetated wetland. . . .”

An applicant can go before the Conservation Commission and get an Order of Conditions to work in this buffer zone so he thought it was not possible to argue that the prohibition is necessary to protect public health, safety and welfare. This "cuts strongly against any notion that working within 100 feet of a bordering vegetated wetland imperils the health, safety and welfare of people of this city."

He understands the need to protect the tree canopy and farmland and to find alternative sources of energy to fossil fuels, he assured. These are all laudable goals competing in this arena. However, he feels the city is somewhat constricted in putting a heavy thumb on trees when the legislature has already put a heavy thumb on solar.

He is not saying there is no other way to balance competing interests, he professed. Instead of restricting clearing to five acres, planners could get an expert to tell them exactly how much carbon is going to be released from an area of proposed clearing. Five acres is an arbitrary number, he suggested. In other words, the city can't just pick five acres and say 4 ½ acres doesn't pose the same threat to health, safety and welfare as five acres. City officials have to prove that the benefit from the solar is overridden by the detriment from cutting the trees in any particular case, he clarified.

PUBLIC COMMENT

Northampton resident Lilly Lombard announced her intention to speak wearing two different hats - as chair of the Northampton Public Shade Tree Commission (PSTC) and as private citizen and activist. As PSTC chair, the committee learned Friday that there were substantive changes to the draft ordinance which they voted to endorse January 2nd, she related. In order to put their stamp of approval as a board, they need to be able to deliberate and they are only able to do so within an open meeting.

She read aloud an official statement stating that the version under consideration is materially different from the version endorsed by her committee. She respectfully requested an additional month for the committee to be able to consider the amended version and discuss it during an open meeting before giving its formal endorsement.

As a private citizen, Attorney Seewald's remarks about the arbitrariness of considering five acres are very well-taken, Ms. Lombard continued. It makes her feel like they need to step back and really start all over.

In terms of the interpretation of Chapter 40A, she went to the Department of Energy Resources (DOER) website, which acknowledged the lack of clarity in interpretation of this law, she shared. She quoted a post from the site as follows: "Regarding large-scale, ground-mounted solar energy systems, DOER is unable to provide a definitive interpretation of 'unreasonable regulation' under Chapter 40A, § 3."

The website goes on to say, "Given the plain language of the statute, DOER believes that it is prudent to allow large-scaled ground-mounted solar energy systems somewhere in the community." However, it continues, ". . . a higher degree of municipal control over the location and permitting of these systems may not be inconsistent with Chapter 40A, Section 3. . ."

She is hoping they take a little time to go back to the drawing board to draft an ordinance that both allows for solar production some appropriate place in the city while protecting the services trees provide, Lombard reiterated. Along with carbon sequestration, there are other measurable benefits to trees that both enhance public health and welfare and should be taken into consideration, she concluded.

David Roitman of 575 Bridge Road informed members he represents a workgroup of Climate Action Now focused on farming, forests and food systems. One of its advisors is Professor William Moomaw, a leading climate scientist. It was very timely that Attorney Seewald pointed out the arbitrary nature of a clearing limit of five acres and the opportunity for more precise science on this because Professor Moomaw is working on this exact question right now.

Mr. Roitman referred to an e-mail exchange with Mr. Moomaw, lead author of several releases from the International Panel on Climate Change (IPCC). Mr. Moomaw is very attached to the idea that society has basically 12 years to change the way it does things so that greenhouse gas emissions are significantly lowered.

While it is entirely appropriate that a primary focus of this meeting be the legal aspect, that is not the only perspective, he reminded.

Mr. Moomaw's comments strongly suggest what Ms. Lombard has advocated; i.e. - slowing down and making sure they get this right. One point he has emphasized in recent talks is new knowledge and insights about the correlation between the age of trees and how much carbon they sequester. There is new understanding of how important it is to keep older trees in the ground. Another point in his correspondence is that in considering solar vs. trees, it is necessary to not just look at what trees contribute to carbon sequestration but to consider all the other things trees do, including water evaporation, lowering the urban heat island effect, cleaning the water and air of pollutants, etc. The fact that Mr. Moomaw is working on this very issue now and that the results of his work are likely to have a strong bearing on what they're considering all strongly support proceeding with all due care, he suggested.

John Skibiski of 50 Hastings Heights commented that, although a strong supporter of conservation and environmental issues, he realizes that life calls for constant rebalancing and that it is necessary to give up some good to accomplish another end. They have to balance their programs and decide whether they want solar energy or fossil fuel. If they want solar energy, they have to decide whether to build on crop land where somebody raises corn or cattle or on a standing wood lot; which are they going to give up? They really don't want to give up either, but if someone wants to build furniture or a house they're going to have to cut down some trees. He suggested a realistic approach; that the ordinance be usable to those who want to get involved in the solar industry. The city also benefits because there is a Payment in Lieu of Taxes (PILOT). Would they rather have small units scattered all over the city or medium-sized operations in specific locations? He asked rhetorically. Solar farms can't go everywhere, he pointed out. They're not going to be next door and they can't be in town but have to be on the outskirts where there is some space.

He is no solar technician but is a promoter and supporter of solar programs. He is proposing that the city make the ordinance usable for the solar industry and that, in regards to space, planners allow the cutting of 20 acres of timber in order to put in a moderate program if necessary. That would allow for a moderate-sized unit. He doesn't have the expertise to go into the details of the methodology, but a 20-acre clearing would give room for about a three-megawatt unit that would be usable for public purposes. If it were adequately arranged with screening, etc. he would think it would be a complement to the community. He doesn't see that as being unreasonable; he sees it as being a reasonable approach to doing what they're all after – reducing fossil fuel consumption.

He acknowledged there is a tradeoff. The community loses some forest area but gains the promise of solar energy which is long-lasting. He advocated giving further study to the proposal and working out technical terms, but, basically, "it should work, it should not be a hindrance to the community." The tradeoff would be a patch of woodlands, which Northampton has a lot of, he pointed out. Solar developers can crown-prune trees at the perimeter to allow for maximum sun exposure, he added.

Garrett Stover of 55 Fairview Avenue said he has three solar systems and is an alternative energy advocate. His original comment to them was going to be that they aren't protecting enough. He understands the constraints the state has left in place but it sounds as if a quantitative analysis of net carbon offset for any non-site serving solar system is 'something they could get away with.' He is also intrigued that constraints on solar installations related to aesthetic buffers don't seem to be in conflict with state law according to the solicitor's interpretation. If that is the case why aren't other concerns not directly related to public safety admissible? He asked.

He will be very curious to see what happens when people in wealthy communities in the eastern part of the state who don't want to look at solar panels start getting involved. He would be interested to see what sorts of challenges and, frankly, what sort of courage other communities have. He would much rather see Northampton continue to uphold its commitment to environmental quality and natural resources on which it has spent a great deal of time and money. The western part of the city has a magnificent portfolio of conservation land, and "it would be a tragedy to lose that."

In browsing solar industry websites, he noted that, "we're talking private equity here." As an ancillary of the business activity and investment, there is a benefit, he acknowledged. But, "these people do not care about your community, they will clear cut as many acres as they possibly can." An 8% annual return on investment "sounds pretty sweet to me," he said. The Park Hill Road solar facility has been sold twice, he noted.

"Stay awake and please do whatever you can," he urged.

Emily Melzer of Olive Street said she is here as a concerned citizen and parent of two children growing up in Northampton and the planet. When she received the [public hearing] notice and saw the big changes, she thought they were significant. It is surprising to her that this is the first she's heard about such big changes to the trees. A special permit process seems like a great choice because it allows the public to look at small things. To allow clear-cutting for an unlimited amount of acreage for solar systems with a life span of 20 years "feels like a really big decision," she observed.

There doesn't seem to be a clear winner in the argument against the value of solar energy vs. the value of trees, she observed. She urged them to do whatever they could within the limit of the law to keep the public voice and allow for a special permit.

She did a little research Friday and found some interesting examples. New Marlborough spent about a year revising its solar policy working closely with a planner from Berkshire Planning. Its zoning does maintain the special permit requirement for certain sizes and places.

Townsend pulled back some of its special permit requirements but not all of them. A notation at the top of an ordinance adopted said "Approved by the Attorney General." She would like to see what can be learned from other towns and what experts they could bring in to guide them in this process. She reached out to Jo

Comerford's office and would love to see what they could do at the state level. She would be interested to know why the issue hasn't been tested in a single one of the communities with special permits in place.

Rebecca Neimark of Columbus Avenue said she thinks it would be counter to public health, safety and welfare if, in clear-cutting trees to create a solar array, they release more carbon than can be saved by solar energy. She too encouraged the board to slow down and try to find a way to protect the health of the community and their future.

Naila Moreira - Northampton resident and teacher at Smith College – said she is in support of all those who spoke in favor of slowing down and considering new ways to retain forest land. She doesn't see any reason forest land should be lower in priority than farmland considering the many benefits of trees. Carbon sequestration is just one piece of the puzzle; trees as they know provide improved air quality and filter ground water, and residents in areas of trees have lower levels of cortisol and stress hormones.

The point of solar being a private-equity investment is also very well-taken, Ms. Moreira observed. She stressed the need to recognize that they can by their regulations provide incentives for people to put solar systems in places where they would be most appropriate. She cited a statistic that there is 125 megawatts of solar capacity on top of municipal facilities in Massachusetts in cities with populations over 100,000. The City of New Bedford alone put 16 megawatts of solar on top of its municipal buildings, she related. New technologies are coming on board like solar shingles and solar roads which hopefully they will move to. In the meantime, trees have a really long lead time to get them back so short-sighted decisions to chop them down will have really long-term consequences. She supported the proposal to slow things down.

Marty Nathan of 24 Massasoit Street joked that "we've all got to be Loraxes in this time." She looked up on the web the public health importance of trees and found that in addition to producing oxygen, intercepting airborne particulates and reducing smog - enhancing a community's respiratory health - access to trees in green spaces and parks promotes greater physical activity and reduces stress and blood pressure, etc.

"I think we all know that trees do more than sequester carbon," she concluded. The latest climate literature contains hair-brained schemes to sequester carbons while trees have been doing it for eons. She agrees with the slowdown and accepts the possibility that if they move forward, they may have to face legislators and the courts.

John Cohen of Island Road said they are overlooking the fact that, not only is the planet in a climate crisis, it is in a crisis of natural biodiversity. Trees and forests are primary habitat of non-human creatures. They are living in an era when the insect population is becoming extinct. The giant web of life of which humans are a minor part requires them to do what they can now not to destroy the web of life that supports them.

Councilor Klein offered the opportunity for Planning Board and Legislative Matters Committee members to pose questions.

In response to a question from Councilor Carney, Ms. Lombard confirmed that the PSTC no longer recommends this version of the ordinance because they haven't had a chance to discuss it.

Ms. Misch said it makes sense to take their time moving forward but the only drawback is that trees can still be cut in the meantime since there is a loophole in current zoning. In the interim it may make sense to provide some framework for further review, she suggested.

Members asked questions and offered comments. Mr. Verson expressed the opinion that the real question is whether an acre of trees creates more benefit than an acre of solar panels. He doesn't think they can move forward until they get solid information on this point, he said. There is an implicit assumption by PSTC members that trees are better but this may or may not be true. He personally doesn't see a problem with delaying adoption for a couple of months.

Attorney Seewald apologized to Ms. Misch if she came away from their conversation with the idea that a special permit is not allowed. A special permit can be required but when all the discretion provided by state law is stripped out, it essentially turns the process into site plan review, he noted. They can call it a special permit as long as all the criteria go to the issue of being 'necessary to protect' public health, safety and welfare, he clarified.

Ms. Misch confirmed that the reason the special permit requirement was eliminated is that it implies greater discretion on the part of the Planning Board. If they advertise that something requires a special permit but in reality restrict denial so significantly, it is not really truth in advertising. She agreed that there is no magic to the threshold of five acres. The idea is to close the loophole in current zoning while finding answers to the questions raised.

Discussion continued, with Councilor Murphy asking if there was any particular timeframe for adoption of the ordinance.

Ms. Misch said no. After seeing what took place on Ryan Road, planners decided it made sense to move forward sooner rather than later. As background, she explained that, as part of the project to install a five-megawatt system at the former Willard gravel pit on Ryan Road, property owners removed over 100,000 board feet of timber. The land was clear-cut before developers applied for the project. The project would not have been able to move forward under revised zoning.

Members discussed how to proceed. Ms. Misch agreed it made sense to understand the science better and fine-tune the threshold for clearing. She doesn't think deferring action for a few months would be a problem. Councilor Klein asked what the process of exploring a more objective performance standard would involve, and Ms. Misch said the planning department would do its best to provide any information requested. No matter what is decided the council may need to revisit the ordinance in a year or so if new information comes out, Misch noted.

Councilor Klein asked who would craft the questions they want answered. Ms. Misch suggested members think about what questions they want answered based on public comments.

Councilor Klein expressed the opinion that the ordinance needs to go back to the PSTC, since it is one of its sponsors. It doesn't make sense to move forward if one of the sponsors has backed out, she suggested.

Councilor Murphy said he shares the concern that one of the sponsors is not comfortable with the ordinance in its current form. From the standpoint of council action, he doesn't think the Legislative Matters Committee would want to act until the Planning Board and PSTC decide if they are going to support the ordinance. Legislative Matters usually weighs in after every other board has weighed in, he noted.

A Planning Board member shared the opinion that, at minimum, planners need to put in a lookback period.

Councilor Murphy moved to continue the public hearing until April 8th. This will give the Planning Board time to review the ordinance and hopefully make a recommendation, he said. Councilor Carney seconded. The motion passed unanimously 3:0 by voice vote with one absent (Councilor Dwight).

Ms. White moved to continue the Planning Board hearing to 7 p.m. on March 28th in Council Chambers. Ms. Grenat seconded. The motion passed unanimously 5:0 by voice vote.

5. Items Referred to Committee

None

6. New Business

None

7. Adjourn

Councilor Murphy moved to adjourn. Councilor Carney seconded. The motion passed unanimously 3:0. The meeting was adjourned at 6:45 p.m.

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