



MARTHA COAKLEY  
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL  
CENTRAL MASSACHUSETTS DIVISION  
10 MECHANIC STREET, SUITE 301  
WORCESTER, MA 01608

(508) 792-7600  
(508) 795-1991 fax  
[www.mass.gov/ago](http://www.mass.gov/ago)

March 27, 2014

Emily Johnson, Town Clerk  
Town of Monterey  
P.O. Box 277  
Monterey, MA 01245

**RE: Monterey Special Town Meeting of December 6, 2013 - Case # 7050  
Warrant Articles # 6 and 7 (Zoning)  
Warrant Article # 2 (General)**

Dear Ms. Johnson:

**Articles 6 and 7** - We approve the amendments to the Monterey by-laws adopted under Articles 6 and 7 at the December 6, 2013 Special Town Meeting. Our comments regarding Article 6 are provided below.

**Article 2** - The Attorney General's deadline for action on Article 2 is extended for 30 days under the authority conferred by G.L. c. 40, § 32 as amended by Chapter 299 of the Acts of 2000. The agreement with Town Counsel for an additional 30 day extension is attached hereto. The amendments adopted under these Articles will be acted upon by the Attorney General on or before **April 29, 2014**.

**Article 6** - The amendments adopted under Article 6 add to the Town's zoning by-laws a new Section 7.8, "Solar Photovoltaic Systems." Section 7.8 pertains to Large-Scale Ground-Mounted Solar Photovoltaic Systems (LGSPS) and Utility-Scale Industrial Ground-Mounted Solar Photovoltaic Systems (UGSPS), which are allowed in all districts subject to a special permit and site plan review.<sup>1</sup>

1. Statutory Protection of Solar Uses.

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

---

<sup>1</sup> Small-Scale Solar Photovoltaic Systems (SSPS) are allowed in all districts and require only a building permit.

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.

The new Section 7.8 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 encourage the Town to consult with Town Counsel regarding the proper application of Section 7.8 in light of the protections granted to solar energy systems in G.L. c. 40A, § 3.

2. Section 7.8.4, Plans.

Section 7.8.4 (2) (c) requires the applicant to provide a site plan showing “[o]ne or three line electrical diagram detailing the solar installation, associated components, and electrical interconnection methods, with all National Electric Code compliant disconnects and overcurrent devices.” The Massachusetts Electrical Code, 527 C.M.R § 12.00, is the electrical code for the Commonwealth. It is unclear what the Town means by “all National Electrical Code compliant disconnects and overcurrent devices.” However, nothing in Section 7.8.4 (2) (c) relieves an applicant from complying with the requirements of the Massachusetts Electrical Code. The Town may wish to amend Section 7.8.4 (2) (c) to reference the Massachusetts Electrical Code rather than the National Electrical Code.

Section 7.8.4 (2) (h) requires the applicant to provide documents pertaining to “fire protection measures.” The Massachusetts Building Code regulates fire suppression systems. *See* 780 CMR 901.1 et seq. Although we approve Section 7.8.4 (2) (h), the Town’s by-law cannot be construed as requiring specific fire suppression systems or sprinklers because only the Building Code can regulate in that area. *See Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Department of Springfield*, 462 Mass. 120 (2012) (Building Code preempted city ordinance requiring certain type of fire protection signaling system). We suggest the Town consult with Town Counsel on this issue.

Section 7.8.4 (4) requires, as a condition of both the Special Permit and Site Plan approval, that the applicant post a bond to cover the cost of remediation of any damage to the landscape and to cover the cost of removal of the installation from the site should the facility cease to operate. Bond proceeds do not become Town funds unless and until the applicant defaults on the obligation under the by-law. Moreover, if the Town must use the bond to pay for compliance with the removal or restoration, 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 7.8.4 (4) 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 removal of the solar installation and remediation of the site.

3. Section 7.8.12, Annual Reporting.

Section 7.8.12 requires the owner or operator of the installation to submit an Annual Report demonstrating and certifying compliance with the Operation and Maintenance Plan and the requirements of the zoning bylaw and the approved site plan. The by-law provides that “[f]ailure to provide such an annual report, within said forty-five (45) days, *shall be a violation of the Special Permit* and subject to penalties and fines of \$100 per day commencing at the expiration of said forty-five (45) day period until the annual has been provided as specified in G.L. c. 40-21 D.” (emphasis added).

General Laws Chapter 40, Section 21D provides that the process may be used to enforce a violation of a “by-law or any rule or regulation of any municipal officer, board or department. . . .” We suggest that the Town consult with Town Counsel regarding a potential future amendment to the by-law to clearly reference that the G.L. c. 40, § 21D fine is based on a violation of the by-law (not a violation of the special permit).

**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,

MARTHA COAKLEY  
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  
nicole.caprioli@state.ma.us

cc: Town Counsel Jeremia Pollard