

Jacobsen, Kristen

From: Beckley, Stuart
Sent: Thursday, April 20, 2023 3:05 PM
To: Jacobsen, Kristen
Subject: FW: Battery storage

From: Jonathan G. Murray <JMurray@k-plaw.com>
Sent: Thursday, April 20, 2023 12:14 PM
To: Beckley, Stuart <sbeckley@townofware.com>
Cc: Jeffrey T. Blake <JBlake@k-plaw.com>; Nicole J. Costanzo <NCostanzo@k-plaw.com>
Subject: RE: Battery storage

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Good Afternoon Stuart,

I have just returned from paternity leave, and Jeff Blake asked me to jump back in since we have had previous conversations on this topic. As for your questions:

For non-solar battery storage, they are concerned that the world doesn't know enough about them, so they are wondering if they can be prohibited town-wide?

In my opinion, this is an open question of law, and the Attorney General has not yet issued a definitive opinion on this. However, based upon recent AG decisions, I would caution the Board against an outright prohibition.

The Attorney General's Office has raised two issues recently that suggests, in my opinion, it may disapprove a bylaw that outright prohibits all battery energy installations, even if they are not associated with solar.

- 1.) First, the Massachusetts Energy Facilities Siting Board is an independent state review board located administratively within the Massachusetts Department of Public Utilities ("DPU"). By reviewing specific requests for approval to construct certain types of jurisdictional energy facilities, the Siting Board is charged, by state statute, with ensuring that the proposed facility will provide a "reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." See G.L. c. 164, § 69H. The Massachusetts statute governing Siting Board activities is Massachusetts G.L. c. 164, § 69G through § 69S. The Siting Board's regulations can be found at 980 CMR 1.00 through 12.00.

In general, the Siting Board's jurisdiction includes review of large electric generating plants, electric transmission lines, intrastate natural gas and oil pipelines, facilities for the manufacture or storage of natural gas, and very large oil storage facilities in Massachusetts. The Attorney General has suggested, to the extent a battery energy storage facility is subject to review by the Siting Board, the Town may be preempted in applying a zoning bylaw to the potential use. See specifically Case # 10526 (Town of Carver) at Page 8, a copy of which is attached hereto.

- 2.) Second, The state Board of Building Regulations and Standards (BBRS) and the state Division of Occupational Licensure (DOL) have confirmed to the Office of the Attorney General that energy storage systems are regulated in the 2021 edition of the International Energy Conservation Code (IECC), which the BBRS is statutorily obligated to adopt. See e.g., Section CE262 AS and subsection CB103.7 of the International Energy Conservation Code (2021 ed.).

General Laws Chapter 143, Section 94 (o) mandates the BBRS to update the Building Code in light of these IECC provisions by directing the BBRS:

To adopt and fully integrate the latest International Energy Conservation Code and any more stringent amendments thereto as part of the state building code, in consultation with the department of energy resources. The energy provisions of the state building code shall be updated within 1 year of any revision to the International Energy Conservation Code.

Energy storage systems are also regulated in Section R328.1 of the 2021 edition of the International Residential Code (IRC), which the BBRs has voted will be a core component of the next edition of the Building Code.

When the Building Code is so updated to reflect the IECC and IRC provisions regarding energy storage systems, the Building Code will preempt municipal regulation in areas covered by the updated Building Code. The Legislature has charged the BBRs --not any city or town--with determining what construction methods and materials should and should not be allowed to ensure "[u]niform standards and requirements for construction and construction materials...." G.L. c. 143, § 95 (a). "In authorizing the development of the [C]ode, the Legislature has expressly stated its intention: to ensure [u]niform standards and requirements for construction and construction materials." St. George Greek Orthodox Cathedral of Western Mass. Inc. v. Fire Dept. of Springfield, 462 Mass. 120, 126 (2012) (citing G.L. c. 143, § 95(c) (invalidating Springfield ordinance that required certain type of fire protective signaling equipment where the Building Code presented four different options for such systems). Based on this express legislative goal of uniformity the St. George court found "the Legislature [had] demonstrate[d] its express intention to preempt local action." Id. at 129. As such, the Building Code occupies the field and any local by-law or ordinance that attempts to regulate what the Building Code regulates is preempted.

In light of the broad preemptive scope of the Building Code, the Town should be aware that zoning bylaw amendments concerning aspects governed (or soon to be governed) by the Building Code may be preempted and unenforceable.

In my opinion, and in light of the fact that there is a new Attorney General, there is a legitimate possibility that the Attorney General's Office disapproves an outright prohibition against all battery energy systems, even if they are not associated with solar. Therefore, I recommend that the Planning Board consider regulating these types of installations through other reasonable regulations (e.g., site plan review, etc.).

However, as stated above, this is still an open question of law. If the Planning Board was inclined to prohibit this specific use outright, the Town can make a good-faith argument that it is within its power to regulate this use under its zoning power. With that said, the Planning Board's report on any such bylaw must be as detailed as possible, and cite multiple and specific examples on why the Town is prohibiting the use (i.e., health and safety concerns, vegetation removal, fire risk, etc.). In my opinion, if the Board's rationale is only not enough is known about the use yet, the Attorney General will not consider that a permissible exercise of zoning power.

And on the line, if that use is not mentioned in the zoning use table, does that mean therefore that they are not allowed, or is it better to list the use and put N's across the districts?

As a matter of clarity, I generally recommend that any use the Town is specifically prohibiting be called out in the zoning use table. That way, future applicants, boards, and zoning enforcement officials are clear as to what uses are allowed and prohibited in a specific district.

If you have any further questions or concerns, please do not hesitate to contact me. Thank you.

Jonathan Murray

Jonathan G. Murray, Esq.

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From: Jeffrey T. Blake <JBlake@k-plaw.com>
Sent: Wednesday, April 19, 2023 12:47 PM
To: Beckley, Stuart <sbeckley@townofware.com>; Nicole J. Costanzo <NCostanzo@k-plaw.com>
Cc: Jonathan G. Murray <JMurray@k-plaw.com>
Subject: RE: Battery storage

Stuart,

We will get you our response shortly.

Jeff

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From: Beckley, Stuart <sbeckley@townofware.com>
Sent: Tuesday, April 18, 2023 8:19 AM
To: Jeffrey T. Blake <JBlake@k-plaw.com>; Nicole J. Costanzo <NCostanzo@k-plaw.com>
Subject: Battery storage

Good morning,

With apologies if I have caused any confusion about another draft, I think you have the latest with minor exception. The Planning Board discussed the bylaw. They are looking to add a zoning district and reconsider setbacks, but the language remains the same,

UNLESS

For non-solar battery storage, they are concerned that the world doesn't know enough about them, so they are wondering if they can be prohibited town-wide?

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Thank you. The Board hearing continues on Thursday.

Enjoy your day.

Stuart