

LEGAL OPINION - HALE ST SOLAR EXT.

Cc: Tracy Murphy <tmurphy@townofwinchendon.com>; Keith Hickey <KHickey@townofwinchendon.com>

Subject: RE: Site Plan Time Extension(s)

Alison:

You have requested an opinion concerning the ability of the Planning Board (the "Board") to extend the time for a developer to commence a solar project under a Formal Site Plan Approval once the Site Plan Approval became void pursuant to its terms. In my opinion, once the developer failed to timely record the Site Plan Approval decision and to timely commence work, the Site Plan Approval was no longer in effect. Consequently, the Planning Board no longer retained authority to extend the time for performance.

According to the information provided to me, Oya Solar MA, L.P. ("Oya") filed an application with the Board in August 2018, for site plan approval to construct a ground-mounted solar array, pursuant to Article 6.11 of the Winchendon Zoning Bylaw. On November 13, 2018, the Board voted to grant Site Plan Approval subject to the conditions requiring that the Site Plan Approval be filed with the Registry of Deeds within sixty (60) days after the expiration of the appeal period, and that the authorized work commence within twelve (12) months of the decision date. The Site Plan Approval expressly provided that the Approval would become void if not timely recorded and/or if the work were not timely commenced. However, after Oya had failed both to timely record the Site Plan Approval, and to commence work within the required 12-month period, Oya requested an extension of time to commence work. And, on February 4, 2020, the Board voted to grant Oya's extension request.

You have specifically asked whether the Board had the authority to grant the extension request, given that the 12-month deadline had already lapsed at the time Oya filed the request. In my opinion, the Board did not have authority to grant the extension because the Site Plan Approval was already void at the time Oya filed the extension request. Condition E of the Site Plan Approval states in part: "This site plan approval, together with this list of conditions, must be filed at the Worcester Registry of Deeds forthwith, but **not later than sixty (60) days** after the expiration of the appeals period . . . **If these required documents are not filed within the required time, this site plan approval shall be void.**" (Emphasis added). Sixty (60) days after the expiration of the appeals period was February 10, 2019. However, Oya did not record the Site Plan Approval with the Registry of Deeds until April 30, 2019, at which point the Approval was void and of no effect. Consequently, there was no longer an effective site plan approval for the Board to extend.

Even if the site plan approval had been timely recorded, however, the Board would not have had the authority to extend the time for commencement of work once the twelve-months had expired. Although Condition M of the Site Plan Approval, as amended by Special Condition 15, contemplates an extension of time to commence work, if requested by the applicant, that condition also expressly states:

If the work is not so commenced and pursued, this site plan approval shall lapse and become void. (Emphasis added).

Once a Site Plan Approval lapses and becomes void, it cannot be revived and there is nothing to extend, in my opinion. Cf. Hunters Brook Realty Corporation v. Zoning Board of Appeals of Bourne, 14 Mass. App. Ct. 76, 80 (1982) (holder of a lapsed variance who seeks to reestablish his rights must initiate a new proceeding); Lopes v. Board of Appeals of Fairhaven, 27 Mass. App. Ct. 754, 757 (1989) (holder of a lapsed variance must prove anew to the Board the existence of each of the statutory conditions for a variance).

In summary, because the Site Plan Approval was void prior to the filing of the extension request, it is my opinion that the Board lacked the authority to extend the time to commence and complete the work authorized by the Site Plan Approval. I recommend, therefore, that the Board inform Oya that the Site Plan Approval was rendered void by its failure to comply with Condition E and Special Condition 15, and permit Oya to file a new application for Site Plan Approval.

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

Best ,

Katie

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From: Alison Manugian <AManugian@townofwinchendon.com>

Sent: Wednesday, March 4, 2020 3:38 PM

To: Katherine D. Laughman <klaughman@k-plaw.com>

Cc: Tracy Murphy <tmurphy@townofwinchendon.com>

Subject: Site Plan Time Extension(s)

Katie,

The Planning Board received a request for time extensions, both to commence and complete, on a site plan for a Solar project here in Winchendon. **A question has come in around the ability of the Planning Board to make this decision. Ideally the request for extension should have come in prior to the end of the 6 month initial window but the project was delayed as National Grid undertook their study and determined connectivity for this project (like many others). I have attached the original decision (from November 2018) and the extension decision. Per this original decision construction should have started by My 2019 and should be completed by November of 2020. Standard Conditions M and J speak to these windows.**

"J. The project must be completed to the satisfaction of the Planning Board within two (2) years from the date of this site plan approval unless an extension of time is mutually agreed upon in writing by the applicant and the Planning Board. If this work is not completed within the required time including approved extensions, this site plan approval shall lapse and become void. ...

M. Work under this site plan shall be commenced within six months of the date of its approval increased by any time consumed by appeals of the approval and shall be diligently pursued thereafter until the completion of the work. The Planning Board may extend this period if so requested by the applicant. If the work is not so commenced and pursued, this site plan approval shall lapse and become void."

Section 6.1 of our Site Plan Regulations is the only other piece that speaks to time frames.

"Section 6.1 Construction

Construction shall be carried out in compliance with the approved site plan and these rules and regulations. All work shall be completed within the time limits specified in the conditions of the plan and any extensions that may be granted by the Board. The Board may grant a time extension for good cause shown without a formal hearing. [Section added Jan. 15, 2008]"

We have two questions:

Was the Planning Board acting within it's rights when they voted to extend the start and completion dates?

If not, how do we best move forward at this point?

Please let me know your thoughts on this and if you would like to have a phone conversation. The Board is meeting again on the 17th and I would like to understand the best path forward in advance of that meeting.

Thank you,
Alison

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