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April 7, 2022
121639-1

Ms. Patricia M. Kendall, Chair
Town of Ashland Planning Board
101 Main Street
Ashland, MA 01721
Ashland.planningboard@ashlandmass.com

Re: NextGrid, Inc. / 311 Pleasant Street – Application for Special Permit Relief

Dear Chair Kendall:

This office represents NextGrid, Inc., which is seeking to lease the property located at 311 Pleasant Street in Ashland, Massachusetts (the “Property”) for the installation of two solar canopies within the existing parking lot area of the existing Veterans of Foreign Wars (VFW) building (the “Project”).¹ NextGrid has a pending application before the Planning Board in which it seeks special permit relief under the Floodplain Overlay District regulations of the Ashland Zoning Bylaws. For the reasons set forth below, the proposed Project satisfies the applicable criteria in the Ashland Zoning Bylaws (“Bylaws”), and as such, special permit relief is warranted.

The Proposed Project

As set forth in the application materials submitted by NextGrid, the proposed solar canopies are to be installed within the existing impervious parking lot within the Property. Because the proposed system is under 250 kW DC, it is not considered a “Large-scale Ground-Mounted Photovoltaic Installation” under the Town’s Bylaws. *See* Bylaws, § 10 (Definitions). As such, and unlike large-scale ground-mounted photovoltaic installations, the Town does not prohibit or place restrictions on this type of proposed solar energy system.

Importantly, the proposed solar use is a protected use under the Massachusetts Zoning Act, G.L. c. 40A, § 3, and as such, cannot be unreasonably regulated or prohibited without a showing that the solar use adversely affects the public health, safety, or welfare. Moreover, the structures necessary to facilitate the solar use fully comply with all applicable dimensional requirements, including setbacks, for the Residence B zoning district. Special permit relief under the Bylaws is only required due to the location of the Property being within the Floodplain Overlay District.

¹ Initially, the Project proposed three solar canopies, but at the request of the Board, the total number of solar canopies has been reduced from three to two.

The Proposed Solar Energy Use is Protected Under the Zoning Act

As you may know, the State Legislature has codified solar energy as a protected use in the Zoning Act, General Laws Chapter 40A, § 3.² In particular, Section 3 provides zoning protections to solar energy systems and the building of solar structures as follows:

No zoning...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 or welfare.

The Massachusetts Department of Energy Resources (DOER) has opined that solar systems under 250 kW DC, such as the system proposed here, “cannot be prohibited as a use within a Zoning Bylaw.” *See* Policy Guidance for Regulating Solar Energy Systems dated March 2014, p. 4. Moreover, “because Special Permits explicitly provide the option to deny an application, the Special Permit process is not a viable choice for regulating these systems.” *Id.*

Like the DOER, the Town of Ashland does not prohibit or restrict solar energy systems under 250 kW DC in any of its zoning districts; rather, it only places limitations on large-scale ground-mounted solar installations proposed within the Town. *See* Bylaws, § 8.3 (allowing large-scale ground-mounted solar photovoltaic installations within the Photovoltaic Installations Overlay District, subject to review by the Planning Board). As this is not a large-scale ground-mounted solar installation, the provisions set forth in Section 8.3 of the Bylaws do not apply. Only the dimensional requirements applicable to the Residence B district apply, and the Project fully satisfies those requirements, as shown on the Proposed Site Plan.³

The Project Satisfies the Floodplain Overlay District Regulations

Because the need for Special Permit relief arises solely due to the Property’s location within the Floodplain Overlay District, the Planning Board may apply the Floodplain Overlay District Regulations to the proposed Project.

The Floodplain Overlay District Regulations apply to uses “whether permitted as a right or by special permit,” and “no structure...shall be erected...unless a special permit is granted by the Planning Board.” Bylaws, § 8.1.3-8.1.4. The regulations also set forth the following special permit criteria for uses within the Floodplain Overlay District:

² Solar energy uses, like other uses protected under the Zoning Act, are so important to the public good that it was necessary “to take away” some measure of municipalities’ “power to limit the use of land” within their borders. *Attorney General v. Dover*, 327 Mass. 601, 604 (1950). Thus, “neighborhood hostility” or contrary local “preferences” should not dictate whether solar energy systems are constructed in sufficient quantity to meet the public need. *Newbury Junior Coll. v. Brookline*, 19 Mass. App. Ct. 197, 205, 207-08 (1985).

³ Even though the setbacks applicable to large-scale ground-mounted photovoltaic installations do not apply here, at the request of the Board, NextGrid revised its plans to ensure the proposed canopies maintain at least a 50-foot setback from all property lines, consistent with the provisions in Section 8.3.7(1) of the Bylaws.

1. The proposed use shall comply in all respects to the provisions of the underlying district in which the land is located.
2. Within ten (10) days of the receipt of the application, the Board shall transmit one (1) copy of the development plan to the Conservation Commission, Board of Health and Building Inspector. Final action shall not be taken until reports have been received from the above Boards or until thirty-five (35) days have elapsed.
3. All encroachments, including fill, new construction and substantial improvements to existing structures, and other development are prohibited in the floodway unless certification by a registered professional engineer is provided by the applicant demonstrating that such encroachment shall not result in any increase in flood levels during the occurrence of the one-hundred-year flood;
4. The Board may specify such additional requirement and conditions as it finds necessary to protect the health, safety and welfare of the public and the occupants of the proposed use; and
5. All subdivision proposals must be designed to assure that:
 - a. Such proposals minimize flood damage;
 - b. All public utilities and facilities are located and constructed to minimize or eliminate flood damage; and
 - c. Adequate drainage is provided to reduce exposure to flood hazards.

Here, the Project satisfies all applicable criteria. The proposed solar energy use is a protected use allowed by right in the Residence B district; the Project has been approved by the Conservation Commission; the minimal construction proposed within the floodway will not result in any increase in flood levels during the occurrence of the one-hundred-year flood, as certified by the Project engineer and approved by the Conservation Commission; and there is no evidence that the Project will have any negative impacts on the health, safety, or welfare of the public or the occupants of the VFW building. Accordingly, a special permit should issue.

Consideration of the General Special Permit Criteria is Improper

We understand that various concerns have been raised by Board members concerning the aesthetics of the Project, particularly due to the Project's location adjacent to the Sudbury River. Respectfully, these considerations are improper in these circumstances, where the only question before the Board is whether the Project satisfies the Floodplain Overlay District regulations.

In *NextSun Energy LLC v. Fernandes*, Mass. Land Court Docket No. 19 MISC 000230 (Feb. 22, 2021) (Foster, J.), 2021 WL 669059, at *14, a solar developer required special permit

relief under the floodplain overlay district regulations of the local bylaw. In denying the application, the local board went beyond those criteria and considered the general special permit criteria: “whether the use is socially or economically desirable, whether it would satisfy an existing need, whether its advantages outweigh any detrimental effects, whether there are other reasonable alternatives, and whether specific conditions could be imposed to minimize its detrimental effects.” *Id.*

In finding the board erred as a matter of law, the Massachusetts Land Court held that the board did “exactly what is not permitted: subjecting an as-of-right use to a discretionary permit.” *Id.*, citing *Prudential Ins. Co. of Am. v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 281 (1986) (emphasis added). The Court found the board could not apply the town’s general special permit criteria to the proposed solar use; rather, the board was “only entitled to apply the two conditions or limitations of [the floodplain overlay district provisions]. In applying those conditions to the amended application, the [b]oard could not deny the application. Rather, it was required to approve the amended application subject to those conditions, much in the way of a site plan approval.” *Id.* As in *NextSun Energy LLC*, a special permit denial here by the Ashland Planning Board based on factors beyond those set forth in the Floodplain Overlay District provisions of the Bylaws would be rejected as improper by a reviewing court.

Site Plan Review Cannot Prohibit the Protected Solar Use

Likewise, the Planning Board cannot deny the proposed solar use through the Bylaws’ site plan review mechanism. “The Supreme Judicial Court has repeatedly focused on site plan review as the *regulation of a use rather than its prohibition* to distinguish site plan review from the special permit process.” *Osberg v. Plan. Bd. of Sturbridge*, 44 Mass. App. Ct. 56, 59 (1997) (emphasis added). “[S]ite plan approval...allows for regulation but not for prohibition.” *Summit Farm Solar, LLC, supra* at *10. The “language of a site plan approval provision in a zoning bylaw ‘implies regulation of a use rather than its prohibition.’” *Id.*, quoting *Y.D. Dugout, Inc. v. Bd. of Appeals of Canton*, 357 Mass. 25, 31 (1970). Thus, the protected solar use cannot be denied through site plan review.

The Project Poses No Public Safety, Health, or Welfare Concerns

The fundamental purpose of G.L. c. 40A, § 3 is to “facilitate the provision of public requirements” that may be locally disfavored. *Cnty. Comm’rs of Bristol v. Conservation Comm’n of Dartmouth*, 380 Mass. 706, 713 (1980); see also *Northbridge McQuade, LLC v. Northbridge Zoning Bd. of Appeals*. Land Court Misc. Case No. 18 MISC 00519 (June 17, 2019) (Piper, J.) (“The purpose of the solar energy facility protections of G.L. c. 40A, § 3 is ‘to require some ‘standing down’ by municipalities to encourage and protect solar facilities – a use that might be seen as unwelcome in municipalities at a local level – by abutters, neighbors, and by town government.”). Thus, the Town must weigh the burdens that a municipal regulation

imposes on solar uses against justifications for the regulation based on legitimate municipal objectives grounded in the protection of health, safety or welfare. *Id.*

Here, there are no public health or safety concerns. Rather, the Board has suggested that the term “public welfare” includes aesthetic considerations. However, “[t]he term ‘public welfare’ should be defined with some strictness, so as not to include everything that might be enacted on grounds of mere expediency.” *Smith v. New England Aircraft Co.*, 270 Mass. 511, 522-23 (1930). “While aesthetic considerations may to some extent be included in the concept of the public welfare, they have been so included only in the establishment of historic districts and regulation of billboards, neither of which involve prohibition of uses subject to zoning exemptions.” *Summit Farm Solar, LLC v. Planning Bd. for Town of New Braintree*, Land Court Misc. Case No. 18 MISC 000367 (Feb. 18, 2022) (Speicher, J.), 2022 WL 522438 at *9. Accordingly, aesthetic concerns related to protected solar energy system uses are not justified under the guise of protecting the “public welfare.” *Id.*

Indeed, in *Summit Farm Solar, LLC*, the Land Court annulled a Planning Board decision that denied a proposed solar project on the grounds it wasn’t adequately screened from public view. In overturning the board’s decision, the Land Court held that “where the exemptive provisions of G.L. c. 40A, § 3 come into play, zoning bylaw provisions protecting residents from potentially intrusive visual impact of protected uses may have to give way.” Thus, in reviewing the proposed solar use, the Board cannot “unreasonably regulate, cannot impose conditions that go beyond statutory limits provided under § 3, cannot [apply zoning provisions] either directly or pretextually as a way to prohibit or ban the use,” and cannot, within their discretion, determine “whether the protected use can take place in the district, because to do so would be at odds with the penumbral protections that are provided under § 3.” *PLH LLC v. Ware*, Land Court Misc. Case No. 18 MISC 000648 (Dec. 24, 2019) (Piper, J.), 2019 WL 7201712, at *3.

Thus, Massachusetts courts have made clear the proposed Project cannot be denied simply because it may be visible to the public. *Id.*; *Summit Farm Solar, LLC, supra* at *7. In any event, NextGrid has more than adequately screened the two proposed solar canopies from public view through the addition of thirty-one (31) trees, which, when combined with the existing vegetation, will create a thick vegetative buffer.

Conclusion

For the foregoing reasons, aesthetic concerns – particularly those related to a possible river walk extension on the other side of the Sudbury River – cannot serve as grounds to deny NextGrid’s site plan review / special permit application. Rather, the Planning Board’s review of this Project is limited to applying the Bylaws’ Floodplain Overlay District regulations and imp. As the Project clearly satisfies those criteria, special permit relief is warranted here.

Chair Kendall
April 7, 2022
Page 6

Please feel free to contact me at (508) 790-5434 should you have any questions or need additional information. Thank you.

Very truly yours,

A handwritten signature in cursive script that reads "Jean L. R. Kampas".

Jean L. R. Kampas

Encl.

cc (w/ encl.): Peter Matchak, Town Planner
Michael D. Herbert, Town Manager

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