

Citizens Opposed to Extensions of 27 & 150
c/o Barry C. Cosgrove
49 Blackmore Pond Circle
West Wareham, Ma 02576

Michael King
Chair, Planning Board
Town of Wareham
Marion Road
Wareham MA.

Kenneth Buckland
Planner
Town of Wareham
Marion Road
Wareham MA.

Sent via email June 22, 2023

Re: 27 Charge Pond Road, Case 7-20 & 150 Tihonet Road, Case 9-20

Dear Chairman King and Planning Board Members:

In connection with the Monday, June 26, 2023, Wareham Planning Board meeting concerning the pending requests for extensions of the approvals granted years ago to the 27 Charge Pond Road ("27") and 150 Tihonet Road ("150") solar projects, the Citizens Opposed to the Extensions of 27 & 150 provide the following comments.

Bottom line - the permits expired months ago. And the public safety, interest, and welfare of the citizens of Wareham compels that the expiration of these permits stand.

If the applicant desires to submit new applications for solar projects on these sites, they are free to do so. But any such applications must be subjected to the rigor of the current-day knowledge of the risks both projects present to our drinking water as well as the risks presented by the multiple batteries planned for these sites.

Extending these permits without the comprehensive and robust evaluation other solar projects have been required to address is unfair to these other applicants and would be unjustified. Too, the applicant's reluctant agreement to increase the insufficient decommissioning amounts previously assigned to these projects is hardly sufficient grounds to render the projects properly vetted.

We also urge that public comments be permitted on this topic during the Monday, June 26, 2023, public meeting. The absence of an opportunity for the public to rebut claims made by the applicants during the meeting would be manifestly unfair to the Citizens of Wareham and could deprive the Board of essential facts and evidence.

'Good Cause' – Case Law & Chapter 40A

The antiquated lower (land) court case cited by the applicant (*Neilson v. Planning Board of Walpole*) does not conclude that an “extension of a special permit is not a discretionary request”.

Instead, the *Neilson* case clarified that an extension was warranted only where good cause exists. And – most importantly - good cause, in that case, was found to exist because multiple **legal appeals** concerning the special permit frustrated the commencement of construction.

The case explicitly noted that the permit recipient “**was unable to proceed with its development pending resolution of its appeal of the related subdivision denial and its defense of the related wetlands appeal.**”

However, the failure of construction commencement at the 27 and 150 projects was not caused by any legal appeals.

Rather, the applicant’s sole explanation for missing the construction commencement deadline is its failure to successfully secure a customer willing to purchase the electrical energy it hoped to generate at the approved sites. The failure does not meet the standard of a **legal appeal**.

More importantly, the applicant’s excuse fails to meet the requirements established by the Massachusetts SJC, which likewise ruled that extensions are warranted where “**delays caused by litigation** held up a project” (See ARTHUR B. BELFER & others vs. BUILDING COMMISSIONER OF BOSTON, 363 Mass. 439).

Again, no such legal appeal or litigation explains the failure of the 27 and 150 projects to commence construction.

And Chapter 40A explicitly provides that:

Zoning ordinances or by-laws shall provide that a special permit granted shall lapse within a specified period of time, not more than 3 years, which shall not include such time required to pursue or await the determination of an appeal - from the grant thereof, if a substantial use thereof has not sooner commenced except for good cause -

So, contrary to the standard suggested by the applicants (“Nothing in the language of (MGL 40A) section 9 provides or even suggests that an affirmative extension is required to prevent automatic lapse of the special permit”), Chapter 40A makes clear that good cause must be demonstrated to this body by the party seeking a permit extension.

‘Good Cause’ – Wareham Bylaw

The Applicant's suggestion that an "extension of a special permit is not a discretionary request" also conflicts with the Wareham Bylaws' plain language, which explicitly requires an applicant to request an extension.

Without wading into the theory that the Site Plan Approvals granted for these projects constituted Special Permits - we note that - either way – this body has clear cut discretion to grant an extension or not.

Section 1565.3 (8) of the Wareham Bylaws (Site Plan Review) makes clear that an applicant "may request" an extension – i.e., good cause is not automatic.

Just as Section 596.3 (Solar Special Permit) provides that any such permit "shall lapse except for good cause shown" placing a duty on the applicant to both request an extension and prove a basis, therefore.

And the applicants own conduct also conflicts with its non-discretionary assertion.

If an extension is not discretionary – why do the applicants' petitions state as follows?

"We respectfully request that the Board consider an extension of the expiration date by 2 years".

And why was the heading of its latest missive styled a "Request for Extensions"?

Applicant's Side of the Coin

Again - they need a customer(s) for their intended product and want more time to - secure one, having failed after almost three years. Yet they have yet to present any evidence of whether they will be successful in doing so or how long it may take - if they do.

And in this regard, we note - "During the 2000-2016 time period, for example, only 23 percent of the projects entering interconnection queues have subsequently been built. These completion percentages are declining

and are lower for solar and wind than for other resources.” - Solar Builder, published by: Benjamin Media Inc.

Indeed, the applicants have also acknowledged that the decision on the part of the potential customer(s) is out of the applicants' own control. **And they completely ignore the possibility that the customer for whom they are waiting may insist upon economically unbearable terms for the projects.** Thus, if good cause includes the inability to obtain a customer – because the customer has not yet decided whether to do business with the applicants – or on what terms they may do such business - this project could be perpetually delayed.

Town's Side of the Coin – Good Cause to say NO is Abundant

First Borrego, now New Leaf Energy. And who will it be next?

The approvals issued were the result of an evaluation of Borrego only. The new owners – New Leaf - have not been vetted by this body.

The Original Approval Process was Flawed

It has been alleged that the original application approval was flawed – because the Conservation Commission approval had not been obtained before the Planning Board vote – which would be a clear violation of the Wareham Bylaw (see Section 1551).

The 27 and 150 Permit Conditions are Insufficient – Dated - Worrisome

The reasons include the following:

A legacy Planning Board conducted the original application reviews without the benefit of substantial legal, scientific, and regulatory know-how now available to this body.

The current Planning Board and the Wareham community are substantially more knowledgeable about the complex and rapidly changing solar industry, including ground water and battery risks.

Balancing the permit conditions issued for the subject solar sites with those instituted or under consideration for more recent projects (Fearing Hill and 0 Route 25, for example) leaves positively no doubt that the 27 and 150 projects received review 'lite' - comparatively.

The project reviews included No Expert Opinion on soils; No Hydrology Review; No Monitoring Wells; No assessment of Deforestation and Threats to Our Sole Source Aquifer; No attention to Mass Audubon Policy and DOER Studies; and No assessment of Cumulative Impacts from Deforestation and Other Land Use Changes and No Wareham Bylaw Section 1566.8 security.

Battery Systems (a/k/a Battery Bombs)

Where is the evidence that the Wareham Fire Department was aware of and able to assess the actual battery storage facilities now proposed for these site(s)?

Clearly, the battery components of these projects have not been vetted sufficiently to protect the town's health, safety, and welfare (including the YMCA and the little fields next door to these projects).

Voting Requirements - Special Permit –

If the Town of Wareham judges that the prior approvals constituted Special Permits, careful attention must be directed to the MGL Chapter 40A voting requirements, accordingly.

Questions

Please confirm the battery intentions for both projects – size, type, capacity, location, and purpose (solely for energy generated at the site or also for energy storage directed from the utility.)

Please confirm that the MW size for both projects is **5 MW DC**. (Records provided to this Citizen Group by the Planning Office report project sizes up to 20MW for each project – which, on information and belief, is incorrect.)

Please inquire if either project's land, lease, or development rights have been sold/leased/transferred/ to SolarREIT or any other entity.

A Blessing in Disguise

For too long, large ground-mounted commercial solar projects in Wareham were virtually rubber-stamped – compared to the standards now required by the current volunteer Planning Board. Extending these approvals – such as they are – does not protect the best interest of the citizens of Wareham and allows two massive projects that – as this board knows very well - were not vetted according to current know-how. And while fatigue with the Fearing Hill and 0 Route 25 projects is understandable – it must not influence your decision.

For the Citizens Opposed to the Extensions of 27 & 150.

Sincerely

/Electronically signed/

Barry C. Cosgrove