

**HARVARD ZONING BOARD OF APPEALS
MEETING MINUTES
MAY 23, 2012
APPROVED: July 17, 2012**

Chairman Chris Tracey opened the meeting at 7:32pm in the Town Hall Meeting Room under Chapter 40A and the Code of the Town of Harvard Chapter 125

Members Present: Chris Tracey, Steve Moeser, Robert Capobianco, Theodore Maxant, Orville Dodson and Mike Lawton

Others Present: Liz Allard (LUB Admin), Mark Lanza , Jane Thomsen, Betsy & Terry Morton, Jackie & Vic Normand, Steve & Stella Matson, Ruth Silman, Bruce Ringwall (GPR, Inc.), Worth Robbins (CSG), Steven Strong (Solar Design), James Saalfeld, Roseanne Saalfeld, Paul Green, Keith Bilafer, Eric de Briae, James Elkind, Ted Van Dusen, Ron Ricci, Ron Hettich, David Fay, Robin & Bill Calderwood, Glen Frederick, Diane Cordner, Steven Richter, Margaret Nessler, Bill Cordner, Gail Conlin, Susan Tarrant, Adam & Lyn Horowitz, George Orsula and Elaine Lazarus

Continuation of a Modification of a Comprehensive Permit – PRM Capital, LLC, Trail Ridge Way. Opened at 7:30m

Annual Appointments

Liz Allard informed the members that Chris Tracey is up for re-appointment of a three-year term. As well Theodore Maxant, Orville Dodson and Michael Lawton are up for annual appoints as alternate members of the ZBA. The Board of Selectmen (BOS) have request the Boards input on these re-appointments. The Board was in agreement with all of the re-appointments. Ms. Allard will inform the BOS.

Election of Officers

After a brief discussion Robert Capobianco made a motion to appoint Chris Tracey as chairman. Steve Moeser seconded the motion. The vote was unanimously in favor of the motion.

Chris Tracey made a motion to appoint Steve Moeser as vice chairman. Robert Capobianco seconded the motion. The vote was unanimously in favor of the motion.

Chris Tracey made a motion to appoint Liz Allard as the clerk. Robert Capobianco seconded the motion. The vote was unanimously in favor of the motion.

Approval of Minutes

Steve Moeser made a motion to approve the minutes of April 26, 2012 as amended. Robert Capobianco seconded the motion. The vote was unanimously in favor of the motion.

Administrative Appeal Hearing – Solar Design Associates, LLC, Woodchuck Hill Road (Map 23 Parcel 50). Opened at 8:00pm

Adjournment

Robert Capobianco made a motion to adjourn the meeting at 10:10pm. Steve Moeser seconded the motion. The vote was unanimously in favor of the motion.

Signed: _____
Liz Allard, Clerk

Zoning Board of Appeals

Continuation of a Modification of a Comprehensive Permit Meeting Minutes

PRM Capital, LLC, Trail Ridge Way

May 23, 2012

The hearing was opened at 7:30pm by Chairman Chris Tracey in the Town Hall Meeting Room under Chapter 40A and the Code of the Town of Harvard Chapter 125

Members Present: Chris Tracey, Steve Moeser, Robert Capobianco, Theodore Maxant, Orville Dodson and Mike Lawton

Others Present: Liz Allard (LUB Admin)

This hearing was continued from April 26, 2012 for the Modification of a Comprehensive Permit filed on behalf of PRM Capital, LLC to allow for the remaining thirty-two (32) units to be constructed as duplexes rather than quadplexes at the development known as Trail Ridge, on Trail Ridge Way, Harvard.

Liz Allard stated she had not received a request to continue the hearing from the applicant. Robert Capobianco made a motion to deny the application without prejudice. Chris Tracey seconded the motion. Mr. Tracey asked if there was any further discussion before taking a final vote. Mr. Capobianco stated the applicant knows of the meeting, the board has taken time out of their days to attend the meeting and the application should be denied on lack of information. Steve Moeser thinks the applicant should be allowed one more chance. Town Counsel, Mark Lanza, stated he understands the Boards frustration, but they should allow the applicant one more chance. Theodore Maxant thinks the ZBA owes it to the residents living at Trail Ridge to see the project to completion. Mr. Capobianco withdrew his motion and made a new motion to continue the hearing to July 17, 2012 at 7:30pm. Steve Moeser seconded the motion. The vote was unanimously in favor of the motion.

Signed: _____
Liz Allard, Clerk

Zoning Board of Appeals

Administrative Appeal Hearing Meeting Minutes

Solar Design Associates, LLC, Woodchuck Hill Road (Map 23 Parcel 50)

May 23, 2012

The hearing was opened at 8:00pm by Chairman Chris Tracey in the Town Hall Meeting Room under Chapter 40A and the Code of the Town of Harvard Chapter 125

Members Present: Chris Tracey, Steve Moser and Robert Capobianco

Others Present: Liz Allard (LUB Admin), Mark Lanza (Town Counsel), Jane Thomsen, Betsy & Terry Morton, Jackie & Vic Normand, Steve & Stella Matson, Ruth Silman, Bruce Ringwall (GPR, Inc.), Worth Robbins (CSG), Steven Strong (Solar Design), James Saalfeld, Roseanne Saalfeld, Paul Green, Keith Bilafer, Eric de Briae, James Elkind, Ted Van Dusen, Ron Ricci, Ron Hettich, David Fay, Robin & Bill Calderwood, Glen Frederick, Diane Cordner, Steven Richter, Margaret Nessler, Bill Cordner, Gail Conlin, Susan Tarrant, Adam & Lyn Horowitz, George Orsula and Elaine Lazarus

This hearing is for an Administrative Appeal filed on behalf of Solar Design Associates, LLC in regards to the denial of a building permit for the development of a solar farm within the agricultural-residential district on Woodchuck Hill Road (Map 23 Parcel 50), Harvard.

Steve Moeser read the application into the record. Ruth Silman stated she is legal representation for the applicant. Ms. Silman stated she would request the chair allow Worth Robbins to give a brief overview of the genesis of the project, Steven Strong to give an overview of the design, and Ms. Silman will follow up with an explanation on how this project is not a commercial development. Chris Tracey was in agreement with the request. Ms. Silman stated Steven Strong of Solar Design Associates, LLC was denied a building permit for the construction of a 249.9kW solar facility on Woodchuck Hill Road on the grounds that it is a commercial development within the agricultural-residential district; also that the facility is not accessory use. A proposed Protective Bylaw amendment which would have allowed for such a facility had been withdrawn by the Planning on the floor at the annual town meeting in April. Ms. Silman will argue that the denial of the building permit was in violation of the Zoning Act, Massachusetts General law (MGL) Chapter 40A. Under section 8 of that Chapter an applicant has the right to appeal the decision of the Building Commissioner to the Zoning Board of Appeals (ZBA).

Worth Robbins stated in November 2010 the Town voted to become a Green Community by meeting the five criteria required by the State. One of the five criteria was an as-of-right siting for renewable energy. A location was established at the existing transfer station parcel on Depot Road. In March 2011 the Town applied to become a part of Solarize Mass initiative and was chosen as one of four communities within the State to bring competitively priced solar to homes and business owners in the Commonwealth. By the end of the program Harvard had eighty-eight (88) participants. Mr. Robbins stated there were a substantial number of people who wanted to participate but could not for whatever reason. At that point a decision was made to split the project into two directions. Jim Elkind took over the Solarize Mass and Mr. Robbins took on creating a Limited Liability Corporation (LLC) for the creation of a community solar garden. The LLC had the ability to tap into the same grants for clean energy as the individual home owners have under Solarize Mass. In determining a location for a community solar garden Mr. Robbins was informed that the overlay created under the Green Community Act was for municipal use and not private use. Mr. Robbins continued to look for a suitable location and found a seventeen (17) acre parcel on Woodchuck Hill Road. The site was perfect as it is south facing and sloping. The

installation of the facility would utilize 1.3 acres of the existing seventeen (17) acres. At this point Mr. Robbins handed the floor over to Steven Strong of Solar Design Associates, LLC to explain the design of the facility.

Steve Strong stated he is the founder and president of Solar Design Associates, LLC here in Harvard. The facility proposed would be 1.3 acres with setbacks that are substantial from all existing property lines. The topography of the site is one that slopes away from the road. The facility at 249kW was designed based on the demand of the public. The panels would be ground mounted on piers that would be driven into the ground. Screening with evergreens and fencing would be provided to reduce potential vandalism. Electricity would be feed by an underground line and there would be requirement for the addition of any poles on the property. This would be a silent operation with no waste or by-products.

Ms. Silman returned to the microphone and stated how incredibly fortunate it is have Mr. Strong here in Town, something that many take for granted. Ms. Silman read the letter dated March 12, 2012 from the Building Commissioner denying Solar Design Associates a building permit. Ms. Silman argued the facility is not designed for the selling of energy back to the grid, but functions similar to a rooftop mounted system. The panels are running on a meter that nets the produced energy back to a bill directly. This project is not that of a solar developer, who typically sells power directly to National Grid at a negotiated price. This is not what is happening here. Ms. Silman stated solar is allowed within the agricultural-residential (AR) district as an accessory use, so she knows accessory gets tricky here. Ms. Silman wanted to make it clear there is not a direct sale to National Grid for the energy produced.

Steve Moeser asked where the electricity that is generated goes to. Ms. Silman stated back into the grid. Mr. Moeser asked why an individual who belongs to the LLC would have their electric bills adjusted. Silman stated because electricity is being generated. Robert Capobianco stated Ms. Silman has used the term "buy in", if you buy something then you must be selling something. Ms. Silman explained the LLC is a member based entity who are buying the solar panels. Mr. Capobianco stated he is having difficult getting over the commercial aspect.

Mr. Tracey stated clearly we have to define what is commercial; is it defined by State code? Town Counsel, Mark Lanza, stated there is a larger issue here, is the particular use allowed in the AR district. Mr. Capobianco stated if it is not allowed under the Protective Bylaw then it is not allowed. Attorney Lanza stated no; a principle use has to be spelled out, however an accessory use do not have to be spelled out in the bylaw.

Mr. Capobianco read the definition of accessory from the Protective Bylaw, which states "an accessory use or structure is one clearly subordinate to, and customarily incidental to, and located on the same premises with the main use or structure to which it is accessory". Mr. Capobianco asked Ms. Silman to tell him how the solar panels are on the same premises. Ms. Silman stated this does not fit neatly into the accessory use; however the Zoning Act contains an exemption. Ms. Silman contended that the project is not commercial and it is not an accessory use. Mr. Capobianco again asked how it is not commercial when you have a buyer and a seller. Mr. Capobianco added if you are paying money then it is a commercial transaction. Mr. Tracey stated he disagrees with Mr. Capobianco. Mr. Tracey agrees that the project does not meet the accessory definition; however he does not see it as a commercial transaction. Just because individuals have come together with a common goal does not make it commercial; they are all doing it for their own benefit, but as a group effort.

Theodore Maxant stated he is in the agreement that the subscribers could balloon and what stops it from ballooning? Ms. Silman stated each member is in for a certain share based on the number of kW available. In addition, if an expansion was needed more panels would be required. The LLC was developed to take advantage of grants available. Mr. Robbins stated this is a fixed project to a specific size; there is no way for this project to get any bigger. Individual's

requirements could change and transferring of shares could take place, but the number of shares remains the same.

Ms. Silman started neither the Protective Bylaw nor the Zoning Act defines commercial, so we look to a dictionary definition. Ms. Silman stated this is a collective group of individuals that would like to offset their electric consumption by banning together and creating this entity. When uses change and morph we need to embrace change and not shut this down because it is different and we do not know what it is.

Mr. Capobianco asked when the shares are sold does the some of money go towards the cost of construction. Ms. Silman stated no one is making a profit. Mr. Capobianco asked why then is it not a non-profit entity rather than an LLC. Ms. Silman stated in order to take advantage of the 1603 grants it can not be a non-profit. Ms. Silman added the lease of land is being net metered. Mr. Maxant asked what would become of extra electricity when others drop out of the LLC. Ms. Silman stated you loose it until someone takes advantage of the available credit. Mr. Maxant thinks it is a good site for this type of development, however if the Building Commissioners decision is over ruled then comes the possible rush to install more of these facilities with the AR district.

Mr. Moeser asked what zoning regulations were used in the design of the facility. Bruce Ringwall, of GPR, Inc., stated he used the setbacks that exist in the current Protective Bylaw from a structure standpoint, and in some areas those setbacks were doubled. Mr. Moeser asked if there is anything in the Protective Bylaw that limits the size of the array. Mr. Ringwall stated no. Mr. Capobianco thinks we are opening a Pandora's Box here if this facility is allowed to be developed in the AR district; he understands what is going on here and if there is any place to have it this is a great location.

Mr. Tracey asked Attorney Lanza about MGL Chapter 40A Section 3 and any existing case law. Attorney Lanza stated there are no current case tests on record. Attorney Lanza read from Chapter 40A section 3 and concluded that it does not mean you have to allow solar anywhere someone wants it. Currently there is an overlay district that does not fit into this specific design. Attorney Lanza stated the Bylaw does not restrict or prohibit the installation of solar.

At this point Mr. Tracey allowed for public comment.

Jim Saalfield, of Woodchuck Hill Road, stated this is a taxable for profit entity that will receive subsidies; in addition to getting a rate benefits that jacks others electric rates. Mr. Saalfield stated there are two companies involved in the LLC that are for profit businesses. Mr. Saalfield stated this is absolutely a commercial enterprise and the applicant has failed to establish any public benefit.

Adam Horowitz, of Woodchuck Hill Road, stated that he and his wife stepped into to assist in a suitable location for the facility because at the General Store they could not take advantage of private solar as other can. Mr. Horowitz thought by stepping in he would be assisting in facilitating an orderly system. Mr. Horowitz stated it has been a very difficult environment to operate in; he is upset by tonight and what he is hearing is not community; if the ZBA can not see this as something good for the community then he might as well closed the General Store. Mr. Capobianco stated we are a community of laws that we must abide by and the question is can we fit this into the law.

Paul Green, of Old Littleton Road, stated this facility would be doing a favor by saving tens of thousands of dollars for the electric company. Mr. Green suggested taking away the excess electricity produced by the facility to make it non-commercial. In addition, the LLC has no say in the economic value of the energy being produced.

Elaine Lazarus, of Littleton County Road, stated she has compared this development to the exemptions under Chapter 40A, such as agricultural, and it fits within the law.

Margaret Nessler, of Cruft Lane, stated she is worried about the precedence that may be set here if the Building Commissioners decision is over turned.

Susan Tarrant, of Oak Hill Road, thinks she heard Ms. Silman say it would be lovely to see the whole Town covered with arrays; that does not seem neighborly.

Jackie Normand, of Stow Road, assumes people are concerned with view sheds; she does not think this development is commercial, but is the taking of panels that would normally go on her roof and putting them together with others who as well do not have a viable site.

Mr. Robbins commented on what other types of facilities maybe or could be developed should the decision be overturned. Mr. Capobianco asked what the time frame was from conception to applying for a building permit was. Mr. Ringwall stated four months. Mr. Strong stated each site has constraints and requirements that need to be considered. Mr. Capobianco commented at that rate we could have four more of these permitted within the AR district within one year.

Bill Calderwood, of Woodchuck Hill Road, had previously submitted comments in writing to the ZBA, but would like to add the Solar Renewable Energy Certificate (SREC) that investors receive which has not been mentioned. Mr. Calderwood stated he moved to Harvard because the Town was essentially made up of the AR district; he does not want a power plant in his back yard. Mr. Capobianco asked Mr. Calderwood to explain more in regards to the SREC. The SREC represent the renewable attributes of solar generation, bundled in minimum denominations of one megawatt-hour (MWh) of production. Massachusetts' Solar Carve-Out provides a means for SREC's to be created and verified, and allows electric suppliers to buy these certificates in order to meet their solar Renewable Portfolio Standards (RPS) requirements. All electric suppliers must use SREC's to demonstrate compliance with the RPS.

Eric de Briae, of Littleton County Road, stated people who have solar on their house are opposed to a community solar garden. Mr. de Briae stated the HCSG is trying to do the right thing here; if we do not move on this one he does not see it going forward anywhere else.

Jim Elkind, of Slough Road, stated he has been helping to support the project where he can. The people who are investing are essentially only having their solar consolidated. In regards to the question about the SREC, the income goes to the community co-operative to maintain, decommission, etc the facility.

Steven Richter, of Hynes Lane, stated residents who have arrays on house get SREC's as well; this is not a select group of people that have come together, anyone could join.

It was clarified that there are two investors who do not live or work in the Town of Harvard.

Ms. Silman thanked the Board, the members of the audience and those that wrote in for participating this evening. Ms. Silman has done a substantial amount of work to get this to come together; she does not believe facilities such as the one being proposed are going to just pop up every where should the decision be overturned. Ms. Silman asked that the Board try to find a way to make it happen.

Mr. Tracey made note of the additional material submitted. Mr. Tracey read letter from the Board of Health into the record. Steve Moeser read the letter from the Planning Board into the record. Mr. Tracey read Westward Orchards letter into the record. Mr. Capobianco read the letter from the Conservation Commission into the record. Mr. Tracey read the Building Commissioners comments into the record.

With no further questions or comments Robert Capobianco made motion to close evidentiary portion of the hearing. Steve Moeser seconded the motion. The vote was unanimously in favor of the motion.

Mr. Moeser stated he listen to the evidence presented this evening, in preparation for this evening he read the information submitted, reviewed the Protective Bylaw and Chapter 40A. Mr. Tracey asked how Mr. Moeser reads Chapter 40A section 3. Mr. Moeser stated he believes Chapter 40A section 3 was based on an individual system and did not envision larger systems at the time it was written, such as the one being proposed. Mr. Moeser added the ZBA is here to interpret the Protective Bylaw; this does not fit into those regulations. Mr. Moeser thinks the facility is a commercial development. The size of the facility is why we are having this discussion; if it was just one unit there would be no issue, still a transaction is taking place, whether the exchange of cash or energy. Mr. Moeser added that not every property is suitable for every use; that is just the nature of property.

Orville Dodson stated the Planning Board seemed to hit the points most accurately in their letter; he would agree with their conclusion. Mr. Maxant stated after hearing the evidence presented this evening it looks more like an investment operation. Mr. Maxant supports the fact this is not an accessory use. Mr. Maxant stated the Protective Bylaw defines accessory use; he himself has been denied building permits for uses that are not accessory to his business.

Mr. Capobianco would like to see a way to get this done, but the Protective Bylaw is not up to speed. In his mind this is a commercial development; nothing stated tonight has proved the facility is not commercial. This particular type of use is not within the Protective Bylaw. The biggest concern is if we allow this before we can get a bylaw in place this Board could be faced with five to six more projects. Mr. Capobianco state maybe we need more time to ponder this before making a decision.

Mr. Tracey would love to find a way to make this work. He has listened to both sides of the equation this evening; he is still struggling with the commercial aspect. Attorney Lanza has previously indicated the Board could deny for reasons separate from the Building Commissioner.

Mr. Moeser stated that we still don't know why the Building Commissioner deemed development this commercial. Mr. Maxant asked if Board overturns the Building Commissioners decision and another building permit was to applied similar to this could he deny it. Attorney Lanza stated yes.

Mr. Tracey stated he does not know think he is perfectly prepared to make a decision on this matter this evening. Mr. Capobianco stated he would prefer to wait to make a final decision.

Chris Tracey made a motion to continue the hearing to June 12, 2012 at 7:30pm in the Town Hall Meeting Room. Robert Capobianco seconded the motion. The vote was unanimously in favor of the motion with Steve Moeser abstaining from the vote.

Signed: _____
Liz Allard, Clerk

DOCUMENTS & OTHER EXHIBITS

**Administrative Appeal Hearing – Solar Design Associates, LLC, Woodchuck Hill Road
(Map 23 Parcel 50)**

- ❖ Memorandum from the ZBA to the ZEO dated April 12, 2012, with the ZEO's handwritten response dated April 23, 2012
- ❖ Letter dated April 23, 2012 from the Harvard Conservation Commission to the ZBA
- ❖ Letter dated May 16, 2012 from Karen and Don Green of Westward Orchard, Inc. to the ZBA
- ❖ Letter dated May 21, 2012 from the Harvard Planning Board to the ZBA
- ❖ Letter dated May 23, 2012 from the Harvard Board of Health to the ZBA
- ❖ Appraisal of 54 Woodchuck Hill Road, Harvard, Massachusetts dated as of May 7, 2012 by Gary Bourque
- ❖ Memorandum dated May 16, 2012 from Bill Calderwood and Robin Carlaw of 54 Woodchuck Hill Road, Harvard, Massachusetts, with photographs and plot plan attached, to the ZBA.
- ❖ Letter dated May 17, 2012 from Worth Robbins, Manager, Harvard Community Solar Garden Project, LLC, with 4 enclosures, to the ZBA.
- ❖ Letter dated May 18, 2012 from Adam and Lyn Horowitz to the ZBA.
- ❖ Article entitled "Health and Safety Concerns of Photovoltaic Solar Panels" by the Good Company (undated).
- ❖ Letter dated May 22, 2012 from Ruth H. Silman, Esq. of Nixon Peabody, LLP to the ZBA.