

TOWN OF BROOKLINE
ADVISORY COMMITTEE
PLANNING AND REGULATION SUBCOMMITTEE

ARTICLE 18 – SHORT-TERM RENTALS

The Planning and Regulation Subcommittee held a Public Hearing on Warrant Article 18 on September 23, 2019. Attendees at the Hearing were Petitioner Scott Gladstone (TMM Pct. 16), Linda Pehlke (TMM Pct. 2), Roger Blood, and Dan Bennett, Building Commissioner. Subcommittee members present were Steve Kanés (Chair), Lee Selwyn, Carol Levin, Neil Wishinsky, Carlos Ridruejo, and Ben Birnbaum.

Petitioner Scott Gladstone explained that the Building Department currently interprets the definition of “Lodger” under the Zoning By-Law to mean someone who rents a room for a period of 30 days or more. Because short term lodging, such as those offered by Air B&B and similar services, are not a permitted use in Brookline, based on complaints, the Building Department has been shutting down advertised Air B&B’s and similar short term rentals.

According to the Petitioner, Article 18 would allow short term lodgers by adding a new use 51C, subject to certain conditions that the property owner will be required to satisfy:

1. The owner would need to be registered under the Commonwealth’s short term rental registration system created by G.L. c. 62C, Section 7;
2. The owner would need to comply with any additional registration or regulatory requirements the Town may choose to impose through amendments to the Town By-Law; and
3. The owner of the dwelling unit, or a Lodger (long term), or a designated property manager living in the dwelling unit, must sleep in the dwelling unit being rented to a short term lodger for all but one night of such short term lodger’s rental in order to avoid a scenario wherein (i) an owner-occupier vacates the unit in order to facilitate the short-term lodger or (ii) the owner occupier of a two, three or multi-family building rents the units in which the owner does not live to short term lodgers.

According to the Petitioner, these conditions – and in particular the requirement that the dwelling be owner-occupied and that the owner or long-term lodger (who could be serving as the property manager) actually sleep in the dwelling -- would preclude the creation of *de facto* hotels out of multi-unit buildings or groups of condo units by nonresident investors. The Petitioner characterized this as a small step toward eliminating what he described as extensive scofflaw violations of existing zoning. He argued that owners would only rent such rooms to such transients on a short-term basis in cases of actual financial need. He suggested that the numerous

disadvantages of allowing strangers into one's home would preclude abuse except where actual financial need exists.

However, the Subcommittee noted that, despite the language putatively specifying that the unit be owner-occupied, the Article as drafted would not actually require that the property owner ever actually sleep in the dwelling; under the By-law as proposed, that requirement appears to be satisfied by either a long-term Lodger or by a resident property manager. Notably, the term "owner-occupied" does not appear to be defined anywhere within the Brookline Zoning By-law.

Linda Olson Pehlke (TMM, Pct. 2) submitted written comments via e-mail and also reiterated these concerns at the hearing:

1) The proposed conditions for approval of a Short-term rental, namely being an owner-occupier and that that said owner must be sleeping in the home or unit while it is being leased to short term renters, are unworkable and unverifiable. While in theory, the presence of the owner would hopefully tamp down on errant behavior, it will be impossible to establish whether or not the owner was present during the rental, should a complaint arise.

2) Permitting Short term rentals in all residential districts is highly problematic and not well thought-out. Ms. Pehlke cited instances where an emergency arises at a building and the occupants of the short term rental could not be alerted because property management does not have knowledge of the rental or the occupants. She advised that legal experts have alerted condominium boards as to the need for very high levels of liability insurance that is required for the unit owner. She noted that demand on common services (i.e. trash, water, heat, etc.) would be impacted by allowing short term rentals, not to mention the potential for damage to common area property. Then there are the safety and quality of life issues that arise from admitting transient strangers into residential properties with common entrances, etc.

3) As a matter of Town wide public policy, we need to carefully consider the potential impacts to housing availability and housing costs if some of our existing housing stock is converted to serve tourists, not residents. Also, short term rentals will cannibalize the clientele (and therefore tax revenue) for our existing hotels, bed and breakfast inns, lodging houses, etc. Similar to the end run around the taxi regulations, Air B&B facilities, through technology, an end run around fire, safety, licensing, etc. regulations.

4) Passing this now would grandfather all currently operating short term rentals. This would make any future efforts by the Town to regulate and oversee short term rentals moot. The Planning Department is presently studying this complex regulatory problem and they should be allowed to continue gathering feedback, working across departments, etc. to make a comprehensive proposal for future consideration. Approving WA 18 would interfere with this work and it would by-pass the necessary community outreach and listening that still needs to occur on this issue.

Roger Blood expressed similar concerns.

During the discussion by the Subcommittee after receiving public comment, it was noted that the Planning Department is currently working on a more comprehensive solution to the Air B&B type of rental, and that it would likely be drafting one or more articles for the 2020 Annual Town Meeting. One member of the Subcommittee expressed concern that these short-term rentals in private homes were being operated under-the-radar of safety and other regulations that apply to hotels and lodging houses, and that such disparate regulation was unfair to these enterprises where compliance was required. He noted specifically that there is no provision in Article 18 that would subject short-term rental dwellings to the types of health and safety regulations to which hotels and lodging houses were routinely subjected. Another Subcommittee member expressed more specific concerns regarding short-term renters' ability to understand and act upon basic safety requirements in the event of an emergency, such as how to exit from the premises in the event of fire. He noted specifically that hotels are required to post such information in all guest rooms and provide other fire safety arrangements.

One member rejected the Petitioner's notion that homeowners should be allowed to engage in such rentals as a means for supplementing their income, noting that engaging in such activities is essentially a business, and that zoning prohibits the establishment of most types of businesses in residential zones. He also rejected the Petitioner's claim that the existing illegal Air B&B locations in Brookline, which the Petitioner had estimated at around 400, could not be easily shut down except in response to specific complaints by neighbors. He noted that the locations of all such illegal activities could be easily obtained from the Air B&B and similar websites. In response, the Petitioner suggested that the Building Department lacked the inspectional staff to pursue and shut down all of these locations. However, similar, perhaps even greater, inspectional resources would be required for safety and other compliance inspections if these units were suddenly to be legalized under this Article.

Other members of the Subcommittee also raised public safety concerns arising from the presence of unknown individuals in their neighborhoods, and did not want to see Brookline's housing stock converted from residents to transient tourists. All members of the Subcommittee felt that the proposed By-law change was, at the very least, premature and required additional study, which is currently underway at the Planning Department.

Following discussion, the Subcommittee VOTED 6-0-0 for NO ACTION on Article 18.

BROOKLINE ADVISORY COMMITTEE
Subcommittee on Planning and Regulation

Report on Article 13: Allow Small Accessory Ground-Mounted Solar Installations

The Planning and Regulation Subcommittee of the Advisory Committee held a public hearing on September 23, 2019, at Town Hall, in Room 111, to discuss and possibly vote upon Warrant Article 13, submitted by: the Department of Planning & Community Development and co-petitioners: Blake Cady; David Lescohier, TMM11; David Lowe, TMM11; Scott Englander, TMM6; Willy Osborn. Attending were P&R Subcommittee members Steve Kanen, Chair, Ben Birnbaum, Carol Levin, Lee Selwyn, Carlos Ridruejo and Neil Wishinsky; Petitioners, Scott Englander, David Lowe, Willy Osborn; Kara Brewton, Economic Development Director; Daniel Bennett, Building Commissioner; also attending were members of the public (see attached sign-in sheet).

SUMMARY

Warrant Article 13 seeks the to amend Section 4.07 of the Town’s Zoning By-Law to allow Accessory Ground Mounted Solar Photovoltaic Installations. If passed, this zoning change would allow smaller ground-mounted solar installations on private properties. Ground solar installations with a nameplate capacity up to 50 kW DC would be added to Use 61 in the Table of Uses which allows accessory structures, such as sheds or greenhouses. Installations with a nameplate capacity smaller than 10 kW DC would be allowed as of right as long as the siting meets all the setback requirements for accessory structures and are setback at least 25 feet from all lot lines. Ground-mounted solar installations with a nameplate capacity between 10 and 50 kW DC would require a Special Permit.

The Subcommittee is of the view that Warrant Article 13 represents a worthy direction towards fulfilling the Town Climate Action Goals, but believes that the proposal needs further development and clarification. To that end, an amendment to WA13 was proposed at the public hearing, which Petitioners have accepted. On that basis, and with the approval of the Moderator, the Subcommittee recommends FAVORABLE ACTION on Warrant Article 13, as provided below.

BACKGROUND

Petitioners’ Warrant Article provides in full as follows:

Zoning By-Law Amendment to permit accessory Ground-Mounted Solar Photovoltaic Installations under certain circumstances.

To see if the Town will amend the Zoning By-Law by amending Section 4.07 – Table of Use Regulations – to allow small accessory ground-mounted solar infrastructure in a similar manner as sheds, by adding text in the description of Accessory Use 61 in the Use

Table, underlined below:

61. Non-commercial greenhouse, tool shed, Ground-Mounted Solar Photovoltaic Installation, or other similar accessory structure. To be considered an accessory use, the nameplate capacity of Ground-Mounted Solar Photovoltaic Installations may not exceed 50 kW DC and shall be subject to use regulations described in Section 5.06.4.h(3-13). Additionally, Ground-Mounted Solar Photovoltaic Installations with a nameplate capacity greater than 10 kW DC in any district requires a Special Permit.

*Special permit required if in excess of 150 square feet of gross floor area.

Solar Panels in the Town of Brookline

In November 2010, Brookline Town Meeting passed a Planning Department warrant article that defined Ground-mounted solar installations and allowed them as-of-right (no discretionary permit required) on the Town's Singletree Hill Reservoir site in Chestnut Hill. At a subsequent Town Meeting, as-of-right zoning for ground-mounted solar panels was expanded to include the Newton Street transfer station.

Allowing as-of-right ground-mounted solar, even though limited to two municipal properties, helped the Town meet two of five criteria to become eligible for state grants under the Green Communities Act: (i) to provide as-of-right siting of renewable or alternative energy generating facilities of at least 250 kW in designated locations and (ii) to adopt an expedited permitting process for such facilities that does not exceed one year.

The 2010 zoning change also created a Special Overlay District that spells out a process for site plan review by the Planning Board, including a minimum setback from all property lines of 25'. To ensure as-of-right siting for purposes of the Green Communities Act, the site plan review notes that facilities of at least 250 kW in nameplate size cannot have conditions attached that make such installation infeasible. This threshold is reflected in the current zoning definitions, which differentiates between Small and Large Ground-Mounted Solar Photovoltaic Installations at the 250 kW threshold.

Current Regulation of Solar Panels on Private Property

The Building Department also permits solar panels on roofs of legal buildings or accessory structures as permitted with our existing zoning. However, a ground-mounted system, such as a residential scale tracking/pivoting solar system that sits on a single high-strength pole (about 15' high) is not currently permitted.

The existing zoning definition for Ground-Mounted Solar Photovoltaic Installations is "A solar photovoltaic system that is structurally mounted on the ground and is not roof-mounted, unless it is located on the roof of a water reservoir or similar structure that is not designed for human occupancy. Such an installation is considered large-scale if it has a minimum nameplate capacity

of at least 250 kW DC; all installations with a minimum nameplate capacity less than 250 kW DC are considered small-scale.”

The existing language accessory use 61 has an asterisk at the end that applies to residential districts, and requires this use with greater than 150 square feet of gross floor area to require a special permit.

By definition, in almost all cases Ground-Mounted Solar Photovoltaic Installations will not have gross floor area (because they are not roof-mounted). In the rare case where Ground-Mounted Solar Photovoltaic Installations are located on a roof not designed for human occupancy, that accessory structure’s gross floor area would then also trigger a special permit if the gross floor area is over 150 square feet and the project is located in a residential district.

Town Climate Action Goals

The Town’s Climate Action Plan recommends a streamlined and expedited permitting process for renewable energy system installations; a reasonable first step is to permit more types of renewable energy systems, especially if the installation has a similar impact to abutting properties as sheds, garages, and accessory buildings.

Following the Select Board’s June 5th Climate Summit, the Select Board agreed that one of the staff-led working teams following the Summit focus on strategic deployment of renewable energy systems on public and private property. The co-petitioners of this article are residents that have spent significant time on this article as well as the warrant article related to a municipal power purchase agreement for several municipal properties.

Proposed Special Permit Threshold

Massachusetts General Law 40 A section 3 states, “No zoning ordinance or by-law 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) advises municipalities to allow any solar facility less than 40,000 square feet to be allowed as of right¹, but also recognizes that this is DOER’s interpretation and that municipalities will want to adapt their own rules and thresholds. The Planning Department is not aware of any case law where the definition of ‘unreasonable’ in this sentence has been tested.

As noted in the Warrant Article explanation, the Warrant Article proposes amending accessory use 61 for non-commercial greenhouses and tools sheds with a permitting threshold between as-of-right and a special permit being required at a 10 kW nameplate size, which is approximately the size of 500 square feet of site area; the Co-Petitioners estimate that this size could more than meet the electricity of a moderately-sized house. This accessory use currently has a special permit threshold in excess of 150 square feet of gross floor area, which would remain in place.

¹ March 2014 Policy Guidance for Regulating Solar Systems, MA Department of Energy
<https://www.mass.gov/files/documents/2017/10/16/model-solar-zoning-guidance.pdf>

Because our existing zoning definition for ground-mounted solar uses the kW size to define categories of use, and because this specification is easily found and used in the industry to identify size, the Co-Petitioners submitted the Warrant Article utilizing the nameplate kW size as both the threshold for a special permit as well as maximum size as an accessory use (50 kw).

PUBLIC COMMENT

Following the presentation by Petitioners, there was input from members of the public, which included the following comments:

There were some questions on what would the possible maximum sizes of the solar panel installations as of by-right or by Special Permit.

The question was asked if these structures would be allowed in the front yard. Building Commissioner Bennett, responded that they would not be allowed in the effective front yard setback, but if a lot had a deeper front yard, they could be installed in the space between the setback and the principal dwelling. This applies to any accessory structure.

It was mentioned that proposal allows residents install solar panels in locations optimal for solar collection, even if the existing buildings on site are not ideal for solar exposure.

There were questions on the different types of solar installations, ie. fixed or those which follow the sun. Each type was described by the Petitioners.

DISCUSSION

The Subcommittee agreed with the concept of this amendment, but discussed that the language of the article could be clarified.

There was much discussion on the size of 10 kW DC installations and why the amendment defines the structures by the output power rather than overall square-footage. It was determined, that as an accessory structure, the limit in height for these installations is of a maximum 15 feet of height.

The Subcommittee suggested that in order to not penalize future technology improvements in output, that perhaps a square-foot limit should be used rather than the power output limitation. This approach would not penalize future, more efficient installations. It would also limit the unintended consequence of a someone using an severely outdated system which in turn would be oversized.

If the structure moves to follow the sun, the maximum movement area of the apparatus would define the overall envelope of the structure.

A limit on the square footage would make the approval process easier and for abutters to imagine what proposed installations would look like.

The Petitioners mentioned that the typical 10 kW DC installation would be of the size of a two-car garage.

Abutter notification process would be discussed. For these solar structures, even as-of-right installations would be subject to Site Plan Review at a public meeting.

The Subcommittee proposed that the Article be amended with a limit in square footage instead of output power. The Town Moderator has found this change to be within the scope of the Article and the Petitioners have provided language that would substitute square footage area for 10 kW DC and 50 kW DC on an equivalent basis, as well as providing clarifying language for accessory structures that are not solar ground-mounted structures.

WARRANT ARTICLE 13, AS AMENDED

Based on discussions with Petitioners, as detailed above, the text of WA13 would be amended as follows (additions are denoted in **bold, italicized text**, deletions are denoted in ~~stricken~~ text):

To see if the Town will amend the Zoning By-Law by amending Section 4.07 – Table of Use Regulations – to allow small accessory ground-mounted solar infrastructure in a similar manner as sheds, by adding text in the description of Accessory Use 61 in the Use Table, underlined below:

61. Non-commercial greenhouse, tool shed, ***Ground-Mounted Solar Photovoltaic Installation***, or other similar accessory structure.

To be considered an accessory use, ~~the nameplate capacity of Ground-Mounted Solar Photovoltaic Installations may not exceed 50 kW DC~~ ***Ground-Mounted Solar Photovoltaic Installations may not exceed 2,500 square feet of above-ground lot area*** and shall be subject to use regulations described in Section 5.06.4.h(3-13). Additionally, in all districts, Ground-Mounted Solar Photovoltaic Installations ~~with a nameplate capacity greater than 10 kW DC in any district~~ ***that exceed 500 square feet of above-ground lot area***, requires a Special Permit.

* Special permit required if in excess of 150 square feet of gross floor area: ***except for Ground-Mounted Solar Photovoltaic Installations not attached to non-commercial greenhouse, tool shed or other similar accessory structure.***

RECOMMENDATION

The Subcommittee was of the view that Petitioners have made a persuasive case for adoption of W13, subject to the amendments discussed above.

By a vote of 6-0-0, the Planning and Regulation Subcommittee recommends FAVORABLE action on an amended and revised Warrant Article 13, as follows:

61. Non-commercial greenhouse, tool shed, Ground-Mounted Solar Photovoltaic Installation, or other similar accessory structure.

To be considered an accessory use, Ground-Mounted Solar Photovoltaic Installations may not exceed 2,500 square feet of above-ground lot area and shall be subject to use regulations described in Section 5.06.4.h(3-13). Additionally, in all districts, Ground-Mounted Solar Photovoltaic Installations that exceed 500 square feet of above-ground lot area, requires a Special Permit.

*** Special permit required if in excess of 150 square feet of gross floor area except for Ground-Mounted Solar Photovoltaic Installations not attached to non-commercial greenhouse, tool shed or other similar accessory structure.**

Sign In

9/23/19
Art. 13

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