

ANDERSON & KREIGER LLP

GEORGE A. HALL, JR.
ghall@andersonkreiger.com
T: 617-621-6530
F: 617-621-6630

EXHIBIT ____

October 15, 2014

SUBMITTED WITH TOWN OF BELMONT'S APPLICATION FOR GREEN COMMUNITIES DESIGNATION

Lisa Capone, Acting Director
Green Communities Division
Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

**RE: Certification of Compliance with Green Communities Act
Criteria For As-of-Right Siting and Expedited Permitting**

Dear Ms. Capone:

In support of the Town of Belmont's application to be designated a Green Community, this letter provides certification by Town Counsel for the Town of Belmont that the Town's Zoning Bylaw¹ complies with As-of-Right Siting (Criterion #1), and that the Town's permitting process complies with Expedited Permitting (Criterion #2) of the Green Communities Act, as described below. Criterion #1 of the Green Communities Act requires that towns must "provide for the as-of-right siting of renewable or alternative energy generating facilities, renewable or alternative research and development facilities, or renewable or alternative energy manufacturing facilities in designated locations." Criterion #2 requires that towns show they provide an expedited application and permitting process for as-of-right energy facilities (Criterion #1) which does not exceed one year from the date of initial application to the date of final permit approval.

¹ The Town of Belmont Zoning Bylaw, updated through May 14, 2012, but not including amendments adopted at Belmont's 2013 Annual and Special Town Meetings or those adopted at the 2014 Annual Town Meeting (none of which are germane to this issue), is included as an attachment to this letter.

I. BELMONT SATISFIES CRITERIA FOR AS-OF-RIGHT SITING

A. Belmont Allows As-Of-Right Siting Of Research and Development Facilities, Including Facilities for “Renewable or Alternative Energy” R&D.

At a Special Town Meeting in 1999, Belmont created a new zoning district encompassing the campus of the McLean Hospital (approximately 240 acres). The rezoning of this area followed extensive negotiations between McLean and the Town, prompted by McLean’s announced intention to sell a portion of its campus for development, and which resulted in a Memorandum of Agreement dated November 22, 1999 (the “MOA”). The new McLean District (Zoning Bylaw, Section 6A) includes six subdistricts for (1) residential use, (2) senior living facilities, (3) research and development, (4) institutional use (which would include the existing McLean Hospital facilities), (5) open space, and (6) a municipal cemetery. These provisions were approved by the requisite 2/3 majority at the 1999 Annual Town Meeting and by the Attorney General. A copy of the McLean District Zoning Map is attached hereto.

The McLean research and development subdistrict (Zone 4) consists of 11.58 acres. Within that subdistrict, “offices ... and laboratories for research and development, including but not limited to, biology, chemistry, engineering, geology, medicine, pharmaceutical, physics, computer research and technology shall be allowed” (Section 6A.1.3). Such R&D offices and laboratories are the *only* use allowed in the R&D subdistrict. In my opinion, the categories for chemistry, engineering, physics and computer research and technology are sufficiently broad to encompass research and development related to all of the renewable and alternative energy technologies referenced in DOER’s guidance on Green Communities Criterion 1.²

Section 6A.4 of the McLean District bylaw requires Design and Site Plan Review for such facilities. The purpose of the Design and Site Plan Review provisions are to permit the Planning Board to impose “reasonable conditions ... as it shall deem appropriate to assure ... consistency of the development with the objectives” of the bylaw. This scope of discretion is in accord with the limits of administrative site plan review applicable to by right uses under Prudential Ins. Co. of America v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278, 281-282 (1986) (where the zoning bylaw clearly designates a use as allowed by right, power of the board under site plan review is “limited to imposing reasonable terms and conditions on the proposed use”).

² These include, in the case of renewable energy technologies, solar-photovoltaic (PV) and thermal; wind; biomass power conversion or thermal technologies, including R&D related to, or the manufacture of, wood pellets; ultra low emissions high efficiency wood pellet boilers and furnaces; low-impact hydro-electric and kinetic; ocean thermal, wave or tidal; geothermal; landfill gas; fuels cells that use renewable energy; and advanced biofuels, and in the case of alternative energy technologies, combined heat and power; electric- and hydrogen-powered vehicles and associated technologies, including advanced batteries and recharging stations.

B. Realistic Opportunity For Additional Development Of Renewable Or Alternative R&D Or Manufacturing Facilities

The McLean research and development subdistrict (Zone 4) contains two former hospital buildings that are currently not utilized and which can either be adapted to reuse or removed in favor of new buildings. The dimensional requirements for Zone 4 provide for (1) a maximum building height of four stories, (2) maximum gross floor area of 150,000 square feet, (2) maximum lot coverage (by a building) of 40% of the lot, (3) a minimum open space percentage of 30%, and (4) maximum impervious cover of 70% (see § 6A.2.3). If the district were to remain a single lot, a facility of 150,000 square feet would be feasible to construct (at three stories, it would have a footprint of about 50,000 square feet and would therefore be well under the 30% lot coverage maximum). The suitability of the site to accommodate up to 150,000 square feet of R&D space is sufficient to meet DOER guidelines regarding the requirement that local zoning provide “a realistic opportunity to locate renewable energy or alternative energy R&D ... facilities.”

II. BELMONT SATISFIES CRITERIA FOR EXPEDITED PERMITTING.

In accordance with DOER’s Updated Guidance dated July, 2013 entitled Expedited Permitting Options (“Updated Guidance”), to document compliance with the Green Communities Expedited Permitting (Criterion #2), by means of the “Standard One Year Process”, towns must provide DOER “a letter from legal counsel affirming that nothing within the municipality’s rules and regulations precludes issuance of a permitting decision within one year along with the language addressing approval procedures and associated timing from any applicable bylaws/ordinances or regulations.”

This letter affirms that nothing within the Town of Belmont’s rules and regulations precludes issuance of a permitting decision for the siting and construction of an energy facility that meets Criterion #1 within one year. The following subsections review the approval procedures and associated timing under the Belmont’s applicable bylaws and regulation.

A. Design and Site Plan Review under the Zoning Bylaw

As noted above, the purpose of site-plan review is to allow review of a proposed project by the Planning Board and to enable it to “impose such reasonable conditions on its approval as it shall deem appropriate to assure the continuing consistency of the development with the objectives set forth in” § 6A, which includes ensuring that the development is consistent with the MOA.

In applying the Design and Site Plan Review Bylaw for the McLean District, the Planning Board is directed to follow the procedural requirements set forth in the Town’s Design and Site Plan Review Bylaw for other projects (§ 7.3). Under that Section, applicants are directed to submit the application to the Office of Community Development (OCD); the Planning Board must hold a public hearing within 45 days of OCD’s receipt of the application, and must act on the application within 20 days of the close of the public hearing. The Bylaw prohibits the issuance

of a building permit until the Planning Board has filed its written decision with the Town Clerk or after 20 days have elapsed from the close of the public hearing without a decision being filed. This latter provision means, in effect, that the application is constructively approved if no decision is filed within the 20-day period.

B. Stormwater Management and Erosion Control Bylaw

Belmont recently enacted a “Stormwater Management and Erosion Control” Bylaw which applies to any land alteration resulting in the disturbance of 2,500 square feet or more of total area, an alteration that will increase the amount of a lot’s impervious surface to more than 25% of the lot’s total area, or any connection to the Town’s Municipal Separate Storm Sewer System (MS4). Permits are issued by the Director of the Town’s Office of Community Development. There is no public hearing process or requirement. It is anticipated that a complete stormwater permit application would be issued on approximately the same timeline as a local building permit, i.e., within 30 days. There are no foreseeable circumstances when a stormwater management/erosion control permit would be delayed beyond one year.

C. Wetlands Protection

While development may be prohibited in wetlands and buffer zones under the state wetlands protection regulations, Zone 4 of the McLean district is not known to contain any wetland resources areas as that term is defined under those regulations.³ Thus, the Conservation Commission would not likely have jurisdiction over development activity in this area.

Even if a developer seeks to build renewable/alternative R&D facilities within jurisdictional areas of the Conservation Commission, however, nothing would preclude the issuance of an Order of Conditions in at most a few months. The Wetlands Protection Act, G. L. c. 131, § 40, establishes timelines for review of Notices of Intent. A hearing must be held within 21 days and a decision must be issued within 21 days of the hearing. If these deadlines are not met, the town loses its ability to prevent the applicant from applying for and receiving a superseding order of conditions from the Department of Environmental Protection (DEP). *See Oyster Creek Preservation, Inc. v. Conservation Comm’n of Harwich*, 449 Mass. 856, 864-866 (2007).

Belmont does not have a local Wetlands Protection Bylaw.

³ See (1) Request for Determination of Applicability dated 8/13/1997, (2) the Wetland Location Plan for McLean Hospital dated 10/7/1997 revised through 11/17/1997, and (3) the Determination of Applicability issued by the Belmont Conservation Commission on 12/11/1997, all attached to this letter. The Determination of Applicability has expired, but there have not been changes at the site that would warrant the conclusion that the wetland boundaries have changed significantly since 1997.

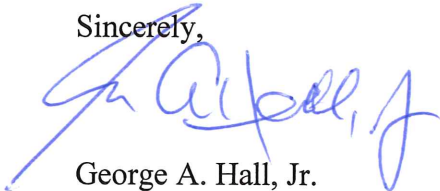
D. Building Permit

Under 780 CMR 111.1, action must be taken on an application for a local building permit within thirty days. Belmont's internal procedures require that other permits be complete prior to the issuance of a building permit. Thus, the building permit application would add at most 30 days to the timelines for other permits described above. There are no foreseeable circumstances when a building permit would be delayed for development in the McLean R&D subdistrict beyond one year.

III. CONCLUSION

Town Counsel has reviewed zoning and other bylaws potentially applicable to the development of renewable energy facilities. We have concluded that Belmont complies with Criteria ## 1 and 2, and can provide as-of-right siting of renewable and alternative R&D facilities, with an expedited permitting process well short of one year.

Sincerely,

A handwritten signature in blue ink, appearing to read "G. Hall, Jr.", is written over the typed name.

George A. Hall, Jr.
Town Counsel