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TOWN ADMINISTRATOR

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December 22, 2009

Devens Enterprise Commission
33 Andrews Parkway
Devens, MA 01434

Re: Request for Reconsideration by Town of Harvard - Evergreen Solar –
Permanent Daytime and Nighttime Sound Monitoring System Protocol

Dear Members of the Devens Enterprise Commission:

Pursuant to Section IV(C) and IV(E) of the Devens Zoning By-laws and 974 CMR 1.12(1), the Harvard Board of Selectmen ("Harvard BOS"), through the Town of Harvard's designee, respectfully request that the Devens Enterprise Commission ("DEC") reconsider its December 3, 2009 decision (the "Decision") to adopt the Permanent Daytime and Nighttime Sound Monitoring System Protocol ("Sound Monitoring System Protocol"). In the Decision, the DEC voted to approve a protocol for the long-term noise monitoring of Evergreen Solar's facility at Devens. This request is timely in that it is being made within thirty (30) days of the DEC decision. Enclosed with this request is a filing fee in the amount of \$1,000.00 as well as a request to waive the filing fee.

The Harvard BOS would like to commend the DEC and its staff for the tremendous amount of time that has been spent addressing the noise concerns regarding Evergreen Solar. The Harvard BOS understands that there are some difficult technical issues that have been addressed and certain others that remain outstanding. The Harvard BOS has been impressed by the level of dialogue, communication and debate regarding the noise issues, particularly among the DEC, Evergreen Solar and the affected property owners. The purpose of this request for reconsideration is to ensure that all viewpoints are being heard and considered thoroughly and fairly, and that the DEC has all of the information available to enable it to make a fair and thoughtful decision.

Pursuant to 974 CMR 1.12(1)(a)(4), the grounds for this request for reconsideration are that the DEC's Decision exceeded its authority by, *inter alia*:

(1) not permitting input, discussion or open debate regarding each issue raised regarding the development and approval of the long-term Sound Monitoring System Protocol;

(2) adopting a Sound Monitoring System Protocol based on information submitted that lacked the requisite supporting data to definitively determine that the Sound Monitoring System Protocol will ensure that Evergreen Solar will be in compliance with 974 CMR 4.05(3): Noise Limits and Standards at all times of night and day and at all times of year;

(3) extending the waiver granted to Evergreen Solar (under the Unified Permit pursuant to 974 CMR 4.05(3): Noise Limits and Standards), beyond the DREZ, approximately 194' onto private property located in the Town of Harvard over which the DEC has no jurisdiction;

(4) failing to exercise adequately its role as the Board of Health for the DREZ by not allowing discussion during the hearing regarding adverse impacts to the health and welfare of neighboring residents and their animals caused by the noise impacts.

This request for reconsideration raises the major concerns of the Harvard BOS. Of course, due to the fact that the December 3, 2009 public hearing lacked open and meaningful debate, there may be other issues or actions by the DEC that the Harvard BOS are not aware of but that may become apparent in the future. The Harvard BOS reserve the right to raise additional issues that come to light in future appeals, although the Harvard BOS are hopeful that no further appeals will be required to address these issues.

More specifically, with respect to the first issue regarding the lack of open debate, from the time various noise consultants met to discuss the Sound Monitoring System Protocol to the December 3rd Decision, residents were only permitted to submit comments in writing. At the November 24, 2009 public hearing, the public was informed that written comments would be accepted through November 30th; no verbal public comments or questions were allowed. At the December 3rd meeting, the public was not allowed to speak to address written comments of others or to ask questions. As a result, the decision of the DEC exceeded its authority because the DEC did not allow the public process to unfold in a manner that promoted discussion and debate. The viewpoints of Harvard residents, as well as their expert consultants, were not permitted to be heard.

The Sound Monitoring System Protocol approved by the DEC changed the compliance measurement location from the property boundary to points immediately behind the Evergreen Solar facility. The Sound Monitoring System Protocol also established noise thresholds at these measurement points which appear to be calculated to ensure that the noise that reaches the boundary line will be in compliance. Evergreen Solar is an industrial use as defined by the Devens Regional Enterprise Zone Zoning By-Laws (VI.A.3.d.). This section states that "*Industrial uses shall be located on sites that are physically distant from residential areas.*" The Record of Decision for the Unified Permit for Evergreen Solar includes a waiver that permits Evergreen Solar to annex a portion of the Cold Spring Brook Conservation area for the purposes of noise attenuation. That action effectively moved the border of an industrial use to the border of a residential/agricultural area. The Sound Monitoring System Protocol then indirectly moved the monitoring location approximately 194' further, onto

the Dunroven Farm property (62 Old Mill Road, Harvard). Industrial noise and vibration is a hazard to the public health and welfare and the Regulations require separation of uses to avoid conflicting land uses. The Decision regarding the Sound Monitoring System Protocol effectively locates an industrial use on a residential area located outside of the DREZ, over which the DEC has no jurisdiction. Furthermore, it is unclear whether the Decision changes the applicable noise limits that are contained in the Record of Decision; this issue deserves further analysis. Implementation of the Protocol may lead to a situation in which the allowed noise levels (i.e., 19-24 dBA) far exceed the allowed noise levels (i.e., 6-7 dBA) permitted by the waiver contained in the Unified Permit Record of Decision.

In addition, the calculation method appears flawed. The supporting evidence included in the Sound Monitoring System Protocol relied only on one data set. Proper science requires multiple data sets to accurately establish the kinds of thresholds put forth in the protocol. These data sets must be in sufficient number and under sufficiently different environmental conditions to identify clearly the statistically valid value. A data set of one is clearly insufficient.

The Sound Monitoring System Protocol is a key decision point in the regulatory process in that it sets forth the manner in which noise levels will be assessed against the relevant regulatory standards. If there is disagreement among the parties involved regarding the Protocol itself, there will never be consensus regarding the results of any measurements. The Harvard BOS urge the DEC to reopen the public hearing on the Sound Monitoring System Protocol, permit written testimony that had been submitted to be openly discussed between the DEC commissioners and members of the public, allow verbal comments and explanations regarding the Protocol's provisions, and allow the public, particularly the residential neighbors who live in Harvard to voice their concerns and comments with regards to the Sound Monitoring System Protocol measurement methodology. After all of the information has been submitted and analyzed, then the DEC will be in a position to make a decision that accounts for varying viewpoints. Until that time, however, implementation of the Sound Monitoring System Protocol should be suspended to address the issues raised in this request.

The Harvard BOS are very concerned about the noise issues and want to work with the DEC to balance the needs of Evergreen Solar, the DEC, other Devens businesses and residents and the residents of Harvard. We respectfully request that the DEC permit this request for reconsideration and schedule a public hearing on the Sound Monitoring System Protocol so that the procedural matters set forth in this letter may be addressed.

Thank you for your time and attention.

Sincerely,



Ruth H. Silman,
As designee, on behalf of the
Harvard Board of Selectmen

Enclosures

cc: Senator James Eldridge
Representative Jennifer Benson
Representative Robert Hargraves
Robert L. Culver, MassDevelopment
Richard Montuori, MassDevelopment
Town of Ayer Board of Selectmen
Town of Shirley Board of Selectmen
James E. DeZutter, DEC
Eric Stoltzfus, DEC
Victor Normand, DEC Alternate
Town of Harvard Board of Health
Mark Lanza, Esq.