

**Selectboard Executive Session - #2**  
**1 Avenue A, Turners Falls, MA**  
**Tuesday, June 6, 2023**  
**6:30 PM**

**RE:** Executive Session in accordance with G.L. c. 30A, §21(a)(6), to consider the possible purchase, exchange, taking, lease or value of real property - Kearsarge, votes may be taken

**Present:** Selectboard Richard Kuklewicz, Christopher Boutwell and Matt Lord, Town Administrator Steve Ellis, Asst. Town Administrator, Walter Ramsey; Executive Assistant, Wendy Bogusz, Director of Assessing, Karen Tonelli

**Documents:**

- May 8, 2024 letter from Kearsarge Energy
- Executive Session Summary Materials for November 14, 2022

Kuklewicz opens the meeting at 6:31 PM and the *Board votes to go into Executive Session in accordance with G.L. c. 30A, §21(a)(6), to consider the possible purchase, exchange, taking, lease or value of real property - Kearsarge, votes may be taken.* Boutwell – Aye, Kuklewicz – Aye, Lord - Aye

- Ellis gives refresher of last meeting held on 5/22/23. There was a request from Kearsarge that the Town has a responsibility to pay \$130,000 to have the burn dump closed. The Solar Lease contract says they are responsible for having the burn dump closed and successfully capped.
- Kearsarge previously came before the board requesting a reduction with the power purchase agreement and the board told them No.
- Tonelli gives over view of old laws and new laws regarding how solar fields are valued.
- The Board of Assessors are not assessing them separately for land. DOR gave clarification that the value of the panels on exempt land of what you've built upon, the land underneath needs to be taxable to the municipality; we have to tax the person that is using it.
- The last revaluation, DOR requested that the land be sectioned out and calculate the land value for their other facilities that had a pilot
- What Kearsarge is paying the Town is under market
- DOR states Districts cannot enter into PILOTS, 38H is clearly for municipalities.
- The battery storage component is not accounted for.

Lord outlines options available to the Board

- 1) Sue Kearsarge to make them do it because that's what we think the contract says and not do anything
- 2) Make it happen on our own without negotiating with Kearsarge
- 3) Negotiate with Kearsarge to some extent or all of the extend including potentially revising the lease agreement or other agreements in order to reach and agreeable amount.

Which one of the above options is most advantageous to the Town, both in the short and long run? What's risk/reward?

M. Lord and S. Ellis will work with Counsel and come back to the full board on 6/12/23 to work and request a declaratory process and meet with Kearsarge. **\*Note: The Board did not have an executive session on 6/12/23 to discuss this**



*Boutwell makes the motion to adjourn the executive session at 7:13 PM and go into regular session. Seconded by Lord, approved unanimously. Boutwell – Aye, Kuklewicz – Aye, Lord – Aye*

Approved:

✓ Richard J. Kuklewicz

Release to the Public:

✓ Yes

       Not Yet

7/9/25 Date

Date Released to the Public:

7/9/25



May 8, 2023

VIA EMAIL ([townadmin@montague-ma.gov](mailto:townadmin@montague-ma.gov))

Mr. Steven Ellis  
Montague Town Administrator  
One Avenue A  
Turners Fall, MA 01376

*RE: Solar and Energy Storage Lease dated as of April 13, 2020 between Kearsarge Montague BD LLC (“Kearsarge”) and the Town of Montague (“Landlord”), Addendum to Solar and Energy Storage Lease dated as of September 29, 2020 (the “Addendum”) and First Amendment to Solar and Energy Storage Lease dated as of April 29, 2021 (collectively, the “Lease”)*

Dear Steve:

Per my discussion with you earlier this year, I am writing to formally ask for a cost sharing agreement due to dramatically increased costs for the final clean up at the Montague Burn Dump project in accordance with the terms of the Addendum. Capitalized terms used herein shall have the meaning set forth in the Lease.

This project has been an excellent public-private partnership with Montague and has had many twists and turns as you are well aware. In addition, as you also know, Kearsarge had to manage change orders in excess of \$587,000 due to the issues resulting from the identification of waste beyond Tighe & Bond’s original delineation of the site’s limit of waste—which Kearsarge has paid in full. Following completion of original construction per Tighe & Bond’s DEP approved design plan, MA DEP did their final walk through and found multiple issues on site that resulted in more than \$130,000 of additional work related to the cap. We followed the T&B plan but this was just an outcome of the capping of the burn dump.

- (1) rebuild the basin berm at the southern end of the cap to enlarge the retention pond;
- (2) fix washed out areas of the slope;
- (3) provide a relief pipe to direct overflow in a controlled fashion to protect the riverbank;
- (4) repair the cap liner in the riprap swale along the maintenance road;
- (5) provide a pressure relief pipe to alleviate subsurface water pressure; and,
- (6) reseed and stabilize the work areas on the southern portion of the site.

In addition, DEP identified another \$145,000 of remediation work that needed to be completed which was required to improve drainage in the parking areas under the solar canopy by replacing asphalt grindings with gravel and improve stormwater management within the

northeast section of the solar array by installing drainage trenches to control flow and limit potential for erosion to the east of the array. This rework was required for final DEP approval and sign off on the project. Kearsarge completed this and does not expect any sharing as this is tied to the solar facility.


We had suggested that Montague's payment of this \$130,000 back to Kearsarge could be spread out over time by reducing savings from the net metered credit purchase agreement for the original capped landfill project and you took this to your board which then declined this option. We also asked about the potential for the DPW to help with snow plowing and road maintenance or mowing for our projects, once again over time, and this option was also declined. Please note, the portion of the mitigation work required by DEP attributable directly to the solar array, Kearsarge paid.

Kearsarge is currently \$862,000 over cost for the Montague Burn Dump project. We respectfully would like to present to the Montague SelectBoard these issues and creatively work together for a solution to cover the \$130,000 final costs needed to close out this project and receive DEP signoff. Kearsarge cannot afford to cover this cost.

Thank you for your continued cooperation with all of our projects in Montague.

Sincerely,

Kearsarge Montague BD LLC  
By: Kearsarge Solar LLC, its  
manager

By:   
Name: Andrew J. Bernstein  
Its: Manager

## **Executive Session Summary Materials for November 14, 2022**

### **Subject: Montague Burn Dump Capping – Assertion of Town Responsibility for Cx Cost**

#### **1. Synopsis**

Kearsarge Solar believes the Town is liable for costs of construction related to a portion of the burn dump. While we think a court would likely favor the Town from a technical/contractual standpoint (see legal notes in sections 4 and 5), the nuance is that one portion of the DEP closure work is directly linked to the solar array runoff (which Kearsarge readily acknowledges they own), whereas the "Proposed South Pond Drainage Improvements" is exclusively associated with the landfill and not necessarily with the solar.

They recently itemized construction expenses that they believe they and we own, with our portion having a price tag of \$120,000. That figure includes prevailing wage, which would be applicable to the non-solar work. Their contractor is mobilizing now to correct the solar-related issues and would mobilize – under their direction – to do the drainage area work in the spring. Their contractor has apparently elected to hold their price to allow this. All of this work must be completed by August 1, 2023, per DEP requirements.

Also included in this document are sections showing the basis for cost to remediate issues in the south pond drainage area, a proposal to offset town costs through PPA revenue reduction, and summaries of legal opinions related to any potential town liability. Focus on the 2022 opinions. They reference his 2020 opinions, which I have also included FYI.

Following are some facts to further ground the conversation:

- The Burn Dump project is subject to a Corrective Action Design (CAD) and Post-Closure Use Permit (PCUP) issued to the Town by MassDEP. The Burn Dump was capped and the solar array was substantially completed by Kearsarge in Fall 2021.
- Prior to issuing final closure certification, DEP requires that the town take actions to address stormwater and erosion issues. They must be resolved by August 1, 2023.
- The town worked with the project engineer to develop the plans to address these concerns. The expense is \$52,000 and we interpreted this as being within our responsibilities. Those plans have been submitted to DEP and are pending approval.
- Kearsarge is asserting that a portion of the construction cost is the Town's responsibility.
- Section 2D of our lease states: "For the avoidance of doubt, Tenant will pay all costs and expenses incurred in connection with the CAD landfill closure and landlord will pay all costs and expenses incurred in connection with the design and operation of the Corrective Action Design Landfill closure.
- Having previously agreed to assist with a portion of additional construction costs stemming from discovery of an additional landfill debris area during construction, our lease amendment section 6D included language intended to protect the Town from further exposure to construction costs.



## 2. Request for Town Payment of Construction Cost

### Initial Communication (9/8)

**From:** Andrew Bernstein

**Sent:** Thursday, September 8, 2022 3:34 PM

**To:** StevenE - Montague Town Administrator <[StevenE@montague-ma.gov](mailto:StevenE@montague-ma.gov)>; Walter Ramsey - Montague Planner ([planner@montague-ma.gov](mailto:planner@montague-ma.gov)) <[planner@montague-ma.gov](mailto:planner@montague-ma.gov)>

**Cc:** E W Tatelbaum <[etatelbaum@kearsargeenergy.com](mailto:etatelbaum@kearsargeenergy.com)>

**Subject:** Montague BD update

Hi Steve

As requested, we have enclosed the lastest proposal from J Bates. JJ came in between Bates (270K) and Sykes (448k). Hoping the scope was correct. Here is the breakdown so you can ask for funding

After discussing with Bates to split out tasks related to the basin work vs. items for solar, we had him apply prevailing wage to the basin-related work.

- Items #2, 3, 6, 7 are basin related and priced for prevailing wage. 50% of #1 Mobilization/Demobilization to be fair. Total = \$119,968.50
- Items #4, #5 are directly related to solar. Non prevailing. 50% of #1 Mobilization/Demobilization. Total = \$149,034.50

Montague portion would be \$120k to fix your side of this. As you know our overall costs are up due to finding more garbage in the array by 348K alone just in capping.

Boston, MA 02134				Fax:	
Project Name: Montague Landfill Drainage Improvements		Bld Number:			
Project Location: Montague Landfill, Montague, MA		Bld Date: 9/1/2022			
Item #	Item Description	Estimated Quantity	Unit	Unit Price	Total Price
1	Mobilization/Demobilization	1.00	LS	\$12,151.00	\$12,151.00
2	Site Prep (Dewatering And Removal And Stockpiling Of Wood Chip Berm)	1.00	LS	\$12,598.00	\$12,598.00
3	Ground Water Pressure Relief	1.00	LS	\$16,219.00	\$16,219.00
4	Furnish & Install 1' Layer Of 3/4" Stone Under Canopy	1,905.00	SY	\$33.00	\$62,865.00
5	Furnish & Install 3/4" Stone Drip Edges	1,907.00	LF	\$42.00	\$80,094.00
6	Furnish & Install Riprap Swale	145.00	LF	\$84.00	\$12,180.00
7	Build South Basin Including Riprap Forebay, Associated Piping, And Riprap Spillway	1.00	LS	\$72,896.00	\$72,896.00
Total Bid Price:				\$269,003.00	

**Notes:**

- Assumes all excavated material can be used as fill or stockpiled somewhere on site. No import of grading material or loam included. No export of material included.
- Assumes existing wood chip berm to be picked up and stockpiled on site.

## Updated Construction Estimate (10/14)



J. Bates & Son, LLC.  
57 Lawrence St.  
Clinton, MA 01510  
Phone: 978-368-7001  
Fax: 978-368-7005

<b>To:</b>	Kearsarge Energy	<b>Contact:</b>	Matt Landman
<b>Address:</b>	1200 Soldiers Field Road, Suite 202 Boston, MA 02134	<b>Phone:</b>	617-393-4222
		<b>Fax:</b>	
<b>Project Name:</b>	Montague Landfill Drainage Improvements	<b>Bid Number:</b>	
<b>Project Location:</b>	Montague Landfill, Montague, MA	<b>Bid Date:</b>	10/14/2022

Item #	Item Description	Estimated Quantity	Unit	Unit Price	Total Price
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### Basin Work

1B	Mobilization/Demobilization (Basin Work)	1.00	LS	\$5,900.00	\$5,900.00
2	Site Prep (Dewatering And Removal And Stockpiling Of Wood Chip Berm)	1.00	LS	\$29,438.00	\$29,438.00
3	Ground Water Pressure Relief	1.00	LS	\$16,075.00	\$16,075.00
6	Furnish & Install Riprap Swale	145.00	LF	\$81.00	\$11,745.00
7	Build South Basin Including Riprap Forebay, Associated Piping, And Riprap Spillway	1.00	LS	\$70,885.00	\$70,885.00

**Total Price for above Basin Work Items:** \$134,043.00

### Solar Work

4	Furnish & Install 1' Layer Of 3/4" Stone Under Canopy	1,905.00	SY	\$32.00	\$60,960.00
5	Furnish & Install 3/4" Stone Drip Edges	1,907.00	LF	\$41.00	\$78,187.00
1A	Mobilization/Demobilization (Solar Work)	1.00	LS	\$5,900.00	\$5,900.00

**Total Price for above Solar Work Items:** \$145,047.00

**Total Bid Price:** \$279,090.00

### Notes:

- Assumes all excavated material can be used as fill or stockpiled somewhere on site. No import of grading material or loam included. No export of material included.
- Assumes existing wood chip berm to be picked up and stockpiled on site.
- Items #1B, 3, 6, 7 include prevailing wage rates.

<b>ACCEPTED:</b> The above prices, specifications and conditions are satisfactory and hereby accepted. <b>Buyer:</b> _____ <b>Signature:</b> _____ <b>Date of Acceptance:</b> _____	<b>CONFIRMED:</b> <b>J. Bates &amp; Son</b>  <b>Authorized Signature:</b> _____ <b>Estimator:</b> _____
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### 3. Approach Suggested by Kearsarge to Offset Cost by Reducing PPA Revenue

**From:** Andrew Bernstein <abernstein@kearsargeenergy.com>

**Sent:** Friday, November 11, 2022 5:24 PM

**To:** StevenE - Montague Town Administrator <StevenE@montague-ma.gov>; Walter Ramsey - Montague Planner <planner@montague-ma.gov>

**Cc:** E W Tatelbaum <etatelbaum@kearsargeenergy.com>

**Subject:** Forecasted Savings vs Actual

Thanks for your time Wednesday.

If we were to write an amendment to the PPA that would give us any savings over and above the forecasted savings until the NPV reached say 60K, I think this would solve the issue without any loss to the town. I would suggest 50% through this method and 50% through an appropriation for remaining 60K. Still the town will get more savings than forecasted..

Forecasted Savings		Actual savings		Overage savings above forecast
\$ 22,088	Yr1	\$ 22,729		\$ 642
\$ 22,636	Yr2	\$ 34,187		\$ 11,550
\$ 23,199	Yr3	\$ 28,675		\$ 5,476
\$ 23,775	Yr4	\$ 31,099		\$ 7,324
\$ 24,366	Yr5	\$ 37,658	forecast	\$ 13,292
\$ 24,972	Yr6	\$ 38,594	forecast	\$ 13,622
\$ 25,592	Yr7	\$ 39,553	forecast	\$ 13,961
\$ 26,228	Yr8	\$ 40,536	forecast	\$ 14,307
\$ 26,880	Yr9	\$ 41,543	forecast	\$ 14,663
\$ 27,548	Yr10	\$ 42,575	forecast	\$ 15,027
\$ 28,233	Yr11			
\$ 28,934	Yr12			
\$ 29,653		Total forecast period		\$ 109,864
\$ 30,390				
\$ 31,145				
\$ 31,919				
\$ 32,712				
\$ 33,525				
\$ 34,358				
\$ 35,212				
\$ 36,087				
\$ 36,984				
\$ 37,903				
\$ 38,845				
\$ 39,810				
\$ 40,799				
\$ 41,813				
\$ 42,852				
\$ 43,917				
\$ 45,009				

#### 4. KP Law Guidance (2022)

*Following is a summary of key communications. Walter spoke with KP on 11/9 and can share that conversation.*

**From:** StevenE - Montague Town Administrator

**Sent:** Wednesday, October 26, 2022 1:44 PM

**To:** David Doneski <DDoneski@k-plaw.com>

**Cc:** Gregg J. Corbo <GCorbo@k-plaw.com>; Walter Ramsey - Montague Planner <planner@montague-ma.gov>

**Subject:** RE: Keararge Burn Dump Lease Request for Opinion

Hi David

We are circling back to this opinion an opportunity to discuss whether we should hold fast to the contract language – which could result in immediate costs and subsequent litigation - or seek to find another path forward. I have attached emails from Andrew Bernstein, which seem to make plain that they feel the Town is responsible for the Basin work. Before we engage the company, I'd like to think through the most strategic response with you. If you receive my vacation message, don't worry about it – I'll make myself available as needed.

Steve

**From:** David Doneski <DDoneski@k-plaw.com>

**Sent:** Tuesday, September 13, 2022 11:08 AM

**To:** Walter Ramsey - Montague Planner <planner@montague-ma.gov>

**Cc:** Gregg J. Corbo <GCorbo@k-plaw.com>; StevenE - Montague Town Administrator <StevenE@montague-ma.gov>

**Subject:** RE: Keararge Burn Dump Lease Request for Opinion

Walter,

This issue seems to be in the same vein as the additional debris removal requirement that arose in 2020. I am taking it that the remedial actions identified by DEP to address stormwater and erosion issues are all within the umbrella of the work under the Corrective Action Design Permit issued by DEP for post-closure use of the landfill. If that is the case, I do see the Lease and Addendum provisions as making the construction cost a responsibility of Kearsarge, as Tenant under the Lease. I can understand a Kearsarge objection to the work component for the South Pond Drainage Improvements on the basis that it is not related to the solar installation. However, if this work component is being directed as part of the DEP review and oversight of the landfill that is required on account of the solar project installation, that is support for the position that the construction cost is a Tenant obligation. In other words, if this work directive would not have been given but for the fact that Kearsarge is doing the solar installation then that supports a Town position that the work is the result of the solar project

and therefore a cost that Kearsarge should pay. In my view, the specifics of DEP's directive are an important element in this analysis. Can you forward the related document(s)?

For a fuller explanation, I have copied below an e-mail chain from July and August of 2020 (Note: SE moved this to next section – KP Law Guidance 2020) that includes my comments on how the lease provisions should be applied to additional construction costs. While the Town did agree to share some of the costs identified in 2020, as set forth in the Addendum to the Lease, I would take the view that the Addendum specified that cost share as a one-time only contribution. Paragraph 6.c of the Addendum states:

Landlord's agreement hereunder to pay a portion of the Additional System Construction Costs is a one-time agreement for contribution toward Tenant's cost responsibilities for design and construction of the System and construction of the Corrective Action Design Landfill closure. Landlord shall have no other obligation or liability to pay any other costs for design and construction of the System or construction of the Corrective Action Design Landfill closure.

Even with this as background, it is probably a reasonable expectation that Kearsarge will push back on the construction cost payment since it is another increase in its total project costs. If Kearsarge refuses to perform the work, the Town could either perform the work through its own contracting/procurement efforts and then seek to recover the costs from Kearsarge or file a legal action against Kearsarge for a declaratory judgment that the additional construction work is Kearsarge's responsibility. Any DEP time deadlines for the construction would obviously affect the decision on how to proceed.

**From:** Walter Ramsey - Montague Planner <[planner@montague-ma.gov](mailto:planner@montague-ma.gov)>

**Sent:** Wednesday, September 7, 2022 9:14 AM

**To:** David Doneski <[DDoneski@k-plaw.com](mailto:DDoneski@k-plaw.com)>

**Cc:** Gregg J. Corbo <[GCorbo@k-plaw.com](mailto:GCorbo@k-plaw.com)>; StevenE - Montague Town Administrator <[StevenE@montague-ma.gov](mailto:StevenE@montague-ma.gov)>

**Subject:** Kearsarge Burn Dump Lease Request for Opinion

Hello David,

I am writing for your opinion as to the town's position relating to the construction costs associated with DEP-required improvements to the Montague Burn Dump landfill cap and solar array.

Facts:

- The Burn Dump project is subject to a Corrective Action Design (CAD) and Post-Closure Use Permit (PCUP) issued to the Town by MassDEP
- The Burn Dump was capped and the solar array was substantially completed by Kearsarge in Fall 2021.

- Prior to issuing the final closure certifications, DEP is requiring the town to implement remedial actions to address stormwater and erosion issues that the identified in a December 2021 site visit.
- In response, The town worked with our project engineer GZA to develop the plans to address DEP's concerns. The design expense is \$52,000 and we interpreted this as being within our responsibilities. Those plans have been submitted to DEP and are pending approval. Kearsarge was consulted and provided input throughout the design process. Kearsarge is currently soliciting construction bids.
- The opinion of probable cost for the construction cost is \$352,000 which is causing Kearsarge considerable consternation. They have suggested that some portion of that cost should be our responsibility (as below).
- Section 2 D of the lease states the following: "For the avoidance of doubt, Tenant will pay all costs and expenses incurred in connection with the CAD landfill closure and landlord will pay all costs and expenses incurred in connection with the design and operation of the Corrective Action Design Landfill closure
- Having previously agreed to assist with a portion of additional construction costs stemming from discovery of an additional landfill debris area during construction, our lease amendment section 6D included language intended to protect the Town from further exposure to construction costs.

While we think the Town is on solid ground suggesting it is not our responsibility to pay for further construction related expense, the nuance to this situation is that one portion of the DEP closure work is directly linked to the solar array runoff (which they readily acknowledge that they own), but the "Proposed South Pond Drainage Improvements" is exclusively associated with the landfill and not necessarily with the solar. That expense is at least \$150,000. Kearsarge is reluctant to pay for this portion of the work and we can expect them to protest, claiming that they "built it as we designed it". It is true that the town did develop the cap design, but there is no obvious evidence of negligence or omission by our designer (in my opinion).

So...

If the town stands firm and requires Kearsarge to pay for construction in order to remain compliant with DEP- what is our level of exposure to a lawsuit from Kearsarge?

- As another twist, if they refuse to contract for and perform that element of the required work, could we compel them to do perform it through this contract? What might that look like?

We've tried to be pragmatic throughout this project and consider Kearsarge a good partner, but are also very concerned that we not pay for expenses that are not legitimately owned by the Town. Happy to discuss at your earliest convenience.

Walter Ramsey, AICP | Montague Town Planner | (413) 863-3200 x 112 | [planner@montague-ma.gov](mailto:planner@montague-ma.gov)

## 5. KP Law Guidance (2020)

**From:** David Doneski

**Sent:** Monday, August 31, 2020 2:09 AM

**To:** 'StevenE - Montague Town Administrator' [townadmin@montague-ma.gov](mailto:townadmin@montague-ma.gov)

**Subject:** RE: Sandy Lane Burn Dump - Excess Solid Waste

Steve,

I have been able to give this some further review. On my read, the Town may reasonably take the position that while it is responsible for the additional design costs for burn dump/landfill closure or remediation activities associated with the installation of the system, the Tenant entity (Kearsarge Montague BD LLC) is responsible for the costs of the associated additional construction work. I say this based on the section 2 and section 16 provisions cited in my e-mail memo of July 27 copied below, as well as other language noted in this memo. The lease does not specifically address the type of "what if" situation we are dealing with here and because of that, together with the broad language defining the Tenant's responsibilities, I would take the position that the lease allocates the risk of additional construction cost to the Tenant. Though I believe the Town may therefore deny responsibility for the additional construction costs now facing the project, I also believe – as we have discussed and as you have floated to Kearsarge – that an arrangement under which the Town shares some of those additional costs, as a project 'partner,' may well be of value to the Town and the project over the long term.

Under Section 10(c) the Tenant "represents" that:

it knows and understands that the System will be built upon all or a portion of the Landfill, which is governed by DEP regulations regarding closed landfills, and agrees that the Leased Premises is subject to all applicable permits, and the Tenant takes this Lease subject thereto. (clause ii)

and, also:

accepts the Leased Premises "as is" and with any and all defects, and without benefit of any services, facilities, improvements or modifications to be made by Landlord, and without any representation or warranty of any kind by Landlord, and without any recourse against Landlord as to the title to and the nature, condition or usability of the Leased Premises, or as to the use(s) to which the Property and Leased Premises or any part thereof have been put except as otherwise detailed in this Lease. (clause vi)

Section 14(e) states a broad Tenant responsibility for compliance with DEP permit conditions, as follows:

Tenant also acknowledges and agrees that the DEP Permit may impose certain terms, conditions and requirements which are related to the Tenant's use of the Leased Premises and/or the installation, construction and/or operation of the System and which would not have been imposed on Landlord were it not for this Lease, and that Tenant shall, notwithstanding anything to the contrary in this Lease, be responsible for those conditions and requirements, as well as for the routine mowing of the Landfill and control of vegetation within the Premises in order to comply with any DEP permits and requirements (hereinafter collectively referred to as "Tenant's Landfill Obligations").

In my view, these provisions place the risk of additional construction costs required to install the System as a consequence of an unforeseen condition (other than Hazardous Waste), and to install it in compliance with DEP and other regulatory requirements, on the Tenant. Accordingly, I think it is fair and reasonable to communicate to Kearsarge that the Town is willing to entertain a cost share arrangement even though it sees the Lease as allocating all of the costs to Kearsarge.

On the issue of closure "operation" costs, I read the language you have referenced as allocating to the Town responsibility for the cost of design of the landfill closure and operation of the closed landfill, as opposed to installation or operation of the solar energy system (the "System"). Specifically, section 2(d) states:

For the avoidance of doubt, Tenant will pay all costs and expenses incurred in connection with the construction of the Corrective Action Design Landfill closure, and Landlord will pay all costs and expenses incurred in connection with the design and operation of the Corrective Action Design Landfill closure.

David J. Doneski, Esq.

KP | LAW

**From:** StevenE - Montague Town Administrator <[townadmin@montague-ma.gov](mailto:townadmin@montague-ma.gov)>

**Sent:** Tuesday, August 25, 2020 11:40 AM

**To:** David Doneski <[DDoneski@k-plaw.com](mailto:DDoneski@k-plaw.com)>

**Subject:** RE: Sandy Lane Burn Dump - Excess Solid Waste

Hi David

I'd like to follow up regarding Montague's responsibility for any additional construction costs associated with an expanded CAD area following discovery of additional debris areas at our closed burn dump. Have you had a chance to look at this more closely yet?

Also, I'm going to offer an update on our status, as well as my own read of the agreement, which does not perfectly align with your original opinion (further below), which I understand

was preliminary and focused on a specific question. Perhaps this can be the basis for a conversation if you have time later today or Wednesday.

#### **Update and Understanding of Responsibility for modified CAD Design and Cap Construction Oversight**

The Selectboard moved last night to use a Reserve Fund Transfer to fund \$50,000 in design work required by DEP as part of modifying our existing Corrective Action Design Permit, so that work will soon be under way. We expect to pursue an additional appropriation (\$35,000) to cover costs associated with engineering oversight at an October Special Town Meeting. Having started with your original opinion, below, I again reviewed sections 2b and 2c. They appear to specify that these costs fall under our responsibilities. Specifically, as per 2b, to obtain the CAD permit, and also, as per 2c, to assume the costs "incurred in connection with the design and operation of the CAD Landfill closure."

*In making this statement, I am assuming that "operation" of the closure is specific to maintaining engineering oversight, but would like your confirmation of this. I see that the term is distinct the Tenant's has specified obligation to cause "completion" of the closure.*

#### **Town v Kearsarge responsibility for construction costs**

When reviewing responsibility, 2b contains language stating that the Tenant will pay all costs associated with the construction of the CAD Landfill closure. As you noted, this is reaffirmed in section 16b (I don't really see it in 16 a or c). This seems like an unambiguous responsibility, but I would note that section 2c references "(iii) the Corrective Action Design Permit issued by DEP on April 5, 2019." I don't anywhere see language referencing a potential change in the CAD and whether obligations change or remain the same in the event of such. I suppose my question is whether any additional construction obligation is overtly theirs (or not) in the present situation. This is important for any negotiations we may undertake relative to the construction cost and also, frankly, is a question I need to have a firm answer on before we proceed. My Selectboard will want to have clarity on our obligations before giving anything away.

Thanks - Steve

**From:** David Doneski [<mailto:DDoneski@k-plaw.com>]

**Sent:** Monday, July 27, 2020 12:27 PM

**To:** StevenE - Montague Town Administrator

**Cc:** Walter Ramsey - Montague Planner

**Subject:** RE: Sandy Lane Burn Dump - Excess Solid Waste

Hi Steve,

Sorry for missing this. Under the lease agreement Kearsarge Montague BD LLC, as Tenant, is responsible for the costs of design and construction of the System "and any and all related improvements on or at the Leased Premises . . ." (section 2(d)) In

section 2(c), the parties acknowledge that construction and installation of the System requires completion of the work required by the Corrective Action Design Permit issued by DEP, and Tenant is responsible for obtaining the permits and approvals necessary for construction of any improvements on the premises, including those issued by DEP. Also, section 14(c) contains a Tenant acknowledgment that the DEP Permit may impose additional conditions and requirements in connection with Tenant's use of the premises, and sections 16(a), (b) and (c) repeat that Tenant has the obligation to cause completion of the closure in accordance with applicable laws and governmental approvals.

With that background, I think it is fair to take an initial position that the cost to address the excess solid waste is a Tenant responsibility. However, I would expect Kearsarge to look for some form of cost relief. At this point, it is unclear precisely how the additional waste will need to be handled – capped in place (presumably less expensive) or removed. When that information is available, we and Kearsarge will be in a better position to evaluate if and how any cost adjustment arrangement should be implemented.

I am presuming that the additional waste is not hazardous waste, which would implicate the Town's representation in section 11(c) of the Lease that it has no reasonable knowledge of the presence of hazardous substances at the site except as set forth in the Post-Closure Use Permit and Corrective Action Design Permit.

Has the Town received any notice from Kearsarge regarding this issue and cost impact?

David J. Doneski, Esq.

**From:** StevenE - Montague Town Administrator  
**Sent:** Tuesday, July 21, 2020 4:37 PM  
**To:** David Doneski  
**Subject:** FW: Sandy Lane Burn Dump - Excess Solid Waste

Hi David

I hope you are doing well. I wanted to touch base because the Burn Dump capping project with Kearsarge Solar has hit a snag. Specifically (and as better described below), the plans for capping as approved by MA DEP did not account for a debris area that was discovered over the past several days. This will undoubtedly add new cost to the project. One question is whether the Town would be responsible for those costs or has some protection in its contract. If we do have responsibility for cost, the second question would be whether this is something we could consider an "emergency" project that could be funded without appropriation until we can have a town meeting in the fall.

Please let me know whether you have any time available to ponder this question and share your thoughts.

Thanks - Steve

**From:** Ryan DaPonte [<mailto:Ryan.DaPonte@gza.com>]

**Sent:** Tuesday, July 21, 2020 12:13 PM

**To:** Walter Ramsey - Montague Planner

**Cc:** Todd Greene; StevenE - Montague Town Administrator; Nolan Fonda

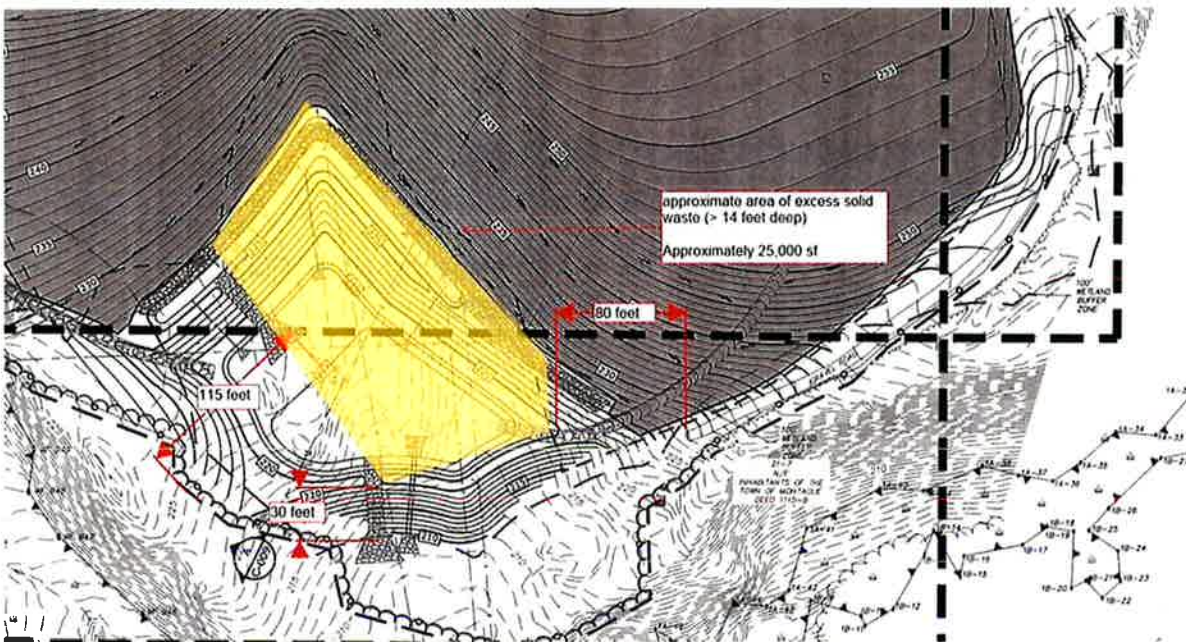
**Subject:** Sandy Lane Burn Dump - Excess Solid Waste

Walter,

While excavating for the stormwater pond associated with the landfill closure, solid waste was encountered beneath the stormwater pond subgrade elevation. In the original design documents, the waste delineation showed that solid waste was not present under the stormwater pond.

Earlier today, GZA directed Bates to dig a series of test pits in order to document the areas where excess waste was present and to attempt to determine the depth of this waste. The areas where excess soil waste were determined to exist are shown in the sketch below. In these areas, solid waste appeared to continue to depths below the groundwater table. In the deepest test hole excavated, solid waste was present at depths greater than 14 feet below the ground surface. This represents a significant volume and area of solid waste that is not accounted for in the MassDEP approved Corrective Action Design (CAD).

GZA recommends that we evaluate if the solid waste can remain in place and be capped in the stormwater pond area, or if it needs to be removed in order to allow for the stormwater pond to infiltrate. In order to make this assessment, we need to review the entire CAD permit application package that was submitted to MassDEP. Do you have a copy of this full application package (figures, narrative, application form, supporting documents) that you can share with GZA, or should we reach out to DEP?



The gray area defines the design waste footprint – the yellow area is the additional waste delineated earlier today.

Feel free to call with any questions.. Regards,

**Ryan DaPonte, P.E.** (RI, MA, CT)

**Project Manager**

FY	Docket#	RP/PP	Code	Location	Owner Name	Acres	A/V	TOM Taxes	TFFD Taxes	Comments
2022	F347471	PP# 1041		131 Turnpike Rd	Kearsarge Turners Falls LLC	na		410,000 PILOT (10,800)	\$1,611.30	
2022	F347468	RP14-O-214		131 Turnpike Rd	Kearsarge Turners Falls RE LLC	6.162		355,400 \$9,179.77	\$1,396.72	
2022	F347470	RP 23-O-67		248 Millers Falls Rd	Kearsarge Millers Falls RE LLC	15.904		275,500 \$7,116.17	\$1,082.72	
2022	F347469	PP #1069		248 Millers Falls Rd	Kearsarge Millers Falls LLC	na		885,610 \$22,875.31	\$3,480.45	SS appraisal
2023	abatement	PP# 1041		131 Turnpike Rd	Kearsarge Turners Falls LLC	na		410,000 PILOT (10,800)	\$1,615.35	
2023	abatement	RP14-O-214		131 Turnpike Rd	Kearsarge Turners Falls RE LLC	6.162		355,400 \$8,451.41	\$1,290.10	Claims RE incl In PILOT
2023	abatement	RP 23-O-67		248 Millers Falls Rd	Kearsarge Millers Falls RE LLC	15.904		275,500 \$7,116.17	\$1,082.72	
2023	abatement	PP #1069		248 Millers Falls Rd	Kearsarge Millers Falls LLC	na		885,610 \$21,059.81	\$3,214.76	
2023	abatement	PP#1030		10 Sandy Lane	Kearsarge Montague LLC	na		PILOT (\$5,000)	\$9,147.60	Claims District tax is included In PILOT
2023	abatement	PP#1030		10 Sandy Lane	Kearsarge Montague BD LLC	na		PILOT (10,000)		Claims District tax is Included in PILOT

# **Situational Analysis: Solar Facility PILOTs (M.G.L. c. 59, § 38H(b))**

An overview of the history and current state of solar facility PILOTs in Massachusetts.

Solar facilities use solar photovoltaic (PV) arrays, which electronically transform solar energy into electricity through mechanical hardware (semiconductors) to power homes and businesses.<sup>67</sup> Solar installations vary in generating capacity, panel size, and supporting equipment. Traditionally, there would be personal property tax due on the value of the equipment for a commercial use, as well as real property tax on the underlying land. Under M.G.L. c. 59, § 38H(b), however, a municipality may enter into a PILOT agreement with an electric “generation company” or “wholesale generation company” to replace taxes on the value of the company’s generating facilities in the community.<sup>68</sup> This statute covers PILOT agreements for conventional power plants as well as facilities using renewable energy, such as solar and wind power.<sup>69</sup> Under this provision of state law, municipalities are supposed to receive the equivalent of full tax payments from these facilities through the PILOTs.<sup>70</sup>

Solar facility PILOTs provide a stable and predictable source of revenue to the municipalities and offer some measure of security to generation facilities by allowing them to anticipate future tax payments.<sup>71</sup> They also allow municipalities to enjoy the benefits of welcoming renewable energy into their communities without the risk of losing tax revenues. Recent examples of solar installations in Massachusetts that have PILOT agreements with municipalities include projects in Rehoboth and Rochester, which are located on large plots of land such as former landfill sites.<sup>72</sup>

**Kearsarge Sandy Lane Solar**

**Phase 1 Project (6MW)**

**LEASE PAYMENT SCHEDULE**

**Rent per MW: \$26,000**

**Escalator: 1.8%**

<b>Year</b>	<b>Rent</b>
1	\$155,922
2	\$158,729
3	\$161,586
4	\$164,494
5	\$167,455
6	\$170,469
7	\$173,538
8	\$176,661
9	\$179,841
10	\$183,079
11	\$186,374
12	\$189,729
13	\$193,144
14	\$196,620
15	\$200,160
16	\$203,762
17	\$207,430
18	\$211,164
19	\$214,965
20	\$218,834
21	\$222,773
22	\$226,783
23	\$230,865
24	\$235,021
25	\$239,251

## Kearsarge Sandy Lane Solar

### Phase 1 Project (6MW)

#### PILOT PAYMENT SCHEDULE

##### Annual Payments Schedule

(Based Upon DC Capacity of 5,997,60 kW)

<u>Year</u>		<u>PILOT Rate (\$ per kW DC)</u>	<u>Total Annual Payment Due</u>
1		\$9.17	\$55,000
2		\$9.17	\$55,000
3		\$9.17	\$55,000
4		\$9.17	\$55,000
5		\$9.17	\$55,000
6		\$9.17	\$55,000
7		\$9.17	\$55,000
8		\$9.17	\$55,000
9		\$9.17	\$55,000
10		\$9.17	\$55,000
11		\$3.75	\$22,500
12		\$3.75	\$22,500
13		\$3.75	\$22,500
14		\$3.75	\$22,500
15		\$3.75	\$22,500
16		\$3.75	\$22,500
17		\$3.75	\$22,500
18		\$3.75	\$22,500
19		\$3.75	\$22,500
20		\$3.75	\$22,500

## **Kearsarge Sandy Lane Solar**

### **Phase 2 – Burn Dump Project (6MW)**

**(Based Upon DC Capacity of 3,000,000 kW and Battery Storage Capacity of 1.27 MW AC)**

#### **LEASE PAYMENT SCHEDULE**

<b>Year</b>	<b>Annual Payment</b>
1	\$1,000.00
2	\$1,000.00
3	\$1,000.00
4	\$1,000.00
5	\$1,000.00
6	\$1,000.00
7	\$1,000.00
8	\$1,000.00
9	\$1,000.00
10	\$1,000.00
11	\$1,000.00
12	\$1,000.00
13	\$1,000.00
14	\$1,000.00
15	\$1,000.00
16	\$1,000.00
17	\$1,000.00
18	\$1,000.00
19	\$1,000.00
20	\$1,000.00
21	\$1,000.00
22	\$1,000.00
23	\$1,000.00
24	\$1,000.00
25	\$1,000.00

**Kearsarge Sandy Lane Solar**

**Phase 2 – Burn Dump Project (**

**(Based Upon DC Capacity of 3,000,000 kW and Battery Storage Capacity of 1.27 MW AC)**

**PILOT PAYMENT SCHEDULE**

<u><b>Year</b></u>	<u><b>Annual Payment</b></u>
1	\$10,000
2	\$10,000
3	\$10,000
4	\$10,000
5	\$10,000
6	\$10,000
7	\$10,000
8	\$10,000
9	\$10,000
10	\$10,000
11	\$10,000
12	\$10,000
13	\$10,000
14	\$10,000
15	\$10,000
16	\$10,000
17	\$10,000
18	\$10,000
19	\$10,000
20	\$10,000

## **Eligibility**

Under Massachusetts law, “generation company” is defined as “a company engaged in the business of producing, manufacturing or generating electricity or related services or products, including but not limited to, renewable energy generation attributes for retail sale to the public.”<sup>75</sup> Many of the state’s large-scale solar farms and facilities with a capacity of over 1 megawatt (MW) are operated by developers that fit the legal definition of “generation company.” (For reference, a 1 MW solar facility in Massachusetts, which produces 1,000 kilowatts [kW] of electricity, can power over 164 households).<sup>76</sup>

These large solar companies and developers, however, cannot participate in net metering or own net metering facilities, according to regulations promulgated by the Department of Public Utilities.<sup>77</sup> Net metering allows owners of solar facilities to offset the cost of their electric bills by transferring any excess energy produced by their renewable energy facilities back to their electric companies for a credit.<sup>78</sup> In decades past, it was not uncommon for residential installations to directly power hot water heaters. Today, the connection goes outside the home to the electric grid. Electric customers are therefore billed for the net difference between their electricity usage and what they produce (or receive net metering credits if their electrical production outpaces their usage). Net metering incentivizes consumers to build their own small solar facilities and also permits customers of community solar projects to sell electricity back to the grid.

Although net metering was initially established for small (under 30 kW) solar installations, an expansion of the program in 2009 allowed privately owned mid-sized solar farms (up to 2 MW) to participate.<sup>79</sup> However, larger solar installations and generation facilities cannot take advantage of this program.

## **PILOT Agreement Components**

Under a PILOT agreement, the generation company must make payments that are the “equivalent of the property tax obligation based on full and fair cash valuation.”<sup>80</sup> According to the DOR’s Division of Local Services (DLS), the following are among the components necessary for a solar facility PILOT agreement:

- a mechanism that represents taxes at full and fair cash valuation;
- estimated projections by municipal assessors of the initial cash valuation and tax payments of the renewable energy system for each year of the PILOT agreement;<sup>81</sup>
- a formula or fixed values to determine values of the solar facility over the life of the agreement;
- a term limit for the PILOT agreement with the generation company;
- approval of the agreement by the municipality’s legislative body or authorization of the chief executive officer to negotiate on the municipality’s behalf;
- documentation of the agreement provided to the DOR’s Bureau of Local Assessment; and
- recordkeeping and reporting of the agreement values.<sup>82</sup>

The PILOT agreement customarily provides that payments do not decrease as the value of the facility declines over time through depreciation. The PILOT can be structured with consistent payments to avoid larger payments at the start of the agreement. PILOT agreements can last for a “reasonable term,” but the DLS recommends they not last longer than the useful life of a solar installation (generally between 20 and 30 years for the average solar PV system).<sup>83</sup>

If the solar developer owns the land on which the solar equipment is placed, the equipment can be assessed as real property if it is to remain

on the site for its useful life, or as personal property if the equipment will be replaced periodically.<sup>84</sup> Some issues arise, however, when the owner of the land is not the solar developer that provides the equipment. If the solar equipment is treated as real estate, the landowner will be taxed for the increase in the property's value caused by the presence of the equipment. If the equipment is treated as personal property, installations are assessed to the solar developer, not the landowner.<sup>85</sup>

### **Taxable Status of Solar Arrays (M.G.L. c. 59, § 5, cl. 45)**

The provisions of M.G.L. c. 59, § 38H(b) are undercut by a property tax exemption provided under M.G.L. c. 59, § 5, cl. 45 for any

*[s]olar or wind powered system or device which is being utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of property taxable under this chapter; provided, however, that the exemption under this clause shall be allowed only for a period of twenty years from the date of the installation of such system or device.*<sup>86</sup>

The original intent of Clause 45, which was enacted in 1975 and revised in 1978,<sup>87</sup> was to provide an exemption to owners of residential properties who wanted to use off-grid rooftop panels to supply electricity to their properties.

Clause 45, however, has generated a great deal of controversy in the current age of solar farms. Between 2014 and 2017, the ATB rendered decisions on cases from the towns of Westborough, Swansea, and Barre and interpreted the clause as exempting *both residential and commercial solar arrays* from property taxes.<sup>88</sup> The ATB held in each of these decisions that a solar operator cannot be taxed if its solar facility is supplying power to a property that pays taxes, regardless of whether the energy generated is used on the property where the facility is located or on another property.<sup>89</sup>

The ATB's interpretation of Clause 45 in these cases has also allowed solar developers that participate in net metering and supply electricity to other properties through the electrical grid to be eligible for the solar exemption.<sup>90</sup> In 2020, the ATB also rendered decisions on cases from the towns of Framingham and West Bridgewater and held, based on the language of Clause 45, that a solar facility that supplies net metering credits for nontaxable properties such as municipal buildings is *taxable*.<sup>91</sup>

The ATB decisions have increased the importance of PILOT agreements as a method to guarantee a steady source of revenue to communities from solar installations.<sup>92</sup> Municipalities can negotiate a PILOT agreement with a solar developer, regardless of whether the installation qualifies for the exemption. Although some developers recognize the need to pay their fair share of taxes, others have sought to avoid or minimize property taxes on their solar installations. This effort has led to difficult interactions between municipal officials and solar developers in recent years, such as the following:

- disputes over assessments of equipment;
- solar developers requesting tax abatements on equipment;
- moratoriums on solar installations after multiple agreements with developers; and
- a reluctance in some municipalities to participate in PILOT agreements.<sup>93</sup>

#### **Footnotes**

67. Solar Energy Industries Association. (2020). *Photovoltaics*. <https://www.seia.org/initiatives/photovoltaics>
68. Massachusetts Department of Revenue, Division of Local Services. (2017, August). *Informational guideline release (IGR) No. 17-26 – Valuation and taxation of electric generating facilities*. <https://dls.gateway.dor.state.ma.us/gateway/DLSPublic/IgrMaintenance/714>
69. M.G.L. c. 59, § 38H(b); Massachusetts Department of Revenue, Division of Local Services. (2017, August). *Informational guideline release (IGR) No. 17-26 – Valuation and taxation of electric generating facilities*.
70. *Id.*; Meeting with Concord Town Assessor, 5/6/20. On file with DLM.
71. Meeting with Concord Town Assessor, 5/6/20. On file with DLM.
72. BlueWave. (2020). *Rochester, MA*. <http://bluewave-capital.co.za/projects/rochester-ma/>; Larocque, M. (2014, August 14). *New solar array in Rehoboth unveiled*. The Enterprise. <https://www.wickedlocal.com/article/20140814/NEWS/140818356>
73. Larocque, M. (2014, August 14). *New solar array in Rehoboth unveiled*.
74. BlueWave. (2020). *Rochester, MA*.

75. M.G.L. c.164, § 1
76. Billman, G. (2018, February 26). *Massachusetts reaches 2,000 MW of solar installations*. Massachusetts Clean Energy Center. <https://www.masscec.com/blog/2018/02/26/massachusetts-reaches-2000-mw-solar-installations>
77. Massachusetts Department of Public Utilities, Electric Power Division. (2020). *Net metering eligibility*. <https://www.mass.gov/service-details/net-metering-eligibility>; 220 CMR 18.06.
78. Massachusetts Department of Public Utilities, Electric Power Division. (2020). *Net metering guide*. <https://www.mass.gov/guides/net-metering-guide>
79. *Id.*; Massachusetts Department of Public Utilities, Electric Power Division. (2020). *Net metering laws and regulations*. <https://www.mass.gov/info-details/net-metering-laws-and-regulations>
80. M.G.L. c. 59 § 38H(b).
81. Some PILOT agreements on file with DLM have provisions that result in small increases in payments each year. See also Massachusetts Department of Revenue, Division of Local Services, *City & Town* (2017, June 1), at 7. <https://www.mass.gov/doc/17ctown-june1pdf/download>
82. Department of Revenue, Division of Local Services, *City & Town* (2017, June 1), at 6-8.
83. *Id.* at 7; Solar Energy Industries Association. (2020). *Recycling & end-of-life considerations for photovoltaics*. <https://www.seia.org/initiatives/recycling-end-life-considerations-photovoltaics>
84. Barnes, J., Laurent, C., Uppal, J., Barnes, C., and Heinemann, A. (2013, July). *Property taxes and solar PV systems: Policies, practices, and issues*, at 29-31. Report prepared by U.S. Department of Energy, North Carolina Solar Center, and Meister Consultants Group. <https://solar.gwu.edu/property-taxes-and-solar-pv-systems-policies-practices-and-issues>; Massachusetts Department of Revenue, Division of Local Services, *City & Town* (2012, March), at 3-4. On file with DLM.
85. Department of Revenue, Division of Local Services. *City & Town* (2017, June 1), at 6.
86. M.G.L. c. 59, § 5, Cl. 45; see also *KTT, LLC v. Board of Assessors of Swansea*, Mass. Appellate Tax Bd., No. ATB 2016-426, slip op. (Oct. 13, 2016) On file with DLM.
87. St. 1975, c. 734; St. 1978, c. 388.
88. *Forrestall Enterprises, Inc. v. Board of Assessors of the Town of Westborough*, No. ATB 2014-1025 (Appellate Tax Bd., Dec. 4, 2014). On file with DLM; *KTT, LLC v. Board of Assessors of the Town of Swansea*, No. ATB 2016-426 (Mass. Appellate Tax Bd., Oct. 13, 2016). On file with DLM; *Quabbin Solar, LLC v. Board of Assessors of the Town of Barre*, No. ATB 2017-480 (Mass. Appellate Tax Bd., Nov. 2, 2017). On file with DLM.
89. *Id.*
90. Further details on recent ATB decisions can be seen in Appendix C.
91. See *PelleVerde Capital, LLC v. Board of Assessors of the Town of West Bridgewater* (Mass. Appellate Tax Bd., May 29, 2020). On file with DLM; *United Salvage Corp. of America v. Board of Assessors of the City of Framingham* (Mass. Appellate Tax Bd., May 29, 2020). On file with DLM.
92. Massachusetts Department of Revenue, Division of Local Services. (2017, August). *Informational guideline release (IGR) No. 17-26 – Valuation and taxation of electric generating facilities*, at 5.
93. See Findings and Recommendations section for more information.

