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June 22, 2018

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The Honorable Jeffrey Sanchez, Chair
The Honorable Stephen Kulik, Vice-Chair
House Committee on Ways and Means
State House
Boston, Massachusetts 02133

Re: Support of S. 2364, An Act Relative to Clarifying Property Tax Exemptions for Solar and Wind Systems

Dear Chairman Sanchez and Vice-Chairman Kulik,

The Massachusetts Municipal Lawyers Association (“MMLA”), the municipal bar association, wishes to express its support for S.2364, *An Act Relative to Clarifying Property Tax Exemptions for Solar and Wind Systems*, which concerns the property taxation of solar and wind energy facilities. The approval of S.2364 would clarify which facilities are eligible for property tax exemptions under G.L. c. 59, §5, in accordance with both the original intent of the exemption provision that was first approved in 1975, and the longstanding interpretation of that provision by the Department of Revenue (“DOR”).

As approved in 1975, G.L. c. 59, §5, cl. 45 (“Clause 45”) provides a 20-year property tax exemption for: *“Any solar 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 that is taxable under [Chapter 59].....”* Clause 45 was commonly understood, and was interpreted by DOR, as providing a property tax exemption for systems that served the property on which the systems were located (or contiguous properties under the same ownership), as a means to encourage individual property owners (both residential and commercial) to install solar and wind systems.

The enactment of Clause 45 preceded the enactment of net-metering statutes that provide for owners of solar and wind systems to receive credits for power generated by the facilities and supplied to the regional power grid. Net metering created a separate financial incentive for renewable power development, and encouraged the development of commercial-scale facilities that were not primarily intended to meet the power needs of the property on which they were located. In DOR’s

opinion, Clause 45 was *not* intended to apply to such commercial facilities whose purpose was to generate energy for sale to the grid. Such facilities were treated as being taxable (although they were eligible for alternative PILOT agreements, subject to municipal approval, under G.L. c. 59, § 38N).

Two recent decisions by the Appellate Tax Board (“ATB”) have overruled DOR’s longstanding interpretation and have created a potential outright exemption from property taxes for commercial-scale facilities, such as “solar farms”:

- (1) In Forrestall Enterprises, Inc. v. Board of the Assessors of the Town of Westborough, 2014 WL 6863331(ATB Dec. 4, 2014), the ATB ruled that Clause 45 applied to systems constructed on two (noncontiguous) properties owned by the petitioner, the net metering credits from which were applied to the electric bills of other properties in town also owned by the petitioner (or by corporations that he owned).
- (2) In KTT, LLC v. Board of Assessors of the Town of Swansea, 2016 WL 6210310 (ATB Oct. 13, 2016), the ATB further expanded the availability of the Clause 45 exemption, by ruling that Clause 45 applied even where the credits were not used primarily to reduce the electric bills of the owner of the property where the facility was sited. In KTT, the owners of the parcel on which a solar farm had been constructed had entered into an agreement with a bank, whereby only 2% of the net metering credit would be used to offset the electric bills of the solar farm owners (whose residence was across the street from the solar farm), while 98% of the net metering credit would be used to offset the electric bills of a bank’s branches. In essence, the bank bought the available credits from the solar farm owner, since the power generated by the solar farm was far in excess of the property owner’s own needs.

Whereas DOR had understood Clause 45 to exempt only those solar and wind facilities used primarily to meet the power needs of the property on which the facilities were located, the ATB reasoned in KTT that any system that provides energy to “property that is taxable,” i.e., property located in Massachusetts, is eligible for the Clause 45 exemption. The ATB decisions effectively exempt any commercial-scaled solar or

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wind facility that generates power to meet the Commonwealth's power needs.

S.2364 restores the original, and the common-sense, meaning of the property tax exemption created in 1975, while recognizing the new role of net-metering credits for excess power generation to offset the utility bills of the property owner on which the facility is located. S2364 offers a compromise by allowing the exemption to apply to additional non-contiguous property owned or leased by the property owner within the same municipality. As proposed, S2364 strikes the current language of Clause 45 and instead exempts:

"A solar or wind powered system that is capable of producing not more than 125 per cent of the annual electricity needs of the real property upon which it is located; provided, however, that the real property shall include contiguous or non-contiguous real property within the same municipality that is owned or leased by the owner of the real property."

Other provisions of S.2364 allow PILOT agreements for solar and wind facilities that do not qualify for the Clause 45 exemption, and clarify the separate provisions in Chapter 59 that apply to the taxation of generating facilities.

By approving S.2364, the Legislature will re-establish the limited purpose of Clause 45. A local property tax exemption will continue to be available to those solar and wind facilities that primarily serve the power needs of the properties on which they are located. If, as a matter of state policy, there are tax benefits or other credits that the Legislature wishes to offer to commercial-scale solar and wind facilities, that should be done at the state level, and not by reducing municipal revenue.

Thank you for your consideration.

Very truly yours,



Matthew G. Feher, Esq.
MMLA Legislative Committee Chair

MGF/jmp