

**TOWN OF FALMOUTH
OFFICE OF TOWN COUNSEL
MEMORANDUM**

TO: PETER JOHNSON-STAUB
FROM: MAURA O'KEEFE, TOWN COUNSEL 
SUBJECT: AUTHORITY OF THE ENERGY FACILITIES SITING BOARD
DATE: JULY 8, 2022

Questions Presented

This office has been asked to comment on the ability of the Energy Facilities Siting Board (the “EFSB”) to override local permit granting authority. Specifically, the following questions have been posed:

- Can Mayflower Wind make landfall in Falmouth without the approval of the Select Board and Town Meeting?
- If Mayflower Wind changes its proposed landfall location such that none of its equipment is to be installed on Town-owned property outside of the road ROW, can the project proceed without Town approval?
- What local approvals can the EFSB override?

Overview of the EFSB

The EFSB, part of the Commonwealth’s Department of Public Utilities, was established as an independent entity, tasked with reviewing and approving all applications for the construction of any electric power facility under M.G.L. c. 164 §§ 69G – 69Q. Approval of the EFSB is required prior to the commencement of construction on any project. Alliance to Protect Nantucket Sound, Inc. v. EFSB, 448 Mass. 45, 46 (2006). The mandate of the EFSB is to “provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.” M.G.L. c. 164 § 69H.

In conjunction with any application, a utility provider must demonstrate to the EFSB that the proposed project will “‘serve the public convenience and is consistent with the public interest’ and is ‘reasonably necessary for the convenience or welfare of the public.’” Town of Sudbury v. MBTA, 485 Mass. 774, 786 (2020), citing M.G.L. c. 164 § 72 and M.G.L. c. 40A § 3.

In rendering its decision, the EFSB will evaluate three primary objectives: reliability, environmental impact and cost of the proposal. Town of Sudbury v. Energy Facilities Siting Board, 487 Mass. 737, 745-46 (2021). The EFSB will balance each of these objectives in making its determination, with no one factor deserving of more weight than another, and will approve the project if it meets these standards and serves the overall mandate of the Board. Id. at 746. If the EFSB determines that the proposed project cannot meet the standards, it may reject the proposal, in whole or in part, or approve of the project with conditions. M.G.L. c. 164 § 69J.

If a utility company encounters certain obstacles in obtaining any local or state permit or approval required for the project, the utility company may request a Certificate of Environmental Impact and Public Interest from the EFSB. M.G.L. c. 164 § 69K. This override provision of the statute allows for the EFSB to issue a Certificate to a utility company if it is prevented from building a facility for any of the following reasons:

- The company “cannot meet standards imposed by a state or local agency with commercially available equipment;”
- Approvals from local or state agencies have been unduly delayed;
- There are inconsistencies between state and local resource use requirements;
- Non-regulatory requirements have been imposed, such as those pertaining to aesthetics or recreation; **or**
- The project cannot be constructed because of “disapprovals, conditions or denials by a state or local agency or body, *except with respect to any lands or interests therein, excluding public ways, owned or managed by any state agency or local government*” (emphasis added).

M.G.L. c. 164 § 69K.

If the EFSB makes a determination that the utility company is unable to commence construction because of any of the above, it may issue a Certificate to allow the project to proceed. M.G.L. chapter 164 § 69K; Town of Winchester v. EFSB, 98 Mass.App.Ct. 1101 (2020). If issued, the Certificate supersedes any denials or the need for any local and state approvals on the specific matter for which the Certificate was issued. M.G.L. c. 164 § 69K. The authority of the EFSB supplants that of local and state agencies as to the contested issue or issues, and the local and state agencies may no longer weigh in on those issues under the Certificate. Id.; Alliance to Protect Nantucket Sound, Inc. v. EFSB, 457 Mass. 663, 678 (2010)(by issuing a Certificate of Environmental Impact and Public Interest, the EFSB is allowed to stand in the shoes of any state or local permitting authority).

Conclusion

While the EFSB has broad authority to override the state and local permit granting process under certain circumstances, the language of section 69K is clear that the EFSB may not override any decision of the Town concerning its own land or an interest in land that it owns, except for land in the public way. Therefore, if a proposed article to grant an easement over Town land fails to pass at Town Meeting, for example, there is no action the EFSB may take to override that vote.

If, however, a utility company puts forth a proposal to construct a facility that does not involve Town land or an easement over Town land, but only impacts public ways or private land, then there exists a possibility that utility company could proceed without any Town approvals. In this example, if the company was hindered in constructing a facility by any of the criteria listed above as found in M.G.L. 164 § 69K, it could seek and obtain a Certificate of Environmental Impact and Public Interest that would enable the EFSB to override any Town permitting or approval process, including those of the Select Board, the Board of Appeals, the Planning Board and the Conservation Commission, among others.