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September 19, 2023

Debra Gremo, Town Clerk
Town of Wareham
54 Marion Road
Wareham, MA 02571

Re: Wareham Special Town Meeting of April 25, 2022 -- Case # 10603
Warrant Article S15 (Zoning)
Warrant Article S12 (General) [1]

Dear Ms. Gremo:

Article S15 - Under Article S15, the Town voted to delete the existing text, and replace it with new text, for Article 5 Section 590 of the Zoning By-laws, "Solar Energy Generation Facilities," and make related amendments to the Zoning By-laws' Use Table and Definitions. We approve the amendments except for text that we determine conflicts with the solar protections in G.L. c. 40A, § 3, as highlighted by the court's decision in Tracer Lane II v. City of Waltham, 489 Mass. 775 (2022), and text that is preempted by state law.

In this decision we discuss the Attorney General's standard of review of town by-laws under G.L. c. 40, § 32; summarize the by-law amendments adopted under Article S15; and then explain why, governed by our review standard, we disapprove certain text.[2] We emphasize that our rulings in no way imply any agreement or disagreement with the policy views that may have led to the passage of the by-law amendments. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or wisdom of the by-law amendments. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986).

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[1] In a decision issued August 29, 2022 we approved Article S12. Our review of Article S15 has been extended because we determined we did not have all the documents necessary to complete our review, and our deadline has also been extended through agreement with Town Counsel as authorized by G.L. c. 40, § 32.

[2] During the course of our review of Article S15 we received communications both in support of and opposition to the by-law. We appreciate this correspondence as it has aided our review.

I. Attorney General's Standard of Review of Zoning By-laws

Our review of Article S15 is governed by G.L. c. 40, § 32. Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") Rather, to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). "The legislative intent to preclude local action must be clear." Id. at 155.

As an amendment to the Town's zoning by-laws Article S15 must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) ("With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" Id. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

II. Article S15 – Solar Energy Generation Facilities

The amendments adopted under Article S15 require all Large-Scale Ground-Mounted Solar Photovoltaic Installations (as defined in the by-law) (Large Scale Solar) to obtain a special permit and site plan approval from the Planning Board. (Section 592.2). Large-Scale Solar is allowed by special permit in six of the Town's sixteen zoning districts. (Use Table). Small-scale solar (as defined in the by-law) and roof or building mounted solar is allowed by right in all districts. (Section 594)

The by-law imposes requirements for the site plan review and special permit application (Section 593); restrictions on siting (Section 594); design standards (Section 595); requirements for abandonment or decommissioning (Section 596); and establishes the criteria for special permit review and approval (Section 597). The amendments adopted under Article S15 also make related changes to the existing definition section of the Zoning By-laws (Article 16) and the Use Table (Article 3, Section 320). The Use Table amendments increase the number of districts where Large-Scale Solar is allowed by special permit from four to six.

III. Disapproved Text Based on Violation of the Solar Zoning Protections in Section 3

As detailed below, we disapprove several of the by-law's provisions because they violate the zoning protection of solar uses in G.L. c. 40A, § 3.

A. Zoning Protection Granted to Solar Installations by G.L. c. 40A § 3.

Solar energy facilities and related structures have been protected under Section 3 for almost 40 years, since 1985 when the Legislature passed a statute codifying "the policy of the commonwealth to encourage the use of solar energy." St. 1985, c. 637, §§ 7, 8. Id. § 2. Section 3's solar provision grants zoning protections to solar energy systems and the building of structures that facilitate the collection of solar energy as follows:

> No zoning . . . bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.

In adopting Section 3, the Legislature determined that certain land uses are so important to the public good that the Legislature has found it necessary "to take away" some measure of municipalities' "power to limit the use of land" within their borders. Attorney General v. Dover, 327 Mass. 601, 604 (1950) (discussing predecessor to G.L. c. 40A, § 3); see Cnty. Comm'rs of Bristol v. Conservation Comm'n of Dartmouth, 380 Mass. 706, 713 (1980) (noting that Zoning Act as a whole, and G.L. c. 40A, § 3, specifically, aim to ensure that zoning "facilitate[s] the provision of public requirements"). To that end, the provisions of Section 3 "strike a balance between preventing local discrimination against" a set of enumerated land uses while "honoring legitimate municipal concerns that typically find expression in local zoning laws." Trustees of Tufts Coll. v. City of Medford, 415 Mass. 753, 757 (1993). Over the years, the Legislature has added to the list of protected uses, employing different language—and in some cases different methods—to limit municipal discretion to restrict those uses.

In codifying solar energy and related structures as a protected use under Section 3, the Legislature determined that "neighborhood hostility" or contrary local "preferences" should not dictate whether solar energy systems and related structures are constructed in sufficient quantity to meet the public need. See Newbury Junior Coll. v. Brookline, 19 Mass. App. Ct. 197, 205, 207-08 (1985) (discussing educational-use provision of Section 3); see also Petrucci v. Bd. of Appeals, 45 Mass. App. Ct. 818, 822 (1998) (explaining, in context of childcare provision, that Legislature's "manifest intent" when establishing Section 3 protected use is "to broaden … opportunities for establishing" that use). Indeed, the fundamental purpose of Section 3 is to "facilitate the provision of public requirements" that may be locally disfavored. Cty. Comm'rs of Bristol, 380 Mass. at 713.

The Supreme Judicial Court reaffirmed this principle in Tracer Lane II. In ruling that Section 3's protections required Waltham to allow an access road to be built in a residential district for linkage to a solar project in Lexington, the Court explicitly noted that "large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth." Id. at 782 (citing Executive Office of Energy and Environmental Affairs,

Massachusetts 2050 Decarbonization Roadmap, at 4, 59 n.43 (Dec. 2020) ("the amount of solar power needed by 2050 exceeds the full technical potential in the Commonwealth for rooftop solar, indicating that substantial deployment of ground-mounted solar is needed under any circumstance in order to achieve [n]et [z]ero [greenhouse gas emissions by 2050]")). The Court explained that whether a by-law facially violates Section 3's prohibition against unreasonable regulation of solar systems and related structures will turn in part on whether the by-law promotes rather than restricts this legislative goal. Id. at 781. While municipalities do have some "flexibility" to reasonably limit where certain forms of solar energy may be sited, the validity of any restriction ultimately entails "balanc[ing] the interest that the . . . bylaw advances" against "the impact on the protected [solar] use." Id. at 781-82.

B. Requirement that Planning Board Approve Applicant's Expert

As part of the site plan review/special permit application the by-law requires the following assessment (emphasis supplied):

> An assessment of the impact on the environment formatted in a before/after method so that it is easy to measure and understand the changes that the proposed Solar Photovoltaic Installation will have on the property and the property abutters. **Such reports will be conducted by a party mutually agreed upon by the Planning Board and the prospective developer.**

Section 593.12. The same text is found in Section 593.13 (sentence two); Section 593.14 (sentence two); Section 593.15 (sentence three); Section 593.15 (sentence two). We disapprove this text everywhere it is found in the by-law because it is an unreasonable regulation of solar uses in conflict with the solar protections in Section 3.

The by-law contains no standards or criteria to limit the Planning Board in its "agreement" to a particular expert. As such, it essentially provides unlimited discretion to the Planning Board to scuttle the application by simply not agreeing to a proposed expert to conduct the evaluation. The Planning Board has the right to retain its own expert to conduct appropriate assessments, and the by-law could reasonably require an appropriate assessment be included in the site plan review/special permit application. But to require the applicant's expert to be approved by the Planning Board with no defining limits on when approval will be granted or withheld is unreasonable. On this basis we disapprove the requirement that "[s]uch reports will be conducted by a party mutually agreed upon by the Planning Board and the prospective developer" in sentence two of Section 593.12, and everywhere else this language appears in the by-law: Section 593.13 (sentence two); Section 593.14 (sentence two); Section 593.15 (sentence three); Section 593.15 (sentence two). [3]

[3] The Town should also consult closely with Town Counsel when applying sentence one of Section 593.12, the by-law does not define the term "assessment of the impact on the environment" and it is not clear what objective information such a report must include. By-law requirements that are not defined such that an applicant can understand how to comply with them are impermissibly vague. Under the "void for vagueness" doctrine, a law that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Commonwealth

C. Section 593.14 Visual Impact

Section 593.14 requires a line-of-sight study to determine visual impact from all directions and includes the following requirement (emphasis supplied): "**All panels and equipment associated with the Solar Photovoltaic Installation should be invisible to any residential home in Wareham, as well as from any public or private road**." We disapprove this requirement as it is un unreasonable regulation of solar uses in conflict with Section 3. The Land Court has recently invalidated an almost identical provision in Summit Farm Solar, LLC v. Plan. Bd. for Town of New Braintree, No. 18 MISC 000367 (HPS), 2022 WL 522438, at *5 (Mass. Land Ct. Feb. 18, 2022) ("a concern for view impact of the proposed facility goes beyond the permissible scope of consideration for public welfare afforded by G. L. c. 40A, § 3 to the town and the Planning Board, as it implicates none of the concerns reserved to municipalities when considering what regulation of solar energy facilities may be considered reasonable, or when considering when municipalities may outright prohibit solar energy facilities."). Because the visual impact requirement (reflected in bold and underline above) contravenes the solar protections in Section 3, we disapprove it.

D. Section 593.16 Alternative Site Analysis

We disapprove the following text in Section 593.16 that requires the applicant to submit "**[a]n alternative use analysis that addresses other siting options with various environmental impacts.**" (Emphasis added) This requirement that the applicant submit alternative sites for the Planning Board's consideration goes well beyond the appropriate use of special permit review for protected solar uses. The Planning Board is free to deny the special permit if it finds the application does not meet the by-law requirements, but the Planning Board cannot impose its own preference for siting of solar installations. See Prime v. Zoning Bd. of Appeals of Norwell, 42 Mass. App. Ct. 796, 803 (1997) (special permit may not be applied to prohibit protected use or impose board's preferences); Cf PLH, LLC v. Town of Ware, 102 Mass. App. Ct. 1103, 1105 (2022) ("Nothing suggests the town has used the special permit requirement to prohibit solar installations or as a pretext for mere preferences regarding land use.")

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v. Carpenter, 325 Mass. 519, 521 (1950) (citation and internal quotations omitted). Vague laws violate due process because individuals do not receive fair notice of the conduct proscribed by the law, id., and because vague laws that do not limit the exercise of discretion by officials engender the possibility of arbitrary and discriminatory enforcement. Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363-64 (1973). The requirement that by-laws contain objective and defined requirements and criteria is especially important in the case of solar installations protected by Section 3. See, e.g., NextSun Energy LLC v. Fernandes, No. 19 MISC 000230 (RBF), 2023 WL 3317259, at *14 (Mass. Land Ct. May 9, 2023), amended, No. 19 MISC 000230 (RBF), 2023 WL 4156740 (Mass. Land Ct. June 23, 2023), judgment entered, No. 19 MISC 000230 (RBF), 2023 WL 4145901 (Mass. Land Ct. June 23, 2023) (special permit requirement that "no perceptible noise" be present at the property line was an unreasonable regulation of solar because " 'perceptible' sound is not a measurable standard.")

Because the requirement to submit an alternative use analysis unreasonably burdens solar uses, we disapprove it. [4]

E. Section 595.1 (15) Limitation on Battery Storage Systems

We disapprove the following limitation on battery energy storage systems in Section 595.1 (15) (emphasis supplied): "**Battery storage systems may be included in a project only when accessory to the PV array collection system utilized for solar power generated as part of the approved project.**" This requirement amounts to a complete ban on stand-alone energy storage systems (ESS) in all districts.

By statute ESS qualify as "solar energy systems" and "structures that facilitate the collection of solar energy" and are protected by G.L. c. 40A, § 3. General Laws Chapter 164, Section 1, defines "energy storage system" as "a commercially available technology that is capable of absorbing energy, storing it for a period of time and thereafter dispatching the energy." [5] See also NextSun Energy LLC v. Fernandes, No. 19 MISC 000230 (RBF), 2023 WL 3317259, at *14 (Mass. Land Ct. May 9, 2023), amended, No. 19 MISC 000230 (RBF), 2023 WL 4156740 (Mass. Land Ct. June 23, 2023), judgment entered, No. 19 MISC 000230 (RBF), 2023 WL 4145901 (Mass. Land Ct. June 23, 2023) (finding that battery energy storage system is entitled to Section 3 solar protections).

Given the strong statutory protections for solar installations and related structures such as ESS in G.L. c. 40A, § 3, and the Tracer Lane II Court's recognition that large-scale solar and related structures "are key to promoting solar energy in the Commonwealth," Tracer Lane II, 489

[4] The Town should consult closely with Town Counsel concerning the second sentence of Section 593.16 that is apparently intended as a criterion for the Planning Board to use in its evaluation whether to grant or deny the special permit: "Financial impacts are not sufficient reason for approval of (*sic*) project with significant environmental impact." The financial impact of a by-law or special permit requirement has been considered in evaluating whether a requirement is unreasonable. See Rogers v. Norfolk, 432 Mass. 374, 383 (2000) (In evaluating by-law restriction on child care use "[e]xcessive cost of compliance with a requirement ... without significant gain in terms of municipal concerns, might ... qualify as unreasonable regulation."); see also Trustees of Tufts College v. Medford, 415 Mass. 753, 759–760 (1993) (zoning requirement is unreasonable if it detracts from usefulness of a structure, *imposes excessive costs on the applicant*, or impairs the character of a proposed structure). The Planning Board should not be entirely precluded from consideration of financial impact on the developer when evaluating special permit applications for solar uses.

[5] We note that the development of energy storage systems is critical to the promotion of solar and other clean energy uses. On August 9, 2018, An Act to Advance Clean Energy, Chapter 227 of the Acts of 2018 ("Act"), was signed into law by Governor Baker. Section 20 of the Act established a 1,000 MWh energy storage target to be achieved by December 31, 2025. The Act also required DOER to set targets for electric companies to procure energy dispatched from battery energy storage systems. https://www.mass.gov/info-details/esi-goals-storage-target (last visited May 16, 2023).

Mass at 782, an outright ban on all stand-alone ESS everywhere in the Town is impermissible without record evidence of a legitimate public health, safety, or welfare concern to justify the prohibition. Just as the Tracer Lane II court found Waltham's "outright ban of large-scale solar energy systems in all but one to two percent of [Waltham's] land area…is impermissible under [G.L. c. 40A, § 3, ¶ 9]," id. at 782, so too is the Town's proposed ban on all principal use ESS in all districts because the record reflects no evidence of public health, safety or welfare concerns that can only be satisfied by this extreme limitation sufficient to justify the ban. See also Kearsarge Walpole, LLC v. Lee, 2022 WL 4938498 (Smith, J. Oct. 4, 2022) at *6 ("[A]bsent a finding of a significant detriment to the interests of public health, safety or welfare, the town cannot prohibit a large-scale ground-mounted solar facility in a Rural Residential zone.") As the Land Court determined in Summit Farm Solar v. Planning Board for Town of New Braintree, 2022 WL 522438 (Speicher, J., Feb. 18, 2022), "the better, and correct view of the limits of local regulation of solar energy facilities allowed by G.L. c. 40A, § 3, is that such local regulation may not extend to prohibition except under the most extraordinary circumstances." Id. at * 10 (rejecting visual impact of solar array as a legitimate public health, safety, or welfare concern). Because the limitation on battery energy storage systems in Section 595.1 (15) ("**Battery storage systems may be included in a project only when accessory to the PV array collection system utilized for solar power generated as part of the approved project.**") conflicts with the solar protections in Section 3, we disapprove it.

IV. Section 593.11 (4)'s Prohibition on Herbicides and Pesticides Use is Preempted by G.L. c. 132B

Section 593.11 (4) prohibits the use of herbicides and pesticides to control vegetation and animals at a solar installation as follows (emphasis supplied): "**Use of herbicides and pesticides shall be prohibited for the maintenance of the project site except where necessary in dual use agriculture in accordance with the Pesticide Control Act.**" We disapprove this sentence in Section 593.11 (4) because it is preempted by the Massachusetts Pesticide Control Act ("Act").

General Laws Chapter 132B establishes the Massachusetts Department of Agricultural Resources' (MDAR) "exclusive authority in regulating the labeling, distribution, sale, storage, transportation, use and application, and disposal of pesticides in the commonwealth…." G.L. c. 132B, § 1. General Laws Chapter 132B, Section 2 defines "Pesticide" to include herbicides, as follows: "a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant…." The Act establishes a Pesticide Board within MDAR (Section 3) and authorizes the Pesticide Board to register pesticides for use in the Commonwealth if the Board determines that "a pesticide, when used in accordance with its directions for use, warnings and cautions and for the uses for which it is registered…will not generally cause unreasonable adverse effects on the environment…." (Section 7).

A town by-law that regulates the application of pesticides in a way that interferes with the purpose of the Act is preempted. Town of Wendell v. Att'y Gen., 394 Mass. 518, 528-529 (1985) (by-law that "contemplates the possibility of local imposition of conditions on the use of a pesticide beyond those established on a Statewide basis under the act" is preempted). Because the by-law text in Section 593.11 (4) prohibiting herbicides and pesticides at a Large-Scale solar installation

is preempted by state law, we disapprove it.

We approve the remaining portions of Article S15 because, on the record before us, we cannot conclude that they amount to an unreasonable regulation of solar facilities in conflict with Section 3. However, given the by-law's extensive regulations, including siting, design, setback and buffer requirements on the location of large-scale solar installations, it is not clear whether there is sufficient land in the Town to accommodate a large-scale solar installation. If Article S15 is used to deny a solar installation, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems and related structures, such application would run a serious risk of violating G.L. c. 40A, § 3. See Tracer Lane II, 489 Mass. at 781 (Waltham's prohibition on solar energy systems in all but one to two percent of its land area violates the solar energy provisions of G.L. c. 40A, § 3.) As the court stated in PLH LLC v. Town of Ware, No. 18 MISC 000648 (GHP), 2019 WL 7201712, at *3 (Mass. Land Ct. Dec. 24, 2019), aff'd, 102 Mass. App. Ct. 1103 (2022), "the review of the municipality conducted under the bylaw's special permit provisions must be limited and narrowly applied in a way that is not unreasonable, is not designed or employed to prohibit the use or the operation of the protected use, and exists where necessary to protect the health, safety or welfare." The Town should consult further with Town Counsel on this issue.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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