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Via Email to: kbuckland@wareham.ma.us

Members of the Wareham Planning Board
c/o Kenneth Buckland
Director of Planning and Community Development
Memorial Town Hall
54 Marion Road
Wareham, MA 02571

Re: Site Plan Review Special Permit Application, 0 Rt. 25, Parcel ID 115-1000

Dear Members of the Wareham Planning Board:

I am writing on behalf of the applicant, Wareham PV I, LLC, an affiliate of Longroad Development Company, LLC ("Longroad"), to discuss why a 75' setback requirement at Section 595.1.3 of the amended Wareham Zoning By-Laws (the "By-Laws") cannot legally be applied to the proposed project.

BACKGROUND

The proposed solar project is a modest sized, well-sited project with no residential neighbors.

The proposed project is a 3.5 MW DC (and 3.5 MW AC) solar energy project on approximately 7.8 acres of a relatively small, irregularly shaped 22.4 acre lot in the R130 zoning district. Much of the site is a former gravel pit, and the project would represent an improvement over the current condition of the site.

While the site and neighboring parcels lie within the R130 district, there are no residential neighbors. The project site is bounded by Route 25 to the south, woodlands, wetland resource areas and cranberry bogs to the east, municipal buildings to the west and woodlands to the north. No fencing is visible from the public right of way or any residences. There would be a 50-foot vegetated buffer on all property lines, and additional plantings are proposed along the western property boundary to supplement existing vegetation.

The current application concerns the same project, well known to the Board, which was first proposed in September 2021, redesigned as a significantly smaller project in November 2022, and redesigned again in June 2023 to remove a battery energy storage component.

As the Board is aware, Longroad initially submitted an application for approval of the solar project in September 2021. The project size was reduced by roughly 30% as part of a redesign in November 2022 to incorporate a 50′ setback. After numerous public hearing sessions, the Board voted in April 2023 to reject the project over concerns about a battery energy storage component. With the Board's permission, in June 2023 Longroad filed an application for approval of the same solar project but without the battery energy storage component. The Board opened the public hearing on September 11, 2023 and continued the public hearing to October 16, 2023.

While the applicability of a 50′ setback under the prior version of the By-Laws was disputed, the Board insisted the project be designed with a 50′ setback, and the applicant did so.

Section 594.1 of the prior version of the By-Laws, in the case of a lot that abuts or is across the street from a Residential district, provided for a setback that "shall not be less than 50 feet, and may be more, as determined at the sole discretion of the permit granting authority, depending on visibility of the facility because of the density of vegetation and/or topography."

Longroad maintained that this setback did not apply because the project site is not on a lot that abuts or is across the street from a Residential district. This was a topic of discussion for some time, but the Board insisted that a 50′ setback was required. On November 8, 2022, Longroad submitted revised site plans reflecting a redesign of the project to include the requested 50′ setback around the entire project.

It has been clear throughout all of the proceedings over the past two years that a 50′ setback for a project with no residential neighbors would be adequate (and arguably more than adequate) to protect public health, safety and welfare. While the Board had the discretion under the old bylaw to require a setback of more than 50′, there was no suggestion over numerous public hearing sessions, whether before or after the November 2022 redesign of the project, that the Board would require a setback of more than 50′. The Board never asked the applicant to redesign the project to include a setback of more than 50′. When the Board voted to reject the prior application on April 20, 2023, Board members made statements to the effect that, while the project would have been approved as a solar-only project, the Board was not comfortable approving the project at that time due to its battery energy storage system component. No statement was made that the prior application was rejected due to inadequate setbacks for a solar project.

The site is protected from certain zoning changes by virtue of an ANR plan freeze.

The approximately 22.4-acre lot on which the project would be sited – 0 Rt. 25 (Parcel ID 115-1000) (the "Site") – is the subject of an Approval Not Required Plan (the "ANR Plan") that was submitted to the Board (along with the required written notice of plan submission to the Wareham Town Clerk) on May 6, 2021. The Planning Board voted to endorse the ANR Plan on July 12, 2021, thereby triggering a three-year "plan freeze" under M.G.L. c. 40A, § 6 (the "ANR Plan Freeze").

Among the amendments to the By-Laws conditionally approved by the Attorney General is a 75′ distance between a Large-Scale Ground-Mounted Solar Photovoltaic Installation and "the residential property line."

On September 19, 2023, the Attorney General conditionally approved in part amendments to the By-Laws adopted on April 25, 2022. Two provisions of the new Section 595.1 are the following:

3. The distance shall be 75 feet from the residential property line which may be increased to reduce or eliminate visibility and noise at the discretion of the SPGA.
5. The front, side, and rear yard depth shall be in accordance with Article 6 of the Wareham Zoning By-Law; provided, however, that where the lot abuts or is across the street from a Residential Neighborhood, the front yard setback for all structures including fencing and vegetated buffer shall not be less than 75 feet, and may be more, as determined at the sole discretion of the SPGA, depending on visibility of the facility because of the density of vegetation and/or topography.

The amended By-Laws do not define "residential property line."

The amended By-Laws do define "Residential Neighborhood" as "at least 3 [three] occupied houses with at least one common lot line and a common street for access." It is clear that the project site is not on a lot that abuts or is across the street from a Residential Neighborhood.

While the Attorney General approved the provisions above, that approval was accompanied by a stern warning that, if the amended By-Laws are "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." The Attorney General directed the Town to "consult further with Town Counsel on this issue."

DISCUSSION

The 75′ setback in the amended By-Laws by its terms does not apply to the proposed project.

Based on recent communications with Director of Planning and Community Development Ken Buckland, we understand that the Board's position may be that Section 595.1.3 of the amended By-Laws applies to project site that shares a property line with a residentially zoned lot and, if so, would impose a 75′ setback on the proposed project. We disagree.

With respect to Section 595.1.3, neither the term "residential property line" nor "residential property" is defined in the By-Laws or even used anywhere else in the By-Laws. When a term in a by-law is undefined, it is to be given its plain meaning. *See*, *e.g.*, *Livoli* v. *Zoning Bd. of Appeals of Southborough*, 42 Mass. App. Ct. 921, 922 (1997).

The plain meaning of this term is a property line shared with an abutting property that is in residential use. Notably, Town Meeting could have but did not adopt language requiring a 75′ setback when the project site is "on a lot in a residential district" or "on a lot that abuts or is across the street from a lot in a residential district" or "on a lot that shares a property line with a lot in a residential district."

No property abutting the proposed project site is in residential use, and therefore the 75′ setback in Section 595.1.3 does not apply.

In addition, as noted above, the lot at issue does not abut or lie across the street from a Residential Neighborhood, as defined in the amended By-Laws, and therefore the 75′ setback in Section 595.1.5 does not apply.

Application of a 75′ setback would have the practical effect of prohibiting large ground-mounted solar energy facility use on the lot; the requirement is therefore inapplicable to the site due to the ANR Plan Freeze.

Even if the Board were to determine that the 75′ setback in Section 595.1.3 generally applies to solar energy projects sharing a property line with a lot in a residential district, the Site is protected from that zoning change as a result of the ANR Plan Freeze.

According to longstanding case law, the ANR Plan Freeze protects "the use of the land" shown on the ANR plan from zoning changes that amount to prohibitions in use even if those changes are nominally changes to dimensional or other zoning requirements not directly related to permissible use. *See Bellows Farms, Inc.* v. *Bldg. Inspector of Acton*, 364 Mass. 253, 260 (1973) (ANR plan freeze protects against change in zoning dimensional requirement where application of new requirement to land covered by plan would "constitute or otherwise amount to a total or virtual prohibition of the use of the locus" for previously allowed use); *see also Cape Ann Land*

Development Corp. v. *Gloucester*, 371 Mass. 19, 22 (1976) (noting that in *Bellows Farms*, court articulated principle that "the protection of [an ANR plan] would extend to certain changes in zoning provisions, not directly relating to permissible uses, if the impact of such changes, as a practical matter, were to nullify the protection afforded by [the plan]") (citations omitted).

In other words, *Bellow Farms* and the cases following it stand for the proposition that during a three-year ANR plan freeze, the use of land shown on an endorsed ANR plan is (1) governed by the applicable zoning requirements in effect at the time of the plan's submission for endorsement, and (2) protected from zoning changes that have the practical effect of prohibiting that use, even if these changes are changes to dimensional or other zoning requirements.

This is precisely the case here. Longroad already reduced the proposed project size in November 2022 by roughly 30% to accommodate a 50' setback, despite the fact that the project would still need to support roughly $2M in fixed costs to interconnect the project with the electric grid. Due to the modest size, irregular shape and topography of the Site, and large interconnection costs, imposition of a 75' setback in this instance would dramatically reduce the available project area to such a degree that no Large-Scale Ground-Mounted Solar Photovoltaic Installation project would be economically feasible at the Site. As application of the 75' setback to the Site would have the practical effect of prohibiting Large-Scale Ground-Mounted Solar Photovoltaic Installation use at the Site, the ANR Plan Freeze protects against imposition of the 75' setback.

With respect to the proposed project, a 75' setback is clearly not necessary to protect public health, safety or welfare and is therefore preempted in this instance by M.G.L. c. 40A, § 3.

The Attorney General's partial approval of the amendments to the By-Laws does not mean that the Board is free to apply the amended By-Laws to a proposed solar energy project in all instances. Instead, as the Attorney General indicated in her September 19, 2023 letter to the Town, under superseding state law – M.G.L. c. 40A, § 3 – the Board has not only the legal authority but also the legal duty to ensure that the Town's zoning requirements are only applied to solar energy projects in a manner that is necessary to protect public health, safety or welfare.

We understand that it may be uncomfortable for the Board to determine whether a provision of the By-Laws is unenforceable in a particular instance due to a superseding state law. Shouldn't the Board's job simply be to apply the By-Laws and then let a court sort out on appeal whether state law mandates that a particular provision of the By-Laws cannot be applied? No, M.G.L. c. 40A, § 3 truly requires that the Board make that determination and refrain from applying zoning requirements at odds with that statute. *See*, *e.g.*, *Summit Farm Solar, LLC* v. *Planning Bd. for New Braintree*, Mass. Land Ct., No. 18 Misc 000367 at 14-21 (February 18, 2022) (Speicher, J.) (holding that, under M.G.L. c. 40A, § 3, zoning board could not enforce requirement in solar bylaw that solar facility must not be visible from residence or public way where enforcement

would not be necessary to protect public health, safety or welfare); *see also Martin* v. *The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 148 (2001) (noting approvingly that local zoning board "made a careful examination of the case law interpreting the Dover Amendment [another name for M.G.L. c. 40A, § 3]" and concluded that application of a zoning bylaw height regulation would be an unreasonable regulation of a protected use); *Campbell* v. *City Council of Lynn*, 415 Mass. 772, 779 (1993) (holding that local zoning officials have authority to determine where requested that generally applicable requirements of local zoning "could not be properly applied because their application would contradict the protection granted by G.L. c. 40A, Section 3" to a protected use).

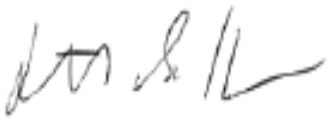
The Board may also wonder whether the applicant should be required to seek a variance in a matter like this. Again, the answer is no. An applicant requesting protection from a zoning bylaw as a result of M.G.L. c. 40A, § 3 does not need to seek a variance. *See*, *e.g.*, *Campbell*, 415 Mass. at 779 (explaining that proponent of a use protected under M.G.L. c. 40A, § 3 "cannot be compelled to seek a variance" from bulk and dimensional requirements alleged to be preempted by M.G.L. c. 40A, § 3); *Trustees of Tufts College* v. *City of Medford*, 415 Mass. 753, 760 (1993) (similar).

In addition, the Board should be aware that the Land Court has held that the visibility of a solar energy project is <u>not</u> a matter of "public . . . welfare" within the meaning of M.G.L. c. 40A, § 3. *Summit Farm Solar* at 19 (holding that "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").

In these circumstances, the Board has the legal authority and the legal duty under M.G.L. c. 40A, § 3 not to apply a setback greater than 50′ to the proposed project. The record could not be clearer that requiring a setback greater than 50′ to the proposed project is not necessary to protect public health, safety or welfare. As noted above, for months on end the Board insisted that a 50′ setback was required for this project. After the project was redesigned to include a 50′ setback and throughout the many public hearing sessions that followed, the Board never requested that the project be further redesigned to include a setback greater than 50′. In light of a project site with no residential neighbors, a 50′ setback is adequate, and arguably far more than adequate to protect public health, safety and welfare, and all the more so given the vegetated buffer. Accordingly, it does not matter if Section 595.1.3 of the amended By-Laws means that a solar energy project should include a 75′ setback from a property line of a lot in a residential district. In these circumstances, that requirement is preempted by state law.

Thank you for your consideration.

Sincerely,



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