

December 1, 2022

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 Application, 0 Rt. 25, Parcel ID 115-1000*

Dear Members of the Wareham Planning Board:

I am writing to follow up on various items discussed at the November 14, 2022 public hearing session and, for the sake of completeness, to confirm that the applicant has addressed various prior comments.

Further Revised Site Plans

On November 8, 2022, in advance of the Board's November 14, 2022 public hearing session, we submitted revised site plans reflecting the redesign of the proposed project to accommodate a 50' setback.

On November 14, 2022, VHB learned that the Wareham Fire Department approved a small segment of the access road less than 20' in width but requested that that segment be 16' wide instead of 14' wide. VHB promptly further revised the site plans and brought hard copies of the further revised site plans to the public hearing session. Due to an inadvertent error, those hard copies did not include the correct revision date on each sheet.

Enclosed is an electronic copy of Site Plans for Proposed Large-Scale Ground-Mounted Solar Photovoltaic Installation, 0 Route 25, Wareham, MA, prepared by VHB, revised as of November 16, 2022. The enclosed Site Plans are the same as those submitted on November 8, 2022 except for the following updates: (1) consistent with the hard copies shared with the Board on November 14, 2022, to incorporate feedback from Captain Chris Smith of the Wareham Fire Department, the small segment of the access road less than 20' in width has been increased from 14' wide to 16'; (2) inclusion of a photo depicting the deer fence; and (3) correction of revision

dates shown on all sheets. For the convenience of the Board, we have also enclosed a version of the site plans where red outlining highlights the cumulative changes made to the site plans with the November 8 and November 16 updates. As the Board is aware, the key update made with the site plans was the redesign of the project to add a 50' setback.

VHB will bring hard copies of the revised Site Plans to the next public hearing session.

Updated Project Description

Attached hereto as **Attachment 1** is an errata sheet that updates the Project Narrative from the original site plan review application to reflect the current anticipated number of solar panels.

Further Revised Decommissioning Plan

On June 9, 2022, in advance of the Board's June 13, 2022 public hearing session, we submitted a revised Decommissioning Plan. We explained that the Decommissioning Plan had been revised to remove salvage value from the gross estimated decommissioning cost. In addition, we noted that the decommissioning cost figure used in the plan reflected 125% of the gross estimated decommissioning cost. Finally, we noted the applicant's agreement to have the surety amount escalated by 2% annually on the anniversary of the commissioning of the project.

Enclosed is an electronic copy of a further revised Decommissioning Plan. The plan now reflects the following further revisions: (1) further language changes to reaffirm the prior exclusion of salvage value; (2) updating of plan to ensure that it reflects current project design (e.g., battery energy storage components of project and reduction of number of solar panels due to accommodation of 50' setback); (3) additional detail on labor rates and time estimates; and (4) inclusion of recycling of solar panels.

As discussed with the Board on November 14, 2022, it is important to note that the combination of the preparation of an updated cost estimate every 5 years coupled with stipulated minimum 2% annual escalation in each intervening year will provide ample protection against inflation in estimated removal costs.

While we are pleased to be able to provide the further revised Decommissioning Plan at this time, we do not believe that anything in the zoning bylaw prevents the Board from issuing site plan approval prior to submission of a final decommissioning plan. Section 593.10 of the Bylaw provides that a site plan review application must include "[a]n operation and maintenance plan" and contains a note that says "see also section 595 on decommissioning." Section 595 consists primarily of regulations that govern the decommissioning of the facility. Section 595.3 provides for the proponent to provide financial surety, and lays out certain requirements (e.g., surety amount equal to 125% of estimated cost, requirement for cost estimate prepared by qualified engineer, method for inflation adjustments), but the Bylaw does not require

preparation or submission of a full decommissioning plan at any point, nor does it require that the cost estimate or financial surety be provided as part of the site plan review application. We also note that, contrary to the comments made at the November 14, 2022 public hearing, the October 2019 version of the Bylaw is identical to the October 2018 version of the Bylaw in its treatment of decommissioning matters. In other words, although we are hopeful that the further revised Decommissioning Plan is now entirely satisfactory to the Board, nothing in the Bylaw prevents the Board from issuing site plan approval subject to reasonable conditions relating to future revisions to the Decommissioning Plan.

Wareham Fire Department Approval of 16' Wide Segment of Access Road

On November 14, 2022, shortly before the Board's public hearing session, Captain Chris Smith from the Wareham Fire Department sent an email to Sarah Ebaugh, VHB, copying Director of Planning and Community Development Ken Buckland, approving the 16' wide segment of the access road. The Board was concerned that the email had been submitted too soon before the public hearing session to be reviewed and also appeared to desire a clearer communication from Captain Smith.

Captain Smith subsequently sent the Board a letter dated November 22, 2022 followed by a clarifying email to Mr. Buckland dated November 23, 2022 confirming that he had reviewed and approved the site plans as revised by VHB as of November 16, 2022.

Grading of Site

Members of the Board and public have brought up concerns about the existing stockpiles on site as well as impacts of the project on the existing topography and drainage patterns. As shown on the revised site plans, the earth work is minimal for this project. The changes to topography include minor regrading to allow for a compliant access road throughout the site, as well as distribution of the existing stockpiles on the northern area of the site within the previously cleared areas to provide a flat surface for installation of the panels that also happens to be more suitable for the planting of the meadow mix. All drainage patterns will remain the same following construction, as noted in the stormwater report, and the site will not require import or export of soils.

Response to Town Peer Reviewer Charles Rowley Comments Dated November 3, 2021

Although we believe that we have previously addressed many, if not all, of the comments made by Mr. Rowley, for the sake of completeness, enclosed is a letter dated December 1, 2022 from Sarah Ebaugh, VHB, responding to each of Mr. Rowley's comments.

Validity of Utility Access Rights

Questions had been raised earlier in the site plan review process about whether there are adequate utility access rights in connection with the proposed project. On July 11, 2022, my colleague Betsy Mason submitted a legal memorandum to the Board explaining that the project will have adequate utility access rights by virtue of an easement created by a 1966 Order of Taking recorded by the Massachusetts Department of Public Works in connection with the construction of Route 25. We believed that that memorandum had addressed the questions, as we had not received any further questions or comments from the Board or its representatives on this topic.

It was brought to our attention this week, however, that the Town Administrator believes that some additional agreement with the Town may be necessary to allow the installation of utilities within the portion of the easement area crossing the Town-owned parcel between the project site and Charge Pond Road. Our understanding remains that the existing easement benefitting the project site includes the right to install and maintain utilities, and the purpose of the state's taking the easement was precisely to avoid the need to negotiate further access or utility easements with the owners of the land crossed by the easement. In addition, the utility lines to be installed are comparable to the utility lines that would be installed by Eversource for any use of the property at issue. The applicant is committed to engaging in communications with the Town to resolve this issue.

This potential difference of opinion with the Town in its capacity as owner of a neighboring parcel of land is not relevant to this Board's site plan review decision. To the extent that the Town is concerned that this Board's issuance of site plan approval will prejudice the Town's rights as property owner, we propose that the Board's site plan approval expressly state that the decision solely concerns the project's compliance with applicable provisions of the Zoning Bylaw and does not constitute any consent or agreement that the applicant may need from or with the Town in its capacity as landowner regarding the installation of utility lines across Town-owned land.

Landowner Prior Activities

Certain questions have been raised about prior activities of the landowner, David Fletcher, and whether they should have a bearing on the Board's issuance of site plan approval. It is important for the Board to know that Massachusetts zoning law does not allow a zoning board to withhold or condition zoning approval based on the identity of the applicant, the identity of the landowner, or prior activities (even prior illegal activities) at the site. *See, e.g., CHR General, Inc. v. City of Newton*, 387 Mass. 351, 356 (noting that "fundamental principle of zoning [is that] it deals basically with the use, without regard to the ownership, of the property involved or who may be the operator of the use") (internal quotation marks and citation omitted); *Dowd v. Board of Appeals of Dover*, 5 Mass. App. Ct. 148, 156-57 (1977) (explaining that zoning criteria

“relate to the land rather than the applicant” and holding that applicant’s past history of zoning violations did not justify denial of permit).

Nonetheless, on August 10, 2022, we submitted to the Board a copy of a January 18, 2018 settlement between Mr. Fletcher and the Town that resolved issues relating to Mr. Fletcher’s earth moving activities.

Protection from Hazardous Materials Contamination

Certain questions have been raised about whether the solar panels that the applicant proposes to use pose a risk that PFAS or Cadmium Telluride (“CdTe”) will leach out of the solar panels, migrate to groundwater and endanger public safety. In the event that there is such a risk, questions have been raised about what conditions would be reasonable to impose as part of the site plan approval.

We have submitted evidence to the Board indicating that there is no significant risk of leaching of PFAS or CdTe from the proposed solar panels. On August 10, 2022, we submitted to the Board a letter, dated July 22, 2022, from First Solar, the U.S.-based solar panel manufacturer, attesting that its products do not contain PFAS. First Solar’s letter also provided information (representing research done by over 50 researchers from institutions including, among others, MIT, Brookhaven National Lab and National Renewable Energy Laboratory) that, while its products do contain CdTe, its products do not pose a significant risk of leaching, not just during normal operations but also in the event of exception accidents such as fire or module breakage and even through end-of-life recycling and disposal. At the same time we provided a copy of a 2020 MIT study covering these issues. In addition, First Solar’s letter indicates that, when transported from a project site, First Solar panels are characterized under federal law as non-hazardous waste.

Notwithstanding the absence of any evidence of significant risk of leaching from the proposed solar panels, Wareham PV I, LLC has submitted a revised operations and maintenance plan for the project that includes a commitment to promptly contain and remove from the site any broken solar panels. Enclosed is an electronic copy of the revised Operations and Maintenance Plan, which replaces the plan included in Section 5 of the original application for site plan review.

Although there is no significant risk of leaching and Wareham PV I, LLC has committed to promptly contain and remove any broken solar panels from the site, we have also submitted evidence to the Board indicating that there is no significant risk of contamination to groundwater, including the aquifer serving the Town’s municipal water supply and off-site properties with private wells. On July 5, 2022, we submitted to the Board a June 30, 2022 groundwater hydrology assessment prepared by Meddie Perry, a Certified Groundwater Professional at VHB. The study employed field data including 6 test pits excavated on the site,

and also relied upon existing in-ground results from the work done at the adjacent Town Garage where soil was excavated and tested for contamination in association with former underground fuel tanks. The June 30 hydrology assessment presents its conclusions in clear and unequivocal terms:

The Project would not adversely affect groundwater. No Project components would withdraw or divert the flow of groundwater. . . Groundwater flow directions will not be altered and groundwater will continue to flow from the higher terrain north and west of the Project Site (from the Municipal Maintenance Facility and adjacent areas), towards the cranberry bogs and stream along the east side of the Project Site. . . In sum, the Project will not affect groundwater resources of off-site properties (including the Municipal Maintenance Facility property) or public water supplies.

Further, the Project has no potential to affect private wells or groundwater along Charge Hill Road, because groundwater from the Project site flows east-southeast, away from Charge Hill Road which is located north and west of the Project.

End-of-life Recycling of Solar Panels

We sympathize with those asking good questions about whether, at the end of their life at the project site, the project's solar panels might be recycled or otherwise beneficially reused. Wareham PV I, LLC has submitted a revised operations and maintenance plan and revised decommissioning plan for the project that includes a commitment to recycle panels and of course will comply with any laws relating to disposal of solar panels. Indeed, Section 595.1.2 of the Bylaw already requires that decommissioning include disposal of all solid and hazardous waste in accordance with applicable waste disposal regulations.

At the same time, it is important for the Board to understand that it does not have any legal authority as a zoning board to regulate waste disposal, whether via conditions to site plan approval or otherwise. And even if the Board could somehow identify some legal authority to regulate disposal of waste within the Town of Wareham, it most certainly has no authority to regulate how waste should be managed once it is removed from the Town of Wareham.

Legal Parameters of Site Plan Review of Solar Project

The Town has indicated that it views site plan approval in this instance as a special permit within the meaning of MGL c. 40A, s. 9.

It is important for the Board to understand that, even where a zoning bylaw treats solar energy use as a special permit use, pursuant to state law protections for solar facilities under M.G.L. c. 40A, § 3, a special permit cannot be denied except where "necessary to protect the public health, safety or welfare." M.G.L. c. 40A, § 3, para. 9; see also *PLH LLC v. Town of Ware*,

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No. 18 MISC 000648, 2019 WL 7201712, at *3 (Mass. Land. Ct. Dec. 24, 2019) (Piper, C.J.) (explaining that, in light of M.G.L. c. 40A, § 3, a special permit granting authority's review of a solar facility "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."

That does not mean a zoning board can deny a special permit for a solar energy facility merely by pointing to a public health or safety concern. Even in the case of a demonstrable public health or safety issue, a denial would only be lawful if the issue could not be addressed through conditions attached to the special permit. *See, e.g., PLH*, 2019 WL 7201712, at *3 (explaining that, within the "narrow ambit" of review outlined by the court, an SPGA may deny a special permit for solar use "but only where the project presents intractable problems, such as those that jeopardize public health, safety, and welfare"); *Ayotte v. Town of Cheshire Planning Board*, CA No. 17-275, slip. op. at 9-13 (Mass. Sup. Ct. May 4, 2018) (Ford, J.) (refusing to uphold planning board's denial of special permit for solar project based on concerns about solar glare and inadequate screening and remanding to board "for the consideration and imposition of any **reasonable** conditions") (emphasis in original).

Wareham PV I, LLC reserves the right to argue that, in the case of a large scale solar energy facility in the R-130 District, site plan approval under the Bylaw is not a special permit within the meaning of M.G.L. c. 40A, § 9.

Posting of Materials on Planning Board Project Webpage

At the November 14, 2022 public hearing session, the Board expressed the desire that all significant materials submitted to the Board by the applicant be posted to the Board's webpage for the project. To aid in this process, we provided Mr. Buckland with a chart showing, in the case of each such item submitted, when it was submitted and whether, as of the date of the chart, the item appears to have been posted to the project webpage. We then worked with Mr. Buckland and Sonia Raposo to ensure that all items previously submitted by the applicant have been posted.

Thank you very much.

Sincerely,

Jonathan S. Klavens

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Enclosures

Site plans, revised as of November 16, 2022, prepared by VHB

Site plans, revised as of November 16, 2022, prepared by VHB (with marking of changes made via November 8, 2022 and November 16, 2022 updates)

Decommissioning Plan, revised as of December 1, 2022, prepared by Stantec

Letter, dated December 1, 2022, from Sarah Ebaugh, VHB

Operations and Maintenance Plan, revised as of November 30, 2022

cc: David Fletcher
Matthew Thornton, Longroad Energy
Lindsey Kester, Longroad Energy
Vanessa Kwong, Esq., Longroad Energy
Sarah Ebaugh, VHB

Attachment 1

APPLICATION FOR SITE PLAN REVIEW – ERRATA

Section 2 – Project Narrative – Project Description

Replace first sentence with:

Within the Site, the Project is expected to include up to approximately 613 solar panels mounted on a fixed racking system at a specific angle for maximum exposure to the sun.