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March 21, 2023

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 several items.

Use of Battery Energy Storage Equipment

We believe that our February 6, 2023 letter to the Board helped to establish that the proposed project will constitute "large ground-mounted solar energy" use allowed under the Zoning By-Law in the R130 district even if the battery energy storage component of the project will occasionally be charged from the grid.

We also wanted to bring to the Board's attention that on March 1, 2023, the Attorney General rejected a prohibition on standalone battery energy storage in a Wendell zoning bylaw based on her determination that "battery energy storage systems qualify as 'structures that facilitate the collection of solar energy' under [M.]G.L. c. 40A, § 3." Letter dated March 1, 2023 from the Attorney General to the Town of Wendell, at note 5. This underscores a point we made in our February 6, 2023 letter and at the February 13, 2023 public hearing session: as a result of M.G.L. c. 40A, § 3, the Board cannot in these circumstances reject the proposed project or require that the battery energy storage equipment be charged exclusively from the solar arrays unless doing so would truly be "necessary to protect public health, safety or welfare" within the meaning of the statute. That cannot possibly be the case here because the battery energy storage equipment will have the same public health, safety and welfare profile regardless of whether it charges exclusively from the solar arrays or primarily from the solar arrays.

At the February 13, 2023 public hearing session, the Board appeared to express some concern about whether, if the project is approved, the applicant could proceed to build a standalone battery energy storage facility or could elect to have the batter energy storage equipment primarily charged from the grid instead of from the solar arrays. Even if it is now clear that that would be allowed by virtue of M.G.L. c. 40A, § 3, we would like to reassure the Board that that has never been proposed for this project, nor is it consistent with our expectation as to the scope of the site plan approval we are seeking. Indeed, to address the Board's concerns we would suggest that the site plan review decision include the following condition:

> This Site Plan Approval does not authorize construction of a standalone battery energy storage facility, nor does it authorize the installation of battery energy storage equipment that is primarily charged from the grid. The Project's battery energy storage equipment shall be primarily charged from the Project's solar arrays.

Nature of Site Plan Review Proceeding

As there have been public comments raising questions about the nature of this site plan review proceeding, we thought it would be useful at this point to share our thoughts on this topic for the Board's consideration in consultation with Town Counsel.

The Zoning By-Law clearly and unambiguously designates large ground-mounted solar energy use as a use allowed in the R130 district subject only to site plan review by the Planning Board.

- Under Section 321, uses that are allowed by Special Permit are designated as "SPP" (for a use allowed by Special Permit from the Planning Board) or "SPZ" (for a use allowed by Special Permit from the Zoning Board of Appeals).
- The table of uses in Section 321 instead designates large ground-mounted solar energy use in the R130 (and R60) district as "SPR" and explains that "[t]his use is allowed by Site Plan Review from the Permit Granting Authority." The By-Law does not refer in this instance to a special permit or a special permit granting authority. (In contrast, the table of uses <u>does</u> clearly make large ground-mounted solar energy a special permit use in the CG and CP districts.)
- This same distinction is echoed in Section 590 (Solar Energy Generation Facilities). Section 592 makes all ground-mounted solar energy facilities subject to "Site Plan Review," while Section 592.1 states that the Board of Appeals is the special permit granting authority for "large ground-mounted solar energy facilities requiring a Special Permit under this bylaw" (*i.e.*, those designated as SPZ in the table of uses). Section 592.1 makes clear that there are other large ground-mounted solar energy facilities that do not require a special permit (*i.e.*, those designated as SPR in the table of uses). It also makes clear that there are no

instances where a large ground-mounted solar energy facility requires a special permit from the Planning Board.

- Nothing in the table of uses or Section 590 makes large ground-mounted solar energy use in the R130 district subject to a special permit.

Does Article 15 (the site plan review bylaw) somehow make each site plan review a discretionary special permit subject governed by Section 1460 and M.G.L. c. 40A, § 9*? No, it does not do that and cannot legally be interpreted in that manner.*

- Section 1510 says that site plan review applies to "certain developments permitted as a matter of right or by Special Permit" (emphasis added).
- Because site plan review under Article 15 may apply to certain uses "permitted as a matter of right," then by definition site plan review under Article 15 cannot itself be a conventional, discretionary special permit. *See Osberg* v. *Planning Bd. of* Sturbridge, 44 Mass. App. Ct. 56, 58-59 (1997) (explaining that "'a use allowed as of right cannot be made subject to the grant of a special permit inasmuch as the concepts of a use as of right and a use dependent on discretion are mutually exclusive'") (quoting *Prudential Ins. Co.* v. *Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 281 (1986)); *see also Wojcik* v. *Lovett, et al.*, Misc. 14-48177 (Mass. Land Ct. June 22, 2016) (Speicher, J.) (noting that, in interpreting a zoning bylaw, "[t]he intent of the by-law is to be ascertained from all its terms and parts" and that, "[i]f a sensible construction is available," the bylaw shall not be construed "to make a nullity of pertinent provisions") (internal quotation marks and citations omitted).
- There are confusing references to the term "special permit" in Article 15, and that creates some ambiguity, but even an ambiguous bylaw cannot be interpreted in a manner that is inconsistent with the By-Law or state law.

Does Article 15 make each site plan review a special type of non-discretionary special permit (one that must be granted subject only to reasonable conditions)? That would seem to be an interpretation the Board could adopt.

- While a zoning bylaw cannot make as of right uses subject to a discretionary special permit, Massachusetts courts have indicated that municipalities can choose to structure site plan review as a non-discretionary "special permit" process. For example, in *Quincy* v. *Planning Bd. of Tewksbury*, 39 Mass. App. Ct. 17, 21–22 (1995), the court considered a "site plan special permit" provision that applied to both as of right uses and special permit uses. The court upheld the use of the procedural framework prescribed by the bylaw for a site plan special permit. *Id.* at 21. But the court explained that, when the site plan special permit process was applied to an as of right use, "the planning board may only . . .

impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use." *Id.* at 21-22.

- If the Board believes the intent of Article 15 is to require a "site plan review special permit" for those uses that are not special permit uses under the table of uses (*i.e.*, any use designated as something other than "SPP" or "SPZ"), then such a "special permit" would have to be just that sort of non-discretionary special permit.
- A non-discretionary special permit would also be the only type of "special permit" that would be permissible for large ground-mounted solar energy use in the R130 district.
    - As noted above, under both Section 321 and Section 590, large ground-mounted solar energy use does not require a "Special Permit" from either the Board of Appeals or the Planning Board.
    - In 2018, after the October 2017 zoning bylaw amendments that made large ground-mounted solar energy use an "SPR" use in the R130 district, the Town was designated a "Green Community" and received a $206,000 Green Communities Program grant from the Department of Energy Resources. To be eligible for that designation and that grant, the Town's zoning bylaw was required to provide for as of right siting of large ground-mounted solar energy use in at least some districts that provided a reasonable opportunity for solar energy development.[1]
    - As DOER explains, "[a]s-of-right zoning bylaws can apply appropriate standards that protect public health and safety and provide for non-discretionary site plan review. Reasonable environmental performance standards per the developed bylaw may be incorporated into the Site Plan Review (SPR) process (e.g. height, setback, etc.), but cannot be so stringent as to make the use infeasible. The key is that SPR must be truly non-discretionary – i.e., if the standards and zoning requirements are met, the project can be built. This is distinct from the Special Permit (SP), in that the SP may be denied if the Planning Board or other permit granting authority is not satisfied with the project." DOER Guidance on Criterion 1 (emphasis in original).[2]
    - According to Section 321, the only Wareham zoning districts in which large ground-mounted solar energy use is not prohibited ("N") and does not require a Special Permit ("SPZ") are the R130 and R60 districts where the use is designated as merely "SPR" – exactly as prescribed in the DOER Green Communities Program guidance document. If an SPR use

[1] There were different ways for the Town to satisfy the as of right siting requirement, but the Town chose to do so by providing as of right siting for large ground-mounted solar energy systems.

[2] Available at https://www.mass.gov/doc/criterion-1-guidance-for-all-3-methods/download.

requires some sort of "special permit," the only type of permit arguably consistent with the Green Communities Program requirements would be a non-discretionary special permit.

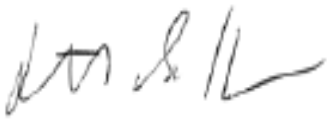
- As a result, if applicable to large ground-mounted solar energy use in the R130 district, a "site plan review special permit" must be a non-discretionary special permit, and the discretionary standards set forth in Section 1460 of the By-Law and M.G.L. c. 40A, § 9 cannot apply to such a permit.

What does this mean for a proposed large ground-mounted solar energy use in the R130 district?

- It appears that large ground-mounted solar energy use in the R130 district is not subject to a special permit from the Board of Appeals or the Planning Board; it is subject only to site plan review by the Planning Board.
- Even if the Board interprets Article 15 as requiring a "site plan review special permit" for uses that do not require a Special Permit under the table of uses, it seems that, in order to be consistent with the language and structure of the By-Law and the Town's designation as a Green Community and receipt of grant funds under the Green Communities Program, the permit at issue would have to be a non-discretionary special permit – one that must be granted subject to reasonable conditions.

Thank you very much.

Sincerely,



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