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March 1, 2023

Anna Wetherby, Town Clerk
Town of Wendell
P.O. Box 41
Wendell, MA 01379

Re: Wendell Annual Town Meeting of June 4, 2022 -- Case # 10721
Warrant Article # 30 (Zoning)

Dear Ms. Wetherby:

Article 30 - Under Article 30 the Town voted to amend its zoning by-laws to allow ground-mounted solar installations and battery energy storage facilities in the Town by: (1) adding a new Article XIV, "Ground-Mounted Solar Electric Generating Installations;" (2) adding new definitions to Article III, "Definitions," for solar related uses; and (3) adding solar and energy related uses to the Town's Use Regulations. As explained below, we disapprove two sections of the by-law: 1) Article XIV, Section (F) (1) that regulates the application of herbicides and pesticides which we disapprove because it is preempted by state law; and 2) the complete prohibition on stand-alone battery energy storage facilities in all zoning districts in Article XIV, Section (C) (7) and Article VI, "Use Regulations," which we disapprove because the prohibition violates G.L c. 40A, § 3, and is not grounded in articulated evidence of public health, safety or welfare concerns sufficient to justify the prohibition. We approve the remainder of Article 30 because the remaining text does not present a clear conflict with state law, including the protections given to solar and energy related uses under G.L. c. 40A, §3. Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).

This decision briefly describes the by-law amendments; discusses the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we disapprove certain text in Article 30. Our analysis is substantially influenced by the Supreme Judicial Court's decision in Tracer Lane II Realty, LLC v. City of Waltham, 489 Mass. 775, 781 (2022) (the determination whether a by-law facially violates Section 3's prohibition against unreasonable regulation of solar installations will turn in part on whether the by-law "restricts rather than promotes the legislative goal of promoting solar energy in the Commonwealth").

We note that our disapproval of certain text in Article 30 in no way implies agreement or disagreement with any 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. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986). [1]

I. Summary of Article 30

Under Article 30 the Town amended several sections of its zoning by-laws regarding ground-mounted solar installations and battery energy storage facilities (BESF). One change deletes the Town's existing Article XIV and replaces it with a new Article XIV, "Ground-Mounted Solar Electric Generating Installations" that allows ground-mounted solar electric generating installations (solar installations) in the Town as follows:

- Small-Scale Solar Installations that are roof mounted or under 1,000 square feet are allowed by right in all the Town's zoning districts (the Rural Residential and Agricultural (RR) District and Historic Industrial (HI) District);

- Medium-Scale Solar Installations occupying more than 1,000 square feet up to ¼ acre with or without an accessory BESF are allowed as of right in the Town's RR District and prohibited in the Town's HI District;

- Large-Scale Solar Installations occupying more than ¼ acre up to 5 acres without a BESF are allowed as of right in the Town's Solar Overlay District and with a BESF are allowed by special permit in the Solar Overlay District. Large-Scale Solar Installations with or without a BESF are allowed by special permit in the RR District and prohibited in the HI District; and

- Very Large-Scale Solar Installations occupying more than 5 acres and up to 10 acres without a BESF are allowed as of right in the Solar Overlay District and with a BESF are allowed by special permit in the Solar Overlay District. Very Large-Scale Solar Installations with or without a BESF are prohibited in the Town's RR and HI Districts.

The by-law states that "[n]o standalone Commercial or Industrial Scale Battery Energy Storage Facilities are allowed" and amends the table of uses in Article VI to reflect that the use "Stand Alone Battery Energy Storage Facility" is prohibited in all districts. Article XIV, Section C, "Applicability" and Article VI, "Use Regulations."

The new Article XIV also includes definitions for terms used in Article XIV and includes restrictions on the siting, design, and construction of solar installations in the Town. Section B, "Definitions" and Section F, "Site Design and Performance Standards and Restrictions." The new

[1] By agreement with Town Counsel pursuant to G.L. c. 40, § 32 we extended our deadline for a decision on Article 30 for an additional ninety days until March 1, 2023.

Article XIV includes requirements for documents and information that must be submitted as part of the special permit and site review process for solar installations. Section E, "Submittal Requirements." Section G, "Dimensional Requirements" and Utility Connections," also imposes setback requirements, safety and environmental standards, including lighting, signage, and utility connections, and land clearing standards.

II. Attorney General's Standard of Review of Zoning Bylaws

Our review of Article 30 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, 798-99. 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. Massachusetts has the "strongest type of home rule and municipal action is presumed to be valid." Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 30, as an amendment to the Town's zoning by-laws, 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, 440 Mass. at 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, 362 Mass. at 101). 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.

III. The By-law's Limitation on the Use of Herbicides and Pesticides at Solar Installations is Preempted by G.L. c. 132B

Article XIV Section (F) (1) states that the "[u]se of any herbicides or pesticides shall be minimized to the maximum extent feasible." We disapprove and delete the text "[u]se of any herbicides or pesticides shall be minimized to the maximum extent feasible." from Section (F) (1) because the use of herbicides and pesticides is preempted by the Massachusetts Pesticide Control Act ("Act"), either expressly (by the 1994 amendment) or impliedly (because "the purpose of the [Act] would be frustrated [by the by-law] so as to warrant an inference that the Legislature intended

to preempt the field.") St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Department of Springfield, 462 Mass. 120, 125-126 (2012) (quoting Wendell v. Attorney General, 394 Mass. 518 (1985)).

A. Section (F) (1) is Preempted by the Pesticide Control 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 . . . ." (emphasis added) G.L. c. 132B, § 1. General Laws Chapter 132B, Section 2 defines "Pesticide" to includes 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). [2] The Act prohibits application of a registered pesticide in a way that is inconsistent with its labeling or other restrictions imposed by the MDAR (Section 6A).

1. Express Preemption

The Pesticide Control Act includes an express statement of intention to preempt local regulation of the application of pesticides: "The exclusive authority in regulating the labeling, distribution, sale, storage, transportation, use and application, and disposal of in the commonwealth shall be determined by this chapter." G.L. c. 132B, § 1, as amended by Chapter 264 of the Acts of 1994. Further, MDAR has confirmed the preemptive effect of the Act and regulations in the area of pesticide application. [3]

Based upon the clear language of the Act, we determine that the text in Section (F) (1) is expressly preempted. Even if the by-law text was not expressly preempted, this section of the by-law is impliedly preempted by the Act and Regulations, as explained below.

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[2] MDAR defines "Use of a pesticide" in 333 CMR § 10.02 to include the following: any act of handling a pesticide, releasing of a pesticide, or exposing of man or the environment to a pesticide, including, but not limited to: (a) Application of a pesticide including mixing or loading of equipment and any supervisory action in or near the area of application. (b) Storage actions relative to pesticides and pesticide containers carried out or supervised by an applicator. (c) Disposal actions relative to pesticides and pesticide containers carried out or supervised by an applicator. (d) Transportation actions relative to pesticides and pesticide containers except those by carriers and dealers.

[3] We disapproved a similar prohibition in decisions issued to the Towns of Belchertown on November 14, 2002 (Case # 10613) and Hopkinton on April 19, 2022 (Case # 10454).

2. Implied Preemption

The purpose of the Act and Regulations is to have centralized and uniform regulations for the use of pesticides in the state. Wendell, 394 Mass. at 518 (town by-law regulating the use of pesticides in town frustrates the statutory purpose of centralized regulation of pesticide use). By limiting the use of herbicides and pesticides, the by-law imposes an additional layer of regulation at the local level. This additional local regulation prevents the achievement of a uniform, statewide determination of the reasonableness of the use of a specific pesticide that frustrates the purpose of the Act. Id. at 529.

In addition, the use of pesticide application on private property is comprehensively addressed in the Act and Regulations. The comprehensive delegation of authority to MDAR to determine appropriate pesticide regulation in the Commonwealth reflects the legislative intent that there is no room for local regulation on this subject. See Doe v. City of Lynn, 472 Mass. 521 (2015) (ordinance imposing residency and location restrictions on sex offenders preempted by comprehensive statutory scheme governing the oversight of sex offenders); and Boston Edison Co. v. Town of Bedford, 444 Mass. 775 (2005) (town by-law imposing fines for failure to remove utility poles preempted by the comprehensive, uniform state regulation of utilities in G.L. c. 164). Because G.L. c. 132B, § 1, provides that the Act and Regulations establish MDAR's exclusive authority and because the Act and Regulations comprehensively regulate the topic of pesticide applications on private property, the by-law text regarding pesticides in Section (F) (1) ("Use of any herbicides or pesticides shall be minimized to the maximum extent feasible".) is preempted by state law and is disapproved.

IV. The Prohibition in Article XIV, Section (C) (7) and Article VI on Stand-Alone Battery Energy Storage Facilities Violates G.L c. 40A, § 3.

Because the complete prohibition on stand-alone BES facilities in all districts has no articulated evidence of an important municipal interest, grounded in protecting the public health, safety, or welfare, that is sufficient to outweigh the public need for solar energy systems, the prohibition conflicts with G.L c. 40A, § 3. See Tracer Lane II Realty, 489 Mass. at 781. [4]

In adopting G.L. c. 40A, § 3, ("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

[4] The Town apparently adopted a moratorium on Large-Scale and Extra Large-Scale solar installations and BES facilities at the Special Town Meeting of December 1, 2021 (see Articles 5 and 6) but these by-law amendment votes were never submitted to the Attorney General for review and approval and thus have no lawful effect. G.L. c. 40, § 32.

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.

Solar energy facilities and related structures have been protected under Section 3 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 codifying solar energy 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. [5]

The Supreme Judicial Court recently reaffirmed this principle in Tracer Lane II v. City of Waltham, 489 Mass. 775 (2022). 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"

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[5] Battery energy storage systems qualify as "structures that facilitate the collection of solar energy" under G.L. c. 40A, § 3. G.L. c. 164, § 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." 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. https://www.mass.gov/info-details/esi-goals-storage-target (last visited March 1, 2023).

against "the impact on the protected [solar] use." Id. at 781-82.

Based on this framework, the Court determined that Waltham had unreasonably restricted solar energy systems by excluding large-scale solar arrays from most zoning districts and "in all but one to two percent" of the City's land area. Id. at 782. The Court acknowledged that Waltham's regulation was designed to advance the generally legitimate municipal purpose of preserving each zone's unique characteristics. Id. But the Court explained that Waltham's categorical and extensive limitation on large-scale solar arrays—a critical form of solar energy system—undermined the state policy favoring solar energy and lacked any public health, safety, or welfare justification sufficient to justify the extent of the restriction. Id. at 781-82. The regulation was therefore unreasonable and unlawful. Id. at 782.

Applying this analysis to the by-law amendments adopted under Article 30, we determine that the complete prohibition of stand-alone battery energy storage facilities violates G.L. c. 40A, § 3. The record contains no evidence of a public health, safety or welfare concern sufficient to justify the prohibition. The record similarly lacks any evidence regarding its purpose. The warrant article itself does not identify the purpose of the prohibition, and there is no written Planning Board report to support the need for the prohibition. [6] Given the strong statutory protections for solar installations and related structures 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 Mass at 782, it is unlikely that a complete prohibition on stand-alone BES facilities would be sanctioned 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 complete ban on stand-alone battery energy storage facilities because the record reflects no evidence of public health, safety or welfare concerns 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). The Town Meeting record here reflects no evidence of such extraordinary circumstances.

With respect to the remaining (approved) text in Article 30, we note that the documentation and other requirements for solar uses are numerous and detailed. We are unable to conclude that these requirements amount to an unreasonable regulation of solar uses in violation of Section 3. However, the Town must ensure that solar installations are allowed consistent with the protections granted to solar uses in G.L. c. 40A, § 3. If Article 30's requirements are used to deny solar projects, or otherwise applied in ways that make it impracticable or uneconomical to build solar

[6] The warrant article does list several purposes for the amendments related to ground-mounted solar installations but includes no statement of any rationale for the prohibition on stand-alone battery energy storage facilities.

energy systems, such application would run a serious risk of violating G.L. c. 40A, § 3. The Town should consult with Town Counsel with any questions on this issue.

V. Article XIV Section (F) (8)'s Requirement to Protect Indigenous Cultural Resources Must be Applied Consistent with G.L. c. 9, § 26A (1) and c. 40, § 8D

Section (F) (8) requires Large-Scale and Very Large-Scale solar installations to protect Indigenous Cultural Resources (defined in the by-law as cultural resources that have religious and cultural significant Native American Tribes), including Ceremonial Stone Landscapes. Section (F) (8) states that the Town entered into a Memorandum of Understanding with federally recognized Tribal Historic Preservation Offices to protect and preserve Ceremonial Stone Landscapes. The by-law provides that the location of any Indigenous Cultural Resources shall be based upon information received, if any, from response to written inquiries to the following parties: all federally or state recognized Tribal Historic Preservation Offices, the Massachusetts State Historical Preservation Officer; tribes or associations of tribes not recognized by the federal or state government with any cultural or land affiliation to the Wendell; and the Town's Historical Commission.

Archaeological site information is not a public record. See G.L. c. 9, § 26A (1) and c. 40, § 8D. The Town must ensure that sensitive archaeological site location information is protected from public disclosure, including during any public meetings conducted by the Town. In addition, even if the applicant or the Town receive no response from the entities listed in the by-law, both federal and state law include certain potentially applicable protections, including G.L. c. 7, § 38A, (providing for the protection and preservation of Native American skeletal remains that are accidentally uncovered during ground disturbance activities). We strongly suggest that the Town discuss the application of Section (F) (8) in more detail with Town Counsel, the State Archaeologist, and the Commission on Indian Affairs.

VI. Conclusion

Except for the prohibition of stand-alone battery energy storage facilities and the limitation on the use of herbicides and pesticides that we disapprove because they conflict with state law, we approve the amendments adopted under Article 30. The Town must apply the remaining approved portions of Article 30 consistent with G.L. c. 40A, § 3 to ensure that solar installations are allowed consistent with G.L. c. 40A, § 3's protections. The Town should consult with Town Counsel with any questions 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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