Citizens Opposed to the 0 Route 25 Solar Siting

c/o Barry C. Cosgrove

49 Blackmore Pond Circle

West Wareham, Ma 02576

**January 2, 2023**

Michael King

Chair, Planning Board

Town of Wareham

Marion Road

Wareham MA.

Kenneth Buckland

Planner

Town of Wareham

Marion Road

Wareham MA.

**Sent via email - January 2, 2023**

Re**:** 33-21 Wareham PV 1, LLC - SPR – 0 Route 25

Dear Chairman King, Members of the Planning Board, and Mr. Buckland:

The Citizens Opposed to the 0 Route 25 Solar Siting hereby respectfully submit that project 33-21 Wareham PV 1, LLC does not promote the health, safety, or welfare of the Town of Wareham and should be denied. And contrary to advice provided to the Planning Board during the last public hearing on this matter, and for the avoidance of doubt, this board may lawfully reject a site plan - see Wareham Zoning Bylaws Sections 1564 and 1565.3 (5). **1**

This volunteer organization previously submitted substantial justification for the denial of this project, including its detailed letter and exhibits dated December 5, 2022 (which we hope this body has now had the opportunity to review). And we continue here with the attached good faith attempt to inform this process with added ideas and suggestions to assist you and our Town in the decision-making process. In so doing, we remind the Board that “the energy business has the tendency to build the problems of tomorrow into the solutions of today.” This may explain, in part, why today’s ‘environmental heretics’ are often found to be tomorrow’s ‘heroes.’

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1 See also Auburn v. Planning Bd. of Dover, [12 Mass. App. Ct. 998](http://masscases.com/cases/app/12/12massappct998.html) (1981)

Let’s face it - our Town has become the solar mile of Massachusetts for revenue purposes. And consequently, with far too little regard for the long-term risks and consequences of neutering our forests and replacing same with unnecessary long-term threats to our drinking water aquifer. Approving this project could perpetuate this pattern.

Equally so, our Town’s performance in minimizing its financial risks from solar projects has been insufficient (particularly in the decommissioning area).

As for the Board’s position – subject to review with Town counsel - that it has jurisdiction to issue a combined Site Plan Review (SPR) and Special Permit (SP) approval for this project, we submit that this position is incorrect.

The subject application itself, the plain terms of the Wareham Zoning Bylaws (including - but not limited to - the Table of Principal Use Regulations, Section 590, and Section 1565.3 (1) thereof), along with well-settled Massachusetts case law and MGL Chapter 40A, all confirm that this body does not have jurisdiction to issue a Special Permit for a large-scale ground-mounted solar facility in the R-130 District. The misapplication of the legal distinctions between a SPR and a SP for large Ground-mounted solar projects does not promote the welfare of the Town of Wareham.

We also note - with equal caution - the applicant’s answers (or lack thereof) to Associate Member Quirk’s insightful questions concerning its reservation of rights that “a site plan approval under the Bylaw is not a Special Permit.” Please make no mistake, this reservation of rights serves the purpose of preserving future legal claims against our Town. And these future legal claims, if any, will most assuredly conflict with the applicant’s December 12, 2022, assertion that there is little practical difference under the Wareham Zoning Bylaw between a SPR and a SP for a ground-mounted solar project in the R-130 District.

If you need further information, please do not hesitate to contact us at any time at bcosgrove02@gmail.com.

On behalf of the Citizens Opposed to the 0 Route 25 Solar Siting, thank you for your volunteer service to our Town and **thank you for your attention to the attached memorandum**.

Sincerely,

/Electronically signed/

Barry C. Cosgrove

Town of Wareham Planning Board

33-21 Wareham PV 1, LLC - SPR – 0 Route 25

January 2, 2023

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**Recommendations of Professor Horsley Dismissed ?**

Internationally recognized hydrologist Mr. Scott W. Horsely urged that a real-life hydrology study be conducted at the site.

In offering alternative thoughts, Mr. Rowley and Mr. Buckland (who previously called for a hydrology study at the site) both neglected to recognize that the basis of their opinions - that the abundant clean sand at the site assures excellent groundwater flow and aquifer cleansing – completely ignores the fact that portions of the site have had massive quantities of the pristine sand removed, and still unknown amounts of fill (loaded with who knows what) put back in its place.

This directs us to the tired – brutally so - subject of the investigations of the site for improper sand removal and fill.

First, the investigations are not closed, and examining any of our prior submissions confirms so.

The settlement agreement with the property owner (Fletcher) was dated January 18, 2018, and it did not – repeat, did not - release future violations. This fact is reported by Town Administrator Sullivan’s email dated June 14, 2022, four years after the settlement agreement. This email is being entered into the record for a third time - despite not once having been previously acknowledged by this Board or the Applicant. **(See Exhibit 1)**

And the conclusion that no investigations are pending also ignores the Conservation Commission’s open inquiry for improper removal and filling under the wetlands regulations. **(See Exhibit 2)**

More importantly, our contention is not that the applicant is, per se, disentitled to approval because of the landowner’s prior history of alleged repeated operations without proper permits.

Instead, our point is that because substantial portions of the land have been so substantially altered (and backfilled with - who knows what), the hydrological evaluations urged by Mr. Horsley make even more sense. Neither the applicant nor the Town’s peer reviewers have presented any data to prove otherwise. And in the absence of such, the applicant has failed to furnish adequate information onthe various considerations imposed by the by-law as conditions of the plan’s approval.

To amplify this point further, please recall that Planning Board member Corbitt recently observed that a gun range was once present at a different proposed solar location in Wareham and that, as a result, this factor needed careful consideration. His point – of course – was to call attention to the resulting conditions of the soils at that site (i.e., the potential presence of lead). His comment was not to promote theater around who did it. We urge the same focus.

The Conservation and earth removal investigations of the applicant site will inform this topic. But these inquiries may be frustrated – if not made impossible - if a permit allows solar panels to cover the site before an authentic hydrology assessment can be performed. Guessing that only raw, clean sand still dominates the site – particularly in the northern end - is dangerous. Detailed answers are needed.

We plea again that the applicant be required to conduct soil testing and a legitimate on-site hydrology analysis as part of this Site Plan Review process – and that this work be performed entirely independently of the separate town investigations, just as was urged by Professor Horsley, Town Administrator Sullivan **(see Exhibit 3**) and – even – Mr. Buckland **(see Exhibit 4**). Importantly, this body required an on-site, scientific, sophisticated hydrology study at Fearing Hill, where there was no evidence of topography changes from sand removal or filling. So why not here, where there is clear evidence of both?

**Drinking Water Matters – Groundwater Protection Overlay District**

Under Section 1510.7 of the applicable Bylaw, the Planning board must assess the subject Site Plan Review application to assure the applicant has paid consideration to – “compliance with all applicable sections of the Zoning By-Laws.”

All applicable sections include - Section 440, which establishes a Groundwater Protection Overlay district in which the Site rests. And Section 440 establishes the following detailed Prohibited Uses as being presumed to be detrimental to groundwater and surface water: *Mining of land except as incidental to a permitted use (444.14); and Earth removal activities within four feet of historic groundwater tables (444.17).*  Contemporaneous satellite images provided to the Town by the applicant (emphasis added) demonstrate the likelihood of such activities within four feet of historic groundwater tables. The consequence of this activity is what matters and is material to the current hydrology of the site. (It is also noteworthy that the same satellite images show truckloads of fill on the site after the sand extraction.) How can this body possibly conclude that the applicant has paid the required consideration to these specific zoning bylaw requirements – when all it has done, instead, is to take pains to run from a real (aka Fearing Hill) hydrology study?

**Help – Experts Needed !!**

Gladly, there now appears to be an explicit acknowledgment of the increasingly complex issues surrounding Solar decommissioning and the urgency of proper financial security to avoid a massive financial liability for the Town. Given the abundance of significant unknowns, the only sensible solution is for the Town to exercise its discretion by engaging expert Bond counsel to advise it on these topics and to collaborate with financial professionals in determining how best to protect us from long-term financial and environmental risks presented by the proposed project. The applicant must pay this cost – and the hearing must not be closed until the results are reported for public input. Importantly, the Town must insist onseparate security to cover the decommissioning of all transformers/batteries**. 1** (And while not the focus of this report, solar landlords should insist on a separate surety policy naming itself as Obligee.)

**$450K per MW and $450K per Transformer /50% Cash – to Start**

Because of the amalgamation of decommissioning unknowns, we respectfully suggest that the decommissioning security includehard cash and surety bonds. The Minimum amounts should be $450K per MW and $450K per transformer, with the cash portion being fifty percent at the start – ramping up by ten percent every three years. Rolling reviews of surety coverage are not adequate. The correct approach is for the cash portion of the security to grow throughout the project’s life. The portion of the aggregate security held in cash should be either in the form of letters of credit or a cash escrow account - while the bond requirements should also be adjusted as appropriate to reflect the then-current conditions. In this way, the operator must properly budget and reserve cash for the decommissioning expenses. At the same time, the town simultaneously reduces its risks from surety industry changes, energy revenue downturns, ownership changes or transfers, and other related and presently unforeseen risks.

And when any applicant signals financial angst before the project has even begun – just as is the case here – this body should not be hurried to close the hearing but should instead – rush from the project altogether. The Town is not a surrogate guarantor for any other privately developed project in the Town. So why should it be for any solar project?

1 Additionally, the Town needs immediate help monitoring its surety bonds. Based on the fourteen surety bonds disclosed by the Town to date, only two of these bonds are even valid. Indeed, Wareham Town Counsel agreed that – if the surety bonds disclosed to us were accurate – “I suggest that this be cured immediately.” Just as problematic, the coverage amounts under all the surety bonds disclosed were also grossly insufficient. Monitoring these bonds carefully will also require attention to premium payments and renewal compliance.

**Forgotten Financial Risks to Wareham – Remediation of Environmental Damage - Section 1566.8 of the Wareham Zoning by Law to the Rescue**

Wholly forgotten in all the decommissioning worries is the equally worrisome financial risk to the Town for the failure of the applicant to either complete the construction of the project or, worse, for any environmental harm caused by the solar project. Gladly our Town Bylaw contemplates these risks, but the applicant and the Planning Board have yet to address these urgent topics.

Section 1566.8 (3) reads: *“Amount - The amount of the performance guarantee shall reflect the estimated cost to the Town of Wareham for completing the work or remediating environmental concerns caused by construction activities should the applicant fail to do so.”* And “*The required funds shall be deposited in this account before the issuance of a building permit by the Director of Inspectional Services.”* The word shall in Section 1566.8 is there for a reason. Shall means must.

AndSection 1566.8 (4) reads: *“Cash Bond - If a performance guarantee is required by the Permitting Authority, a deposit of funds* ***shall*** *be made in a joint passbook with the Town of Wareham-.*” Note - cash is king under Section 1566.8(4).

**Why has The Applicant Failed to Address the Requirements of Section 594.3 of the Zoning Bylaw ?**

Little wonder the applicant has also ignored the mandatory obligation in Section 594.3 of the Zoning Bylaw that the transformers must be “*screened from the view of persons, not on the parcel.”*

This likely is because the abutting Town-owned lots are elevated over the proposed site - due in no small part to the prior excavating activity. Consequently, the project will render these once valuable Town-owned lots into virtual ‘balcony seats’ over the monster transformers and solar panels below.

The proposed site already presents a particular risk to the valuation of these Town-owned residentially zoned properties along the western edge. Noncompliance with Section 594.3 would seal their - diminution in value – fate. Additionally, the undeniable glare from panels just fifty feet from the lot lines will undoubtedly result in decreased property values as well.

**Do Bangladesh Trash Dumps Require More Proof of Pollution-Free Solar Panels than Does the Town of Wareham for Solar Panels - Installed on Top of Our Sole Source of Drinking Water ??**

Bangladesh is classified as a Fourth World country by the United Nations because it is one of the Least Developed Countries on the planet. Yet, according to reports, Bangladesh junk yards – repeat junk yards - are beginning to institute strict testing standards for solar panels before allowing them into their trash piles.

However, when concerned Wareham citizens ask for similar proof of PFAS-free products intended to reside – for decades – on top of our sole drinking water source, the best the applicant has done is hang its hat on nothing more than a ‘company letter’ from a solar panel supplier with a direct and substantial pecuniary interest in the project.

This ’company letter’ does not qualify as the equivalent of manufacturing specification sheets for these solar panels, nor as a Bill of Materials (BOM) or Construction Data Form (CDF). The letter also fails to qualify as Safety Data Sheets (SDSs) for the solar panels.

Without these documents, we remain unsure how the Town can conclude that this ‘company letter’ constitutes, as the applicant claims, verifiable proof that the subject panels are PFAS-free.

A letter from the panel provider claiming third parties check their panels for PFAS content differs from the actual proof provided directly by the evaluating source(s). Consequently, we repeat that such verification of PFAS-free panels is necessary to make certain the panels intended for the Site are genuinely safe. And for the avoidance of doubt, the third-party source must not be a solar industry-financed trade association - in disguise.

**“Bet the Town” or Protect the Town ?**

The applicant has confirmed that cadmium telluride is a toxic element and poses risks to soil quality and human health and, worse, that it is present on their intended solar panels. Yet, the applicant has provided no proof that this substance will not ultimately leach into the ground, particularly when the glass ‘sandwich’ of cadmium telluride finds its way into the stomach of end-of-life landfills.

Despite its efforts at scientific explanation and assurances – the Town is essentially urged to accept the gamble.

And this weak proposition is garnished with the applicant’s concocted theory that enforceable **indemnities** from the applicant to the Town are overkill - due to the existence of various State and Federal environmental protection statutes. These statutes rarely pay for the Town’s legal and expert fees required during years of environmental litigation. These burdensome costs are inevitable, and in the absence of **indemnities,** the Town is financially and strategically disadvantaged.

Furthermore, if the applicant is so confident of their scientific correctness, what then is the risk to them of indemnifying the Town for its litigation and expert costs and expenses if the Town needs to take legal or corrective action for harm caused to the neighboring Town properties or our drinking water by the project?

The applicant knows the difference between a private indemnity right versus reliance on environmental statutes. But like its (non)answers to specific direct questions from Member Quirk, they also prefer to leave this issue for another day. Which, in turn, fits with its unrelenting plea to “close the hearing.” After all, how dare Wareham continue to seek long-term protections for its citizens through enforceable and sophisticated financial accountability?

Another sensible method to reduce the risk of contamination of soil, groundwater, and exposure to aquatic life from cadmium telluride and PFAS is to compel the solar panel manufacturer, the solar facility operator, and the host landlord to install **monitoring wells** at the site. This idea was raised and discussed during the applicant’s failed efforts before the Wareham ZBA – which intelligently denied its request to shoehorn solar panels into the 50-foot buffer zone. Some intramural thinking on this is advisable. After all, this solar project applicant boasts about balancing profitability with social responsibility. Monitoring wells and meaningful indemnities test that pledge. So far, the applicant has avoided this test altogether.

**Right of Way or Out of My Way?**

The Board is highly focused on the location of electrical transmission lines over the Town property. The real question, however, is whether the underground transmission lines - designed to deliver power to the utility versus the inverse - are even permitted under the easement from the Town. The applicant, dutifully, wants that issue out of the purview of the Planning Board and from citizens as well, arguing that this is a separate ‘business matter.’ But not so fast.

# The case of Weld v. Board of Appeals of Gloucester, 345 Mass. 376 makes clear that a permit granting authority in a zoning case may not delegate to another board, or reserve to itself for future decision the determination of an issue of substance, i.e., one central to the matter before the permit granting authority.

In the Weld case, the availability of water supply was central to the use of the locus for a hotel. Just as here, the availability of transmission lines is obviously vital (a prerequisite) to the operation of a solar generating facility. This hearing, therefore, must only be closed after this right-of-way matter is fully decided.

**Closing of Public Hearing before Expert Input on Issues of Substance**

The Weld case also makes clear that closing the public hearing before full transparency to the anticipated expert third-party input on substantive issues such as decommissioning costs and financial security would also be legally improper.

**Deny the Application - If Not - Imperative Permit Conditions Are a Safety Net**

In our prior submission, we suggested approximately twenty-six conditions. Despite innuendo that most of these conditions were well beyond the scope of this Board’s jurisdiction, more than half of these conditions were already required by this Planning Board for the Fearing Hill project – before – that project site plan hearing was even closed.

Of the remaining proposed conditions, most relate to the financial security which is permitted under existing terms of the Wareham Zoning Bylaw. And our prior submission already provided this body with a - connect the dots - analysis of each such jurisdictional basis. The fact that a suggested condition is new or different or has yet to be fully deployed previously does not take it out of the jurisdiction of this body. When it comes to protecting the Town’s financial future – open minds should rule – as should diligent attention to all sections of the bylaw which safeguard the Town’s economic welfare.

And as for the suggested condition regarding the pacing of a PILOT agreement – think LEVERAGE.

Finally, there should be an additional condition to those proposed in our prior submission. The applicant should not be allowed to consider the installation of any future lithium-ion battery storage unit as a minor modification. Instead, such installations shall qualify as a Major Revision under Section 1566.9 (2) (a), thus requiring approval from the Planning Board following a new site plan review application and public hearing**.**

**Still No Answers – Why ?**

**Notice to Abutters Question**

The applicant attempted to address the November 3, 2021, Town Engineer’s questions about whether several Charge Pond Road properties were omitted from the notice requirement. In its reply – it neglected attention to why some house lots across the street were given notice, and other house lots immediately adjacent thereto were not – despite the houses not being notified appearing to be the same or similar distance from the site as those houses that were notified.

**Sizing of Sedimentation Areas and Stump Removal Impacts**

Mr. Rowley asked about the applicant’s sizing of the sedimentation areas – and an unusual method used – in its design. The requested footnote documentation/backup for this design is still outstanding.

The applicant has also yet to answer Mr. Rowley’s questions concerning the impacts on surface water and runoff due to the removal of stumps – which removal disturbed the soils – and which could have changed groundwater conditions from before construction to after construction.

The expert opinion herein highlights the need for a comprehensive hydrological study to appropriately answer Mr. Rowley's questions.

**Cumulative Impacts of Solar in Wareham**

There has been no analysis by the applicant or the Planning Board of the cumulative impact of the existing nineteen large ground-mounted solar projects in Wareham on our natural resources, drinking water, real estate values, quality of life, or other factors; resulting from the approximately 330 acres of open space in the Town which has been converted to LGMSI.

The cumulative impacts of these nineteen existing LGMSIs and ten proposed LGMSIs need to be addressed. The nine proposed solar projects threaten another 1,400 acres of globally rare Pine Barrens forests, wetlands, and agricultural lands.

**Required Landscape Plans**

Kindly confirm if a registered landscape architect’s seal appears on the plans.

Also, attention is called to section “*1071 MAINTENANCE OF LANDSCAPING PLANTINGS - To ensure the implementation and long-term maintenance of landscaping plantings and requirements, the Board may require one or more of the following: 1. A two (2) year guarantee on all new plant material. If any required tree or shrub dies within this period of time, it shall be replaced. 2. Require the developer to post a performance or maintenance bond conditioned upon satisfactory implementation of the landscape plan. 3. Require the developer/owner/applicant to maintain a long-term maintenance agreement with a landscape company to maintain the landscaping on the site.”* Has proper account of these requirements been taken?

**Interconnection Agreement**

Stay tuned.

**-END-**