

# Memorandum

**BROWN**RUDNICK  
One  
Financial  
Center  
Boston  
Massachusetts  
02111  
tel 617.856.8200  
fax 617.856.8201

**TO:** Town of Wareham Planning Board

**FROM:** Gregory S. Sampson

**DATE:** May 20, 2021

**SUBJECT:** Preliminary Subdivision Plan Filings by A.D. Makepeace Co. / Zoning Freezes

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This memorandum is being submitted to provide information pertaining to the filing of four (4) Preliminary Subdivision Plans (“PSPs”) by A.D. Makepeace Co. for the properties identified as 0 Maple Springs Road (Wareham Planning Board File Number 13-21); 27 Charge Pond Road (Wareham Planning Board File Number 14-21); 150 Tihonet Road (Wareham Planning Board File Number 15-21); and 140 Tihonet Road (Wareham Planning Board File Number 16-21). The information is intended to respond to (i) questions raised and comments made by members of the Town of Wareham Planning Board during the May 10, 2021 public meeting relating to these filings as it pertains, in particular, to the proposed zoning bylaw amendment being considered by the Town of Wareham at the Annual Town Meeting, currently scheduled for June 12, 2021; and (ii) provide a general outline of the process.

### *Rationale for Filing of the PSPs*

As the Planning Board is aware, in accordance with MGL c. 40A §6, the filing of a preliminary subdivision plan followed by a definitive subdivision plan within seven months is a tool used to effect a “zoning freeze,” pursuant to which the land shown on a subdivision plan is protected from subsequently enacted zoning changes (a so-called “plan freeze”).

Several members questioned the rationale behind the filing of the PSPs and suggested that such filings were unnecessary because several solar projects located on these properties were already approved, and the Town’s proposed bylaw would therefore not apply to such projects (i.e., the previously approved projects are exempt from the requirements of subsequently enacted bylaw changes). This, unfortunately, is not accurate. MGL c. 40A §5 provides for a very limited exemption for previously approved projects. Specifically, projects that have received either a **building permit** or a **special permit** receive the benefit of a freeze from zoning changes (a so-called “permit freeze”), and such freeze is limited to only a 12-month period from the date of said permit.

With respect to the properties noted above, the Planning Board issued three special permits for solar projects: on the 140 Tihonet Road site (Case No. 8-20; decision dated March 8, 2021), on the 150 Tihonet Road site (Case No. 9-20; decision dated December 28, 2020); and on the 27 Charge Pond Road site (Case No. 7-20; decision dated October 20, 2020). Accordingly, each of



these projects has the benefit of a 12-month permit freeze. If the use or construction of these projects is not commenced within this 12-month period, the permit freeze lapses and the projects would need to comply with any subsequently enacted bylaw changes. Given the projected timeline for completing the interconnection process, and then the lengthy diligence process which precedes the securing of financing for these projects, the project proponents cannot safely assume that the construction of the projects will commence within the limited 12-month window.

Accordingly, absent the filings of the PSPs to establish plan freezes, the proposed solar projects on the properties listed would not be indefinitely exempt from the potential zoning bylaw changes. If the proponent had not effected the plan freeze, and the bylaw is adopted as currently proposed (and the Massachusetts Attorney General's office thereafter approves it), pursuant to MGL c. 40A §6, the zoning changes would become retroactively effective to all permits issued after the date of the first publication of notice of the public hearing held on such bylaw amendment.<sup>1</sup>

#### *Procedures Relating to the Filing of the PSPs*

Several board members asked about the process associated with the filing of the PSPs and questioned whether "acceptance" of the filings at the public meeting should be delayed until after Town Meeting. With respect to the four (4) PSPs described above, whether or not the Planning Board formally "accepts" the filings in a public meeting is irrelevant because, as noted by the Director of Planning & Community Development during the public meeting, the applicant caused the filings to occur by both hand delivery (for acceptance at a regularly-scheduled meeting) and by registered mail to the Town Clerk, in accordance with the Town's Subdivision Rules and Regulations. Most importantly, timely notice of the filings was made to the Town Clerk in each instance. In accordance with MGL c. 40A §5, delivery of notice of the filing of each PSP to the Town Clerk's office perfects the plan freeze as it relates to these properties.

Furthermore, whether or not the PSPs comply with the Planning Board's submittal requirements is also irrelevant, as Massachusetts case law has made it clear that a preliminary plan need only substantially comply with the definition set out in MGL c. 41 §81L to trigger a zoning freeze; compliance with any more stringent requirements under local subdivision regulations is irrelevant.<sup>2</sup>

For these reasons, the filing of the PSPs with the Planning Board for the properties listed above, combined with timely delivery of notice of the filings to the Town Clerk, has created plan freezes for the land shown on each of the respective PSPs. To the extent the proposed solar

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<sup>1</sup> In this case, the Planning Board's hearing on the zoning bylaw amendment was held on April 20, 2021 and the first publication of notice occurred on April 1, 2021. Accordingly, absent the benefit of a zoning freeze, the bylaw's requirements are imposed on any structure or use proposed, or on any building or special permit issued, on or after this date.

<sup>2</sup> See *Paul Livoli, Inc. v. Planning Bd. of Marlborough*, 347 Mass. 330, 336 (1964); see also *Attleboro Sand & Gravel Corp. v. Planning Board of Attleborough (Order Granting Partial Summary Judgment)*, 27 LCR 67 (2019).



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bylaw is passed at Town Meeting, it will not apply to these properties for the duration of the respective plan freeze.

*Options for Proceeding Ahead*

We understand that the Planning Board has specifically discussed a possible floor amendment to the proposed zoning bylaw to provide for a broader exemption for previously permitted projects. Such an amendment would be a welcome modification because, as discussed above, the solar projects on the properties above either have a limited permit freeze associated with the special permits (which likely will lapse) or they fail to qualify for another form of permit freeze. And in all instances, the new bylaw would have a significant impact on the viability of the projects that have been designed on these properties. Providing for a broader exemption by a floor amendment to the bylaw would be respectful of the time and energy put into the design and review of these projects by both the applicants and the Town Boards. Furthermore, it would minimize the possibility of any challenges to the validity of the Town's bylaw under the solar protection provisions of MGL c. 40A §3, which protects solar uses from unreasonable restrictions, as they pertain to previously reviewed projects in particular.

We would be happy to discuss the contents of this memorandum with Town Counsel and/or the Planning Board.