October 18, 2021

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: #33-21 Site Plan Review - Wareham PV I, LLC - 0 Route 25 - Map 115 Lot 1000 - Large Ground-Mounted Solar Energy Facility (the "Project")

Dear Members of the Wareham Planning Board:

Wareham PV I, LLC has received and reviewed the October 13, 2021 Report regarding the Site Plan Review Application for the Project (the "Report"), and respectfully offers the following response.

I. BACKGROUND

At its June 12, 2021 Special Town Meeting, the Town of Wareham voted to amend Subsection 594.1.1 of its Zoning By-Laws to require that a parcel used as the site of a large ground-mounted solar energy facility must not only be at least three acres in size (as already required prior to June 12, 2021), but now must also be (1) no more than 10 acres in size, and (2) "previously cleared of trees" within the "portion of the parcel used" for the facility "for a period of at least five (5) years prior to the date of submission of the project for approval."[1]

The approximately 22.4-acre parcel proposed to be used for the Project – 0 Rt. 25 (Parcel ID 115-1000) (the "Site") – is the subject of an Approval Not Required Plan (the "ANR Plan") that was submitted to the Planning Board (along with the required written notice of plan submission to

[1] Wareham PV I, LLC notes that the Massachusetts Office of the Attorney General has not yet approved these amendments to Subsection 594.1.1 and has agreed with the Town to extend the period provided for its review of the amendments' consistency with state law by an additional 60 days, to November 25, 2021. See September 27, 2021 Letter from Assistant Attorney General Kelli E. Gunagan to Wareham Town Clerk Michele Bissonnette (attaching September 27, 2021 Letter from Assistant Attorney General Kelli E. Gunagan to Wareham Town Counsel Richard Bowen).

the Wareham Town Clerk) prior to June 12, 2021. The Planning Board voted to endorse the ANR Plan on July 12, 2021, thereby triggering a three-year "plan freeze" under M.G.L. c. 40A, § 6 (the "ANR Plan Freeze").

II. WAREHAM PV I, LLC'S RESPONSE TO THE REPORT

A. The Report Misinterprets the Applicable Law Regarding ANR Plan Freezes.

The Report makes the following statements:

> Under MGL chap 40A sec 6, the ANR [*sic*] does not protect against changes in dimensional standards, which in this case include, the maximum size of the project in acres and the minimum time for clearing the area. This position is supported by the ANR Handbook, which references *Bellows Farms v. Building Inspector of Action* [*sic*] *(1973)*. The MA Supreme Court's decision stated, "the language found in the zoning statute merely protected the land shown on such plans as to kind of uses which were permitted by the zoning bylaw at the time of the submission of the plan. This decision established the court's view that the land shown on ANR plans would not be immune to changes in the zoning bylaw, which did not prohibit the protected uses" (emphasis in original).

These statements misread the applicable case law and, as a result, draw erroneous conclusions.[2] Specifically, the case to which the Report cites – Bellows Farms, Inc. v. Bldg. Inspector of Acton – in fact declared that an ANR plan freeze protects "the use of the land" shown on the ANR plan from zoning changes that amount to prohibitions in use even if those changes are nominally changes to dimensional or other zoning requirements not directly related to permissible use. See 364 Mass. 253, 260 (1973) (ANR plan freeze protects against change in zoning dimensional requirement where application of new requirement to land covered by plan would "constitute or otherwise amount to a total or virtual prohibition of the use of the locus" for previously allowed use). See also Cape Ann Land Development Corp. v. Gloucester, 371 Mass. 19, 22 (1976) (noting that in Bellows Farms, court articulated principle that "the protection of [an ANR plan] would extend to certain changes in zoning provisions, not directly relating to permissible uses, if the impact of such changes, as a practical matter, were to nullify the protection afforded by [the plan]") (citations omitted).

In other words, contrary to the Report's interpretation, Bellow Farms and the cases following it stand for the proposition that during a three-year ANR plan freeze, the use of land shown on an endorsed ANR plan is (1) governed by the applicable zoning requirements in effect at the time of the plan's submission for endorsement, and (2) protected from zoning changes that have the

[2] These statements also misinterpret the plain language of both of the proposed amendments to Subsection 594.1.1, as discussed below.

practical effect of prohibiting that use, even if these changes are changes to dimensional or other zoning requirements.

B. The Report Misreads and Misapplies the 10-Acre Maximum Parcel Size Requirement of Section 594.1.1.

The Report misreads the 10-acre maximum parcel size requirement and as a result improperly applies it to the Project rather than to the parcel proposed to be used for the Project, that is, the Site.[3] This is erroneous because the 10-acre maximum parcel size requirement on its face regulates the type of land that can be used for large ground-mounted solar energy facilities, not the facilities themselves. See Zoning By-Laws Section 594.1.1 ("Large ground-mounted solar energy facilities shall … [b]e *sited on a parcel of* at least three (3) acres in size (no less than 130,680 square feet), and *no more than ten (10) acres in size* (no more than 435,680 square feet)") (emphasis added). Specifically, the plain language of the requirement prohibits the use of any parcel that is more than 10 acres in size as the location for a proposed large ground-mounted solar energy facility, regardless of the facility's nameplate capacity over 250 kW DC. The fact that the 10-acre maximum applies to the parcel and not the portion of the parcel comprising the footprint of the facility is crystal clear as the very next sentence of Section 594.1.1 states that "[t]he *portion of the parcel* used for solar generation facilities" must have been cleared of trees for at least five years prior. Id. (emphasis added). It is plain that "parcel" as used in Section 594.1.1 means parcel – not a portion of a parcel.

In the context of the ANR Plan, the 10-acre maximum parcel size requirement constitutes a change in zoning dimensional requirements that effectively prohibits the previously (pre-June 12, 2021) allowed use of the Site as the location for a large ground-mounted solar energy facility, in this case the Project. Under applicable law, the ANR Plan Freeze protects the Site (and therefore the Project) against this change.

C. The Report Misreads and Misapplies the Five-Year Tree Removal Requirement of Section 594.1.1.

The Report improperly interprets the five-year tree removal requirement to be a zoning dimensional requirement. The requirement is in fact a zoning use requirement. First, it

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[3] See, e.g., Staff Report, p. 3 ("*The system proposed* does not conform to the 10 acre maximum … required by the Zoning By-Law") (emphasis added); id., p. 5 ("Under MGL chap 40A sec 6, the ANR does not protect against changes in dimensional standards, which in this case include, *the maximum size of the project in acres* ….") (emphasis added); id., p. 8 ("Due to *the new bylaws regarding the maximum size of solar farms*, the project must avoid clear-cutting the southern portion of the parcel. *The system proposed* does not conform to the 10 acre maximum and previously cleared area required by the Zoning By-Law") (emphasis added); id., p. 8 ("The proposal does not conform to the zoning bylaws, sec. 590 et seq., regarding … *size of the project*.") (emphasis added).

expressly prohibits the use of land – specifically, any "portion of [a] parcel used for solar generation facilities" – as the location for a large ground-mounted solar facility unless any tree-clearing activity on that land was completed at least five years before a site plan review or other zoning application is filed for such a facility. See id. ("The portion of the parcel used for solar generation facilities must have been previously cleared of trees for a period of at least five (5) years prior to the date of submission of the project for approval."). Moreover, the Massachusetts Supreme Judicial Court has held that a time-based restriction on a specific land use is a zoning use requirement. See Collura v. Arlington, 367 Mass. 881, 884 (1975) (zoning by-law amendment that suspended construction of apartment buildings in certain areas of town for two years was change in zoning use requirement because "it effectively reclassified the district to a more restrictive use, if only for a temporary period").

In the context of the ANR Plan, the five-year tree removal requirement constitutes a change in zoning use requirements that effectively prohibits the previously (pre-June 12, 2021) allowed use of that portion of the Site from which trees have not been cleared in the past five years as the location for a large ground-mounted solar energy facility, in this case the Project. Under applicable law, the ANR Plan Freeze protects the Site (and therefore the Project) against this change.

Even if, for the sake of argument, the five-year tree removal requirement could be interpreted as a zoning dimensional requirement (which Wareham PV I, LLC does not concede), it would constitute a change in dimensional requirements that effectively prohibits the previously (pre-June 12, 2021) allowed use of that portion of the Site from which trees have not been cleared in the past five years as the location for the Project or any other large ground-mounted solar energy facility. Under applicable law, the ANR Plan Freeze protects the Site (and therefore the Project) against this change.

D. The Report Misapplies the Zoning By-Laws' Frontage Requirements to the Project.

The Zoning By-Laws' minimum frontage requirements only apply to "buildings," and a large ground-mounted solar energy facility does not qualify as a "building" under the Zoning By-Laws' definition of that term, so the minimum frontage requirements do not apply to the Project. Specifically:

- Section 611.1 of the Zoning By-Laws expressly states that "[n]o principal *building* or accessory *building* thereof shall be erected on any lot: 1. With less than the minimum … street frontage" (emphasis added).

- Article 16 of the Zoning By-Laws defines "building" as "[a] combination of any materials, whether portable or fixed, *having a roof, and enclosed within exterior walls* or

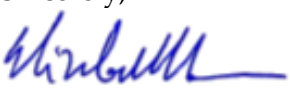
firewalls; *built to form a structure for the shelter of persons, animal or property*" (emphasis added).[4]

- In contrast, Article 16 defines "structure" as "[a] combination of *materials assembled at a fixed location to give support* or shelter, such as building, bridge, trestle, tower, *framework*, retaining wall, tank, tunnel, tent, stadium, reviewing stand, platform, bin, fence, sign, flagpole or the like" (emphasis added).

Based on these definitions, the Project is a "structure" under the Zoning By-Laws, with the result that the minimum frontage requirements do not apply.

Thank you for your consideration.

Sincerely,



Elizabeth F. Mason

cc: David Fletcher
Haley Ordeval, Longroad Energy
Vanessa Kwong, Esq., Longroad Energy
Richard P. Bowen, Esq., Wareham Town Counsel

[4] Under Article 16, "Building, Principal" means "[a] building in which is conducted the principal use of the lot on which it is located," and "Building, Accessory" means "[a] detached building, the use of which is customarily incidental and subordinate to that of the principal building, and which is located on the same lot as that occupied by the principal building."