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November 10, 2023

Cara Dahill, Town Clerk
Town of Carver
108 Main Street
Carver, MA 02330

Re: Carver Annual Town Meeting of April 11, 2023 -- Case # 10941
Warrant Articles # 17, 18, 19, 20, 21, 22, 23, 27, 28, 29, 30, 31, 32, 33, and 34 (Zoning)
Warrant Articles # 15, 16, and 24 (General) [1]

Dear Ms. Dahill:

Articles 28 and 29 – Under Article 28 the Town voted to amend its zoning by-laws to add a new Section 3590 that imposes requirements for Tier 1, 2, and 3 Battery Energy Storage Systems (BESS). Under Article 29 the Town voted to amend Section 2230, "Use Regulation Schedule," to add new entries for Tier 1, Tier 2, and Tier 3 BESS and to provide for the zoning districts where they are allowed as of right, by special permit, or are prohibited. We approve Articles 28 and 29 because we determine they do not conflict with state law, including the solar protections in G.L. c. 40A, § 3, as highlighted by the court's decision in Tracer Lane II v. City of Waltham, 489 Mass. 775 (2022).

In this decision we discuss the Attorney General's standard of review of town by-laws under G.L. c. 40, § 32; summarize the by-law amendments adopted under Articles 28 and 29; and then explain why, governed by our review standard, we approve Articles 28 and 29. [2] We emphasize that our decision in no way implies any agreement or disagreement with the policy views that may have

[1] In a decision issued August 8, 2023 we approved Articles 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 30, 31, 32, 33, and 34 and by agreement with Town Counsel pursuant to G.L. c. 40, § 32, we extended our deadline for a decision on Articles 27, 28, and 29 until November 11, 2023. We will issue our decision on Article 27 under separate cover.

[2] During our review of Articles 28 and 29 we received communication opposing Articles 28 and 29 on the basis that they assertedly impose unreasonable requirements on solar uses in violation of G.L. c. 40A, § 3 and prohibit Tier 3 BESS in almost the entire Town in violation of Tracer Lane II. We appreciate this correspondence as it has aided our review.

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 amendments. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986).

I. Attorney General's Standard of Review of Zoning By-laws

Our review of Articles 28 and 29 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. 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.

As amendments to the Town's zoning by-laws Articles 28 and 29 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 v. IDC Bellingham, LLC, 440 Mass. 45, 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 v. City of Leominster, 362 Mass. 95, 101 (1972)). 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.

II. Summary of Articles 28 and Article 29

Under Article 28 the Town amended the zoning by-laws to add a new Section 3590, "Battery Energy Storage Systems," that adds new definitions for BESS related terms and imposes requirements for Tier 1, Tier 2, and Tier 3 BESS in the Town. Section 3590.95 defines "Battery Energy Storage Management Systems (BESS)" as follows:

> Battery Energy Storage Management System (BESS): An electronic system that protects energy storage systems from operating outside their safe operating parameters and disconnects electrical power to the energy storage system or places it in a safe condition if potentially hazardous temperatures or other conditions are detected.

The Town also added a new Section 3590.20, "Applicability," that classifies BESS as a Tier 1, Tier 2, and Tier 3 BESS as follows:

> 2. A battery energy storage system that is subject to this bylaw is classified as a Tier 1, Tier 2, or Tier 3 Battery Energy Storage System as follows:
>
> a) Tier 1 Battery Energy Storage Systems have an aggregate energy capacity less than 0.5MWh and, if in a room or enclosed area, consist of only a single energy storage system technology
>
> b) Tier 2 Battery Energy Storage Systems have an aggregate energy capacity equal to or greater than .05 MWh but less than 1MWh or are comprised of more than one storage battery technology in a room or enclosed area.
>
> c) Tier 3 Batter Energy Storage Systems have an aggregate energy capacity greater than 1MWh or are comprised of more than one storage battery technology in a room or enclosed area.

Section 3590.40 allows a Tier 1 BESS by right subject to minor site plan review in all zoning districts. Section 3590.50 allows a Tier 2 and Tier 3 BESS by special permit with site plan review "in those zoning districts identified" in Section 2230, the Town's Use Regulations Schedule. [3] Section 3590.50 also imposes signage, lighting, noise, and setback requirements for Tier 1, Tier 2, and Tier 3 BESS. In addition, Section 3590 imposes requirements applicable only to Tier 2 and Tier 3 BESS, including dimensional, fencing, screening, mitigation, and decommissioning requirements. See Sections 3590.50 (6), (7), (8), and (10)-(14). [4]

Under Article 29 the Town amended its Use Regulation Schedule to allow Tier 1 BESS in all districts; to allow Tier 2 BESS by special permit in all districts except for the Village Business and Village Districts where they are prohibited; and to allow Tier 3 BESS by special permit in the Town's Highway Commercial, Industrial A, B, and C, and Airport Districts and to prohibit them in the remaining districts.

III. Articles 28 and 29 Must be Applied Consistent with G.L. c. 40A, § 3' Solar Protection.

Solar energy facilities and related structures have been protected under Section 3 for almost 40 years, since 1985 when the Legislature passed a statute codifying "the policy of the commonwealth

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[3] The concept of site plan review is not embedded in the Zoning Act. See Bobrowski, *Handbook of Massachusetts Land Use and Planning Law*, § 9.07. The Town has adopted a permitting scheme that differentiates between "site plan review" and "minor site plan review" that, generally, requires more impactful land uses to undergo site plan review with a higher level of application submissions and review, and less impactful land uses to undergo only minor site plan review with a lower level of application submissions and review. See Section 3155.

[4] The new Section 3590 is similar to the BESS by-law adopted by the Town of Medway under Article 15 and approved by this Office in a decision dated November 14, 2022. See Case # 10779.

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 adopting 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 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.

In codifying solar energy and related structures 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.

The Supreme Judicial Court reaffirmed this principle in Tracer Lane II. 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" against "the impact on the protected [solar] use." Id. at 781-82.

By statute ESS qualify as "solar energy systems" and "structures that facilitate the collection of solar energy" and are protected by G.L. c. 40A, § 3. General Laws Chapter 164, Section 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." [5] See also NextSun Energy LLC v. Fernandes, No. 19 MISC 000230 (RBF), 2023 WL 3317259, at *14 (Mass. Land Ct. May 9, 2023), amended, No. 19 MISC 000230 (RBF), 2023 WL 4156740 (Mass. Land Ct. June 23, 2023), judgment entered, No. 19 MISC 000230 (RBF), 2023 WL 4145901 (Mass. Land Ct. June 23, 2023) (battery energy storage systems are entitled to Section 3 solar protections).

We approve Article 28 and Article 29's regulation of Tier 1, Tier 2, and Tier 3 BESS because we cannot conclude that they constitute an unreasonable regulation of solar energy and related structures in violation of G.L. c. 40A, § 3, or otherwise conflict with state law. However, given the extensive requirements of the by-law amendments, including the special permit, setback and buffer requirements on Tier 2 and Tier 3 BESS, it is not clear on our record whether there is sufficient land in the Town to accommodate a Tier 2 and Tier 3 BESS. If Articles 28 and 29 are used to deny a BESS, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems and related structures, such as structures that facilitate the collection of solar energy, such application would run a serious risk of violating G.L. c. 40A, § 3. See Tracer Lane II, 489 Mass. at 781 (Waltham's prohibition on solar energy systems in all but one to two percent of its land area violates the solar energy provisions of G.L. c. 40A, § 3.) The Town should consult further with Town Counsel 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 that 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 voted by Town Meeting, unless a later effective date is prescribed in the by-law.

[5] We note that 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. The Act also required DOER to set targets for electric companies to procure energy dispatched from battery energy storage systems. https://www.mass.gov/info-details/esi-goals-storage-target (last visited November 8, 2023).

Very truly yours,
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cc: Town Counsel Gregg J. Corbo