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March 21, 2022

Michele Bissonnette, Town Clerk
Town of Wareham
54 Marion Road
Wareham, MA 02571

Re: Wareham Special Town Meeting of June 12, 2021 -- Case # 10230
Warrant Articles # 8, 9 and 17 (Zoning)
Warrant Articles # 10 and 11 (General) [1]

Dear Ms. Bissonnette:

Article 17 - Under Article 17 the Town voted to amend the Town's zoning by-laws to place restrictions on the siting of large-scale ground mounted solar energy facilities (solar facilities). The by-law proposes to restrict such solar facilities to parcels no more than ten acres in size and requires the footprint of the solar array to have been previously cleared of trees for a period of at least five years before the application for special permit or site plan approval.

We must disapprove Article 17 because it violates G.L c. 40A, § 3's prohibition against unreasonable regulations of solar uses. The Town's by-law filing submitted to this Office pursuant to G.L. c. 40, § 32 reflects no 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. Article 17 also fails to comply with the requirement that a land use moratorium be limited to only a reasonable time necessary to conduct planning studies. Zuckerman v. Hadley, 442 Mass. 511, 520-521 (2004).

In this decision, we summarize the by-law amendments adopted under Article 17 and the Attorney General's standard of review of zoning by-laws, and then explain why, based on our standard of review, we must disapprove Article 17.

[1] In a decision issued on September 27, 2021, we approved Articles 8, 9, 10, and 11 and extended our deadline for a decision on Article 17 until November 25, 2021. On November 20, 2021, we further extended our deadline for Article 17 until December 25, 2021. On December 20, 2021, we placed Article 17 on "Hold" pending receipt of information required under G.L. c. 40A, § 5.

During our review of Article 17, we received input urging our Office to approve or disapprove Article 17 on various grounds. [2] This input has informed our review of the by-law and illustrated the importance of the issues at stake. We emphasize that our disapproval of the by-law in no way implies any agreement or disagreement with any policy views that led to the passage of the by-law. 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 the wisdom of the by-law. Amherst v. Attorney General, 398 Mass. 793, 798-99 (1986) ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.").

I. Summary of Article 17

Under Article 17, a citizen-petition warrant article, the Town voted to amend the Wareham Zoning By-Laws, Section 590, Solar Energy Generation Facilities, subsection 594.1.1 to require solar facilities to be located on parcels no more than ten acres in size, and to require the footprint of the solar array to have been cleared of trees for at least five years prior to the date of special permit or site plan application. The proposed amended Section 594.1.1 would read:

> 594.1 Large ground-mounted solar energy facilities shall meet the following standards:
>
> 1. Be 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). 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. Aerial photos that are date-time stamped or come from a government source may be used to show the time of clearing. The appropriate reviewing board will have the sole discretion in determining compliance with this standard.

Nether the warrant article nor the text of the proposed by-law amendment includes a statement of purpose or intent of the by-law amendment. However, in its G.L. c. 40, § 32 by-law filing for Attorney General review the Town submitted a copy of the Planning Board report on Article 17 which reads as follows:

> **STM Article 17 Solar Bylaws** zoning amendment
>
> **Statement**: This was proposed as a stop-gap measure so that the Solar Bylaw may be comprehensively revised and submitted for Town Meeting action in the Fall. It does not provide a full stop because the proponents may file preliminary

[2] We appreciate the letters from Linda Rinta (July 23, 2021); Attorneys Elizabeth F. Mason and Jonathan S. Klavens on behalf of Longroad Development Company (September 3, 2021); Attorney Douglas T. Radigan (November 10, 2021); Brian A. Wick, Cape Cod Cranberry Growers Association (March 3, 2022); Nancy McHale, Chairperson of the Wareham Solar Bylaw Study Committee (September 17, 2021); Lori Benson, Wareham Land Trust (October 4, 2021); and Richard Swenson, Chairperson of the Wareham Planning Board (September 21, 2021).

subdivision plans and preserve the right to develop their property under the existing bylaw. However, the quicker Wareham puts in place controls around size and land clearing, the quicker we can better manage solar farm installations.

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

Our review of Article 17 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).

Article 17, 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 v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). Because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." Id. at 51. "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.'" Durand, 440 Mass. 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.

III. Analysis of Article 17's Conflicts with State Law

A. Article 17 Is an Unreasonable Restriction on Solar Uses in Violation of G.L c. 40A, § 3

Article 17's restrictions on solar facilities amount to an unreasonable regulation of solar uses in violation of G.L. c. 40A, § 3 because the record reflects no 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.

Although the Zoning Act, together with the Home Rule Amendment, provides municipalities with great latitude in the exercise of local zoning powers, the Legislature has acted to limit this authority in certain areas. 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 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. [3]

In 1985, as part of a statute codifying "the policy of the commonwealth to encourage the use of solar energy," St. 1985, c. 637, §§ 7, 8, the Legislature added solar to Section 3's list of protected uses. Id. § 2. Specifically, 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 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. Cnty. Comm'rs of Bristol, 380 Mass. at 713.

Several recent Land Court decisions have analyzed the solar protections in Section 3. In Tracer Lane II Realty, LLC v. City of Waltham, 2021 WL 861157, *5 (Mar. 5, 2021), *appeal pending*, No. SJC-13195 (Mass.), the Land Court concluded that a categorical prohibition of solar

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[3] Compare G.L. c. 40A, § 3, ¶¶ 2, 3 (protecting educational, religious, and childcare uses by making them subject only to "reasonable regulations" concerning specified dimensional and parking requirements), with id. ¶ 2 (protecting public utility uses through exempting from zoning regulations upon designated agency's finding that particular use is "reasonably necessary"), and id. ¶ 5 (protecting "family child care home" uses by creating presumption that uses are "allowable," but permitting municipalities to overcome presumption by "prohibit[ing] or specifically regulat[ing]" use). See Rogers v. Town of Norfolk, 432 Mass. 374, 381 (2000) (explaining that provision protecting childcare uses must be interpreted differently in practice than similarly worded provision protecting religious and educational uses).

facilities in all but industrial zoning districts in the city violates the solar protections in Section 3. The question before the Land Court was "whether, and to what extent, G.L. c. 40A, § 3 overrides the prohibition in the Waltham Zoning Code against the use of land in a residential zoning district for an access road to serve a solar energy facility located in a commercial zoning district in an adjacent municipality." Id. at *3. To answer this question, the court analyzed the meaning of the term "unreasonable" in Section 3's mandate that municipalities may not "unreasonably regulate" solar facilities:

> "Unreasonable" regulation has generally been determined to be regulation that as a practical matter amounts to a prohibition or otherwise unduly restricts the protected use. There are several ways in which an applicant may demonstrate "unreasonableness." A zoning requirement is unreasonable if it detracts from usefulness of a structure, imposes excessive costs on the applicant, or impairs the character of a proposed structure. Trustees of Tufts College v. Medford, 415 Mass. 753, 759-760 (1993). Further, "proof of cost of compliance is only one way" to show unreasonableness, and courts must consider other aspects such as use or character of property. Rogers v. Norfolk, 432 Mass. 374, 385 (2000).

As the court highlighted, "[e]ven dimensional regulations that do not strictly prohibit a protected use may impair it to an impermissible degree" and thus qualify as an unreasonable regulation under Section 3. See Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141 (2001) (as applied to the Church's proposed temple, Belmont zoning by-law limiting steeples to 11 feet, two inches was an unreasonable regulation of a religious structure in violation of Section 3 because the by-law's height restriction "would impair the character of the temple without advancing any municipal concern.")

Applying these principles to the Waltham zoning ordinance that limited as of right solar uses to less than 2 % of the City, the Tracer Lane court determined that the ordinance was an unreasonable regulation of solar uses in violation of Section 3. Central to the court's decision was an analysis of "the geographical extent of the areas in which solar energy systems were allowed and in which they were prohibited." Id. at *6. The exclusion in the Waltham ordinance of solar uses in 98% of the City was found to be unreasonable:

> This categorical exclusion of the vast majority of the city's area from even consideration of solar energy facilities, regardless of the surrounding built environment, the topography, and other considerations typically considered in site plan review or special permit review, unquestionably violates the requirement that municipalities not "prohibit or unreasonably regulate" such facilities. An outright prohibition in 98% of the municipality, or for that matter in any large segment of the municipality, without a showing that the prohibition is "necessary to protect the public health, safety or welfare," runs afoul of this statutory injunction, and it is irrelevant that such solar energy facilities may be permitted in four small pockets of the city.

Id. at *6. Ultimately, the Tracer Lane court applied similar reasoning as other recent Land Court decisions in assessing the practical effect of the restriction—notably the geographic scope of its

limitations on solar energy systems—against the necessity for such restrictions to achieve important municipal aims, such as protecting public health, safety, or welfare. See id. at *7. [4]

This understanding of Section 3's solar provision reflects, as the Land Court observed in another case, that "[t]he purpose of the solar energy facility protections of G.L. c. 40A, § 3, is 'to require some 'standing down' by municipalities to encourage and protect solar facilities - a use that might be seen as unwelcome in municipalities at a local level - by abutters, neighbors, and by town government." Northbridge McQuade, LLC v. Northbridge Zoning Bd. of Appeals, Mass. Land Ct., No. 18 Misc 000519 * 2 (June 17, 2019) (Piper, C.J.) (determining that before towns may regulate or prohibit solar installations, there must be an analysis of the need for such prohibition or regulation against the legislatively determined public interest in allowing solar energy installation). In sum, evaluating a zoning regulation's conformity with Section 3's solar provision therefore requires weighing the burdens that a municipal regulation imposes on solar uses against justifications for the regulation based on legitimate municipal objectives grounded in the protection of health, safety, or welfare. [5]

Applying the requisite analysis to the solar restrictions here in Article 17, we determine that the by-law is an unreasonable solar regulation in violation of G.L. c. 40A, § 3 because it unduly restricts solar facilities. Taking first the by-law's requirement that the solar facility footprint be cleared of trees for a period of at least five years prior to the site plan review or special permit application, the record reflects no showing that this potentially significant limitation on new solar construction is necessary to protect any important municipal objective. G.L. c. 40A, § 3. Notably, the Town's existing by-law requires that clear cutting of trees and vegetation be strictly limited to what is necessary for the project. (Zoning by-law, Section 594.3 (6)). It is unclear why an additional five-year limitation is necessary to protect the health, safety, or welfare of the Town. In addition, as one opponent has noted, the requirement that a solar developer wait five years after clearing the solar array footprint before the developer may even *submit* a site plan review or special permit application is an unreasonable economic burden on solar uses. (Attorney Mason letter September 2, 2021, p. 11). [6] Two other opponents note that the five-year waiting period

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[4] See also PLH LLC v. Ware, 2019 WL 7201712 at *3 (December 24, 2019) (Piper, C.J.) (review under solar by-law's special permit provisions "must be limited and narrowly applied in a way that is not unreasonable, is not designed or employed to prohibit the use or the operation of the protected use, and exists where necessary to protect the health, safety or welfare.")

[5] Our Office filed an amicus brief in the pending appeal of the Land Court's decision in Tracer Lane, and that brief provides additional context and background for the balancing required by Section 3's solar provision. The Supreme Judicial Court's forthcoming decision in Tracer Lane should provide additional guidance in this regard.

[6] We recognize that preservation of trees and the related need to protect sensitive ecosystems can be legitimate municipal interests that protect the public welfare, and we have approved other solar by-laws that seek to limit wholesale tree cutting beyond that necessary for the solar array. (See, e.g., Wendell Case # 6622). But the attempt here to impose a five-year waiting period between tree clearing and special permit or site plan review application, and to limit large-scale arrays to those parcels that have been cleared for five years, appears wholly unnecessary, unmoored to any legitimate justification, and intended to work a substantial prohibition of solar uses, especially in light of the Wareham by-law's existing requirement limiting tree clearing to that required for the project.

requirement would stop several on-going projects intended to promote solar arrays on cranberry bogs and would prevent most solar projects on agricultural land. (Wick letter, p. 1; Rinta letter, p. 2). These burdensome results of the proposed by-law amendment are in effect little different than an absolute prohibition on solar installations. The by-law's restrictions on solar energy are not narrowly tailored to promoting any important municipal objective and generally undermine the "legislatively determined public interest in allowing solar energy installations." Northbridge McQuade, LLC at *2.

Similarly, the requirement in Article 17 that the parcel cannot exceed ten acres also unreasonably limits the parcels on which a solar facility may be placed, by imposing a significant restriction on solar construction, and by doing so without any valid articulated reason. There is no evidence that the by-law amendment resulted from a municipal study of the impacts of large-scale solar arrays, nor any evidence of "the geographical extent of the areas in which solar energy systems [would be] allowed and in which they [would be] prohibited" under the by-law. Tracer Lane, at *6. As in Tracer Lane, without any indication that the ten- acre maximum parcel size serves an important municipal goal sufficient to outweigh the public need for large solar energy systems, and with the by-law's apparent intention to prohibit all solar installations on large parcels where such facilities could otherwise be built, the maximum parcel size amounts to an unreasonable regulation of solar facilities in violation of G.L. c. 40A, § 3.

The only evidence of the by-law's purpose or intent in the record submitted for Attorney General review pursuant to G.L. c. 40, § 32 is the report of the Planning Board to Town Meeting which states that Article 17 "was proposed as a stop gap measure so that the Solar Bylaw may be comprehensively revised and submitted for Town Meeting action in the Fall." (Planning Board Report, p. 6.) This appears to be an attempt to impose a moratorium on solar facilities in the Town, as several supporters of the proposed amendment have subsequently communicated to us in their letters of support. (See e.g., Swenson letter). However, a town has only limited authority to impose a moratorium on land uses. Such a restriction may only be for a reasonable, limited time, and "adopted to provide controlled development while the municipality engages in comprehensive planning studies." Sturges v. Chilmark, 380 Mass. 246, 252-253 (1980). The by-law amendment here does not qualify as a legitimate moratorium because it has no time limit at all. Although the Planning Board Report references the Town's intent to impose a "stop-gap" measure for the Town to study the issue, the by-law itself does not impose a time limitation or state the reasons the Town may need to impose a moratorium.

To be clear, a town's expressed need for time to undertake a planning process does qualify as a legitimate zoning purpose for a temporary moratorium. See W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 567 (2002) ("The desirability of thoughtful consideration before a municipality reconciles the variety of competing interests that affect any zoning change constitutes the rational reason that justifies a halt to private activities.") We have approved such temporary moratoriums (on solar and other land uses) where the by-law filing record reflects that the proposed moratorium is for a limited period necessary for a town to conduct a legitimate planning process, as required by Sturges. [7] But the Town here has imposed non-temporary, unreasonable restrictions on solar facilities in violation of G.L. c. 40A, § 3 under the guise of a "stop-gap" measure. Planning Board Report, p. 6. This is not a lawful use of the Town's zoning

[7] For example, we approved a one-year moratorium on solar uses in Spencer Case # 9979.

power. "Except when used to give communities breathing room for periods reasonably necessary for the purposes of growth planning generally, or resource problem solving specifically, as determined by the specific circumstances of each case, such [moratorium] zoning ordinances do not serve a permissible public purpose, and are therefore unconstitutional." Zuckerman v. Hadley, 442 Mass. 511, 520-521 (2004) (*citing* Sturges, 380 Mass. at 257).

IV. CONCLUSION

Because Article 17 violates G.L c. 40A, § 3's prohibition against unreasonable regulation of solar uses, we disapprove and delete it.

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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