MAURA HEALEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

September 19, 2022

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

See A.G. comments pp 5-7

RE: Carver Annual Town Meeting of April 12, 2022 - Case # 10526
Warrant Articles # 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 26, and 38 (Zoning)
Warrant Articles # 28 and 29 (General)

Dear Ms. Dahill:

Articles 10, 11, 12, 13, 14, 15, 16, and 17 - We approve Articles 10, 11, 12, 13, 14, 15, 16, 17, and the map amendments voted under Article 13, adopted at the Carver April 12, 2022 Annual Town Meeting. Our comments on Articles 10, 11, 12, 13 and 14 are provided below. [1] We will send the approved map to you by regular mail.

Articles 10, 11, 12, and 13 - Under Articles 10, 11, 12, and 13 the Town voted to amend several provisions in its zoning by-laws related to the Green Business Park District (GBP). [2]

Under Article 10 the Town voted to amend Section 2320, "Table of Dimensional Requirements," (Table) to increase the maximum building height in the GBP from forty feet to sixty-five feet. Article 10 also amends Footnotes 11 and 12 in the Table. Footnote # 11 is amended to exclude rooftop mechanicals and rooftop solar installations from being considered an additional story. However, rooftop mechanicals and rooftop solar installations are included in determining the overall height of the building. Footnote # 12 is amended to exempt water towers owned or operated by the North Carver Water District from the height limitations within the GBP.

Article 11 amends Article VI, "Definitions," to amend the definition of "Accessory Building and Structure" to exempt water towers and tanks used for potable water supply or fire protection from the definition's height restriction for accessory structures.

[1] In a decision issued on August 11, 2022, we approved Articles 19, 20, 28, and 29 and extended our deadline for a decision on Articles 10, 11, 12, 13, 14, 15, 16, 17, 26, and 38 for an additional 60 days until October 13, 2022. We will issue our decision on Articles 26 and 38 on or before October 13, 2022.
[2] Articles 14, 15, 16, and 17 also made amendments to the Town's zoning by-laws related to the GBP.

Article 12 amends Section 3350, "Driveway Design" to require access driveways for nonresidential premises to be a minimum of twelve feet for one-way traffic and a minimum of twenty-four feet for two-way traffic.

Article 13 rezones a parcel of land located off of Park and Montelli Streets consisting of approximately 7.48 acres from the Highway Commercial (HC) District to the GBP District. Articles 10, 11, 12, and 13 all relate to the development of vacant and blighted land within the GBP.

Together Articles 10, 11, 12, and 13 will allow the redevelopment of approximately 235 acres of land that will include a warehouse and distribution facility. See Letter from Corbo to Hurley dated July 7, 2022, p. 1. As detailed below, we approve these Articles because they are not clearly in conflict with state law, including G.L. c. 40A, § 5's procedural requirements for amending zoning by-laws. Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).

I. Attorney General's Standard of Review of Zoning Bylaws

Our review of Articles 10, 11, 12, and 13 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, in order 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. Where the Legislature intended to preempt the field on a topic, a municipal by-law on that topic is invalid and must be disapproved. Wendell v. Attorney General, 394 Mass. 518, 524 (1985).

Articles 10, 11, 12, and 13, as amendments 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). 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. "Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions." Concord v. Attorney General, 336 Mass. 17, 25 (1957) (*quoting* Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). "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.

II. Articles 10, 11, 12, and 13 Are Consistent with State Law

During our review of Articles 10, 11, 12, and 13, we received correspondence from two citizens of the Town urging our disapproval of these Articles asserting that the Articles violate the provisions of G.L. c. 40A, § 5. The opponents allege that the petitioner of these Articles is the Carver Redevelopment Authority (RDA) and the RDA "is not an agency of the Town," that can initiate a zoning by-law amendment. We appreciate this input as it has aided our review. However, as provided in more detail below, we do not agree that this argument renders Articles 10, 11, 12, and 13 invalid.

A. General Laws Chapter 40A, Section 5's Procedural Requirements

General Laws Chapter 40A, Section 5 requires a planning board hearing before a zoning by-law is adopted and establishes the procedural requirements for such hearing. Section 5 provides in pertinent part as follows:

> Zoning . . . by-laws may be adopted and from time to time changed by amendment, addition or repeal, but only in the manner hereinafter provided. Adoption or change of zoning . . . by-laws may be initiated by the submission to the . . . board of selectmen of a proposed zoning . . . by-law by . . . a board of selectmen, a board of appeals, by an individual owning land to be affected by change or adoption, by request of registered voters of a town pursuant to section ten of chapter thirty-nine . . . by a planning board, by a regional planning agency or by other methods provided by municipal charter. The board of selectmen . . . shall within fourteen days of receipt of such zoning . . . by-law submit it to the planning board for review.
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> No zoning . . . by-law or amendment thereto shall be adopted until after the planning board in a . . . town . . has . . . held a public hearing thereon, together or separately, at which interested persons shall be given an opportunity to be heard. . . . Notice of said hearing shall also be sent by mail, postage prepaid to the department of housing and community development, the regional planning agency, if any, and to the planning board of each abutting city and town.

Against this backdrop, we review the adoption of Articles 10, 11, 12, and 13.

B. Opponents' Claim That Articles 10, 11, 12, and 13 Were Not Properly Initiated Zoning Articles

The opponents urge our disapproval of Articles 10, 11, 12, and 13 alleging that they were not initiated by an individual or entity authorized to do so under G.L. c. 40A, § 5. The opponents claim that these Articles were proposed by the RDA and the RDA is not a town agency that can propose zoning by-law changes under G.L. c. 40A, § 5.

General Laws Chapter 40A, Section 5 provides that zoning changes may be initiated by certain local officials, including the Board of Selectmen or the Planning Board, or by other individuals, including an individual owning land to be affected by the change, or by request of registered voters of a town pursuant to G.L. c. 39, § 10. See Bellingham Massachusetts Self Storage, LLC v. Town of Bellingham, 101 Mass.App.Ct. 1108, * 2 (June 9, 2022, Memorandum and Order Pursuant to Rule 23.0) (a zoning by-law amendment initiated by an individual resident with no ownership interest in any land within the affected district did not comply with G.L. c. 40A, § 5's requirements for who can

initiate a zoning by-law amendment). The Town Meeting Warrant for Articles 10, 11, 12, and 13 states that the Articles were sponsored by the RDA. Other material submitted to our Office as part of our procedural review of the zoning by-law amendments states that the RDA proposed the amendments to the Board of Selectmen.

According to the Town, Articles 10, 11, 12, and 13 were proposed by the property owner, but because they are part of the Town's Urban Renewal Plan, they were discussed at several meetings held jointly with the property owners, the RDA, the Planning Board, and the Board of Selectmen in order to ensure the proper wording of the zoning by-law amendments. See Letter from Corbo to Hurley at pg. 2. According to the Town, once the language of the zoning by-law amendments was drafted, the RDA, submitted them to the Board of Selectmen for inclusion in the Town Meeting Warrant and the Assistant Town Administrator submitted them to the Planning Board hearing as required by G.L. c. 40A, § 5. See Letter from Corbo to Hurley at pg. 2. Thereafter, as required by G.L. c. 40A, § 5, the Planning Board held a hearing on the proposed zoning by-law amendments. Based on our standard of review, we conclude that Articles 10, 11, 12, and 13 were initiated by a local official or individual authorized to do so under G.L. c. 40A, § 5. Therefore, we approve Articles 10, 11, 12, and 13.

Because we cannot conclude that Articles 10, 11, 12, and 13 conflict with the procedural requirements of G.L. c. 40A, § 5, and because we find no other conflict with the Constitution or laws of the Commonwealth, or we approve them.

Article 14 - Under Article 14 the Town voted to amend Section 3580.00, "Large-Scale Ground Mounted Solar Photovoltaic Installations," to: (1) exempt small-scale and building and roof-mounted solar installations from Section 3580.00's provisions and (2) to add a new Section 3580.15. that exempts roof-mounted solar installations on new non-residential buildings in the Town's GBP District. We approve Article 14 because it does not violate the solar protections in G.L. c. 40A, § 3, which require that any burdens placed on solar energy be reasonable and justified by a sufficiently strong legitimate municipal interest grounded in public health, safety or welfare.

In this decision, we summarize the by-law amendments adopted under Article 14 and then explain why, based on our standard of review, we approve Article 14.

I. Summary of Article 14

Under Article 14 the Town amended Section 3580.00, "Large-Scale Ground Mounted Solar Photovoltaic Installations" to provide exemptions from its provisions for small-scale and building and roof-mounted solar installations. [3] The Town also voted to add a new Section 3580.15 that exempts roof-mounted solar electric installations on a new non-residential building within the GBP District from the provisions of Section 3580 and makes it clear that such use is customarily accessory and incidental to permitted principal uses and is allowed by right in the GBP District. As amended, Section 3580.10 provides as follows (new text in bold):

[3] While Article 14 indicates that the text exempting small-scale ground or building mounted solar installations from the provisions of Section 3580 is new text, such text appears in the Town's existing Section 3580, which was adopted under Article 10 from the Carver December 6, 2021 Special Town Meeting (See Case # 6590).

LARGE-SCALE GROUND MOUNTED SOLAR PHOTOVOLTAIC INSTALLATIONS
3580.10. Purpose. The purpose of this bylaw is to promote the creation of new large-scale groundmounted solar photovoltaic installations (LSGMSPI) defined as those with a minimum nameplate capacity of 250 kW or greater or covering 1 acre or more of land, by providing standards for the placement, design, construction, operation, monitoring, modification and removal of such installations that address public safety, minimize impacts on scenic, natural and historic resources, and to provide adequate financial assurance for the eventual decommissioning of such installations.

The provisions set forth in this section shall apply to the construction, operation, and/or repair of LSGMSPI proposed to be constructed or materially altered after the effective date of this section. To the extent that any particular provision of this bylaw is determined to be invalid, such invalidation shall not affect the validity of any other provision.

Smaller scale ground or building mounted solar electric installations which are an accessory structure to an existing residential or non residential use do not need to comply with this Section, but must comply with the other provisions of Carver's Zoning Bylaws as applicable.

3580.15 Exemptions. Notwithstanding any other Zoning Bylaw provisions to the contrary, the following types of solar uses and structures are exempt from the provisions of Section 3580 and are considered as allowed uses and structures by right and customarily accessory and incidental to permitted principal uses: a. Roof-mounted solar electric installations on a new non-residential building within the GBP District; provided, however, that such uses and structures above shall comply with the other provisions of the Carver Zoning Bylaws as applicable, and with health and safety requirements of the Building Inspector and Fire Chief, and/or his/her designee

II. Protections for Solar Uses Under G.L. c. 40A, § 3

Solar uses are protected under G.L. c. 40A, § 3. 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.

Solar energy facilities and related structures have been protected under Section 3 since 1985, when the Legislature passed a statute codifying "the policy of the commonwealth to encourage the use of solar energy." St. 1985, c. 637, §§ 7, 8. 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.

The Supreme Judicial Court has recently reaffirmed this principle in Tracer Lane II v. City of Waltham, 489 Mass. 775 (2022). 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 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.

Applying that framework to the facts of the case before it, the Court explained that Waltham had unreasonably restricted solar energy systems by excluding large-scale solar arrays from most zoning districts and "in all but one to two percent" of the City's land area. Id. at 782. The Court acknowledged that Waltham's regulation was designed to advance the generally legitimate municipal purpose of preserving each zone's unique characteristics. Id. But the Court explained that Waltham's categorical and extensive limitation on large-scale solar arrays—a critical form of solar energy system—undermined the state policy favoring solar energy and lacked any public health, safety, or welfare justification sufficient to justify the extent of the restriction. Id. at 781-82. The regulation was therefore unreasonable and unlawful. Id. at 782.

IV. Analysis of Article 14

The by-law amendments adopted under Article 14 appear to be reasonable solar regulations that are designed to enhance, rather than limit, the development of small-scale and building and roof-mounted solar energy facilities in Carver. The Town Meeting Warrant for Article 14 proposes a limited exemption for roof-mounted solar for a new non-residential building in the GBP District. According to the Town, this amendment will allow solar facilities for a project proposed in the GBP District as part of the project's Massachusetts Environmental Policy Act

Office (MEPA)Massachusetts Environmental Policy Act's (MEPA) Certification. See proposed_zoning_articles_2022_annual_town_meeting_2-23-22.pdf (carverma.gov)

Given this Office's limited review of zoning by-laws, we cannot conclude that Article 14 constitutes an unreasonable regulation of solar energy in contravention of G.L. c. 40A, § 3. However, if Article 14 is used to deny solar projects, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems, such application would run a serious risk of violating G.L. c. 40A, § 3. The Town should consult closely with Town Counsel in applying Article 14 to ensure that the by-law amendments do not result in an unreasonable regulation of solar energy systems.

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,
MAURA HEALEY
ATTORNEY GENERAL
Kelli E. Gunagan
By: Kelli E. Gunagan
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600

cc: Town Counsel Greg J. Corbo