

# Town of Carver

## Solar and Battery Energy Storage Systems Bylaw Considerations

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# Agenda

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- ▶ Overview of the Dover Amendment
- ▶ Overview of the Tracer Lane Decision
- ▶ Considerations for the Committee in Light of AG Decisions
- ▶ Questions and Answers

# Overview – What is the Dover Amendment?

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- ▶ G.L. c. 40A, § 3 is a statute commonly referred to as the “Dover Amendment”
- ▶ Originally enacted to prevent municipalities from restricting educational and religious uses of land
- ▶ Over time, “the Legislature has expanded the statute to ensure that other uses of land would be free from local interference.” Crossing Over, Inc. v. Fitchburg, 98 Mass. App. Ct. 822, 829 (2020).
- ▶ In general, the Dover Amendment limits the authority of municipalities to regulate through zoning certain protected or exempted uses

# Overview – What is the Dover Amendment?

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- ▶ The areas of limitation include:
  - ▶ Agricultural uses;
  - ▶ Religious uses;
  - ▶ Educational uses;
  - ▶ **Solar uses;**
  - ▶ Interior areas of residential buildings;
  - ▶ Childcare facilities;
  - ▶ Structures destroyed by fire; and
  - ▶ Antenna structures

# Dover Amendment – Solar Uses

- ▶ Solar was added as a protected use in 1985
- ▶ The Legislature demonstrated a specific intent to protect solar energy systems from local regulation by enacting “An Act promoting solar energy and protecting access to sunlight for solar energy systems.” St. 1985, c. 637.



# Dover Amendment – Solar Uses

► G.L. c. 40A, § 3, ninth para. states:

No zoning ordinance or by-law 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.

# Dover Amendment – Solar Uses

- ▶ Prior to this year, there had been no appellate case law interpreting what constitutes a “prohibition” or “unreasonable regulation” of solar energy
- ▶ In June of 2022, the SJC issued its decision in Tracer Lane II Realty, LLC v. City of Waltham, 489 Mass. 775, 779 (2022) (“Tracer Lane”)
- ▶ The case is being strictly applied by the Attorney General to any new solar-related zoning bylaws, moratoria, and the like



# Tracer Lane Case

- ▶ The developer had proposed to construct a large-scale ground-mounted solar energy system in a commercial zoning district in Lexington
- ▶ It also proposed an “access road” through a residential zoning district in abutting Waltham, in an area in which large-scale solar facilities were not permitted
- ▶ Waltham officials determined that solar development was not authorized under Zoning Code
- ▶ Developer appealed that decision to the Land Court

# Tracer Lane Case

- ▶ The Court first held that the proposed access road was a protected use under G.L. c. 40A, § 3 because it was an ancillary solar structure
- ▶ Road would “facilitate the primary [solar energy] system’s construction, maintenance, and connection to the electrical grid”



# Tracer Lane Case

- ▶ Next, the Court evaluated whether G.L. c. 40A, § 3 precluded Waltham's zoning decision to prohibit large-scale solar in this residential district
- ▶ Waltham's zoning code prohibited large-scale ground-mounted solar in all but **1-2%** of its total land area (industrial districts only)
- ▶ Zoning Code did not actively promote by-right solar in any zoning districts
- ▶ This equated to an "outright ban of large-scale solar energy systems"
- ▶ These restrictions had no articulated or reasonable basis grounded in "**public health, safety or welfare**"

# Tracer Lane Case

- ▶ Holding: Where the City's decision "restricts rather than promotes" the legislative goal of promoting solar energy, its Zoning Code violated G.L. c. 40A, § 3. While municipalities do have some "flexibility" to reasonably limit where solar may be sited, the validity of a regulation entails "balance[ing] the interests that the ... bylaw advances" against "the impact on the protected [solar] use."
  - ▶ Limited to the specific facts before it, *i.e.*, a zoning code which allows commercial-scale solar systems in only 1-2% of the City and had no reasonable basis for doing so
- ▶ Key Takeaway: proactively conduct and document municipal planning efforts (or update current planning efforts) in a way that promotes, rather than restricts, the siting of solar energy and articulate reasonable health, safety, or welfare basis for each solar regulation

# Attorney General Bylaw Review

## Examples

- ▶ Case #10340, 4/19/22 (Hopkinton): Approved solar bylaw where Town extensively “studied impacts presented by commercial solar and has articulated, in the record, legitimate public health, safety or welfare reasons” justifying the bylaw’s requirements for commercial solar.
- ▶ Case #10230, 3/21/22 (Wareham): Disapproved solar bylaw that restricted large scale ground-mounted solar to parcels of 3-10 acres that were already cleared of trees for at least 5 years because record had no evidence of public health, safety, or welfare interest sufficient to outweigh public need for solar energy systems.
- ▶ Case #10454, 4/4/22 (Washington): Approved solar bylaw amendments where it included as-of-right siting for solar that is 250KW or more in various districts, and special permit siting for others, because the as-of-right amendments for promote solar permitting and installation which allows it to be designated as a Green Community.
- ▶ Case #10436, 2/28/22 (Spencer): Approved solar bylaw which imposed 100-300 ft. setbacks and other regulations, but very hesitatingly and prior to the SJC’s decision in Tracer Lane, cautioning that if challenged the Town would have to prove that it engaged in the requisite balancing of how the setbacks were reasonably related to public health, safety, or welfare.

# Attorney General Bylaw Review

## Approved (or Reasonable) Regulation of Solar

- ▶ Major site plan review to preserve natural features, minimize tree and soil removal, abating noise and odors, parking, lighting, and access
- ▶ Additional requirements for agricultural use or open space use, such as minimizing soil removal and field disturbances
- ▶ Bonds for decommissioning and removal of solar installation, but amount may not unduly burden solar applicants (typically not to exceed 125% of the cost of removal)
  - ▶ Performance security funds require compliance with G.L. c. 44, § 53G1/2
- ▶ Limits on wholesale tree cutting beyond that necessary for the solar array
- ▶ Requirements for pollinator-friendly plantings

# Attorney General Bylaw Review

## Disapproved (or Unreasonable) Regulation of Solar

- ▶ Prohibition on use of pesticides, herbicides, and fertilizers for solar farms (preempted by exclusive jurisdiction of Dep't of Agricultural Resources)
- ▶ Restriction of large-scale ground-mounted solar to parcels of 3-10 acres
- ▶ Restriction of large-scale ground-mounted solar to parcels of land that had already been cleared of trees for at least 5 years
- ▶ Anything not reasonably grounded in protection of public health, safety, or welfare



# Battery Energy Storage Systems (BESS)

- ▶ BESS typically relates to systems designed to store electrical energy for resale to the wholesale energy market or other customers on the grid, including all accessory equipment
- ▶ Approved definition: “a physical container [or series of containers] providing secondary containment to one or more battery cells for storing electrical energy [for periodic resale to the wholesale energy market and/or other customers on the electrical grid] that is equipped with cooling, ventilation, fire suppression, and an electronic battery management system. It may be a primary use or accessory to a solar energy facility, power generation facility, electrical substation, or other similar uses. BESS facilities shall not constitute a Public Utility for purposes of this bylaw. For purposes of this bylaw, the aggregate rating of the facility shall exceed 80 kWh.”



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# Battery Energy Storage Systems (BESS)

- ▶ Moratorium cannot cover any BESS that has a “direct connection (and many do not) to solar energy” due to protected-use status. Case #10409, 5/17/22 (Medway).
- ▶ Cannot interfere with jurisdiction of the Energy Facility Siting Board
- ▶ Energy storage systems are regulated in the State and International Building Codes, and future amendments to the code may preempt some or all BESS regulations
  - ▶ Attempts to regulate what the Building Code regulates for BESS will be preempted
  - ▶ E.g., construction methods and materials

# Battery Energy Storage Systems (BESS)

## Energy Facility Siting Board (EFSB) Jurisdiction

- ▶ EFSB reviews large energy facilities to determine whether project would “contribute to a reliable energy support with a minimum impact on the environment at the lowest possible cost.” G.L. c. 164, § 69G-S. This can include large-scale BESS.
- ▶ Proponent of project can apply to EFSB for individual or comprehensive exemptions from local zoning bylaws under G.L. c. 40A, § § 3, 11. To be granted an exemption from zoning, three criteria must be met:
  - ▶ 1) applicant is a public service corporation;
  - ▶ 2) present or proposed use of land is reasonably necessary for the public convenience; and
  - ▶ 3) exemptions from zoning are required to construct or operate project.

# Battery Energy Storage Systems (BESS)

- ▶ Case #10475 (Montague): AG approved BESS regulations and determined that bylaw did not violate Section 3's prohibition against the unreasonable regulation of solar energy, provided that it was not used to deny solar projects or make them uneconomic or impracticable to build. Those regulations included:

- ▶ BESS allowable by special permit in some districts to match existing allowable districts for the siting of solar energy facilities
- ▶ Small-scale BESS allowed by-right as accessory use in all districts
- ▶ Regulations to encourage co-location siting with solar facilities
- ▶ Requirements for pollinator-friendly plantings



# Dual-Use Solar

- ▶ Dual-use solar siting, also known as agrivoltaics, is the practice of installing solar panels on farmland in such a manner that primary agricultural activities are maintained simultaneously
- ▶ Chapter 179 of Acts of 2022 amended G.L. c. 61A, § 2A to provide that land used **primarily and directly for agriculture** or horticulture may be used to site renewable energy if it does not impede the agricultural use of the land
- ▶ Solar energy on such land “shall be subject to the provisions afforded to land used for agriculture under [G.L. c. 40A, § 3].”



# Considerations for the Committee

- ▶ New and existing standards must be reasonably connected to public health, safety, or welfare, as documented by a study or analysis and statement of purpose in bylaw
- ▶ No discrimination in the standards applied to solar regulations (*i.e.* are setbacks and aesthetic requirements the same for other commercial uses?)
- ▶ Engage technical consultants to assist in documenting reasonable standards

# Considerations for the Committee

- ▶ Update zoning map and bylaw to ensure a sufficient percentage of the Town's land area is available for solar
- ▶ Update table of uses for further clarification of allowed uses for BESS, large-scale solar, small-scale solar, rooftop solar, dual use solar, etc.
- ▶ Provide clear definitions and standards for BESS, large-scale solar, small-scale solar, rooftop solar, dual use solar, etc.



# Resources

- ▶ AG's MLU Decisions:  
<https://massago.hylandcloud.com/203publicaccess/mlu.htm>
- ▶ Cape Cod Commission's Draft Model Bylaw:  
[https://www.capecodcommission.org/resource-library/file?url=/dept/commission/team/Website\\_Resources/Climate-Initiative/Model%20Large-Scale%20Solar%20Bylaw%20FINAL.pdf](https://www.capecodcommission.org/resource-library/file?url=/dept/commission/team/Website_Resources/Climate-Initiative/Model%20Large-Scale%20Solar%20Bylaw%20FINAL.pdf)
- ▶ Commonwealth's Model Bylaw and Guidance:  
<https://www.mass.gov/doc/model-solar-zoning-0/download>

# Questions?

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