Connor B. Degan, Town Clerk  
Town of Hopkinton  
18 Main Street  
Hopkinton, MA 01748

Re:  Hopkinton Annual Town Meeting of May 8, 2021 -- Case # 10454  
Warrant Articles # 29, 30, 31, 32, 33, 34, and 35 (Zoning)  
Warrant Articles # 7, 38, 39, 40, 41, and 42 (General)

Dear Mr. Degan:

Article 35 - Under Article 35 the Town voted to replace its existing solar by-law with new text allowing commercial solar photovoltaic installations ("commercial solar") in all zoning districts by special permit on lots of three acres or more, with additional site plan review submission requirements. In general, as compared with the previous version the new by-law requires more application information for commercial solar but retains the allowable locations for such installations.

As detailed in Section V below, we disapprove Section 210-204 that prohibits the use of pesticides, herbicides, defoliants, or synthetic fertilizers unless approved by the Conservation Commission or the Planning Board, because the regulation of such products is solely within the jurisdiction of the state Department of Agricultural Resources and towns are preempted from adopting such requirements, See St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Department of Springfield, 462 Mass. 120, 125-126 (2012).

Except for Section 210-204 we approve Article 35 because the Town has studied the impacts presented by commercial solar and has articulated, in the record, legitimate public health, safety or welfare reasons that justify several new requirements for proposals to develop commercial solar installations. Although the new requirements impose potentially significant burdens on developers of commercial solar installations, we lack any sufficient record basis on which to find that these burdens, either individually or collectively, are excessive or unreasonable. We thus do not have a basis to find that the by-law, on its face, violates 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. However, as further explained below, we strongly urge the Town to consult closely with town
counsel during the administration of the by-law because the cumulative effect of the by-law’s submission requirements, and the broad language dictating the standard for grant of a special permit, create the real risk that the by-law will be used to unlawfully burden or deny a solar use in contravention of G.L. c. 40A, § 3.

In this decision, we summarize the by-law amendments adopted under Article 35 and the Attorney General’s standard of review of zoning by-laws, and then explain why, based on our standard of review, we approve Article 35.

During our review of Article 35, we received input urging our Office to approve or disapprove Article 35 on various grounds. 1 This input has informed our review of the by-law and illustrated the importance of the issues at stake. We emphasize that our approval of the by-law in no way implies any agreement or disagreement with any policy views that may have 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.”). We further emphasize that although we cannot determine that the by-law, on its face and in light of the record before us, clearly violates the solar protections of G.L. c. 40A, § 3, the by-law may yet be applied in ways that are inconsistent with that statute, for example if the new requirements are unnecessary or unduly burdensome or if the Town arbitrarily exercises its discretion to deny special permits for commercial solar installations that satisfy all of the by-law’s enumerated standards. 2

I. Summary of Article 35

Under Article 35, the Town deleted its existing Article XXXI, “Commercial Solar Photovoltaic Installations,” and inserted a new Article XXXI, “Commercial Solar Photovoltaic Installations.” 3 The new by-law allows commercial solar photovoltaic installations (“commercial solar”) by special permit on lots with a minimum of three acres in any zoning district in the Town. Section 210-202 (A). The setback, yard, buffer, and screening requirements for commercial solar are those that apply in the zoning district where the solar installation is located. However, the Planning Board, as the special permit granting authority, can impose greater setback requirements as may be necessary to mitigate the solar installation’s impact on the neighboring land uses. Section 210-202 (C). The Planning Board is also authorized to impose reasonable requirements to

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1 We appreciate the letters from Attorney Richard B. Klibaner on behalf of a citizen of Hopkinton (November 30, 2021) and Attorneys Bertram and Miyares on behalf of the Town of Hopkinton (February 16, 2022 and April 11, 2022.)

2 In a decision issued on January 19, 2022, we approved Articles 7, 29, 30, 31, 32, 33, 34, 38, 39, 40, 41, and 42 and extended our deadline for a decision on Article 35 for an additional sixty days until March 20, 2022. On March 18, 2022, we extended our deadline for Article 35 for an additional thirty days until April 19, 2022.

3 Commercial Solar Photovoltaic Installation is defined in the zoning by-laws as “[a] solar photovoltaic system which is not accessory to a permitted use.” Section 210-4, “Definitions.”
minimize the visual impacts of the solar installations. Section 210-202 (E). The by-law also requires the special permit application to include various information about visual impacts, glare, noise, and land and tree clearing. Section 210-202 (F).

Commercial solar installations must also comply with the “major project” site plan review submission requirements under Article XX, “Site Plan Review.” Section 210-202 (B). As a “major project” under Article XX, the solar facility must submit a site plan application as required by the Planning Board’s “Site Plan Review Submission Requirements and Procedures.” Section 210-135 (A). The submitted site plan must show compliance with specific site standards, including preserving natural and historic features; minimizing tree, vegetation, and soil removal; screening structures and uses from abutting properties; abating noise and odors from the site; and parking, lighting, and access. Section 210-136.1. While the Planning Board must hold a public hearing within sixty-five days of the site plan submission and must issue a decision within ninety days of the close of the hearing, the Planning Board must act on a major project site plan review application for a renewable or alternative energy research and development or renewable or alternative energy manufacturing facility within six months of the date of submission of a complete application. Section 210-135 (c). The Planning Board will approve the site plan, approve the site plan with reasonable conditions, including requiring a performance bond, or deny the site plan if the application fails to include required information or the required application fee. Section 210-136.2

The new by-law imposes additional requirements on commercial solar located on land in agricultural use or in pervious open space. These additional requirements require soil removal and field disturbances to be minimized. Section 210-202 (L). The by-law also prohibits the use of pesticides, herbicides, defoliants, or synthetic fertilizers unless approved by the Conservation Commission or the Planning Board. Section 210-204. Lastly, the by-law imposes requirements on an owner when a solar installation is decommissioned or discontinued, including a bond requirement to cover the cost of removing a solar installation in the event the Town must remove a solar installation. Section 210-206. 

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

Our review of Article 35 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.

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4 We note that many of the submission requirements and compliance criteria for a solar facility’s special permit and site plan applications under the new Solar By-law and the Town’s Site Plan Review by-law appear to be duplicative. For example, both applications require information about and impose requirements on screening, lighting, noise, and stormwater control. Section 210-202 and Section 210-136.1, respectively. Further, provisions in the new solar bylaw appear to internally overlap. Both Section 210-205 (D) and Section 210-206 address the decommissioning of solar facilities. Section 210-205 (D) authorizes the Planning Board, as a condition of a special permit, to impose a bond requirement for the removal of a solar facility with the bond amount limited to 150% of the cost of removal. Section 210-206 includes more details on the decommissioning process, including authorizing the Planning Board to require a bond to cover the cost to the Town for removing a solar facility. However, Section 210-206 does not limit the amount of the bond. The Town should consult closely with Town Counsel to ensure these requirements do not unduly burden solar applications in violation of G.L. c. 40A, § 3.
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 35, 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. Protections for Solar Uses Under G.L. c. 40A, § 3

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); seeCnty. 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.\(^5\)

\(^5\) 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]”
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 ... ylaw 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. Commrs 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 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, “[c]even 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 Martia 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 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).
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 afield 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 *7.6

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 M.sc 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.7

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6 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 provision: “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.”)

7 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.
Against this backdrop, we review the zoning amendments adopted under Article 35.

IV. Analysis of Article 35

Applying the requisite analysis to the new solar by-law here in Article 35, we determine that the by-law, on its face and on the record before us, is not an unreasonable solar regulation in violation of G.L. c. 40A, § 3. The Town’s filings with our Office reflect that the new by-law resulted from a review process consisting of approximately two years of meetings by the Planning Board and the Zoning Advisory Committee discussing the impacts of commercial solar installations in the Town. As stated in the report of the Planning Board to Town Meeting, Article 35 “seeks to strengthen the existing commercial solar bylaw by effectively eliminating the visual impact from ground-mounted, commercial solar sites.” (See Planning Board Report, p. 2.)

It appears from the record that the amendments adopted under Article 35 are the result of a considered, deliberative process designed to mitigate and minimize the adverse effects of solar installations within the Town, so as to protect legitimate municipal interests grounded in the public health, safety or welfare. Indeed, the Town has not made any of its districts entirely off-limits to commercial solar installations but has instead established certain submission requirements and standards for such installations, wherever they may be located. As the Supreme Judicial Court has explained in the context of another protected use in G.L. c. 40A, § 3, municipalities may, as the Town’s proposed by-law accomplishes, “adopt zoning restrictions specifically tailored to the protected use.” Rogers v. Town of Norfolk, 432 Mass. 374, 379 (2000). And because the by-law’s submission requirements and criteria are rationally designed to limit certain adverse consequences of commercial solar installations, they do not, on their face 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. Indeed, the record here does not contain any indication that the added burdens on solar imposed by the by-law’s new requirements are overly onerous or will serve to unduly discourage solar installations in the Town.

That said, the Town may be vulnerable to a court challenge if the by-law’s requirements are found, upon consideration of a full factual record, to be unnecessary or unduly onerous, such that they are not narrowly tailored to avoid unduly frustrating solar development. While the Town has imposed a not insignificant number of potentially costly and time-consuming obligations on a developer wishing to construct a commercial installation—including requirements to engage engineers and other professionals to conduct studies and requirements to address issues ranging from visual impact to glare to noise—we are not in a position to evaluate the real-world impact of these obligations or to weigh their salutary effects against their individual and cumulative potential to frustrate solar development. See Rogers, 432 Mass. at 380-81 (analyzing a by-law’s impact on a protected use to determine if it unreasonably “nullifie[d] the protection” granted that use by G.L. c. 40A, § 3). While a challenge to the by-law on this type of basis “can be properly resolved only by reference to specific facts” not now before us, Trustees of Tufts College v. City of Medford, 415 Mass. 753, 766 (1993) (quotation marks omitted), and is thus not a basis for us to disapprove the by-law, the Town should consult closely with Town Counsel regarding how best to apply the by-law consistent with the requirements of G.L. c. 40A, § 3.
In addition, the Town should be careful not to utilize either the “major project” site plan review submission requirements, or the special permit requirements, as a means to unduly restrict protected solar uses. As the Land Court recognized in PLH LLC v. Ware, 2019 WL 7201712 at *3 (December 24, 2019) (Piper, C.J.), a special permit requirement “cannot be used either directly or pretextually as a way to prohibit or ban the use,” nor can it “be used to allow the board any measure of discretion on whether the protected use can take place in the district.” Thus, the Town runs a serious risk of violating the solar use protections in G.L. c. 40A, § 3 if it interprets or applies the by-law as allowing it broad discretion to disapprove commercial solar installations that satisfy all of the enumerated submission requirements and criteria. Accordingly, the Town should consult closely with Town Counsel throughout the site plan review and special permit process to ensure that it does not act inconsistently with the solar use protections in G.L. c. 40A, § 3.

V. Disapproval of Section 210-204 (A) Because it is Preempted by G.L. c. 132B and Chapter 262 of the Acts of 2012 and G.L. c. 128, § 2

Section 210-204 (A) prohibits the use of pesticides, herbicides, defoliants, and synthetic fertilizers at a solar installation unless such use is approved by the Conservation Commission or the Planning Board. We disapprove Section 210-204 (A) because it is: (1) preempted by the Massachusetts Pesticide Control Act (“Act”), either expressly (by the 1994 amendment) or impliedly (because “the purpose of the [Act] would be frustrated [by the by-law] so as to warrant an inference that the Legislature intended to preempt the field.”) and (2) preempted by Chapter 262 of the Acts of 2012 (amending G.L. c. 128, § 2), which grants the Department of Agricultural Resources (MDAR) the exclusive authority to regulate the application of plant nutrients, including fertilizers, in the Commonwealth. See St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Department of Springfield, 462 Mass. 120, 125-126 (2012) (quoting Wendell v. Attorney General, 394 Mass. 518 (1985)).

A. Section 210-204 (A) is Preempted by The Pesticide Control Act

General Laws Chapter 132B establishes the MDAR’s “exclusive authority in regulating the labeling, distribution, sale, storage, transportation, use and application, and disposal of pesticides in the commonwealth...” G.L. c. 132B, § 1. The Act establishes a Pesticide Board within MDAR (Section 3), and authorizes the Pesticide Board to register pesticides for use in the Commonwealth if the Board determines that “a pesticide, when used in accordance with its directions for use, warnings and cautions and for the uses for which it is registered... will not generally cause unreasonable adverse effects on the environment...” (Section 7). The Act

8 General Laws Chapter 132B, Section 2, defines “Pesticide” as “a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant...”

9 MDAR defines “Use of a pesticide” in 333 CMR § 10.02 to include the following: any act of handling a pesticide, releasing of a pesticide or exposing of man or the environment to a pesticide, including, but not limited to: (a) Application of a pesticide including mixing or loading of equipment and any supervisory action in or near the area of application. (b) Storage actions relative to pesticides and pesticide containers carried out or supervised by an applicator. (c) Disposal actions relative to pesticides and pesticide containers carried out or supervised by an applicator. (d) Transportation actions relative to pesticides and pesticide containers except those by carriers and dealers.
prohibits application of a registered pesticide in a way that is inconsistent with its labeling or other restrictions imposed by the MDAR (Section 6A). General Laws Chapter 132B, Section 2, defines “Pesticide” as “a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant. . . .”

1. Express Preemption

The Pesticide Control Act demonstrates an express intention to preempt local regulation of the application of pesticides. The Legislature expressly stated its intention that the Act serve as “[t]he exclusive authority in regulating, the labeling, distribution, sale, storage, transportation, use and application, and disposal of pesticides in the commonwealth.” G.L. c. 132B, § 1, as amended by Chapter 264 of the Acts of 1994 (emphasis supplied). Chapter 264 of the Acts of 1994, “An Act Further Regulating the Use of Pesticides,” clearly expressed the intent to preempt local regulation in the area of pesticides: “The exclusive authority in regulating, the labeling, distribution, sale, storage, transportation, use and application, and disposal of pesticides in the commonwealth shall be determined by this chapter.” Further, during our review of the Section 210-204, we communicated with MDAR, and it confirmed the preemptive effect of the Act and regulations in the area of pesticide application. Based upon the current version of the Act, we find that the by-law is expressly preempted. Even if the by-law was not expressly preempted, for the reasons provided below, this section of the Town’s by-law is impliedly preempted by the Act and Regulations.

2. Implied Preemption

The purpose of the Act and Regulations is to have centralized and uniform regulations for the use of pesticides in the state. Wendell, 394 Mass. 518 (1985) (town by-law regulating the use of pesticides in town frustrates the statutory purpose of centralized regulation of pesticide use). By prohibiting pesticide application unless the application is approved by either the Town’s Conservation Commission or Planning Board, the by-law imposes an additional layer of regulation at the local level. This additional local regulation prevents the achievement of a statewide determination of the reasonableness of the use of a specific pesticide in particular circumstances frustrating the purpose of the Act. Id. at 529.

In addition, because the use of pesticide application on private property is comprehensively addressed in the Act and Regulations, the Town’s by-law is also preempted. See Doe v. City of Lynn, 472 Mass. 521 (2015) (ordinance imposing residency and location restrictions on sex offenders preempted by comprehensive statutory scheme governing the oversight of sex offenders); and Boston Edison Co. v. Town of Bedford, 444 Mass. 775 (2005) (town by-law imposing fines for failure to remove utility poles preempted by the comprehensive, uniform state regulation of utilities in G.L. c. 164). The Act does not allow for a local approval process for pesticide application. Therefore, because G.L. c. 132B, § 1, provides that the Act and Regulations establish MDAR’s exclusive authority and because the Act and Regulations comprehensively regulate the topic of pesticide applications on private property, Section 210-204 (A) is preempted by state law.
B. Section 210-204 (A) is Preempted by G.L. c. 128, § 2 (k) (as amended by Chapter 262 of the Acts of 2012, “An Act Relative to the Regulation of Plant Nutrients.”)

The use of plant nutrients, including fertilizers, in the Commonwealth is regulated by G.L. c. 128, § 2 (k) (as amended by Chapter 262 of the Acts of 2012, “An Act Relative to the Regulation of Plant Nutrients.”). General Laws Chapter 128, Section 2 grants authority to MDAR to regulate the application of plant nutrients, including fertilizers, in the Commonwealth, by adding to the list of the MDAR’s duties the following Subsection (k):

k. Maintain authority to regulate and enforce the registration and application of plant nutrients put on or in soil to improve the quality or quantity of plant growth, including, but not limited to, fertilizer, manure and micronutrients in the commonwealth.

In addition, G.L. c. 128, § 2 (k) authorizes the MDAR to “promulgate regulations that specify when plant nutrients may be applied and locations in which plant nutrients shall not be applied” and directs the MDAR to work in conjunction with the University of Massachusetts Amherst Extension to “ensure any regulations of the department relative to plant nutrients are consistent with the program’s published information, educational materials and other public outreach programs relative to nutrient management and fertilizer guidelines.” General Laws Chapter 128, Section 2 (k) also authorizes the MDAR to establish penalties for violations of the regulations and establishes an appeal process.

Section 8 of Chapter 262 of the Acts of 2012 includes a clause ensuring the continued enforceability of nutrient-management and fertilizer guideline by-laws adopted prior to July 31, 2012, strongly indicating that all such town by-laws adopted on or after July 31, 2012, are not enforceable:

Section 8. Notwithstanding subsection (k) of section 2 of chapter 128 of the General Laws, any rule, regulation, ordinance or by-law relative to nutrient management and fertilizer guidelines: (i) of a city or town in existence prior to July 31, 2012, shall remain enforceable by that city or town....

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10 Section 8 of Chapter 262 also provides (with emphasis added) that a “rule, regulation, ordinance or by-law relative to nutrient management and fertilizer guidelines: . . . (ii) specific to sewerage sludge of a city or town in existence prior to January 1, 2013, shall remain enforceable by that city or town.” But that exception is not applicable here. In addition, Section 9 of Chapter 262 allows for certain “rule[s], regulation[s], ordinance[s] or by-law[s] relative to nutrient management and fertilizer guidelines” to remain enforceable without regard to the date of their adoption (although the context makes clear that section 9 was meant to apply to future enactments). However, Section 9 applies only to those provisions adopted pursuant to Chapter 361 of the Acts of 1973 (“An Act Establishing the Nantucket Planning And Economic Development Commission”); Chapter 831 of the Acts of 1977 (“An Act Further Regulating the Protection of the Land And Waters Of The Island Of Martha's Vineyard”); Chapter 716 of the Acts of 1989 (“An Act Establishing The Cape Cod Commission”); or “in accordance with a regional water resources management plan under Chapter 312 of the Acts of 2008.” Further, such provisions must not be less restrictive than the regulations (not including adopted by the Department under Section 1 of Chapter 262 (i.e., G.L. c. 128, § 2(k)), and must be drafted “in conjunction with the University of Massachusetts Amherst Extension.” Ayer’s proposed by-law does not qualify under any of these exemptions and is therefore not enforceable. And the fact that Section 9 allows for future regulation by specified other entities (in shorthand terms, regional entities) “notwithstanding” G.L. c. 128, § 2(k), and thus as an exception to its general rule, further buttresses the conclusion that G.L. c. 128, § 2(k)’s general rule precludes such
Thereafter, the deadline for towns to adopt enforceable nutrient management by-laws was extended to July 31, 2013 by the adoption of Section 157 of Chapter 38 of the Acts of 2013, as follows:

Notwithstanding sections 2 and 65A of chapter 128 of the General Laws, sections 8 and 9 of chapter 262 of the acts of 2012 or any other general or special law to the contrary, any ordinance or by-law relative to nutrient management or establishing fertilizer guidelines enacted or adopted by a city or adopted by a town between July 31, 2012 and July 31, 2013 shall be enforceable by that city or town, notwithstanding any disapproval under section 32 of chapter 40 of the General Laws occurring prior to July 1, 2013.

Together, these statutes establish that any by-law that regulates nutrient management or establishes fertilizer guidelines adopted by a Town after the deadline of July 31, 2013, is not enforceable. Apart from by-laws that were adopted during the protected time period established by Chapter 262 of the Acts of 2012, as extended by Section 157 of Chapter 38 of the Acts of 2013, the sole authority to regulate the use and application of plant nutrients is vested in the MDAR. As authorized by G.L. c. 128, § 2 (k), the MDAR has promulgated regulations (330 CMR 31.00) that establish “limitations on the application of plant nutrients to lawns and non-agricultural turf to prevent these non-point source pollutants from entering the surface and groundwater resources of the Commonwealth of Massachusetts.” 330 CMR 31.01, “Purpose.” These regulations are comprehensive “state-wide limitations on plant nutrient applications.” Id.

Because Section 210-204 (A) purports to regulate “synthetic fertilizer” and because it was not adopted until May 8, 2021 (long after the July 31, 2013, cut-off date selected by the Legislature), it is no more enforceable.

In the course of our review of Section 210-204 (A), we have confirmed that MDAR, too--based on the same statutory language and legislative history discussed above--interprets G.L. c. 128, § 2 (k) and Chapter 262 of the Acts of 2012 (as extended by Chapter 38 of the Acts of 2013) as intended to preempt the field such that, on and after July 31, 2013, the application of plant nutrients (including fertilizer) to soil would be regulated by the MDAR at the state level (except in the limited circumstances outlined in Sections 8 and 9 of Chapter 262). Further, G.L. c. 128, § 2 (k) requires the MDAR to work in conjunction with the UMass Amherst Extension to ensure that the MDAR regulations are consistent with the UMass program, and Section 9 of Chapter 262 imposes this same requirement on the specified entities (not including municipalities) that are allowed to engage in future regulation, so long as such regulation is “not less restrictive than regulations adopted by the [D]epartment[.]” To allow one town to impose its own local regulations, without this coordination with the UMass Amherst Extension program and without any requirement that such regulations be at least as restrictive as the MDAR’s regulations, would frustrate the purpose of G.L. c. 128, § 2 (k) to conduct such regulation at the state or regional level, in accordance with UMass Amherst Extension standards and a statewide “floor” set by the MDAR.

future regulation by other entities, such as municipalities.
Where the Legislature has made a specific determination to vest regulatory authority with the MDAR, rather than cities and towns, the Town may not validly adopt (and we may not approve) a by-law which conflicts with this legislative determination. *St. George*, 462 Mass. at 126 (local legislative action “is precluded . . . where . . . the purpose of State legislation would be frustrated [by a local enactment] so as to warrant an inference that the Legislature intended to preempt the field.”). Because Section 210-204 (A) of the by-law is preempted, we disapprove 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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