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September 27, 2024

Elizabeth Cunniff, Town Clerk
Town of Groveland
183 Main Street
Groveland, MA 01834

Re: Groveland Annual Town Meeting of April 29, 2024 -- Case # 11373
Warrant Articles # 16 and 17 (Zoning)
Warrant Articles # 6, 12, 13, 14, 15, and 35 (General)[1]

Dear Ms. Cunniff:

Articles 16 and 17 – Under Article 16 the Town voted to amend the zoning by-laws, Section 50.13.2(A), "Site Plan Review; Applicability," to add a new Sub-section (5) imposing site plan review for the construction of any new or expanded Battery Energy Storage System (BESS). Under Article 17 the Town voted to amend the zoning by-laws, Article 7, "Special Use Regulations," to add a new Section 50.7, "Battery Energy Storage Systems," regulating BESS.

We approve these amendments because they are consistent with the solar protections in G.L. c. 40A, § 3, as analyzed by the Supreme Judicial Court in Tracer Lane II Realty, LLC v. City of Waltham, 489 Mass. 775, 779, 781 (2022) (to evaluate the validity of a solar by-law under Section 3, a court will "balance the interest that the ordinance or bylaw advances and the impact on the protected use" while keeping in mind that Section 3's solar energy provision "was enacted to help promote solar energy generation throughout the Commonwealth.") By statute BESS qualify as "solar energy systems" and "structures that facilitate the collection of solar energy" and are protected by G.L. c. 40A, § 3. General Laws Chapter 164, Section 1, defines "energy storage system" as "a commercially available technology that is capable of absorbing energy, storing it for a period of time and thereafter dispatching the energy." See also NextSun Energy LLC v. Fernandes, No. 19 MISC 000230 (RBF), 2023 WL 3317259, at *14 (Mass. Land Ct. May 9, 2023), amended, No. 19 MISC 000230 (RBF), 2023 WL 4156740 (Mass. Land Ct. June 23, 2023), judgment entered, No. 19 MISC 000230 (RBF), 2023 WL 4145901 (Mass. Land Ct. June 23, 2023) (finding that battery energy storage system is entitled to Section 3 solar protections).

[1] In a decision issued August 2, 2024, we approved Articles 6, 12, 13, 14, 15, and 35; and by agreement with Town Counsel as authorized by G.L. c. 40 § 32, we extended the deadline for our review of Articles 16 and 17 for an additional 45-days until September 29, 2024.

In this decision we summarize the by-law amendments; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, under that limited standard of review, we approve the by-law provisions adopted under Articles 16 and 17.

I. Summary of Articles 16 and 17

Under Article 16 the Town amended Section 50.13.2(A), "Site Plan Review; Applicability," to add a new Sub-section (5) imposing site plan review for the construction of any new or expanded BESS. Under Article 17 the Town amended Article 7, "Special Use Regulations" to add a new Section 50.7, "Battery Energy Storage Systems," regulating BESS. We further summarize Article 17 below.

The purpose of the new Section 50.7 is to "advance and protect the public health, safety, welfare, and quality of life by creating regulations" for BESS that are "consistent with state law, including but not limited to...General Laws chapter 40A, section 3..." Section 50.7 (A), "Purpose." Section 50.7 (B), "Definitions," defines terms used in the by-law. The by-law applies to certain BESS but provides that those BESS that do not meet the specified "threshold capacities" are not subject to the by-law and are allowed by right in all zoning districts. Section 50.7 (C)(1), "Applicability." The by-law further categorizes BESS as either Tier 1 or Tier 2, defined as follows:

- Tier 1 BESS have an aggregate energy capacity less than or equal to 1MWh and, if in a room or enclosed area, consist of only a single energy storage system technology;

- Tier 2 BESS have an aggregate energy capacity greater than 1MWh or are comprised of more than one storage battery technology in a room or enclosed area. Section 50.7 (C)(2).

Section 50.7 (D), "General Requirements," imposes requirements on all BESS, including compliance with all required codes and NFPA standards. Tier 1 BESS are allowed as of right in all zoning districts subject to minor site plan review. Section 50.7 (E), "Permitting Requirements for Tier 1 Battery Energy Storage Systems." Tier 2 BESS area allowed by special permit in all zoning districts. Section 50.7 (F), "Permitting Requirements for Tier 2 Battery Energy Storage Systems."

In addition, the by-law imposes siting and general requirements on BESS including requirements related to utility lines, signage, lighting, vegetation and tree cutting, setbacks, fencing and screening and visibility. Section 50.7 (F)(1)-(8). Further, Section 50.7 imposes requirements related to "Mitigation for Loss of Carbon Sequestration and Forest Habitat" that requires when the land used for a BESS is forestland (or was forestland one year immediately preceding the filing of an application to install Tier 2 BESS), the plans shall designate an area of unprotected land on the same lot and "of a size equal to two times the total area of Forestland that will be eliminated, cut, destroyed, or otherwise disturbed by the installation." Section 50.7

(F)(9). The by-law also requires an applicant show alternative trail alignments if "existing trail networks, old roads, or woods or car roads" are disrupted by the location of a Tier 2 BESS (Section 50.7(F)(10)) and prohibits Tier 2 BESS from being sited in the following areas:

> Historic resources, structures and properties, such as cellar holes, farmsteads, stone corrals, marked graves, water wells, or pre-Columbian features, including those listed on the Massachusetts Register of Historic Places or as defined by the National Historic Preservation Act... Section 50.7 (F)(11).

Further, the by-law imposes requirements related to a decommissioning plan, decommissioning fund and proof of liability insurance. Section 50.7 (F)(13)-(15). Section 50.7 (G), "Battery Energy Storage System Site plan application," details the required site plan information including a commissioning plan; fire safety compliance plan; operation and maintenance manual; and emergency operations plan. Section 50.7 (H), "Ownership Changes," allows a special permit to remain in effect if an owner changes, provided that the successor owner or operator assumes in writing all obligations of the special permit, site plan approval and decommissioning plan. Lastly, Sections 50.7 (I), (J), and (K) impose safety requirements, abandonment provisions and authorize the permit granting authority to grant a waiver for "aesthetic items" only.

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

Our review of Articles 16 and 17 is governed by G.L. c. 40, § 32. Under 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 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). 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).

Articles 16 and 17, 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). 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. Zoning Protections Granted to Solar Installations and Structures that Facilitate the Collection of Solar Energy by G.L. c. 40A § 3

Solar energy facilities and related structures have been protected under Section 3 for almost 40 years, since 1985 when the Legislature passed a statute codifying "the policy of the commonwealth to encourage the use of solar energy." St. 1985, c. 637, §§ 7, 8. Id. § 2. Section 3's solar provision grants zoning protections to solar energy systems and the building of structures that facilitate the collection of solar energy as follows:

> No zoning . . . bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.

In adopting Section 3, the Legislature determined that certain land uses are so important to the public good that the Legislature has found it necessary "to take away" some measure of municipalities' "power to limit the use of land" within their borders. Attorney General v. Dover, 327 Mass. 601, 604 (1950) (discussing predecessor to G.L. c. 40A, § 3); see Cnty. Comm'rs of Bristol v. Conservation Comm'n of Dartmouth, 380 Mass. 706, 713 (1980) (noting that Zoning Act as a whole, and G.L. c. 40A, § 3, specifically, aim to ensure that zoning "facilitate[s] the provision of public requirements"). To that end, the provisions of Section 3 "strike a balance between preventing local discrimination against" a set of enumerated land uses while "honoring legitimate municipal concerns that typically find expression in local zoning laws." Trustees of Tufts Coll. v. City of Medford, 415 Mass. 753, 757 (1993). Over the years, the Legislature has added to the list of protected uses, employing different language—and in some cases different methods—to limit municipal discretion to restrict those uses.

In codifying solar energy and related structures as a protected use under Section 3, the Legislature determined that "neighborhood hostility" or contrary local "preferences" should not dictate whether solar energy systems and related structures are constructed in sufficient quantity to meet the public need. See Newbury Junior Coll. v. Brookline, 19 Mass. App. Ct. 197, 205, 207-08 (1985) (discussing educational-use provision of Section 3); see also Petrucci v. Bd. of Appeals, 45 Mass. App. Ct. 818, 822 (1998) (explaining, in context of childcare provision, that Legislature's "manifest intent" when establishing Section 3 protected use is "to broaden ... opportunities for establishing" that use). Indeed, the fundamental purpose of Section 3 is to "facilitate the provision of public requirements" that may be locally disfavored. Cty. Comm'rs of Bristol, 380 Mass. at 713.

The Supreme Judicial Court reaffirmed this principle in Tracer Lane II. In ruling that Section 3's protections required Waltham to allow an access road to be built in a residential district for linkage to a solar project in Lexington, the Court explicitly noted that "large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth." Id. at 782 (citing Executive Office of Energy and Environmental Affairs, Massachusetts 2050 Decarbonization Roadmap, at 4, 59 n.43 (Dec. 2020) ("the amount of solar power needed by 2050 exceeds the full technical potential in the Commonwealth for rooftop solar, indicating that substantial deployment of ground-mounted solar is needed under any

circumstance in order to achieve [n]et [z]ero [greenhouse gas emissions by 2050]")). The Court explained that whether a by-law facially violates Section 3's prohibition against unreasonable regulation of solar systems and related structures will turn in part on whether the by-law promotes rather than restricts this legislative goal. Id. at 781. While municipalities do have some "flexibility" to reasonably limit where certain forms of solar energy may be sited, the validity of any restriction ultimately entails "balanc[ing] the interest that the . . . bylaw advances" against "the impact on the protected [solar] use." Id. at 781-82.

By statute ESS qualify as "solar energy systems" and "structures that facilitate the collection of solar energy" and are protected by G.L. c. 40A, § 3. General Laws Chapter 164, Section 1, defines "energy storage system" as "a commercially available technology that is capable of absorbing energy, storing it for a period of time and thereafter dispatching the energy."[2] See also NextSun Energy LLC v. Fernandes, No. 19 MISC 000230 (RBF), 2023 WL 3317259, at *14 (Mass. Land Ct. May 9, 2023), amended, No. 19 MISC 000230 (RBF), 2023 WL 4156740 (Mass. Land Ct. June 23, 2023), judgment entered, No. 19 MISC 000230 (RBF), 2023 WL 4145901 (Mass. Land Ct. June 23, 2023) (finding that battery energy storage system is entitled to Section 3 solar protections).

IV. Articles 16 and 17 Must be Applied Consistent with G.L. c. 40A, § 3

We cannot determine that the by-law provisions adopted under Articles 16 and 17 violate G.L. c. 40A, § 3 and we therefore approve them. However, we offer the following comments to the Town to ensure that the by-law provisions are applied consistent with the protections granted to solar uses and related structures in G.L. c. 40A, § 3.

The by-law imposes several requirements on BESS including special permit and site plan requirements. See Sections 50.7 (E) and (F). The by-law does not impose different standards on BESS based on whether it is connected to solar or is a "stand alone" BESS and instead imposes different requirements based on whether the BESS is categorized as Tier 1 or Tier 2. Sections 50.7 (C), (E), and (F). The by-law imposes requirements related to vegetation and tree cutting, and requires areas within 10 feet of each side of a Tier 2 BESS to be cleared of "combustible vegetation and other combustible growth" and requires the removal of trees to be "minimized to the extent possible." Section 50.7 (F)(4). Further, Section 50.7 (F)(9) requires that if forestland is used to site a BESS, then land on the same lot and of a size equal to two times the total area of eliminated or disturbed forestland must be sent aside and preserved in its natural condition.[3] The

[2] We note that the development of energy storage systems is critical to the promotion of solar and other clean energy uses. On August 9, 2018, An Act to Advance Clean Energy, Chapter 227 of the Acts of 2018 ("Act"), was signed into law by Governor Baker. Section 20 of the Act established a 1,000 MWh energy storage target to be achieved by December 31, 2025. The Act also required DOER to set targets for electric companies to procure energy dispatched from battery energy storage systems. https://www.mass.gov/info-details/esi-goals-storage-target (last visited September 25, 2024).

[3] Neither Section 50.7 or the Town's existing zoning by-laws define the term "Forestland." To avoid arbitrary or discriminatory application of the by-law, the Town should consult with Town Counsel to determine if the by-law should be amended at a future Town Meeting to define this

by-law also prohibits the siting of a BESS on property with historic resources, structures and properties, as detailed in Section 50.7 (F)(11).

Based on our standard of review, we cannot conclude that these provisions conflict with Section 3. However, given the by-law's extensive siting regulations and limitations, including that if forestland is used for the BESS installation then land of a size two times the total area of the forestland that is eliminated, cut or otherwise disturbed must be set aside in its natural condition (Section 50.7 (D)(9)) as well as the prohibition against siting a BESS on land with historic resources, structures and properties (Section 50.7 (D)(11)), it is not clear whether there is sufficient land in the Town to accommodate a Tier 2 BESS. If these provisions are used to deny a BESS, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems and related structures, such application would run a serious risk of violating G.L. c. 40A, § 3. As the court stated in PLH LLC v. Town of Ware, No. 18 MISC 000648 (GHP), 2019 WL 7201712, at *3 (Mass. Land Ct. Dec. 24, 2019), aff'd, 102 Mass. App. Ct. 1103 (2022), "the review of the municipality conducted under the bylaw'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." The Town should consult further with Town Counsel on this issue.

We also highlight for the Town's consideration that Section 50.7 (B), "Definitions," does not appear to define the term "Battery Energy Storage System," but instead defines the term "Battery Energy Storage Management System (BESS)" (emphasis added), as follows:

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

The Town should consult with Town Counsel to determine if the by-law should be amended at a future Town Meeting to also define the term "Battery Energy Storage System," as that term is used throughout Section 50.7.

Lastly, Section 50.7 (G), "Battery Energy Storage System Site plan application," Subsection (10), "Emergency Operations Plan," paragraph (h), requires the site plan to include information regarding the "[p]rocedures and schedules for conducting drills…and for training local first responders on the contents of the plan and appropriate response procedures." Although nothing in Section 50.7 (G)(10)(h) requires the applicant to pay for the training of local first responders, we remind the Town that the by-law cannot be applied in a manner that would require the owner or operator of a BESS to pay for training of any local first responders, because that application would be in conflict with state law. Towns are prohibited from charging a BESS operator a fee or costs for fire suppression services, including training. See Freetown v. New

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term. See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363-364 (1973) ("Such vagueness would permit untrammeled [administrative] discretion and arbitrary and capricious decisions…").

Bedford Wholesale Tire, 384 Mass. 60, 61 (1981) (no authority for recovery by a town for its expense in fighting a fire.) "Safeguards against fire are maintained 'for the benefit of the public and without pecuniary compensation or emolument.'" Id. at 61 citing Tainter v. Worcester, 123 Mass. 311, 316 (1877).

Moreover, in Emerson College v. Boston, 391 Mass. 415 (1984), the court held that fees imposed for fire protection were unlawful, in part, because the benefits of "augmented" fire protection are not limited to owners of certain properties. "The capacity to extinguish a fire in any particular building safeguards not only the private property interests of the owner, but also the safety of the building's occupants as well as that of surrounding buildings and their occupants." Id. at 425. Because the Town's training of its employees is for the public benefit, the Town must ensure that Section 50.7 (G)(10)(h) or other provision in the by-law is not applied in a manner that would require the BESS owner or operator to pay for training of fire or other local first responders on the required Emergency Operations Plan. The Town should consult with Town Counsel with any questions to ensure the proper application of this provision.

V. Conclusion

We approve Articles 16 and 17 because, on the record before us, we cannot conclude that the by-law provisions amount to an unreasonable regulation of BESS in conflict with Section 3. However, if Articles 16 and 17 are used to deny a BESS, or otherwise applied in ways that make it impracticable or uneconomical to build BESS, such application would run a serious risk of violating G.L. c. 40A, § 3. See Tracer Lane II, 489 Mass. at 775. The Town should consult with Town Counsel with any questions.

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.

Very truly yours,

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cc: Town Counsel Adam J. Costa