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October 20, 2023

Amanda J. Cannon, Town Clerk
Town of Lancaster
701 Main Street
Lancaster, MA 01523

Re: Lancaster Special Town Meeting of November 14, 2022 – Case # 10850
Warrant Articles # 3, 5, 6, and 7 (Zoning) [1]

Dear Ms. Cannon:

Article 7 – Under Article 7 the Town voted to amend its zoning by-laws to allow for "standalone" energy storage systems (ESS) (as defined in the by-law) by special permit in all Town districts. We approve Article 7 because it does not conflict with the solar protections in G.L. c. 40A, § 3, as highlighted by the court's decision in Tracer Lane II v. City of Waltham, 489 Mass. 775 (2022). However, we offer the following comments on Article 7 for the Town's consideration.

In this decision we discuss the Attorney General's standard of review of town by-laws under G.L. c. 40, § 32; summarize the by-law amendments adopted under Article 7; and then explain why, governed by our review standard, we approve Article 7.

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

Our review of Article 7 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 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). Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may

[1] In a letter issued to the Town on March 20, 2023 we placed Articles 3, 5, 6, and 7 on "Hold' pending receipt of all the required information under G.L. c. 40, § 32, and c. 40A, § 5. On May 23, 2023, we received a completed by-law submission and notified the Town of our new 90-day deadline (August 21, 2023). In a decision issued on August 18, 2023, we approved Articles 5 and 6, placed Article 3 on "299 hold" due to a procedural defect in the planning board hearing notice and extended our deadline for a decision on Article 7 for sixty days until October 20, 2023. On September 28, 2023, we approved Article 3.

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). "The legislative intent to preclude local action must be clear." Id. at 155.

As an amendment to the Town's zoning by-laws Article 7 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). "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.'" Id. 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. Summary of Article 7

Under Article 7 the Town amended its zoning by-laws to allow "standalone" (as defined in the bylaw) energy storage systems by special permit in all zoning districts. In addition, under Article 7 the Town deleted the existing title of Article XVII "Solar Energy Systems," and inserted a new title, "Solar Photovoltaic and Standalone Energy Storage Systems." The Town also amended Article XVII, Section 220-73, "Purpose" to include ESS as follows (with emphasis added):

> A The purpose of this bylaw is to provide appropriate siting for solar photovoltaic energy systems for power generation and standalone energy storage systems for energy storage and distribution, while preserving the right of homeowners to install solar systems for residential use.
>
> A Roof-mounted solar energy installations may be constructed in any zoning district without need for a special permit.
> B. Ground-mounted solar energy installations within a Solar Overlay District may be constructed without need for a special permit and according to the site plan criteria as set forth herein.
> C. Ground-mounted solar energy installations in the Residential and Neighborhood Business Zoning Districts are allowed by special permit through the Planning Board.
> *D. Standalone energy storage systems may be constructed in any zoning district by special permit through the Planning Board.*

> B. The provisions in this section of the Zoning Bylaw shall apply to the construction, operation, repair, and/or removal of all solar energy installation and standalone energy storage system installations, and to physical modifications that materially alter the type, configuration or size of these installations or related equipment.

Article 7 also adds to Section 220-74, "Definitions," a definition for "Standalone Energy Storage System" as follows:

> A system that is capable of absorbing energy from the electric grid, storing it for a period of time and thereafter distributing electricity, and having a nameplate capacity of less than ten (10) megawatts.

Article 7 also adds a new Section 220-77, "Standalone energy storage systems installations," that imposes design, construction, and operation standards for ESS, including setback and height requirements, noise, lighting, land clearing and visual impacts. The by-law imposes site plan review for ESS. Section 220-77 (B). The amendments adopted under Article 7 also make related changes to the Town's Use Regulation Schedule to list "Standalone Energy Storage Systems," as a use permitted by special permit in all districts.

III. Article 7 Must be Applied Consistent with G.L. c. 40A, § 3's Solar Zoning Protections

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).

We approve Article 7's regulation of ESS because we cannot conclude that the regulations

[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 May 16, 2023).

constitute an unreasonable regulation of solar energy and related structures in violation of G.L. c. 40A, § 3, or otherwise conflict with state law. However, if Article 7 is used to deny an ESS, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems and related structures (structures that facilitate the collection of solar energy), such application would run a serious risk of violating G.L. c. 40A, § 3. See Tracer Lane II, 489 Mass. at 781 (Waltham's prohibition on solar energy systems in all but one to two percent of its land area violates the solar energy provisions of G.L. c. 40A, § 3.) [3] The Town should consult further with Town Counsel on this issue.

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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[3] The existing Article XVLL does not expressly state whether an ESS as part of a solar energy system is allowed. The Town may wish to amend Article XVLL to address this issue.