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September 5, 2024

Deborah Brennan, Town Clerk  
Town of Wilbraham  
240 Springfield Street  
Wilbraham, MA 01095

**Re: Wilbraham Annual Town Meeting of June 3, 2024 -- Case # 11474**  
**Warrant Articles # 31 and 32 (Zoning)**  
**Warrant Articles # 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 (General)**

Dear Ms. Brennan:

**Articles 31, 32, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56** - We approve Articles 31, 32, and 43 through 56 from the June 3, 2024 Wilbraham Annual Town Meeting. Our comments regarding Articles 32 and 46 are provided below.

**Article 32** - Under Article 32 the Town voted to amend several sections of the zoning by-laws to regulate Battery Energy Storage Systems (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).

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 Article 32.

## **I. Summary of Article 32**

Under Article 32 the Town amended several sections of the zoning by-laws to regulate BESS. The Town amended Section 1.3, “Definitions,” to insert new definitions, including a definition for “Battery Energy Storage System,” that classifies a BESS as either a Tier 1, Tier 2, or Tier 3 system, in relevant part as follows:

- Tier 1 BESS have an aggregate energy capacity equal to 20kWh and greater and whose purpose is to store energy from residential solar energy systems if in a room or enclosed area consisting of only a single energy storage system technology;
- Tier 2 are interconnected to utility distribution lines and have an aggregate energy capacity greater than 20 kWh but less or equal to 10 Megawatts; and
- Tier 3 BESS are interconnected to high voltage transmission lines and have an aggregate energy capacity greater than 10 Megawatts.

Under Article 32 the Town also amended Section 3.4, “Table One: Schedule of Use Regulations,” to insert a new subsection 3.4.3.8 to allow BESS co-located with on-site solar generation in the Residence 34 (R34), Residence 40 (R40), Residence 60 (R60), and General Business (GB) Districts by special permit (PB); in the Industrial, Professional Office Park and General Business (IPG) District as of right with site plan approval (SPA) and to prohibit this use in the remaining zoning districts (subsection 3.4.3.8); and to insert a new subsection 3.4.3.9 that allows a “Stand Alone (Not Associated with On-Site Solar Generation)” BESS by special permit in the GB and IPG Districts and prohibits this use in the remaining nine zoning districts. Further, the Town amended a number of provisions in Section 10.7, “Large-Scale Ground-Mounted Solar Energy Systems,” as follows: (1) insert a new subsection 10.7.5.L relating to noise studies; (2) amend Section 10.7.6.G, “Appurtenant Structures,” to insert reference to co-located BESS; and (3) amend Section 10.7.10, “Construction and Monitoring,” related to an as-built plan.

Finally, the Town amended the zoning by-laws to insert a new Section 10.9, “Battery Energy Storage Systems,” to impose siting and general requirements on BESS. Section 10.9.4 imposes requirements related to a special permit application, including requiring that the application contain an emergency operations plan; procedures related to inspection and testing; and emergency procedures. Section 10.9.5 imposes design, safety and site standards including requirements related to vegetation and tree-cutting. Section 10.9.6 addresses the required special permit criteria. The by-law also includes provisions related to modifications, waivers and enforcement. Sections 10.9.7 – 10.9.11.

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

Our review of Article 32 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).

Article 32 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 Protection 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.”<sup>1</sup> 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

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<sup>1</sup> 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 3, 2024).

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. Article 32 Must be Applied Consistent with G.L. c. 40A, § 3**

We cannot determine that the by-law provisions adopted under Article 32 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 3.4.3.8 and 3.4.3.9. In addition, the by-law distinguishes between BESS connected to solar and “stand alone” BESS and imposes additional limitations on the locations where “stand alone” BESS may be sited that are not imposed on BESS connected to solar. See Section 3.4.3.9. We additionally note that although the by-law categorizes BESS as Tier 1, Tier 2 or Tier 3, the by-law appears to impose requirements only on Tier 2 and Tier 3 BESS.<sup>2</sup> Section 10.9.3.A.

Further, the by-law imposes several requirements, including an emergency operation plan and various emergency procedures. Section 10.9.4.C. The by-law also requires areas within 10 feet of each side of the BESS to be cleared of “combustible vegetation and other combustible growth” and limits clearing of vegetation to only “what is necessary for construction, operation and maintenance.” Section 10.9.5.B. And the by-law requires screening and buffers to protect against “adverse visual impacts;” integration into existing landscape; and requires that the proposed use not be “unduly detrimental” to the health, safety, or welfare of the community. Section 10.9.6. Lastly, the by-law requires BESS to meet the same standards as large-scale ground-mounted solar installations including the design requirements and performance standards in Section 10.7.7; construction and monitoring and operation and maintenance standards in Section 10.7.10 and 10.7.11 and decommissioning requirements in Section 10.7.13.

Based on our standard of review, we cannot conclude that these provisions conflict with Section 3. However, 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.

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<sup>2</sup> Further, the Table of Use does not reference the various Tiers. See Sections 3.4.3.8 and 3.4.3.9. The Town should consult with Town Counsel to determine if any amendment to the Table of Use or Section 10.9 is needed at a future Town Meeting to clarify the regulations as it relates to the various BESS Tiers.

Finally, Section 3.4.8.9 allow a BESS “not associated with on-site solar generation” by special permit (PB) only in the GB and IPG Districts and prohibits this use in all other zoning districts. We approve these portions of the by-law because we cannot conclude that they conflict with Section 3. However, given the by-law’s extensive siting regulations and limitations, it is not clear whether there is sufficient land in the Town to accommodate a “stand alone” BESS. If the by-law’s 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 as BESS, 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.) The Town should consult further with Town Counsel on this issue.

## **V. Conclusion**

We approve Article 32 because, on the record before us, we cannot conclude that the by-law amounts to an unreasonable regulation of solar facilities and related structures (including BESS) in conflict with Section 3. However, if Article 32 is 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.

**Article 46** – Under Article 46 the Town voted to amend the general by-laws to add a new Section 642, “Permitting of Ice Cream Truck Vendors.” The new Section 642 is adopted pursuant to 520 CMR 15.00 *et seq.*, pertaining to permitting of ice cream truck vendors. We offer the following comments for the Town’s consideration.

### **A. Section F – Fees**

Section F provides that the police department will charge an administrative fee of \$50.00 for the investigation of each permit “pursuant to Massachusetts General Law Chapter 6 Section 172B ½.” General Laws Chapter 6, Section 172B ½, requires that \$30 of the \$50 fee “shall be deposited into the Firearms Fingerprint Identity Verification Trust Fund and the remainder of the fee may be retained by the licensing authority for costs associated with the administration of the system.” The Town should consult with Town Counsel with any questions on the application of this provision.

### **B. Section H – Fingerprint Requirements**

Section H provides that the Chief of Police, or his designee, shall conduct an investigation including “performing state and national criminal history records check as authorized by Massachusetts General Laws, Chapter 6 Section 172B ½.” In order for a municipality to conduct state and national criminal history record checks pursuant to G.L. c. 6, § 172B ½, the municipality must comply not only with the requirements of G.L. c. 6, § 172B ½, but also with the procedures required by the Federal Bureau of Investigation (“FBI”). The Executive Office of Public Safety and Security (“EOPSS”) has issued an Informational Bulletin which explains the requirements for town by-laws and the procedures for obtaining criminal

histories. The Informational Bulletin can be found here: [https://www.mass.gov/doc/municipal-civil-fingerprinting-bulletin/download?\\_ga=2.115691462.1588319617.1657896501-951842872.1621620055](https://www.mass.gov/doc/municipal-civil-fingerprinting-bulletin/download?_ga=2.115691462.1588319617.1657896501-951842872.1621620055)

According to the EOPSS Bulletin, the FBI will not allow a municipality to access the national criminal history records database unless the municipality has a by-law in place which satisfies several requirements, as outlined in the EOPSS Bulletin. See EOPSS Informational Bulletin, p.2. It appears that the “Permitting of Ice Cream Truck Vendors” by-law does not comply with all of the FBI’s requirements, including the requirements that the by-law authorize the use of FBI records to conduct state and national criminal history records checks, and the requirement that the by-law clearly state that the FBI criminal history will not be disseminated to unauthorized entities. The EOPSS Bulletin also contains detailed information about other requirements the Town must comply with in order to implement the criminal history check system. These include the requirement that the by-law must be forwarded to the State Identification Section of the Massachusetts State Police (SIS) and copied to the Massachusetts Department of Criminal Justice Information Services Office of the General Counsel (DCJIS OGC) to coordinate approval by the FBI Access Integrity Unit (AIU). The Town should consult with Town Counsel regarding these requirements if the Town wishes to gain access to the national criminal history records information.

### **C. Sections I and L - Revocation of a Permit**

Sections I and L authorize revocation of a permit under certain circumstances including “for just cause” and for a violation of the by-law. The by-law provides for a right to appeal to the Select Board in the event of a revocation of a permit. However, the by-law is silent as to any notice and hearing rights prior to the revocation of a permit as well as the procedure for an appeal hearing before the Select Board. The Town should consult closely with Town Counsel to determine whether any amendments to the by-law are needed to address these issues. In addition, the Town may wish to consult with Town Counsel prior to revoking a permit to ensure that any required due process has been satisfied.

**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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