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August 12, 2021

Stefany Ohannesian, Town Clerk
Town of Medway
155 Village Street
Medway, MA 02053

Re: Medway Annual Town Meeting of May 10, 2021 -- Case # 10086
Warrant Articles # 20, 21, 22, 23, 24, 25, 26, and 27 (Zoning)

Dear Ms. Ohannesian:

Articles 20, 21, 22, 23, 24, 25, 26, and 27 - We approve Articles 20, 21, 22, 23, 24, 25, 26, and 27 from the May 10, 2021 Medway Annual Town Meeting. Our comments on Articles 22 and 23 are provided below.

Article 22 - Under Article 22 the Town voted to add to the Town's zoning by-laws a new Section 8.11, "Solar Electric Installations." We approve Article 22 because it does not present a clear conflict with state law or the Constitution. 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). However, the Town must apply the amendments adopted under Article 22 consistent with the protections given to solar installations under G.L. c. 40A, § 3.

In this decision, we summarize the by-law amendment adopted under Article 22 and the Attorney General's standard of review of by-laws, and then explain why, based on our standard of review, we approve Article 22.

I. Summary of Article 22

Town Meeting voted to add a new Section 8.11, "Solar Electric Installations," to the Town's zoning by-laws. The new by-law allows roof-mounted solar facilities as of right in the entire Town and allows small-scale and large-scale solar installations and solar parking canopies by special permit in certain zoning districts in the Town. The new by-law also imposes specific requirements regarding site control, dimensional, density, parking, and other design standards on certain small-scale solar installations and all large-scale solar installations.

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

Our review of Article 22 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 of a by-law. Id. at 798-99. Rather, in order 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. Massachusetts has the "strongest type of home rule and municipal action is presumed to be valid." Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 22, 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. "Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions." Concord v. Attorney General, 336 Mass. 17, 25 (1957) (quoting Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). "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)). In general, a municipality "is given broad authority to establish zoning districts regulating the use and improvement of the land within its borders." Andrews v. Amherst, 68 Mass. App. Ct. 365, 367-368 (2007). 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. General Laws Chapter 40A, Section 3 Provides Protections for Solar Energy Systems

General Laws Chapter 40A, Section 3 provides 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.

There are no appellate level judicial decisions to guide the Town or this Office in determining what qualifies as an unreasonable regulation of solar uses under G.L. c. 40A, § 3. However, there are number of Land Court decisions that provide some guidance.

Most recently, the Land Court in Tracer Lane II Realty, LLC v. City of Waltham, 2021 WL 861157 * 5 (March 5, 2021), concluded that a categorical prohibition of solar facilities in a majority of the city without a showing that the prohibition is "necessary to protect the public health, safety or welfare" of the city is inconsistent with G.L. c. 40A, § 3's protections. In reaching its decision, the Land Court rejected as irrelevant the fact that solar energy facilities would be allowed as of right in four small areas of the city. [1] Similarly, in Northbridge McQuade, LLC v. Northbridge Zoning Bd. of Appeals, Mass. Land Ct., No. 18 Misc 000519 * 2 (June 17, 2019) (Piper, C.J.), the court concluded that before a Town may regulate or prohibit a proposed solar installation on any site in the town, there must be an analysis of the need to prohibit or regulate the solar installation measured against the legislatively determined public interest in allowing the solar energy installation. (See Order Granting Partial Summary Judgment). In addition, in PLH LLC v. Ware, 2019 WL 7201712, at *3 (December 24, 2019). (Piper, C.J.), the Land Court upheld a special permit requirement applicable to solar energy projects, but ruled that "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."

However, in Duseau v. Szawlowski Realty Inc., 2015 WL 59500, * 8 (January 2, 2015) the Land Court concluded that a solar project proponent failed to demonstrate that restricting a solar energy project to the Town's Industrial Districts was an unreasonable regulation and not necessary to protect the public health and welfare. In Duseau the court acknowledged that G. L. c. 40A, § 3's exemption would invalidate such a prohibition "if it can be demonstrated that restricting solar energy systems only to the industrial districts is an 'unreasonable' regulation, and that such a regulation is not necessary to protect the public health and welfare." See also Briggs v. Zoning Board of Appeals of Marion, 2014 WL 471951 * 5 (February 6, 2014) (a zoning board of appeals' decision upholding a division between commercial solar energy and residential accessory solar energy was reasonable and did not violate G.L. c. 40A, § 3).

Based upon the limited record available to us in our review of town by-laws we do not have the complete factual record necessary to determine whether the Town's by-law amendments would satisfy the test in Tracer Lane and G.L. c. 40A, § 3. However, the fact that solar uses are allowed in a majority of the Town's zoning districts may indicate that the Town has engaged in the requisite balancing of interests required by G.L. c. 40A, § 3. The Town should consult closely with Town Counsel when applying the amendments adopted under Article 22 to ensure that the Town does not run afoul of the solar use protections in G.L. c. 40A, § 3.

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[1] On April 5, 2021 the City filed a notice of appeal, Case # 2021-P-0429. See Appeals Court docket sheet https://www.ma-appellatecourts.org/docket/2021-P-0429 and Land Court docket http://www.masscourts.org/eservices/;jsessionid=E7AC11DD157F4BE5EA80B234BB6332D9?x=ySIPG1gbJiAkXQD3CNVjbjjYO6jZAZDZDSidbcJcOojjKMbu82-uBYYEaUAx-p3qhIKEjfAl3LmagmA3-RwvTw

IV. Comments on Specific Sections in the new Section 8.11

In light of the protections provided to solar installations, we offer the following comments on specific text in the new Section 8.11.

A. Section 8.11 (D) "General Requirements"

Sections 8.11 (D) (2), (3), (4), and (5) require application plans to show various types of on-site mitigation when a solar installation causes a loss of carbon sequestrations and forest habitats, or disrupts trail networks and historic resources and properties. We recognize that the Town may utilize its zoning power to impose reasonable regulations on solar uses based upon the community's unique local needs. See Burnham, 333 Mass. at 116-117. However, the Town may be vulnerable to a challenge in court when the mitigation requirements for a particular solar installation result in an unreasonable regulation of solar energy. The Town may wish to discuss with Town Counsel the application of Sections 8.11 (D) (2), (3), (4), and (5) to a particular solar installation project to ensure it is consistent with G.L. c. 40A, § 3.

B. Section 8.11 (E) "Required Documents"

Section 8.11 (E) requires a site plan showing all known, mapped, or suspected Native American archaeological sites or Native American ceremonial activity sites. Section 8.11 (E) (1) (c) provides that the identification of such sites shall be:

> based on responses, if any, to written inquires with a requirement to respond within 35 days, to the following parties: all federally or state recognized Tribal Historic Preservation Officers with any cultural or land affiliation to the Medway area; the Massachusetts State Historical Preservation Officer; tribes or associations of tribes not recognized by the federal or state government with any cultural or land affiliation to the Medway area; and the Medway Historical Commission.

Archaeological site information is not considered public records. See G.L. c. 9, § 26A (1) and c. 40, § 8D. Thus, great care must be given to protect sensitive archaeological site location information from public disclosure during any public meetings conducted by the Town. Moreover, it is unclear whether such information would be available to an applicant. In addition, failure to receive a response from the listed entities does not take away requirements or rights given under federal or state law, including G.L. c. 7, § 38A, (providing for the protection and preservation of Native American skeletal remains that are accidentally uncovered during ground disturbance activities). We strongly suggest that the Town discuss the application of Section 8.11 (E) (1) (c) in more detail with Town Counsel, the State Archaeologist, and the Commission on Indian Affairs.

Article 23 - Under Article 23 the Town voted to amend the Town's zoning by-laws by deleting the existing Section 5.6.1 and inserting a new Section 5.6.1, "Floodplain District." Article 23 was sponsored by the Town's Planning and Economic Development Board and is part of a federal requirement for communities that choose to participate in the National Flood Insurance Program (NFIP). The new Section 5.6.1 is adopted to ensure that the Town's zoning by-laws contain the necessary and proper language for compliance with the NFIP.

The text of the new Section 5.6.1 appears to follow the "Massachusetts 2020 Model Floodplain Bylaw" provided by the Massachusetts Department of Conservation and Recreation Flood Hazard Management Program. (DCR Flood Hazard Management Program) See https://www.mass.gov/guides/floodplain-management#-2020-massachusetts-mo. The DCR Flood Hazard Management Program is the state coordinating office for the NFIP and, according to their website, they have provided the Model Floodplain Bylaw to Massachusetts communities "to assure that their local bylaws…contain the necessary and proper language for compliance with the" NFIP.[2] For this reason, we approve Article 23. The Town should consult with Town Counsel and the DCR Flood Hazard Management Program with any questions regarding the application of the new Section 5.6.1.

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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cc: Town Counsel Mark Reich

[2] https://www.mass.gov/doc/october-2020-qa-presentation-with-notes/download

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May 17, 2022

Stefany Ohannesian, Town Clerk
Town of Medway
155 Village Street
Medway, MA 02053

Re: Medway Special Town Meeting of November 15, 2021 -- Case # 10409
Warrant Articles # 9, 10, 11, 12, and 13 (Zoning)

Dear Ms. Ohannesian:

Article 10 - Under Article 10 the Town voted to place a time-limited moratorium on the construction of battery energy storage systems (BESS) in the Town's Energy Resource zoning district. Because the proposed temporary moratorium is limited in time and scope, and has a discernibly legitimate planning purpose, it does not present a clear conflict with state law or the constitution, and therefore, we approve it. See 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).[1]

In this decision, we summarize the by-law amendments adopted under Article 10 and the Attorney General's standard of review of town by-laws, and then explain why, based on our standard of review, we approve the temporary moratorium. We also provide comments for the Town's consideration in applying the moratorium and developing any future by-law to regulate BESS. (Section V).

As with our review of all by-laws, we emphasize that our approval or disapproval does not imply any agreement or disagreement with the policy views that may have led to the passage of the by-law amendments. 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 wisdom of the by-law. Amherst v. Attorney General, 398 Mass. 793, 798-99 (1986).

[1] In a decision issued on February 9, 2022, we approved Articles 11, 12, and 13 and extended our deadline for a decision on Articles 9 and 10 for sixty days until April 17, 2022. In a decision issued April 14, 2022, we approved Article 9 and extended our deadline for a decision on Article 10 for thirty days until May 17, 2022.

I. Summary of Article 10

Under Article 10 the Town voted to amend two sections of its zoning by-laws regarding battery energy storage facilities/systems.[2] First, the Town added a definition for "Battery energy storage facility" in Section 2 of the Town's zoning by-laws:

> **Battery energy storage facility:** A series of containers or cabinets containing batteries and related equipment designed to store electrical energy for periodic resale to the wholesale energy market and/or other customers on the electrical grid. This includes all accessory equipment necessary for energy storage, including, but not limited to, inverters, transformers, cooling equipment, switching gear, metering equipment, transmission tie-lines, other power interconnection facilities and/or a project substation.

Second, the Town adopted a new Section 1.8, "Temporary Moratorium," to impose a 19-month moratorium on the construction of Battery Energy Storage Systems limited solely to the Town's Energy Resources (ER) zoning district, through June 30, 2013:

> 1.8 Temporary Moratorium
>
> A. Preamble
>
> WHEREAS, the Medway Town Meeting voted on May 10, 2021:
>
> "That the Planning and Economic Development Board conduct a review and study of Battery Energy Storage Systems (BESS) and engage the services of consultants and other experts as may be necessary to provide information on all aspects of the operation, safety, security, and technology of such systems, including the economic impact of a BESS facility if located in the Town of Medway, with a report to be completed by October 15, 2021 of the board's findings and recommendations, to include but not be limited to, consideration of potential amendments to the Zoning By-Law."
>
> And WHEREAS, the Planning and Economic Development Board is conducting the review and study as voted by the Town Meeting, but the review and study was not completed by October 15, 2021, as a result of which, potential zoning bylaw amendments to address BESS have not been completed in time to be presented to the November 15, 2021 Town Meeting.
>
> NOW, THEREFORE, it is proposed that a temporary moratorium be imposed in order to allow the Planning and Economic Development Board time to conduct its

[2] In its May 10, 2021, vote the Town referred to the use as "Battery Energy Storage Systems (BESS)" but the November 15, 2021, vote under Article 10 uses both BESS and "Battery energy storage facility." We have confirmed with the Town that these terms both refer to the same use now defined in Section 2 of the zoning by-law as a "Battery energy storage facility." We refer to the use as "BESS" throughout this decision.

review and study, and to propose potential zoning bylaw amendments to regulate BESS.

B. Temporary Moratorium

There is hereby imposed a temporary moratorium on the construction of any and all battery energy storage facilities in the Energy Resources (ER) zoning district effective until June 30, 2023.

II. Attorney General's Standard of Review

Our review of Article 10 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. 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 10, 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. Municipal Authority to Adopt a Moratorium

In general, a town has the authority to "impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies." Sturges v. Chilmark, 380 Mass. 246, 252-253 (1980). Towns must show that a zoning by-law creating a moratorium "has

some reasonable prospect of a tangible benefit to the community" and that there was a "reasonable basis" for the zoning by-law. Sturges, 380 Mass. at 257. A temporary moratorium is within a town's power when there is a stated need for "study, reflection and decision on a subject matter of [some] complexity…" W.R. Grace, 56 Mass. App. Ct. at 569 (City's temporary moratorium on building permits in two districts was within City's authority to zone for public purposes). Further, a town is not required to conduct studies *before* adopting a temporary moratorium. Id. In the appropriate circumstances, a town's expressed need for time to undertake a planning process can qualify as a legitimate zoning purpose for a temporary moratorium. Id. at 567 ("The desirability of thoughtful consideration before a municipality reconciles the variety of competing interests that affect any zoning change constitutes the rational reason that justifies a halt to private activities.") We have approved such temporary moratoriums (on a variety of land uses) where the record reflects that the proposed moratorium is for a limited period necessary for a town to conduct a legitimate planning process, as required by Sturges.

However, the Supreme Judicial Court's holding in Zuckerman v. Hadley, 442 Mass. 511, 520-521 (2004) is a useful guardrail for towns considering the adoption of moratoria: "Except when used to give communities breathing room for periods reasonably necessary for the purposes of growth planning generally, or resource problem solving specifically, as determined by the specific circumstances of each case, such [moratorium] zoning ordinances do not serve a permissible public purpose, and are therefore unconstitutional." Id., 442 Mass. at 520-521 (citing Sturges, 380 Mass. at 257).

IV. Analysis of Article 10's Temporary Moratorium

Here, the stated purpose of the temporary moratorium is to provide time for the completion of the review and study of BESS (called for in the Town's May 10, 2021, vote) so that the Town's Planning and Economic Development Board can propose a zoning by-law amendment to regulate BESS. (See Article 10, Preamble). The Town has been working with two outside consultants to provide information on the operation, safety, security, and technology of BESS, including the economic impact of a BESS. According to the Town, the outside consultants have begun their work, including a preliminary draft of recommended technical language to include in it zoning by-laws. See Documents dated March 8, 2022 Medway Planning & Economic Development Board Meeting (bess_-_items_for_3-8-22_pedb_mtg.pdf (townofmedway.org). However, the text of Article 10 reflects, and the Town has confirmed for us, that the outside consultant review has not yet been completed and the Town needs additional time to draft the proposed zoning by-law, obtain the necessary community and Town board input on the proposed text, complete the planning board hearing process as required under G.L. c. 40A, § 5, and complete the Town Meeting warrant and vote process.

Based on the information provided by the Town, it appears that the Town is utilizing the moratorium for the proper purpose of "resource problem solving specifically." Zuckerman, 442 Mass. at 520-521. The moratorium is limited in time (until June 20, 2023) and scope (BESS in the Town's ER zoning district), and thus does not present the problem of unlimited duration which the Zuckerman court determined was unconstitutional. Id. For this reason, we approve Article 10. However, the Town should consult with Town Counsel to ensure that the planning efforts continue to be carried out in a timely way so that the moratorium time period is used for its intended purpose:

"to give communities breathing room for periods reasonably necessary for the purposes of growth planning generally, or resource problem solving specifically, as determined by the specific circumstances of each case." Zuckerman, 442 Mass. at 520-521.

V. Proper Application of the Temporary Moratorium to Pending Project Under EFSB Review and in Light of Protections in G.L. c. 40A, § 3 and Future State Building Code Amendments.

Although we approve this temporary moratorium because the record reflects it is limited in time and geographic scope and adopted for a discernibly legitimate planning process, we offer the following comments for the Town's consideration.

1. EFSB Jurisdiction

First, because the moratorium is limited solely to the Town's Energy Resources (ER) zoning district, it does *not* apply to the pending application by Medway Grid, LLC Medway Grid, LLC to the Massachusetts Energy Facilities Siting Board (EFSB) to construct a 250MW/500 MWh stand-alone Battery Energy Storage Facility, including a new electric substation, on a parcel outside of the ER district. (See https://www.townofmedway.org/planning-economic-development-board/pages/battery-energy-storage-systems-bess, last visited May 12, 2022). Even so, the Town must not apply this temporary moratorium (or any future by-law) in a way that interferes with the jurisdiction of the EFSB to review the Medway Grid project or any other proposed large energy facilities that are within the EFSB jurisdiction. (See https://www.mass.gov/orgs/energy-facilities-siting-board, last visited May 12, 2022).

2. G.L. c. 40A, §3 Protected Uses

Second, the Town cannot apply the moratorium in a way that would interfere with any of the potentially applicable protections in G.L. c. 40A, § 3. 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); 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.

The by-law's definition of a BESS is broad enough to potentially include BESS that are part of solar energy facilities—a use protected under Section 3 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. 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 . . . 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 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. Comm'rs of Bristol, 380 Mass. at 713.

Given this Office's limited review of zoning by-laws, we cannot conclude that this temporary moratorium of BESS in the Town's ER zoning district, which furthers a legitimate municipal interest and is limited to the time needed to study issues related to BESS, constitutes an unreasonable regulation of solar energy in contravention of G.L. c. 40A, § 3. There is no indication here that the temporary moratorium was intended as a measure to stymie solar energy facilities, and in fact, the moratorium covers any BESS, whether or not is has any direct connection (and many do not) to solar energy. Thus, whatever a municipality's authority may be to adopt a temporary moratorium affecting a Section 3 protected use, the moratorium here has a legitimate sweep separate and apart from any impact on protected solar uses. That said, any attempt by the Town to apply Article 10 to a BESS that is part of a solar energy system may be vulnerable to a court challenge asserting that such application is in an unreasonable regulation of solar energy systems under G.L. c. 40A, § 3. Indeed, if Article 10 is used as a basis to reject solar projects, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems in the Town's Energy Resource zoning district, such application would run a serious risk of violating G.L. c. 40A, § 3. Accordingly, the Town should consult closely with Town Counsel in applying Article 10 to ensure that the temporary moratorium does not result in an unreasonable regulation of solar energy systems.

The temporary moratorium may also implicate other Section 3 protected uses because a BESS as defined under the by-law may qualify as a public service corporation protected under G.L. c. 40A, § 3, ¶ 2, as follows:

> Lands or structures used or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning . . . by-law if, upon petition of the corporation, the department of telecommunications and energy shall . . . determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public; . . . if lands or structures used or to be used by a public service corporation are located in more than one municipality such lands or structures may be exempted in particular respects from the operation of any zoning . . . by-law if, upon petition

> of the corporation, the department of telecommunications and cable or the department of public utilities shall . . . determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public.

Section 3 allows the Department of Public Utilities (DPU) to exempt public service corporations from a Town's zoning by-laws. The Town cannot apply the temporary moratorium to any facilities that have received such an exemption from the DPU.

3. Future Amendments to State Building Code

Because the Town is using the moratorium period to develop by-law amendments to regulate BESS, the Town should consult with Town Counsel regarding imminent amendments to the State Building Code (Building Code) that may well preempt municipal regulation of battery energy storage systems.

During our review of Article 10 we consulted with the state Board of Building Regulations and Standards (BBRS) and the state Division of Occupational Licensure (DOL). The BBRS and DOL confirmed that energy storage systems are regulated in the 2021 edition of the International Energy Conservation Code (IECC) which the BBRS is statutorily obligated to adopt. See e.g., Section CE262 AS and subsection CB103.7 of the International Energy Conservation Code (2021 ed.). General Laws Chapter 143, Section 94 (o) mandates the BBRS to update the Building Code in light of these IECC provisions by directing the BBRS:

> To adopt and fully integrate the latest International Energy Conservation Code and any more stringent amendments thereto as part of the state building code, in consultation with the department of energy resources. The energy provisions of the state building code shall be updated within 1 year of any revision to the International Energy Conservation Code.

Energy storage systems are also regulated in Section R328.1 of the 2021 edition of the International Residential Code (IRC), which the BBRS has voted will be a core component of the next edition of the Building Code.

To the extent that the Building Code is so updated to reflect the IECC and IRC provisions regarding energy storage systems, the Building Code will preempt municipal regulation in areas covered by the updated Building Code. The Legislature has charged the BBRS --not any city or town--with determining what construction methods and materials should and should not be allowed to ensure "[u]niform standards and requirements for construction and construction materials...." G.L. c. 143, § 95 (a). "In authorizing the development of the [C]ode, the Legislature has expressly stated its intention: to ensure '[u]niform standards and requirements for construction and construction materials." St. George Greek Orthodox Cathedral of Western Mass. Inc v. Fire Dept. of Springfield, 462 Mass. 120, 126 (2012) (citing G.L. c. 143, § 95(c) (invalidating Springfield ordinance that required certain type of fire protective signaling equipment where the Building Code presented four different options for such systems). Based on this express legislative goal of uniformity the St. George court found "the Legislature [had] demonstrate[d] its express

intention to preempt local action." Id. at 129. As such, the Building Code occupies the field and any local by-law or ordinance that attempts to regulate what the Building Code regulates is preempted.

In light of the broad preemptive scope of the Building Code, the Town should consult with Town Counsel to ensure any future zoning by-law is not preempted by the updated Building Code provisions to be published in the near future.

V. Conclusion

We approve the temporary moratorium adopted under Article 10 based on the Attorney General's limited standard of review of Town by-laws under G.L. c. 40, § 32. However, we strongly encourage the Town to consult with Town Counsel to ensure that Article 10 is applied consistent with state law and in light of the other comments in this decision.

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,

MAURA HEALEY
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