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March 23, 2023

Katherine M. Chretien, Town Clerk
Town of New Marlborough
P.O. Box 99
Mill River, MA 01244

Re: New Marlborough Annual Town Meeting of May 2, 2022 -- Case # 10547
Warrant Article # 46 (Zoning)
Warrant Articles # 39, 43, 44 and 45 (General)

Dear Ms. Chretien:

Article 46 – Under Article 46 the Town amended the zoning by-laws, Section 8.9, "Solar Voltaic Installations" to make changes to subsection 8.9.5.1 and to insert a new subsection 8.9.5.2 regarding small-scale ground mounted solar installations.[1] We approve the amendments adopted under Article 46 because we cannot conclude that the by-law amendments present a clear conflict with state law, including the protections given to solar and energy related uses under G.L. c. 40A, § 3. 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 by-law consistent with the solar protections in G.L. c. 40A, § 3, as explained below.

[1] On August 11, 2022 we issued a decision taking no action on Article 39 because it was not a by-law amendment and placing Articles 43, 44, 45 and 46 on "hold" until we received from the Town the documents necessary to conduct our review pursuant to G.L. c. 40, § 32 and G.L. c. 40A, § 5. On August 12, 2022, we received a complete by-law submission from the Town and notified the Town of our new 90-day deadline (November 10, 2022). In a decision issued on November 9, 2022, we approved Articles 43, 44 and 45 and placed Article 46 on "Chapter 299 hold" because of a procedural defect in the planning board hearing notice. On January 5, 2023, the Town Clerk certified that the Town had followed all notice and publishing requirements of G.L. c. 40, § 32, and no claims were received. The Attorney General is therefore authorized to, and does, waive Article 46's procedural defects. Following the Town's completion of the 299-hold process, our 90-day review period resumed and we notified the Town of our new deadline for Article 46 (January 14, 2023). On January 6, 2023, by agreement with Town Counsel under G.L. c. 40, § 32, we extended the deadline for review of Article 46 for 45-days until February 28, 2023. On February 22, 2023, by agreement with Town Counsel, we extended our deadline for review of Article 46 for an additional 45-days until April 14, 2023.

I. Summary of Article 46

Under Article 46 the Town amended the zoning by-laws, Section 8.9, to substitute a new subsection 8.9.5.1 and add a new subsection 8.9.5.2 (and renumber the existing sub-sections accordingly), as follows:

> 8.9.5.1 A small-scale ground mounted solar photovoltaic installation is allowed by right only in the Rural Residential District after issuance of a Building Permit by the Building Inspector.
>
> 8.9.5.2 Small ground-mounted solar photovoltaic solar panels in the Village Residential District require a Special Permit.

Prior to the amendments adopted under Article 46, subsection 8.9.5.1's existing text allowed small-scale ground-mounted solar photovoltaic installation by-right in both the Rural Residential District and Village Residential District.[2] The Rural Residential and Village Residential districts appear to be the only two zoning districts in the Town. See Section 2.1, "Types of Districts."

Section 8.9.3.6 defines the term "Small-Scale Solar Photovoltaic Installation" as follows:

> A ground-mounted solar photovoltaic installation that occupies 1/8th of an acre or less and generates electricity for the purpose of on-site use.

The existing by-law also imposes design requirements on small-scale installations including: a 20 foot height limit requirement (Section 8.9.5.2.A); setback requirements (Section 8.9.5.2.B); and screening and vegetation clearing requirements (Sections 8.9.5.2.C and 8.9.5.2.D). In addition, the existing by-law imposes abandonment and removal requirements on small-scale solar (Section 8.9.5.3).

II. Attorney General's Standard of Review of Zoning Bylaws

Our review of Article 46 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, 798-99. 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). "The legislative intent to preclude local action must be clear." Id. at 155. Massachusetts has the "strongest type of home rule and

[2] The existing text of Section 8.9.5.1 provided: "A small-scale ground-mounted solar photovoltaic installation may be allowed by-right after the issuance of a building permit by the Building Inspector."

municipal action is presumed to be valid." Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 46, 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, 440 Mass. at 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, 362 Mass. at 101). 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. The By-law Amendments Must be Applied Consistent with G.L. c. 40A, § 3.

The Town cannot apply Article 46 in a way that would interfere with any 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.

Solar energy facilities and related structures have been 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. 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.

The Supreme Judicial Court recently reaffirmed the Section 3 solar protections in Tracer Lane II v. City of Waltham, 489 Mass. 775 (2022). 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.

We cannot conclude that the amendments adopted under Article 46 constitute an unreasonable regulation of solar energy in contravention of G.L. c. 40A, § 3. However, the Town must apply these amendments, and the existing provisions of Section 8.9, consistent with G.L. c. 40A, § 3's solar protections. If subsection 8.9.5.2's special permit requirement is used to deny solar projects, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems, such application would run a serious risk of violating G.L. c. 40A, § 3.[3] The Town should consult with Town Counsel with any questions 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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cc: Town Counsel Jeremia Pollard

[3] The new subsection 8.9.5.2 refers to the undefined term "small ground-mounted solar photovoltaic solar panels" but the rest of the by-law uses the term "small-scale ground mounted solar photovoltaic installation." The Town should consult with Town Counsel to determine if Section 8.9.5.2 should be further clarified at a future Town Meeting to address this issue.