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January 13, 2023

By Electronic Mail

Karen Apuzzo Langton, Chair
Holliston Planning Board
Town Hall
703 Washington Street
Holliston, Mass. 01746

Re: Holliston Planning Board | Proposed Battery Energy Storage Facility at 600 Central Street

Dear Ms. Apuzzo Langton and Members of the Board:

On behalf of BWC Holdings, LLC ("BlueWave"), I am pleased to respond to the questions posed to BlueWave and the Holliston Planning Board (the "Board") by Town Counsel at the October 13, 2022 Planning Board hearing regarding BlueWave's proposed battery energy storage facility (the "Project") to be located at 600 Central Street (the "Property").

Specifically, clarification was requested regarding (1) the zoning by-law under which the Project is applying; (2) whether more than one principal use is permitted at the Property; and (3) whether the proposed use category is appropriate for the Project.

First, the Project is applying for a special permit to use the Property for "outdoor storage of building or other materials or equipment not covered elsewhere in this by-law," a use allowed with a special permit in all zoning districts under Section II.G.6 of the Town of Holliston Zoning By-Laws as amended through October 30, 2017 ("Zoning By-Law").

This use, permitted under the 2017 version of the Zoning By-Law, applies to the Project because BlueWave submitted an approval not required plan ("ANR Plan") prior to the May 9, 2022 Annual Town Meeting at which the Zoning By-Law was amended to remove the use. Pursuant to G.L. c. 40A, § 6, the submission of an ANR Plan freezes and preserves the zoning in effect at the time of the ANR Plan's submittal.[1] Specifically, ANR Plans freeze "the use of the land shown on [the ANR Plan]," *id.*, and bar a municipality from

[1] *See Cape Ann Land Development Corp. v. Gloucester*, 371 Mass. 19, 21 n.3 (1976) (confirming that G. L. c. 40A, § 6, formerly G. L. c. 40A, § 7A, protects the uses permitted on the land at the time of filing an ANR for three years following filing of the ANR).

prohibiting the frozen use.[2] BlueWave's ANR Plan identifies that the proposed use at the Property is "outdoor storage of building or other materials or equipment not covered elsewhere in this by-law," a permitted use on the Property at the time the ANR Plan was submitted. As a matter of state law, that use is now frozen and preserved at the Property until May of 2025, pursuant to G. L. c. 40A, § 6.

Second, the Zoning By-Law does allow more than one principal use on the Property. The Zoning By-Law does not distinguish between principal/primary uses and secondary uses. Rather, it simply describes "permitted use[s]," "use[s] allowed under Special Permit," and "prohibited use[s]." Under the 2017 Zoning By-Law, the use of land "for religious purposes" is allowed by right in all zoning districts (Section II.B.1), and use of land for "outdoor storage of building or other materials or equipment not covered elsewhere in this by-law," is allowed with a special permit in all zoning districts (Section II.G.6).

Nor does the Zoning By-Law prohibit multiple allowed uses from existing simultaneously on the same site. Indeed, we are aware of numerous sites in Holliston on which multiple uses, which are not accessory to one another, exist simultaneously. These include sites that contain both religious structures (Section II.B.1) and child care centers (Section II.B.9), sites that contain both restaurants (Section II.D.14), retail sales (Section II.D.5), and business offices (Section II.D.10), and sites that contain both commercial agriculture (Section II.C.3) and farm stands for the sale of agricultural products (Section II.C.4), to name but a few.

Third, the proposed use at the Property is appropriate under the use category applied. In the spring of 2022, BlueWave participated in a pre-application meeting with the Town Planner, a representative from the Building Department, the Fire Chief, and the Conservation Commission Agent. During that meeting, BlueWave explained its intention to use the Property for a battery energy storage system, and identified "outdoor storage of building or other materials or equipment not otherwise covered under the by-law" as the appropriate use category. Neither the Town Planner nor the Building Department identified any concern with the proposed use category, and confirmed that no other use category under the Zoning By-Law appeared appropriate.

On its face, the use category "outdoor storage of building or other materials or equipment not otherwise covered under the by-law" is broad, and nothing in it is inconsistent or incompatible with an energy storage use. Indeed, energy storage falls well within the scope of this category. Not only are the batteries themselves indisputably equipment that will be stored outdoors, but the batteries will be used for the storage of energy. The Zoning By-Law broadly authorizes by special permit the outdoor storage of *any* "materials or equipment not otherwise covered under the by-law." In multiple respects, that is precisely what is being proposed by BlueWave here.

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[2] *See also Bellows Farms, Inc. v. Building Inspector of Acton*, 364 Mass. 253 (1973) (zoning amendments which would "amount to a total or virtual prohibition of the use or impede the reasonable use of the . . . land" are impermissible while a zoning freeze is in place).

Alternatively, the proposed energy storage use is still allowed even if the outdoor storage use were *not* appropriate, since under those circumstances the Zoning By-Law would prohibit the use of the Property for "structures that facilitate the collection of solar energy." Such a prohibition would contravene (and therefore be preempted by) G. L. c. 40A, § 3 ("Section 3"), which bars municipalities from prohibiting or unreasonably regulating the installation of solar energy systems or the building of structures that facilitate the collection of solar energy. In enacting Section 3, the Legislature expressly extended the statute's protections to "solar energy systems ***or*** the building of structures facilitating the collection of solar energy" (emphasis supplied). In using the word "or," the Legislature established that these protections are disjunctive, meaning that an energy storage facility is entitled to Section 3 protection so long as it "facilitate[s] the collection of solar energy," regardless of whether that energy storage facility is also a component of a "solar energy system."[3] Thus, stand-alone storage facilities unconnected to solar generation facilities — such as the one proposed here — qualify for the protections provided that those storage facilities "facilitate the collection of solar energy."

Here, that is indisputably true. The Project will participate in the state Department of Energy Resources' Clean Peak Energy Portfolio Standard, whose statewide regulations *confirm* that by charging an energy storage system within state-specified "Solar-based Charging Hours," that energy storage system "facilitates the collection of solar energy." Under 225 CMR § 21.05(2), *as a matter of law* a Qualified Energy Storage System "operates primarily to store and discharge renewable energy" if it is "charging coincident with periods of typically high renewable energy production as a percent of the grid generation mix as defined below." The regulation provides the following table that expressly identifies "*Solar-based* Charging Hours":

	Energy Storage Charging Windows	
Clean Peak Season	**Wind-based Charging Hours**	**Solar-based Charging Hours**
Spring	12:00 A.M. - 6:00 AM	8:00 A.M. - 4:00 P.M.
Summer	12:00 A.M. - 6:00 AM	7:00 A.M. - 2:00 P.M.
Fall	12:00 A.M. - 6:00 AM	9:00 A.M. - 3:00 P.M.
Winter	12:00 A.M. - 6:00 AM	10:00 A.M. - 3:00 P.M.

A principal stated purpose of the Clean Peak regulations is "*displacing nonrenewable generating resources during Seasonal Peak Periods*" (225 CMR § 21.01). This means charging energy storage systems during prime solar-based charging (daylight) hours, so the grid has available to it clean solar energy at peak-use hours when solar energy would otherwise be unavailable (for instance, on cloudy days or after dark). By charging during

[3] G. L. c. 40A, § 3, ¶ 9.

"Solar-based Charging Hours" — as the Project will do — the system will both in practice and as a matter of law be "*facilitating* the collection of solar energy," whether that solar energy is produced on-site or elsewhere on the grid.

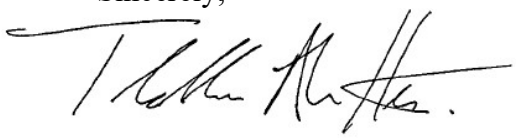
As the Supreme Judicial Court recently held in *Tracer Lane II Realty, LLC v. Waltham*, 489 Mass. 775 (2022), a by-law contravenes the protections of Section 3 — which was "enacted to help promote solar energy generation throughout the Commonwealth" — if it "restricts rather than promotes the legislative goal of promoting solar energy." *Id.* at 778, 782. A November 14, 2022 Opinion of the Attorney General, striking down proposed zoning restrictions in the Town of Carver ("*Carver*") makes clear that "battery energy storage systems qualify as 'structures that facilitate the collection of solar energy' under [Section 3]," and that the prohibition of or imposition of unreasonable regulation on battery energy storage systems violates Section 3. Because the Project is protected by the provisions of Section 3, it cannot be prohibited or unreasonably regulated under the Zoning Bylaw.

In short, "outdoor storage of building or other materials or equipment not covered elsewhere in this by-law" is the appropriate use category under the Zoning By-Law. Moreover, to the extent the Zoning By-Law were construed as *not* allowing a battery energy storage system in this zoning district, the result would be the prohibition of battery storage facilitating the collection of solar energy, which would contravene G.L. c. 40A, § 3.

* * *

For the above reasons, BlueWave's proposed project at 600 Washington Street complies with the applicable zoning for the locus and is eligible for a Planning Board special permit as a matter of law. Please do not hesitate to contact me to answer any questions or provide any further information.

Sincerely,



Tad Heuer

Cc: Brian Winner, Esq., Town Counsel
Karen Sherman, Town Planner
Joshua Lariscy, BlueWave Solar