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Memo

Date:	June 16, 2023
To:	BWC Bogastow Brook, LLC
From:	Tad Heuer
Regarding:	Holliston Zoning with Respect to Battery Energy Storage Systems ("BESS")

I. BATTERY STORAGE HAS DOVER AMENDMENT ZONING PROTECTION

As explained in further detail in BlueWave's prior correspondence of January 13, 2023, a battery energy storage system ("BESS") is an allowed use by special permit in the residential zone under Section III.G.6 of the 2017 version of the Holliston Zoning Bylaw ("Bylaw"), which permits "[o]utdoor storage of building or other materials or equipment not covered elsewhere in this by-law."

Regardless, because BESS is protected by G.L. c. 40A, § 3, ¶ 9 ("the Dover Amendment") as a "structure that facilitates the collection of solar energy", the Land Court has been unambiguously clear that the Planning Board's proper legal standard of review here is the standard applicable to site plan approval: ***"[S]pecial permits regulating solar energy facilities must be treated like site plan approval, which allows for regulation but not for prohibition***." *Summit Farm Solar v. Planning Board for Town of New Braintree*, 2022 WL 522438 (Speicher, J., Feb. 18, 2022). (Emphasis supplied).

BlueWave's March 9, 2023 submission detailed the factual reasons why a standalone BESS is a "structure that facilitates the collection of solar energy" for the purposes of the Dover Amendment, even though not directly connected to a solar array. The Dover Amendment expressly preempts municipal zoning bylaws that "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 reaffirmed the statutory imperative of ensuring the construction of solar facilities in *Tracer Lane II v. City of Waltham*, 489 Mass. 775 (2022) ("*Tracer Lane*"), observing that § 3 evinces a Legislative intent that "large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth." *Id.* at 782. The Court explained that whether a zoning bylaw facially violates Section 3's prohibition against unreasonable regulation of solar systems and related structures

turns, in part, on whether the bylaw "restricts rather than promotes the legislative goal of promoting solar energy." *Id.* at 778, 782.

On March 1, 2023, the Massachusetts Attorney General issued a written opinion (*Town of Wendell*) that confirmed BlueWave's position: standalone BESS is a "structure that facilitates the collection of solar energy as a matter of law," and is entitled to the zoning protections of the Dover Amendment. Notably, the Attorney General specifically emphasized in *Wendell* that the central purpose of the Dover Amendment is to prevent "'neighborhood hostility' or [being] contrary local 'preferences'" from being used to "dictate whether solar energy systems and related structures are constructed in sufficient quantity to meet the public need." *Id*.

On May 30, 2023, the Attorney General released a more comprehensive written opinion (*Town of Spencer*), reaffirming the special protections for BESS even more clearly:

> ESS qualify as "solar energy systems" and "structures that facilitate the collection of solar energy" under G.L. c. 40A, § 3. General Laws Chapter 164, § 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." 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." *Spencer* at 5.

The Land Court has also been clear on this point. In *Kearsarge Walpole, LLC v. Lee*, 2022 WL 4938498 (Smith, J., Oct. 4, 2022) at *6, the Land Court held that "absent a finding of a significant detriment to the interests of public health, safety or welfare, the town cannot prohibit a large-scale ground-mounted solar facility in a Rural Residential zone." The Land Court was even clearer in *Summit Farm Solar v. Planning Board for Town of New Braintree*, 2022 WL 522438 (Speicher, J., Feb. 18, 2022), holding that "the better, ***and correct*** view of the limits of local regulation of solar energy facilities allowed by G.L. c. 40A, § 3, is that such local regulation ***may not extend to prohibition*** except under the most extraordinary circumstances,"*id*. at * 10 (emphases supplied). The Land Court then went on to reiterate for good measure, as noted above, that "special permits regulating solar energy facilities must be treated like site plan approval, which allows for regulation but not for prohibition." *Id.*

Because BESS is a Dover-protected use as a matter of law, the only basis on which it can be prohibited (or even heavily regulated) is if there is a health, safety, or welfare reason for doing so. Crucially, in evaluating proposed solar zoning bylaws pursuant to its authority under G.L. 40, § 32, the Attorney General has uniformly, repeatedly, and consistently disapproved bylaws that would have unreasonably regulated or prohibited solar facilities where no contemporaneous evidence existed (either in the bylaw itself or from the warrant at the time of approval) that the bylaws were intended to allay legitimate public health, safety or welfare concerns with respect to such facilities.[1] Put differently, a prohibitory justification cannot be supplied *ex post* by the permit-granting authority. Here, nothing in the Holliston

[1] A number of these decisions are referenced in the following section.

zoning bylaw articulates a health, safety or welfare reason specific to BESS that could be invoked here as a basis for denial.

In short, because a standalone BESS facility has been confirmed as being one that "facilitates the collection of solar energy" as a matter of law, it is entitled to heightened protection from local zoning requirements under the Dover Amendment. Consistent with *Tracer Lane* and *Summit Farm Solar*, the special permit process form BESS "must be treated like site plan approval, which allows for regulation but not for prohibition." *Id.*

II. HAZARDOUS MATERIALS

As detailed comprehensively elsewhere in this submission, the Project has been designed to meet all health and safety requirements and standards.

With respect to the technical zoning issue regarding the siting of uses involving hazardous materials, the only zoning category applicable to BESS under the 2017 Bylaw is Section III.G.6, for "[o]utdoor storage of building or other materials or equipment not covered elsewhere in this by-law." BESS is not a "general industrial use" under Section III.G.2, since that classification references storage in the context of industrial uses that involve manufacturing, processing, fabrication, packaging, and assembly — none of which are present here. *People for the Ethical Treatment of Animals v. Dep't of Agric. Resources*, 477 Mass. 280, 287 (2017) (reiterating that the statutory interpretation canon of *noscitur a sociis* requires that "ordinarily the coupling of words denotes an intention that they should be understood in the same general sense.") Moreover, as BESS is a use that involves hazardous materials, BESS is a prohibited use under Section III.G.2 for a separate and independent reason: Section III.G.2 expressly prohibits "any use which involves the . . . storage . . of hazardous . . .materials." As a consequence, the *only* use category in the Bylaw that allows storage of hazardous materials is Section III.G.6, which authorizes storage by special permit of materials "*not* covered elsewhere in this by-law" (emphasis supplied).

Further, if the Town contends that BESS is not an allowed use by special permit *even under Section III.G.6*, then by definition BESS is entirely prohibited in the Town, since the Bylaw provides that "no building or structure shall be erected or used for any purpose other than those set forth in the Schedule of Use Regulations." In such circumstances, the Bylaw is undeniably preempted by G.L. c. 40A, § 3, ¶ 9: "No zoning ordinance or by-law 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 the absence of a reasonable basis grounded in public health, safety, or welfare, such a prohibition is impermissible under [Section 3]." *Tracer Lane II v. City of Waltham*, 489 Mass. 775, 781 (2022).

Finally, as referenced above, numerous opinions[2] from the Municipal Law Unit of the Massachusetts Attorney General's Office ("AGO") confirm that any purported public health, safety or welfare justification for an unreasonable zoning restriction on solar facilities ***must***

[2] Opinions from the Municipal Law Unit are available online at: https://massago.hylandcloud.com/203publicaccess/mlu.htm.

be proffered at the time the restriction is proposed, not at some later date. There is no such justification present in the 2017 Bylaw.

In Opinion No. 10230,[3] the AGO disapproved a proposed bylaw that would have required solar facilities in Wareham, MA to be located on parcels no more than ten acres in size, and to require the footprint of the solar array to have been cleared of trees for at least five years prior to the date of special permit or site plan application. Opinion No. 10230 at 2. The AGO noted that "[n]either the warrant article nor the text of the proposed by-law amendment includes a statement of purpose or intent of the by-law amendment" and that "the record reflects no evidence of an important municipal interest—grounded in protecting the public health, safety or welfare—that is sufficient to outweigh the public need for solar energy systems." *Id.* at 2-3. The AGO therefore disapproved of the bylaw because it was "an unreasonable solar regulation" that had not shown that the "limitation was necessary to protect the health, safety or welfare of the Town." *Id.* at 6.

In Opinion No. 10526, the AGO disapproved proposed moratoria on large-scale solar facilities in Carver, MA because the town failed to justify the moratoria at the time they were proposed. Opinion No. 10526 at 5. It did not matter that the Carver Town Counsel had submitted letters to the AGO asserting "several public health, safety, or welfare concerns to justify the moratoria." *Id.* Whatever *ex post* justifications were offered by the town, those justifications were "not articulated or substantiated in the Town Meeting record filed with this Office" and the "record reflect[ed] only that the Town was concerned about the ***potential impacts*** of several previously permitted projects but includ[ed] no evidence of the required public health, safety or welfare impacts sufficient to justify the prohibitions." *Id.* (emphasis supplied).

And in Opinion No. 10721, the AGO disapproved a proposed bylaw prohibiting stand-alone battery energy storage facilities in Wendell, MA for the very same reasons, pursuant to the same solar energy provisions of G.L. c. 40A, § 3. Opinion No. 10721 at 7. The record before the AGO contained "no evidence of a public health, safety or welfare concern sufficient to justify the prohibition," the "warrant article itself [did] not identify the purpose of the prohibition, and there [was] no written Planning Board report to support the need for the prohibition." *Id.* Indeed, just last month on May 17, 2023, the AGO disapproved another proposed solar storage bylaw in Medway, MA on identical grounds in Opinion No. 10779, reiterating that "[t]he record contains no evidence of an articulated public health, safety or welfare concern sufficient to justify the prohibition."

Since here, "[t]he record contains no evidence of an articulated public health, safety or welfare concern sufficient to justify the prohibition" (Opinion No. 10779), any prohibition-by-omission of BESS under the 2017 Bylaw — for any reason — is preempted by state law. In sum, whether by special permit under the *Summit* standard (per Section III.G.6) or by right (per G.L. c. 40A, § 3), BESS cannot be prohibited at this location.

[3] This Opinion was issued on March 21, 2022, three months before the Supreme Judicial Court's decision in *Tracer Lane*. However, the Opinion relied on and adopted the analysis in the lower court decision – *Tracer Lane II Realty, LLC v. City of Waltham*, 2021 Mass. LCR LEXIS 29* (Mar. 5, 2021) – that was affirmed by the Supreme Judicial Court.