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November 16, 2023

Grace Bannasch, Town Clerk
Town of Shutesbury
P.O. Box 264
Shutesbury, MA 01072

Re: Shutesbury Special Town Meeting of January 19, 2023 -- Case # 10856
Warrant Article # 3 (Zoning)

Dear Ms. Bannasch:

In January 2023, the Town voted under Article 3 to delete its existing by-law, "Ground-Mounted Solar Installations" (Section 8.10) and replace it with a new solar by-law with the same title and section number. The new by-law seeks to impose a special permit requirement for Large-Scale and Small-Scale solar installations. Article 3 also proposes to amend the definitions section of the zoning by-law and the Use Table so that the new use of Energy Storage Systems (ESS) is prohibited as a principal use in all districts.

In this decision we review the amendments adopted under Article 3 for consistency with state law. See G.L. c. 40, § 32 (mandating the Attorney General's review of town by-laws); and Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986) (establishing the scope of the Attorney General's by-law review as determining conflicts with state law). Based on this standard of review, we disapprove the amendments adopted under Article 3 because the Planning Board hearing notice for Article 3 failed to comply with G.L. c. 40A, § 5 in that a map that was one of the subject matters of the proposed Article was not identified in the notice, and this omission was misleading to the voters. These statutory violations require our disapproval of the entire text adopted under Article 3 because a town meeting lacks jurisdiction to vote on a zoning by-law amendment if the requirements of G.L. c. 40A, § 5 are not met. Town of Canton v. Bruno, 361 Mass. 598, 605, 282 N.E.2d 87, 92 (1972) (internal quotations and citations omitted) (where no Section 5-compliant planning board report was submitted to town meeting, "town meeting had no jurisdiction to take up the consideration of the merits of (the proposed by-laws), and without jurisdiction the action of the town meeting in adopting it was a nullity.")

As an additional ground for our disapproval of Article 3, we determine that the limitation of one Large-Scale installation per Planning Board sector conflicts with G.L. c. 40A, § 4. We also encourage the Town to consult closely with Town Counsel regarding any future attempt to regulate solar installations in the Town because many of the proposed regulations in Article 3 appear to

violate 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.")

We emphasize that our decision in no way implies any agreement or disagreement with the policy views that may have led to the passage of the by-law. 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, 795-96, 798-99 (1986). [1]

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, even under that limited standard of review, we disapprove the by-law amendments adopted under Article 3.

I. Summary of Article 3

A. Restrictions on Large-Scale Solar Installations

Under Article 3 the Town amended its zoning by-laws by deleting the existing text and inserting new text for Section 8.10, "Ground-Mounted Solar Electric Installations." The new by-law allows Large-Scale solar installations (defined as those occupying between 1.5 and 15 acres of land) in only one of the Town's four zoning districts, the Forest Conservation (FC) District, and only if granted a special permit by the Town's Planning Board. Large-Scale solar installations are prohibited in all other zoning districts. (Section 8.10-3; Section 3-1.1, Use Table).

Article 3 purports to incorporate by reference a map entitled "Large Ground Mounted Solar Electric Installation Districts" ("Planning Board Map"). The Planning Board Map depicts nine different sectors in the Town and seeks to limit Large-Scale solar installations to one in each sector. ("Planning Board Sectors"). Town Meeting never amended the zoning map pursuant to G.L. c. 40A, § 5 to add the nine Planning Board Sectors to the four existing zoning districts. Moreover, the vote under Article 3 did not propose to amend the zoning map to incorporate these Planning Board Sectors as new zoning districts. The proposed new by-law text simply announces that the Planning Board Sectors are "depicted on the map entitled Large Ground Mounted Solar Electric Installation Districts *and incorporated into this zoning bylaw*," Section 8.10-4.C.9, "Mitigation for Forest Block Fragmentation" (emphasis supplied).

[1] During our review we received correspondence from an attorney for a property owner in Shutesbury who asserts that Article 3 conflicts with the zoning protections for solar energy systems under G.L. c. 40A, § 3. We also received input from the Town's Board of Selectmen and Planning Board on behalf of the Town urging our approval of Article 3. We appreciate these comments as they have aided our review.

The by-law text includes several other restrictions on Large-Scale solar installations. Section 8.10-4 (B) imposes dimensional requirements, including setback and lot size requirements. Section 8.10-4 (C) imposes mitigation requirements for: (1) the loss of carbon sequestration and forest habitats; (2) the degradation of forest health and habitats; (3) the disruption of trail networks; (4) the disruption of historic resources and properties; (5) road damage; and (6) for preserving undeveloped blocks of forest.

Section 8.10-5 imposes design and performance requirements that address lighting, signage, and prohibit herbicide and pesticide use. Section 8.10-6 imposes safety and environmental requirements that limit land clearing and prohibit large-scale solar installations from being located on protected habitats.

B. Restriction on Energy Storage Systems

By the vote on Article 3 the Town also amended Section 13.2, "Definitions," to add a new definition for Energy Storage Systems (ESS) and amend the Use Table to prohibit ESS as a principal use in all districts:

> Energy Storage System (ESS) shall mean any mechanical, thermal, electrical, chemical, electrochemical or other device that is operated in conjunction with an Energy and Utility Use facility (as listed in the Use Table) to store energy for use by the utility grid or a backup system.

Use	RR	FC	TC	LW	Section Reference
Energy Storage System (ESS) as a principal use	**N**	**N**	**N**	**N**	**8.10**

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

Our review of Article 3 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 3, 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). 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. The Vote on Article 3 Violated G.L. c. 40A, § 5 Because the Planning Board Hearing Notice Did Not Identify Where the Map Entitled "Large Ground Mounted Solar Electric Installation Districts" Could be Inspected

The existing provisions of the Town's Use Table (Section 3.1-1) establish that Large-Scale solar installations are allowed by special permit in one district (the FC District) and prohibited in all other districts. [2] In the vote on Article 3 the Town attempts to further restrict the siting of Large-Scale installations by reference to the Planning Board Map, "Large Ground Mounted Solar Electric Installation Districts" in Section 8.10-3 (C) (9):

> 9. Mitigation for Forest Block Fragmentation:
> In order to preserve the ecological integrity of Shutesbury's large blocks of undeveloped forestland, no more than one Large Ground-Mounted Solar Electric Installation shall be permitted within the bounds of any set of public ways and/or Town borders as depicted on the map entitled Large Ground Mounted Solar Electric Installation Districts, and incorporated into this zoning bylaw.

However, the Town's zoning by-law and zoning map do not include the Planning Board Sectors as official zoning districts. Thus, the Town attempts to restrict the siting of Large-Scale solar by incorporating siting restrictions that conflict with state law, as explained below, and we disapprove the vote on Article 3 on this basis.

A. Because the Planning Board Map Was Not Referenced in the Planning Board Hearing Notice the Notice Failed to Comply with G.L. c. 40A, § 5.

"V]alid zoning measures can be implemented only by following the procedures spelled out in G.L. c. 40A." Spenlinhauer v. Town of Barnstable, 80 Mass. App. Ct. 134, 137 (2011). G.L. c. 40A, § 5 details the requirements for zoning by-law adoption or amendment, including that a planning board hearing be held after notice that includes information about "where texts and maps" may be inspected, as follows:

> Section 5. Zoning ordinances or by-laws may be adopted and from time to time changed by amendment, addition or repeal, but only in the manner hereinafter provided…. No zoning ordinance or by-law or amendment thereto shall be adopted until after the planning board in a city or town…has each held a public hearing thereon, together or separately, at which interested persons shall be given an opportunity to be heard. Notice of the time and place of such public hearing, *of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected* shall be published in a newspaper of general

[2] This provision in the Use Table was not changed by the vote under Article 3.

> circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of said hearing…

G.L. c. 40A, § 5 (emphasis supplied). "Section 5's notice provisions aim at giving the public a fair opportunity to participate in the process of legislating zoning." Penn v. Town of Barnstable, No. 17 MISC 000009 (MDV), 2018 WL 2085547, at *4 (Mass. Land Ct. Apr. 30, 2018), judgment entered, No. 17 MISC 000009 (MDV), 2018 WL 2049326 (Mass. Land Ct. Apr. 30, 2018), and aff'd sub nom. Penn vs. Town of Barnstable, 96 Mass. App. Ct. 205 (2019). The requirements in Section 5 are mandatory and a town's failure to comply invalidates the town meeting vote. "T]he legislature mandated a rule of strict compliance by the plain language, '[Zoning] ordinances or by-laws may be adopted ... but only in the manner ... provided." Town of Canton v. Bruno, 361 Mass. 598, 603 (1972) (Canton Town Meeting lacked jurisdiction to adopt zoning by-law because no compliant Planning Board hearing was conducted and no compliant Planning Board report was submitted to Town Meeting); see also Bellingham Massachusetts Self Storage, LLC v. Town of Bellingham, 101 Mass. App. Ct. 1108 (2022) (zoning amendment invalid because initiated by town resident who was not statutorily authorized to initiate it). However, a defect in the Planning Board notice provisions must be found to be misleading for the vote to be invalidated: "No defect in the form of any notice under this chapter shall invalidate any zoning ordinances or by-laws unless such defect is found to be misleading." G.L. c. 40A, § 5.

Here the documents submitted by the Town Clerk to this Office include a copy of the posted notice and the published notice for the Planning Board hearing on October 17, 2022. Neither notice mentions the map entitled "Large Ground Mounted Solar Electric Installation Districts" (Planning Board Map). The notices also fail to include the required statement identifying where such map could be inspected.[3] The Planning Board hearing notices thus fail to meet the requirements of G.L. c. 40A, § 5 because they fail to sufficiently identify the subject matter of the hearing and fail to identify where the Planning Board Map entitled "Large Ground Mounted Solar Electric Installation Districts" could be inspected.

We also determine that the notices' failure to reference the map or identify where it could be viewed was misleading. Section 8.10-3 (C) (9) seeks to significantly limit the siting opportunities for Large-Scale solar, a G.L. c. 40A, § 3 protected use, by reference to boundaries depicted on the Planning Board Map. In a letter to this Office the Town itself acknowledges the importance of the map as depicting the "nine blocks where large-scale solar development can occur." [4] Without a reference to the Planning Board Map or any information about where the

[3] We are informed by the Town Clerk that, at the time of the Planning Board hearing the Planning Board Map could only be found on the Town's website under the Planning Board website under the "Bylaws and Regulations" section. (Email from Town Clerk to AAG Hurley dated July 18, 2023). Thus, the statement in the Planning Board hearing notices that the by-law text to be considered was on file with the Town Clerk appears to be in error because not all the by-law text was on file with the Town Clerk.

[4] April 26, 2023 letter from Shutesbury Selectboard, p. 4.

Planning Board Map the hearing notices deprived the public of "a fair opportunity to participate in the process of legislating zoning." Penn, 2018 WL 2085547, at *4. [5] [6]

IV. The Town's Attempt to Restrict the Siting of Large-Scale Solar Installations by Limiting Them to One Per Planning Board Sector Violates the Map and Uniformity Requirements in G.L. c. 40A, § 4

Section 8.10-3 (C) (9)'s attempted limitation of one Large-Scale solar installation per Planning Board Sector also conflicts with the requirement in G.L. c. 40A, § 4 that, if a Town adopts regulations establishing where land uses may be sited, such restrictions must be reflected on the official zoning map:

> Section 4. Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.
> Districts shall be shown on a zoning map in a manner sufficient for identification. Such maps shall be part of zoning ordinances or by-laws.

The Town's zoning by-law seemingly reflects this requirement in its Section 1.2 "User Guide" to the zoning by-law:

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[5] We acknowledge that G.L. c. 40, § 32 provides the Attorney General discretion to waive any defect in the Planning Board hearing notice:

> Notwithstanding the provisions of the preceding paragraph, if the attorney general finds there to be any defect in the procedure of adoption or amendment of any zoning by-law relating to form or content of the notice of the planning board hearing prescribed in section 5 of chapter 40A, or to the manner or dates on which said notice is mailed, posted or published as required by said section 5, then instead of disapproving the by-law or amendment because of any such defect, *the attorney general may proceed under the provisions of this paragraph. If the attorney general so elects*, written notice shall be sent to the town clerk…

G.L. c. 40, § 32 (emphasis supplied). However, this defect waiver process is solely at the discretion of the Attorney General ("if the Attorney General so elects") and we decline to initiate the defect waiver process here.

[6] The Town Meeting Warrant also makes no reference to the Planning Board Map, and Town Counsel has confirmed that the Planning Board map was not provided to the Town Meeting voters. Email from Town Counsel to AAG Hurley, August 18, 2023. Although G.L. c. 39, § 10 requires only that the warrant identify "the subjects to be acted upon" at town meeting, without the Planning Board Map the voters lacked full knowledge of the scope of the siting restrictions they were being asked to impose on Large-Scale solar. See Fish v. Canton, 322 Mass. 219 (1948) (internal citations and quotations omitted) (invalidating town meeting vote because "the warrant did not sufficiently apprise the voters of the subject matter of the vote finally taken. It did not indicate with substantial certainty the nature of the business to be acted on.")

1.2.1 This bylaw regulates land use by dividing the Town into zoning districts and establishing rules for the use of land in each district.

As the Town's "User Guide" recognizes, zoning districts are intended to provide information regarding what can be built where in town and under what requirements. The requirement in G.L. c. 40A, § 4 that "[d]istricts shall be shown on a zoning map in a manner sufficient for identification" reflects the importance of the zoning map in providing easily identifiable information about allowable land uses.

Section 8.10-3 (C) (9) violates these requirements. It attempts to impose a rule for the use of land (a limit on the number of Large-Scale installations per sector) according to Planning Board Sectors that were never properly adopted as land use districts. These Planning Board Sectors are not reflected on the Town's official zoning map. From the information supplied to this Office, the only way a person could locate this Planning Board Map was to search the Planning Board website under the "Bylaws and Regulations" section. This fails to provide the notice to landowners that G.L. c. 40A, § 4 requires.

G.L .c. 40A, § 4 also includes the requirement that land use rules and restrictions must apply equally to all parcels within a district. "Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." G.L .c. 40A, § 4. "A zoning ordinance is intended to apply uniformly to all property located in a particular district ... and the properties of all the owners in that district [must be] subjected to the same restrictions for the common benefit of all." Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 324 Mass. 433, 439 (1949). See also SCIT, Inc. v. Plan. Bd. of Braintree, 19 Mass. App. Ct. 101, 107 (1984) ("the uniformity requirement is based upon principles of equal treatment: all land in similar circumstances should be treated alike, so that "if anyone can go ahead with a certain development [in a district], then so can everybody else.")

Section 8.10-3 (C) (9) violates the uniformity principles of G.L. c. 40A, § 4. As in SCIT, it creates an inherent conflict in the zoning by-law because the Use Table indicates Large-Scale solar installations are allowed by special permit in the FC district, but Section 8.10-3 (C) (9) restricts the allowable siting locations of Large-Scale solar installations to one per nine Planning Board Sector. This violates the uniformity requirement that "all land in similar circumstances should be treated alike, so that 'if anyone can go ahead with a certain development [in a district], then so can everybody else.'" SCIT, 19 Mass. App. Ct. at 107 (quoting 1 Williams, American Land Planning Law § 16.06 (1974).)

V. The Unlawful Text Cannot Be Severed From the Remainder

We have analyzed whether we could disapprove only the offending text (Section 8.10-3 (C) (9) that limits Large-Scale solar installations to one per Planning Board Sector) rather than the entire by-law and determine that we cannot. As an initial matter, the by-law contains no severability clause. Even it did, "[t]he inclusion of a severability clause creates a presumption of severability but does not end the inquiry." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685-686 (1987). When a portion of a by-law is found to be invalid, "the invalid part may be dropped if what

is left is fully operative as a law." Id. at 684.

Here the limitation in Section 8.10-3 (C) (9) of one Large-Scale solar installation per Planning Board Sector serves as the foundation of the by-law. There is no clear indication that Town Meeting would have adopted the remainder of the by-law's limitations as written if Section 8.10-3 (C) (9) was not included in the by-law. For example, if the sector restrictions did not exist the Town may have adopted additional buffer or lot size restrictions than are currently included in the by-law. For this reason, we determine that the text in Section 8.10-3 (C) (9) is not severable.

VI. Any Future Bylaw Must Comply with the Solar Zoning Protections in Section 3

We recognize that the Town may pursue a future attempt to regulate solar installations. The Town should consult closely with Town Counsel regarding any future by-law language and avoid simply restating the restrictions currently found in Article 3, because it is not clear that the current restrictions are "necessary to protect the public health, safety or welfare ." 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.

Any future by-law must contain record evidence that each of the regulations is necessary to protect the public health, safety or welfare in the Town. "Under Tracer Lane II, [any] limitation on the area available for large-scale facilities may only survive scrutiny under G.L. c. 40A, § 3 if it is rooted in the protection of public health, safety, or welfare." Kearsage Walpole, LLC v. Lee, 2022 WL 4938409 (Land Court, October 4, 2022). In Kearsage Walpole, the Land Court overturned the decision of the Walpole Zoning Board of Appeals that a large-scale solar installation could not be built in the town's Rural Residential District. The court determined that the by-law's stated purpose of the Rural Residential District – agriculture, open space, and an area for lower density, single-family residential land use - were legitimate municipal goals but did not qualify as public health, safety or welfare. Id. at *7. "Where the bylaw advances a municipal purpose outside the umbrella of public health, safety, and welfare - *like preserving open space and agricultural land*- Tracer Lane suggests that the bylaw may only preclude development of a solar facility [in the Rural Residential District] if there is ample other land area in the municipality available for large-scale solar facilities." Id.(emphasis supplied) Because Walpole had only approximately 2% of land available for the installation of a large-scale solar facility the court held the Town could not prohibit a large-scale solar facility in the Rural Residential zone. Id.

Here it is not clear that the siting limitations are grounded in public health, safety or welfare. Although the by-law makes repeated reference to various reports establishing the important role of forestland in counter-acting the effects of climate change (*see generally* Section 8.10, Background), it is not clear that the preservation of "large blocks of undeveloped forestland" (Section 8.10-3 (C) (9)) is a recognized public health, safety or welfare interest in the context of the Tracer Lane II balancing test. Moreover, there is no record evidence here that explains why each of the siting limitations in Article 3 is necessary to achieve that goal in Shutesbury. And, as in Tracer Lane and Kearsage Walpole, the siting limitations can only survive "if there is ample other land area in the municipality available for large-scale solar facilities." Kearsage Walpole,

2022 WL 4938409 at *7. The Town has not established on this by-law record that there is sufficient remaining land available for large-scale solar installations. Without such a showing, siting restrictions such as those contained in Article 3 would violate G.L. c. 40A, § 3.

The by-law's proposed town-wide ban on energy storage systems (ESS) is in another category because it is a total prohibition of a protected solar use and thus facially conflicts with G.L. c. 40A, § 3. 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." [7]

Given the strong statutory protections for solar installations and related structures such as ESS in G.L. c. 40A, § 3, and the Tracer Lane II Court's recognition that large-scale solar and related structures "are key to promoting solar energy in the Commonwealth," Tracer Lane II, 489 Mass at 782, an outright ban on all ESS everywhere in the Town is impermissible without record evidence of a legitimate public health, safety, or welfare concern to justify the prohibition. Just as the Tracer Lane II court found Waltham's "outright ban of large-scale solar energy systems in all but one to two percent of [Waltham's] land area…is impermissible under [G.L. c. 40A, § 3, ¶ 9]," id. at 782, so too is the Town's proposed ban on all principal use ESS in all districts because the record reflects no evidence of public health, safety or welfare concerns that can only be satisfied by this extreme limitation sufficient to justify the ban. See also Kearsarge Walpole, LLC v. Lee, 2022 WL 4938498 (Smith, J. Oct. 4, 2022) at *6 ("[A]bsent 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.") As the Land Court determined in Summit Farm Solar v. Planning Board for Town of New Braintree, 2022 WL 522438 (Speicher, J., Feb. 18, 2022), "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 (rejecting visual impact of solar array as a legitimate public health, safety, or welfare concern).

VII. Conclusion

We disapprove the by-law amendments adopted under Article 3 because the Town failed to comply with the Planning Board hearing requirements in G.L. c. 40A, § 5, and the Planning Board map that serves as the foundation for the by-law amendments conflicts with G.L. c. 40A, § 4. We also encourage the Town to consult closely with Town Counsel regarding any future attempt to regulate solar installations in the Town because many of the proposed regulations in Article 3 appear to violate the solar protections in G.L. c. 40A, § 3.

[7] 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 May 16, 2023).

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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