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November 4, 2020

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

Re: Shutesbury Annual Town Meeting of June 27, 2020 -- Case # 9829
Warrant Articles # 15, 29, and 30 (Zoning)
Warrant Articles # 23 and 33 (General)

Dear Ms. Bannasch:

Articles 15, 29, and 30 - We approve Articles 15, 29, and 30 from the June 27, 2020 Shutesbury Annual Town Meeting.[1] Our comments on Articles 15 and 29 are provided below.

Article 15 - Article 15 deletes from the Town's zoning by-law the existing Section 8.10 pertaining to solar installations and inserts a new Section 8.10, "Ground-Mounted Solar Electric Installations." The new Section 8.10 allows large ground-mounted solar electric installations by special permit in the Town. Specifically, Section 8.10-3 (J) provides as follows:

> In order to preserve the ecological integrity of Shutesbury's large blocks of undeveloped forestland as stated in Section 5.1-1 herein, 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.

General Laws Chapter 40A, Section 3, protects solar energy systems and the building of structures that facilitate the collection of solar energy, and provides in pertinent part as follows:

> 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.

[1] In a decision issued October 8, 2020, we approved Articles 23 and 33 and extended our deadline for the decision on Articles 15, 29, and 30 for an additional 30 days until November 7, 2020 under the authority conferred by G.L. c. 40, § 32, as amended by Chapter 299 of the Acts of 2000.

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, a Land Court decision provides some guidance. In Briggs v. Zoning Board of Appeals of Marion, 2014 WL 471951 * 5 (2014), the Land Court determined that a zoning board of appeals' decision maintaining a division between commercial solar energy and residential accessory solar energy was reasonable and did not violate G.L. c. 40A, 3. In addition, as a general principle, 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 v. Board of Appeals of Gloucester, 333 Mass. 114, 116-117 (1955) ("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."). The reasonableness of a regulation is a fact-dependent determination that includes a consideration whether a regulation substantively diminishes or detracts from a project's usefulness or imposes an excessive cost that outweighs legitimate municipal concerns *See e.g.*, Duseau v. Szawlowski Realty Inc., 2015 WL 59500, * 8 (2015) (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 applying the new Section 8-10 the Town should consult closely with Town Counsel to ensure that the Town does not run afoul of the solar use protections in G.L. c. 40A, § 3. In light of the above, we offer comments on certain specific portions of the new Section 8.10

A. Section 8.10-3 "General Requirements"

Sections 8.10-3 (B), (C), (D) (E), and (F) require application plans to show various types of on-site mitigation when a solar installation causes a loss of carbon sequestrations and forest habitats, requires the installation of perimeter fencing, 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 Section 8.10-3 to a particular solar installation project to ensure it is consistent with G.L. c. 40A, § 3.

B. Section 8.10-4 "Required Documents"

Section 8.10-4 (A) (3) requires a site plan showing all known, mapped, or suspected Native American archaeological sites or Native American ceremonial activity sites. Section 8.10-4 (A) (3) 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 Shutesbury 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 Shutesbury area; and the Shutesbury 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 right 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 8.10-4 (A) (3) in more detail with Town Counsel, the State Archaeologist, and the Commission on Indian Affairs.

C. Section 8.10-6 "Design and Performance Standards"

Section 8.10-6 (C) provides that herbicides and pesticides may not be used to control vegetation at the solar installation. Section 8.10-6 (C) must be applied consistent with the Pesticide Control Act, which establishes the Act's "exclusive authority in regulating, the labeling, distribution, sale, storage, transportation, *use and application*, and disposal of pesticides in the commonwealth." *See* G.L. c. 132B, § 2, as amended by Chapter 264 of the Acts of 1994 (emphasis supplied). Herbicides are included in the definition of pesticides under G.L. c. 132B, § 2.[2] The Town must ensure that it applies the by-law in a manner consistent with the Pesticide Control Act. The Town should consult with Town Counsel regarding any questions on this issue.

D. Section 8.10-9 "Abandonment and Decommissioning"

Section 8.10-9 (C) provides that in the case of an abandoned solar installation, "the Town may enter the property and physically remove the installation at the owner's expense, drawing from the escrow account or upon the bond or other financial surety provided by the applicant."

"Municipal officials do not have the authority to conduct non-emergency warrantless searches of private property without permission of the owner. Commonwealth v. John G. Grant & Sons Co., Inc., 403 Mass. 151, 159-60 (1988). The U.S. Supreme Court has held that warrants are required for non-emergency administrative inspections. Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1966) (requiring warrant for health inspector non-emergency entry); See v. City of Seattle, 387 U.S. 541 (1966) (requiring warrant for non-emergency inspection by fire chief). "[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." See, 387 U.S. at 545. Massachusetts courts have similarly recognized that "statutes can no longer convey blanket powers of warrantless entries." Commonwealth v. Hurd, 51 Mass. App. Ct. 12, 17 (2001) (holding that G.L. c. 129, § 7, does not authorize warrantless searches for animal inspection). The Town should consult with Town Counsel to ensure that this Section is enforced in a manner that is consistent with state law and applicable constitutional requirements.

Article 29 - Article 29 amends the Town's zoning by-laws by deleting Section 8.4, pertaining to signs and inserting a new Section 8.4, "Sign Regulations." The new Section 8.4 identifies signs that are permitted as of right, permitted by special permit, and prohibited in the Town. Our comments on the new Section 8.4 are provided below.

[2] The definition of "pesticide" in G.L. c. 132B, § 2 includes herbicides, as follows "a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant. . .".

A. Sign By-laws in General - The Reed Test

In Reed v. Gilbert, Arizona, 135 S. Ct. 2218 (2015), the United State Supreme Court held that the Town's content-based sign regulation was unconstitutional because it was not narrowly tailored to serve a compelling state interest.

The Town of Gilbert, Arizona adopted a comprehensive sign ordinance that required a sign permit for outdoor signs. The sign ordinance exempted 23 types of signs from the permit requirement, including three types of signs that were the focus of the Court's decision: (1) ideological signs; (2) political signs; and (3) temporary directional signs relating to a qualifying event.[3] However, such signs were subject to specific restrictions, including durational and size limitations.

The Petitioners in Reed were the Good News Community Church and its pastor, who placed 15 to 20 signs around the Town informing the public of its worship services. The Petitioners were cited twice for violating the Town's temporary directional sign restrictions. Specifically, the Petitioners were cited for (1) displaying the signs past the time limit required under the ordinance and (2) for omitting the date of the event on the signs. After failing to resolve the matter with the Town, the Petitioners filed a complaint alleging that the sign ordinance violated their free speech rights guaranteed under the First and Fourteenth Amendments to the U.S. Constitution. The Ninth Circuit Court of Appeals held that the sign ordinance's provisions were content-neutral and did not violate the First Amendment. The United State Supreme Court granted certiorari and reversed the Ninth Circuit's decision.

The Supreme Court focused on three categories of signs that, in the Town's ordinance, were exempt from the sign permit requirement but subject to specific durational and size limitations: (1) ideological signs; (2) political signs; and (3) temporary directional signs relating to a qualifying event. First, the Court reiterated that the First Amendment prohibits local governments from restricting expression because of the message, idea, subject matter, or content. Id. at 2226. A regulation is content-based if it applies to a particular speech because of the topic discussed or the idea or message expressed. "This commonsense meaning of the phrase 'content-based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Id. at 2227. Content-based laws are subject to strict scrutiny and are presumptively unconstitutional. Strict scrutiny requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. Id. at 2227.

The Supreme Court held that Gilbert's sign ordinance was content-based on its face because the restrictions placed on signs were based entirely on the communicative content of the sign. For example, the sign ordinance defined an ideological sign as a sign that communicates a message or idea that does not fit within another category in the sign ordinance. The ordinance defined a political sign as a sign that is designed to influence the outcome of an election. Finally, a temporary directional sign was defined as a sign that directs the public to church or some other qualifying event. Each of these signs was then subject to different size and durational limitations. Because the sign ordinance was content-based, the Court analyzed it using strict scrutiny.

[3] "Qualifying event" was defined in the ordinance as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." Id. at 2225.

Strict scrutiny requires the Court to determine whether: (1) the municipality demonstrated a compelling governmental interest and (2) whether the restriction is narrowly tailored to achieve that governmental interest. The Town of Gilbert offered two governmental interests for adopting its sign ordinance: (1) preserving the Town's aesthetic appeal; and (2) traffic safety. Reed, 135 S.Ct. at 2231. The Court assumed for the sake of argument that those were compelling governmental interests but found that the sign ordinance's distinctions were under-inclusive. The sign ordinance was under-inclusive because temporary directional signs are "no greater [an] eyesore" than ideological or political signs, yet, the ordinance allowed unlimited ideological signs while imposing greater restrictions on temporary directional signs. As to traffic safety, the Court found that temporary directional signs did not pose a greater threat to traffic safety than ideological or political signs.[4] Id. at 2231-32. Because of this under-inclusiveness, the ordinance was not narrowly tailored to further a compelling governmental interest and therefore failed strict scrutiny review. Id. at 2232.

In holding that the Town's sign ordinance was unconstitutional, the Court offered guidance on the types of sign regulations that may be adopted consistent with the First Amendment. The Court noted that the Town had ample content-neutral options to regulate signs. In a concurring opinion, Justice Alito offered specific examples of sign regulations that could be imposed so long as they are not content-based:

- Rules regulating size;
- Rules regulating location;
- Rules distinguishing between lighted and unlighted signs;
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change;
- Rules that distinguish between the placement of signs on commercial and residential property;
- Rules distinguishing between on premises and off-premises signs;
- Rules restricting the total number of signs allowed per mile of roadway; and
- Rules imposing time restrictions on signs advertising a time event.

Reed, 135 S.Ct. at 2233.

If a sign by-law is challenged in court, it is the municipality's burden to demonstrate that the sign by-law is narrowly tailored to achieve a compelling government interest. Reed, 135 S.Ct. at 2231. A municipality usually attempts to meet that burden by citing to a statement of purpose or findings in the by-law itself. *See, e.g.,* Commonwealth v. Weston W., 455 Mass. 24, 27-28, 36 (2009) (ordinance included a series of findings made by the council followed by a statement of purpose, supporting the trial court judge's finding that the council adopted the ordinance only 'after months of planning, debating, and researching models from other cities"). Only after the community demonstrates the legitimate goals of the by-law can the court determine whether the by-law is narrowly tailored to achieve those goals.

The Town may wish to discuss with Town Counsel the application of the Reed decision to the new Section 8.4.

[4] In fact, the Court observed that a "sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting." Id. at 2232.

B. Section 8.4 (C) "Billboards"

Section 8.4 (C) prohibits billboards. The power to regulate billboards is granted to the Outdoor Advertising Board ("OAB") pursuant to G.L. c. 93, §§ 29-33. However, the OAB's powers are exercised by the Office of Outdoor Advertising ("OOA") within the Massachusetts Department of Transportation. *See* Chapter 25 of the Acts of 2009 (creating the Massachusetts Department of Transportation). The Town must apply any regulation of billboards in a manner consistent with G.L. c. 93, §§ 29-33 and the regulations promulgated by the OOA at 700 C.M.R. 3.00 *et seq.* General Laws Chapter 93, Section 29, authorizes the State to "make, amend or repeal rules and regulations for the proper control and restriction of billboards, signs and other advertising devices...on public ways or on private property within public view of any highway, public park or reservation." In addition, Section 29 establishes that billboards may be licensed by the OOA through the issuance of permits; however, no permit shall issue unless written notice of an application is given at least thirty days earlier to the city or town in which the proposed billboard, sign or other advertising device is to be located.

It is not inconsistent with the provisions of G.L. c. 93, §§ 29-33, or the rules and regulations of the OOA, for a town to regulate billboards. *See* John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 215 (1975) (town by-law which had effect of prohibiting off-premises signs, was consistent with G.L. c. 93, §§ 29-33, which explicitly provides for local regulation of billboards). However, Section 8.4.-6 (C) must be applied in a manner consistent with G.L. c. 93, §§ 29-33, and the rules and regulations of the OOA. We suggest that the Town consult with Town Counsel before applying Section 8.4-6 (C)'s billboard prohibition.

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 Donna MacNicol