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November 14, 2024

Anna Wetherby, Town Clerk
Town of Wendell
P.O. Box 41
Wendell, MA 01379

Re: Wendell Special Town Meeting of May 1, 2024 -- Case # 11380
Warrant Article # 1 (General)

Dear Ms. Wetherby:

Article 1 - Because Article 1 is a by-law that regulates the use of land and therefore should have been adopted as a zoning by-law (rather than a general by-law), we must disapprove it because it conflicts with G.L. c. 40A, § 5. By-laws that regulate the use of land, buildings and structures must comply with the Zoning Act, G.L. c. 40A ("Zoning Act"), including the Zoning Act's zoning protections given to certain uses and structures (G.L. c. 40A, § 3) and the Zoning Act's procedural requirements for adoption or amendment of zoning by-laws (G.L. c. 40A, § 5). Spenlinhauer v. Town of Barnstable, 80 Mass. App. Ct. 134, 137-38 (2010).

This decision briefly describes the by-law and the Zoning Act; discusses the Attorney General's standard of review of town by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we must disapprove the by-law adopted under Article 1 because it conflicts with the Zoning Act.[1]

I. Summary of Article 1

Under Article 1, a citizen-petitioned article,[2] the Town voted to amend the general by-laws to add a new "General Bylaw for the Licensing of Battery Energy Storage Systems." Article 1 states that it is adopted for the purpose of "dealing with the licensing of Battery Energy Storage Systems (BESS)…for the purpose of protecting the health, safety and welfare of residents of Wendell and its natural built environment." Section A, "Purpose." The by-law states that there

[1] During the course of our review, we received correspondence from a Wendell resident and the Town of Leverett Selectboard urging our approval of the by-law and from legal counsel for a battery energy storage developer urging our disapproval of the by-law. We appreciate these communications as they have aided our review and highlight the important issues implicated by the by-law.

[2] The Warrant provides that Article 1 was "submitted by petition of 111 registered voters of the Town of Wendell."

are fire risks associated with BESS and that by "responsibly regulating and managing the hazards associated with this energy technology, we seek to minimize the risk to the health safety and welfare of the Wendell Community." Id. The by-law further aims to "limit[ ] unnecessary forest land conversion and clear-cutting, reducing the loss of all other forest benefits, and promoting the reuse of already developed sites for" BESS. Id.

The by-law categorizes the licensing requirements for BESS into three tiers as follows: (1) a BESS with a power rating of less than 1MW does not require a license; (2) a BESS with a power rating greater than 1MW and no more than 10MW requires "licensing approval, based on findings that their emergency operation plan; hazard mitigation analysis, evacuation plan and other emergency response plan documents are 'sufficient in content and detail to protect the public health, safety, convenience, and welfare'"; and (3) a BESS with a power rating greater than 10MW will not receive a license (and therefore appears to be prohibited). Id. The by-law does not distinguish in any way between a BESS associated with a solar installation and a BESS as a principal use. In order to receive a license, the BESS must comply with the licensing by-law, all other Wendell by-laws and regulations, the National Fire Protection Association (NFPA) standards, and the State Building Code, as well as "meet insurance and financial surety requirements, liability insurance, and cost of decommissioning." Id.

Section B, "Definitions," defines terms used in the by-law including "energy storage system," "battery energy storage system (BESS)," and "Licensing Board." The by-law provides that the Licensing Board shall be comprised of the following members: (1) the Selectboard; (2) one member appointed by the Conservation Committee; (3) one member appointed by the Board of Health; (4) one member appointed by the Planning Board; (5) one member appointed by the Zoning Board of Appeals; (6) one member appointed by the Energy Committee; (7) one member appointed by the Municipal Light Board; and (8) one member appointed by the Finance Committee. Id.

The by-law provides that the Licensing Board "is empowered to approve, reject, or amend and approve any application for a Battery Energy Storage System License" and further requires that "[l]icensing approval shall require a two-thirds vote of the voting members of the Licensing Board."[3] Section B. Decisions of the Licensing Board "shall be based on the Licensing requirements contained in Section D…and the Licensing Findings contained in Section E…." Id.

Section C, "Basic Requirements by BESS Size," provides that because the risks to public health, safety, and welfare "rapidly increase with the size of a BESS, applications to construct and operate such systems shall be subject to increasing scrutiny according to size." The by-law applies to the "construction and operation of all BESS installations" and requires compliance with: (1) all local, state and federal requirements, including all applicable safety, construction, electrical and communications requirements; (2) the Town's Wetlands Protection Bylaw; (3) Board of Health regulations; (4) the Solar Energy Bylaw; (5) building codes including the

[3] The Licensing Board is made up of seven appointed members plus the three-member Selectboard for a total of 10 members. A two-thirds vote of the Licensing Board would therefore require seven votes.

State Building Code;[4] and (6) NFPA standards for installation of "Stationary Energy Storage Systems." Id. The by-law also requires that the Building Inspector "shall review all plans or designs for the installation of a BESS facility and certify that the final installation conforms to all required building codes." Id.

Section C further provides (in bold text in the original, omitted here), that "No license approval shall be granted by the licensing board unless the requirements of Section D and E of this bylaw are fully satisfied." Section C also provides that "[n]o BESS with a power rating greater than 10MW shall be licensed." Id. Moreover, Sections C (3) and (4) require:

> 3. To the maximum extent feasible, all new BESS shall be located on previously-developed commercial industrial sites, landfills, repurposed building pads or roadways. Construction on undeveloped land of any kind shall be minimized to the extent possible, but in no case shall exceed 25% of the total gross square footage of the proposed site. Total site square footage per applicant shall not exceed five acres.
>
> 4. To minimize forest land conversion, any BESS project defined in this bylaw shall not include clear-cutting of forest land in excess of one-half (.5) of an acre.

Section D, "Licensing Requirements," specifies the information that must be included in an application "for a License to construct or operate a BESS" including, but not limited to: (1) the location of the proposed BESS storage equipment; (2) the power rating and storage capacity of the proposed BESS equipment; (3) a training plan, approved by the Town Fire Chief, "for all specialized training required to respond to an emergency incident involving the BESS equipment" including a plan for "training on an annual basis"; (4) an emergency operation plan (EOP) as required by the NFPA standards; (5) a hazard mitigation analysis; (6) an air dispersion model and analysis to determine "the extent and effects of a thermal runaway event affecting at last 50% of the battery cells proposed for use as part of the BESS equipment"; and (7) an analysis of the "manpower and equipment" need for an emergency response to a thermal runaway event.

Section D also details the information that must be included in the required EOP including, but not limited to: (1) procedures for safe shutdown, de-energizing, or isolation of equipment and systems under emergency conditions; (2) procedures for inspection and testing of alarms, interlocks and controls; (3) emergency procedures; (4) identification of all hazards

[4] It is not clear what Article 1 means by "building codes including the State Building Code" as the only Building Code in Massachusetts is the State Building Code ("Code"), 780 CMR § 1.00, *et. seq.* The Code is authorized by G.L. c. 143, § 93 wherein the Legislature abolished all local building codes, established the state Board of Building Regulations and Standards ("BBRS"), and charged the BBRS with adopting and regularly updating the Code. Id. § 94(a), (c,) (h). A town by-law that seeks to address a subject regulated by the Code is preempted where G.L. c. 143, § 95 directs the BBRS, in promulgating the Code, to pursue "uniform standards." St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dep't of Springfield, 462 Mass. 120 (2012).

associated with fire, explosion, or release of liquids or vapors; and (5) any "[o]ther procedures or information determined necessary by the Licensing Board."

Section E, "Required Licensing Findings," provides that "[n]o license to construct and operate a BESS shall be issued unless the Licensing Board" makes certain findings, including but not limited to finding that: (1) the emergency operations plan, hazard mitigation analysis, evacuation plan and other emergency response documents "are sufficient in content and detail to protect the public health, safety, convenience and welfare"; (2) the manpower, equipment and other resources of the Town are sufficient to respond to a potential hazard or emergency response scenario associated with the proposed BESS equipment; (3) the applicant has adequately and completely identified all hazards associated with the operation of the BESS system equipment in the location proposed; (4) the potential hazards associated with the BESS equipment "can be appropriately managed and minimized"; and (5) "[t]here are no other considerations that would result in operation of the BESS system equipment in the particular location creating an undue or unacceptable risk to the public health, safety, convenience, and welfare, and the project to the greatest extent feasible has avoided or minimized adverse impacts to the health, safety, convenience and welfare of the town of Wendell."

Section F authorizes the Licensing Board to seek the services of an independent consultant to "conduct a professional review and advise the Boards on technical aspects of the applicant's proposal…including engineering, environmental preservation, traffic, public safety, convenience and welfare." Section G requires an applicant "for a License to construct and operate a BESS" to also provide proof of liability insurance "in an amount $100 Million to cover loss or damage to person(s) and structure(s) occasioned by the use or failure of any BESS facility including coverage for fires, explosions and flooding events." Section G also requires a cash escrow or other form of financial surety to be deposited by the applicant for a license to "cover the cost of removal, recycling, and disposal of the installation and remediation and/or restoration of the site in the event the Town must remove the installation and remediate and/or restore the site to its natural preexisting condition." Section G further requires the applicant for a license to submit a decommissioning plan and requires that the surety "in its full amount shall be presented to the Licensing Board prior to the commencement of construction."

Lastly, Section H authorizes the Licensing Board to enforce the by-law and Section I contains a severability and conflicts clause, including that "[i]f any provision of this bylaw [is] found to be in conflict with the provisions of other town bylaws, the provision of this bylaw shall supersede the other bylaws."

II. The Attorney General's Standard of Review and Constraints on the Town's Police Power

A. Standard of Review of General By-laws

Our review of Article 1 is governed by G.L. c. 40, § 32. The Attorney General is authorized to disapprove a by-law that conflicts with state law or the constitution. See 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). The Attorney General does not

review the policy arguments for or against the enactment of a by-law. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law."). Instead, when reviewing 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. Amherst, 398 Mass. at 795 ("The Attorney General is guided in the exercise of his limited power of disapproval by the same principles that guide us.").

Because the adoption of a by-law by the voters at Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." Durand v. IDC Bellingham, 440 Mass. 45, 51 (2003). However, a "municipality has no power to adopt a by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6. Therefore, a town's general police power "cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature." Rayco Inv. Corp. v. Selectmen of Raynham, 368 Mass. 385, 394 (1975) (quoting Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 360 (1973)).

B. General By-laws Versus Zoning By-Laws

Zoning by-laws are those "by-laws, adopted by …towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of …towns to protect the health, safety and general welfare of their present and future inhabitants." G.L. c. 40A, § 1A. "The zoning power is, of course, merely one category of the more general police power, concerned specifically with the regulation of land use." Rayco, 368 Mass. at 392 n. 4. By-laws that regulate the use of land, buildings and structures must comply with the Zoning Act, G.L. c. 40A, including the Zoning Act's limitations on the subject matter of zoning by-laws (G.L. c. 40A, § 3) and the Zoning Act's procedural requirements for adoption or amendment of zoning by-laws (G.L. c. 40A, § 5). See Spenlinhauer, 80 Mass. App. Ct. at 137-38.

The distinction between a general by-law and a zoning by-law is an important one. "[V]alid zoning measures can be implemented only by following the procedures spelled out in G.L. c. 40A," Spenlinhauer, 80 Mass. App. Ct. at 137. The Zoning Act's procedural requirements for adoption or amendment of zoning by-laws are substantial, and include the following requirements: (1) prior to the adoption or amendment of a zoning by-law, the planning board must hold a public hearing, after giving due notice, and provide a report with recommendations to Town Meeting; (2) notice of the planning board hearing must also be provided to the Executive Office of Housing and Livable Communities (previously called the Department of Housing and Community Development), the regional planning agency, the Planning Boards of all abutting cities and towns, and all non-resident property owners (who have filed a request with the Clerk for notice); (3) any motion to adopt or amend a zoning by-law must be approved by a two-thirds vote of Town Meeting (except for certain housing related provisions not applicable here that can be adopted by majority vote); and (4) if a proposed adoption or amendment fails to pass at Town Meeting, it cannot be revisited within two years (with one exception). See G.L. c. 40A, § 5.

In addition to the procedural requirements for adoption (or amendment) of a zoning by-law, "changes in zoning [by-laws] protect some prior existing uses, see G.L. c. 40A, § 6, but general [by-laws] typically do not." Spenlinhauer, 80 Mass. App. Ct. at 137-38. Because of the procedural protections required for adoption (or amendment) of zoning by-laws, "[t]he distinction between zoning and other regulations is not an empty formality[.]" Id. at 137. When a town adopts a land use by-law as a general by-law rather than as a zoning by-law, these procedural safeguards are frustrated. Id. at 137-39 (ordinance limiting overnight off-street parking invalid exercise of general police power). See also Rayco, 368 Mass. at 393-94 (by-law limiting number of trailer park licenses invalid because town failed to adopt it as a zoning by-law).

III. Because Article 1 Seeks to Regulate the Use of Land, It Must be Adopted as a Zoning Article

A. Applicable Law

We have considered whether Article 1 regulates the use of land, building and structures, such that it must comply with the Zoning Act, G.L. c. 40A, § 5. We conclude that it does regulate the use of land, buildings, and structures and therefore must be adopted as a zoning by-law. We are guided in this determination by what courts have considered when deciding whether "the nature and effect of the [by-law] is that of an exercise of the zoning power." Rayco, 368 Mass. at 392-93. Factors the courts consider include: whether the by-law is within the town's zoning power and has the town historically regulated the subject at hand in its zoning by-law? Id. ("There seems little doubt that the [general] by-law could be viewed as within the scope of the town's zoning power…[and] prior to the adoption of the [general] by-law the town's zoning by-law dealt specifically with the subject of trailer parks."); and whether the by-law "prohibit[s] or permit[s] any particular listed uses of land or the construction of buildings or the location of buildings or residences in a comprehensive fashion," or instead, require[s] that "permission be obtained…based on factual circumstances surrounding individual applications." Lovequist, 379 Mass. at 13 (wetlands protection by-law, involving individual application process, not required to be adopted as a zoning by-law). See also Spenlinhauer, 80 Mass. App. Ct. at 141-42 ("The bylaw does not simply focus on individual applications for activities in which a landowner wishes to engage but instead regulates parking on all land in single-family residence zones" and thus should have been adopted under procedures for zoning by-laws).

In determining whether the Article 1's adoption as a general by-law was proper, we also consider (as would a court): whether the by-law's provisions "deny or invite permission to build any structure"? Lovequist, 379 Mass. at 13; whether the by-law seeks to manage the "typical concerns usually reflected in the zoning process" such as "air pollution, noise, demands for sewers and other municipal services or the character of the community and compatibility of nearby land uses" Id.; and whether the by-law's impact on land use is secondary to its dominant purpose of protection of some other general concern, such as the protection of wetlands values (as in Lovequist), the regulation of earth removal, (Glacier Sand & Stone Co. v. Board of Appeals of Westwood, 362 Mass. 239 (1972)), or the regulation of signs (American Sign and Indicator Corp. v. Town of Framingham, 9 Mass. App. Ct. 66, 68-69 (1980), all of which can be accomplished through either general or zoning by-laws.

In ruling that a trailer park general by-law manifested the "nature and effect" of a zoning by-law, the Rayco court found it "significant" that prior to the by-law at issue, the town had previously dealt with the issue of trailer parks in its zoning by-law rather than its general by-laws, and had done so comprehensively. Rayco, 368 Mass. at 393 ("It is evident that this portion of the zoning by-law purported to cover this subject in a comprehensive fashion…."). Similarly, the Town of Barnstable had thoroughly regulated off-street parking "at almost any conceivable location" through its zoning by-laws before adopting the general by-law which Spenlinhauer challenged. Spenlinhauer, 80 Mass. App. Ct. at 139-40 ("The bylaw as a whole…clearly evinces the town's historical reliance on the zoning by-law to deal with parking."). In Lovequist, by contrast, there was no evidence "that there is or ever has been a comprehensive zoning by-law governing the wetland activities proposed by the plaintiffs." Lovequist, 379 Mass. at 14.

Within this framework, we analyze the amendments adopted under Article 1.

B. Article 1 Regulates the Use of Land

Although captioned as a "licensing" by-law, Article 1 establishes requirements and performance standards for the "construction and operation" of BESS. These requirements are wide-ranging and include, but are not limited to:

1. prohibiting BESS over 10MW (Section A);

2. regulating and managing "the hazards" associated with BESS so as to minimize the risks to the health, safety and welfare of the Wendell community (Section A);

3. requiring the construction and operation of a BESS to be in compliance with numerous requirements including those related to safety, construction, electrical and communication requirements (Section B);

4. requiring plans and designs for the installation of a BESS to be reviewed and certified by the Building Inspector (Section B);

5. regulating where a BESS can be sited including prohibiting a BESS on a site over five acres and prohibiting a BESS from being constructed on a site where more than 25% of the site is comprised of undeveloped land (Section C);

6. imposing clear-cutting requirements and prohibiting a BESS from clear-cutting more than one-half acre of forest land (Section C);

7. requiring an emergency operations plan, a hazard mitigation analysis, an air dispersion model, an analysis to determine the extent and effect of thermal runaway and an analysis of the Town's manpower and equipment for an emergency response (Section D);

8. identifying all hazards associated with the BESS and determination of the effective response manpower and equipment necessary to respond (Section D); and

9. requiring "such other analyses as may be requested by the Town (Section D) as well as any "[o]ther procedures or information as determined necessary by the Licensing Board" necessary to "provide for the safety of occupant, neighboring properties and emergency responders." (Section D)

The proposed by-law seeks to regulate and manage "typical concerns usually reflected in the zoning process." Lovequist, 379 Mass. at 13. As detailed above, the by-law imposes extensive regulations including prohibiting BESS over 10MW in size; prohibiting BESS on parcels over 5 acres or on parcels with more than 25% undeveloped land; imposing requirements related to clear-cutting of trees including a prohibition against clear cutting over one-half acre of forest land; and requiring an analysis and plans to minimize fire and other hazards associated with the use.

In addition, the by-law seeks to provide a method to "deny or invite permission to build any structure." Lovequist, 379 Mass. at 13. The by-law requires that, before a BESS may be constructed or operated, the Licensing Board must first grant a license and must make specific findings under Sections D and E of the by-law. In the absence of the Licensing Board making such findings and granting a license, a BESS will not be allowed to be *constructed* or operated. This land use permit-granting authority is a emblematic exercise of the Town's zoning power.

Further, Article 1's purpose section, Section A, mirrors many of the purposes of the Town's zoning by-law regulating solar with or without accessory battery energy storage facilities. The proposed general by-law's purpose is to "protect[ ] the health, safety and welfare of residents of Wendell and its natural and building environment" by adding a new bylaw "dealing with the licensing of" BESS. Section A. In addition, Section A's articulated purpose includes "responsibly regulating and managing the hazards associated with this energy technology…to minimize the risks to health safety and welfare of the Wendell community" as well as "limit[ing] unnecessary forest land conversion and clear-cutting, reducing the loss of all other forest benefits, and promot[ing] the reuse of already developed sites for battery energy storage systems." Section A.

These purposes and requirements are "typical of the concerns usually reflected in the zoning process." Lovequist, 379 Mass. at 13-14. Indeed, the Town's existing zoning by-law, Article XIV, regulating ground-mounted solar installations with or without accessory battery energy storage facilities includes as its purpose "establish[ing] a procedure to find a balance between renewable energy generation and natural and cultural resource protection that serves both our social and environmental responsibilities and protects public health and safety." Moreover, the Town's existing zoning by-laws as a whole include as their purpose "promot[ing] the health, safety and welfare of the inhabitants of Wendell in accordance with The Zoning Act, Chapter 40A, Massachusetts General Laws; to… regulate land uses that have an impact on the Town's natural physical and fiscal capabilities,… to maintain and encourage agricultural and other resource based activities; to preserve wildlife habitat; to protect water quality and supply;

to encourage appropriate use of the land; to ensure adequate provision of municipal services consistent with controlled growth of the population; to reduce hazards;… to encourage energy efficiency;… and to preserve the ecology and rural nature of the town." Wendell Zoning By-laws, Article I, "Purpose and District Designation." The preservation of "unique natural, ecological or other values" is a classic exercise of zoning power. Johnson v. Town of Edgartown, 425 Mass. 117, 119 (1997) (upholding Town's three-acre minimum lot requirement for residential uses in a certain district in order to protect the public health, water, water supply and water resources). These shared purposes of the new Article 1 and the Town's existing zoning by-laws weigh in favor of the conclusion that Article 1 demonstrates "the nature and effect" of a zoning by-law. Rayco, 368 Mass. at 392-93.

We have also considered whether the Town has previously regulated BESS through a zoning by-law. As the court in Spenlinhauer noted, one factor in determining whether a particular topic should be regulated by way of a zoning by-law, rather than a general by-law, is how the town has historically regulated the topic. Id. at 140 ("The bylaw as a whole, then, clearly evinces the town's historical reliance on the zoning bylaw to deal with parking."). See also Rayco, 368 Mass. 385 (1975) (holding that a trailer park regulation should have been adopted as a zoning by-law rather than a general by-law, in part because the town's zoning by-law had previously dealt specifically with trailer parks). Here, Wendell has historically regulated BESS (and solar uses that include BESS) by way of a zoning by-law (see AGO decision in Case # 10721 disapproving zoning by-law prohibition on principal use BESS and approving remainder of zoning by-law regulating BESS accessory to solar uses, Article 30 from the June 4, 2022 Annual Town Meeting).[5] Article XIV of the Town's zoning by-laws regulates the construction and operation of BESS. The existing zoning by-laws comprehensively regulate the size of the solar use with our without battery storage (Article XIV (C)); whether such use is as of right or requires a special permit and site plan review (id.); water provision at the site including fire protection measures (Article XIV (E)(2a)(vii)); the requirement to submit a hazard mitigation and hazardous materials plan (Article XIV (E)(2c)(i); and forest removal limitation requirements for solar with or without accessory battery storage (Article XIV (F)(1)).

Further, as detailed above, the licensing by-law imposes extensive regulations typical of zoning including prohibiting BESS over 10MW in size; prohibiting BESS on parcels over 5 acres or on parcels with more than 25% undeveloped land; imposing requirements related to clear-cutting of trees including a prohibition against clear cutting over one-half acre of forest land; and requiring an analysis and plans to minimize fire and other hazards associated with the use. Moreover, the licensing by-law requires the construction and operation of *all BESS*, including BESS accessory to or in connection with a solar use, to receive a license from the Licensing Board. However, we note that the general by-law's BESS licensing provisions conflict in certain respects with the Town's zoning by-laws governing solar with or without accessory BESS. For example, the general licensing by-law prohibits all BESS from "clear-cutting of forest land in excess of one-half (.5) of an acre." Section C (4). This conflicts with the Town's existing zoning by-law, Article XIV (F)(1), "Site Design and Performance Standards and Restrictions; Environmental impacts," that allows up to 1 acre of forest removal at a solar installation with or without accessory battery storage, as follows: "Forest removal shall be limited to a maximum cumulative total of 1 acre to prevent erosion, protect water and air quality and to provide climate

[5] A copy of this decision can be accessed at: www.mass.gov/ago/munilaw (decision lookup).

benefits to the public health and welfare." Therefore, the Town's zoning by-law allows forest removal up to one acre, but the licensing by-law will require disapproval of a licensing application if the forest removal exceeds one-half acre.

By way of another example, the general licensing by-law prohibits any BESS over 5 acres in size. Section C (3) ("[t]otal site square footage per applicant shall not exceed five acres."). However, the Town's zoning by-law, Article XIV, Sections B and C, allow "very large-scale ground-mounted solar electric generating installation" with accessory BESS in the Solar Overlay District that "occupy… over 5 acres of land and up to 10 acres of land." Therefore, a BESS use allowed under the Town's zoning by-laws would be prohibited under the Town's general licensing by-law. A general by-law may not be effective to change earlier zoning by-law provisions governing a particular subject matter where, as here, the procedural requirements of Chapter 40A, the Zoning Act, have not been observed. See Rayco, 368 Mass. at 394 (concluding that by-law limiting trailer-park operator licenses was insufficient to amend town's previous zoning by-law regulating such parks where record did not demonstrate that license limitation had been enacted in accordance with the procedural requirements of Chapter 40A); see also Valley Green Grow, Inc. v. Town of Charlton, 2019 WL 1087930, at *1 (Mass. Land Ct. Mar. 7, 2019) (declaring invalid a general by-law prohibiting all commercial marijuana uses enacted by special town meeting several months after town had enacted zoning to govern these uses at its annual town meeting).

In addition, the general by-law does not merely supplement the regulation of a use already governed by the zoning by-laws. Rather, the general by-law seeks to impose extensive regulations, including prohibitions on BESS over a certain size or certain acreage, despite the use being otherwise allowed under the zoning by-laws. Where a town has enacted comprehensive zoning by-laws governing a particular use or activity within its borders, amendments to that regulation must occur within the zoning framework. Id. at 10 ("Having permitted marijuana use through its zoning bylaw, Charlton could only change or bar that use by amending the zoning bylaw. It could not do what it did here -- bar the previously allowed zoning use by Warrant Article 2, a general bylaw.").

For these reasons, the general by-law proposed under Article 1 demonstrates "the nature and effect" of an exercise of zoning power, without complying with any of the procedural safeguards required by the Zoning Act, G.L. c. 40A, § 5. See Hancock Village I, LLC v. Town of Brookline, 2019 WL 4189357 (Mass. Land Ct. Sept. 4, 2019), citing Rayco, 368 Mass. at 385, ("A municipality cannot utilize its general police power to enact a bylaw which is, at its essence, a zoning regulation, if it does not resort to G. L. c. 40A; doing so would frustrate the purpose and implementation of the statute.")). Because the Town did not comply with G.L. c. 40A, § 5, we must disapprove the proposed by-law.[6]

[6] We note that during the course of our review, we received correspondence from a Town resident and author of Article 1 who asserts that the "[w]e acknowledge that two sections of the bylaw meet the standards for land use and zoning…," and further states that "[t]he Dover Amendment does not apply to general town by-laws." Letter dated June 30, 2024 from Gloria Kegeles to AAG Hurley, pgs. 1 and 4.

IV. The Town Cannot Circumvent the Protections of G.L. c. 40A, § 3 for a Protected Use by Adopting the By-law as a General By-law

Solar energy facilities and related structures, such as BESS, are a use protected under G.L. c. 40A, § 3. By extensively regulating this protected use as a general by-law, the Town would impermissibly circumvent the protections of G.L. c. 40A, § 3. We disapprove Article 1 on this basis as well, as explained below.

Solar energy facilities and related structures have been protected under G.L. c. 40A, § 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 Realty, LLC 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.

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] See also NextSun Energy LLC v. Fernandes, No. 19 MISC 000230 (RBF), 2023 WL 3317259, at *14 (Mass. Land Ct. May 9, 2023), amended, No. 19 MISC 000230 (RBF), 2023 WL 4156740 (Mass. Land Ct. June 23, 2023), judgment entered, No. 19 MISC 000230 (RBF), 2023 WL 4145901 (Mass. Land Ct. June 23, 2023) (finding that battery energy storage system is entitled to Section 3 solar protections).

Solar uses, including BESS, are a use protected under G.L. c. 40A, § 3. The Town's general licensing by-law attempts to impose extensive regulations on the construction and operation of BESS, including a complete prohibition under the general by-laws of any BESS over 10MW, or sited on over 5 acres, or which removes more than ½ acre of forest land. Certain requirements could potentially be an unreasonable regulation in violation of Section 3's zoning protections, even if they were properly adopted as a zoning by-law.[8] Therefore, the prohibitions,

[7] 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 ("Clean Energy Act"), was signed into law by Governor Baker. Section 20 of the Clean Energy Act established a 1,000 MWh energy storage target to be achieved by December 31, 2025. The Clean Energy 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 November 12, 2024).

[8] However, as part of this decision, we make no determination as to whether the amendments would be found consistent with the G.L. c. 40A, § 3 protections afforded to solar energy systems and related structures such as BESS, had the amendments been adopted in accordance with G.L. c. 40A, § 5 as a zoning by-law rather than under Article 1 as a general by-law. We note, however, that the provisions of Article 1 contain extensive siting and operational requirements. Thus, if these extensive provisions were adopted as a zoning by-law and then used to deny a BESS, or are otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems and related structures (including BESS), such applications may run a serious risk of violating G.L. c. 40A, § 3. See Tracer Lane II, 489 Mass. at 781 (Waltham's prohibition on solar energy systems in all but one to two percent of its land area violates

limitations and requirements on the construction and operation of BESS, through a general by-law would impermissibly circumvent the G.L. c. 40A, § 3 protections afforded to BESS uses. For this additional reason, and because the by-law regulates the use of land, buildings and structures for BESS, without complying with the Zoning Act, G.L. c. 40A, including G.L. c. 40A, § 3's limitations on the subject matter of zoning by-laws, we disapprove Article 1.

V. Conclusion.

The general by-law proposed under Article 1 demonstrates the "the nature and effect" of an exercise of zoning power. See Rayco, 368 Mass. at 392-93. Before imposing the zoning-like requirements found in the proposed by-law, the Town must comply with the procedural safeguards found in the Zoning Act, G.L. c. 40A, § 5. Because the Town did not comply with G.L. c. 40A, § 5, we must disapprove the proposed by-law. In addition, because the by-law would impermissibly circumvent the G.L. c. 40A, § 3 protections afforded to solar energy facilities and related structures such as BESS, without complying with the Zoning Act, G.L. c. 40A, including G.L. c. 40A, § 3's limitations on the subject matter of zoning by-laws, we disapprove Article 1.

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.

Very truly yours,

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the solar energy provisions of G.L. c. 40A, § 3); see also PLH LLC v. Town of Ware, No. 18 MISC 000648 (GHP), 2019 WL 7201712, at *3 (Mass. Land Ct. Dec. 24, 2019), aff'd, 102 Mass. App. Ct. 1103 (2022) ("the review of the municipality conducted under the bylaw's special permit provisions must be limited and narrowly applied in a way that is not unreasonable, is not designed or employed to prohibit the use or the operation of the protected use, and exists where necessary to protect the health, safety or welfare."). Therefore, should the Town wish to revisit the requirements proposed under Article 1 as a zoning by-law amendment at a future Town Meeting, we encourage the Town to consult with Town Counsel to ensure that any proposed zoning by-law is consistent with G.L. c. 40A, § 3.