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May 29, 2024

Doris Jemiolo, Town Clerk
Town of Blandford
1 Russell Stage Road
Blandford, MA 01008

Re: Blandford Annual Town Meeting of June 6, 2022 – Case # 11165
Warrant Articles # 22 and 25 (Zoning)
Warrant Article # 21 (General)

Dear Ms. Jemiolo:

Article 25 - We approve Article 25 from the June 6, 2022 Blandford Annual Town Meeting.[1]

Under Article 25 the Town voted to amend the zoning by-laws by: (1) deleting Section XII, "Schedule of Uses Table," in its entirety and inserting a new Section XVI, "Schedule of Uses Table;" (2) renumbering Section XIII," Definitions," as Section XVII, "Definitions;" (3) inserting new definitions for "home occupation" and "home professional office" and renumbering the existing definitions; (4) renaming Sections XII and XIII as "Section Reserved;" and (5) amending Section 4.4.4, "Permitted Uses," to say "See Section XVI: Schedule of Uses Table."

We approve these amendments and offer comments for the Town's consideration regarding the new Section XVI, "Schedule of Uses Table" (Table).

[1] On December 8, 2023, we placed Articles 21, 22, 23, 24 and 25 on HOLD pending our receipt of additional documents from the Town, as required under G.L. c. 40, § 32 and G.L. c. 40A, § 5, to complete our review of the by-laws. On January 29, 2024 we received the required documents from the Town needed to complete our review of Article 21 and on that date, we took Article 21 off hold and assigned it a new 90-day deadline of April 28, 2024. Also on January 29, 2024 we received confirmation from the Town that Articles 23 and 24 were tabled at Town Meeting and are therefore not part of the Town's by-law submission. On March 11, 2024, we received additional documents from the Town needed to complete our review of Articles 22 and 25, and on that date, we took Articles 22 and 25 off hold and assigned these Articles a new 90-day deadline of June 9, 2024. On April 24, 2024 we issued a decision to the Town approving Articles 21 and 22.

A. Section 2.0 – Community Uses

The Table, Section 2.0, "Community Uses," Subsection 2.3, "Convalescent Home or Nursing Home," allows these uses by special permit in the Agricultural District (AG) and prohibits them in the remaining three districts (Residential (R), Business (B), and Long Pond Watershed Protection (LPWP) districts). The Town must apply this portion of the Table in a manner consistent with the protections provided to disabled persons under G.L. c. 40A, § 3 as follows:

> Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

The Town should consult with Town Counsel to ensure that it applies this portion of the Table consistent with the protections given under G.L. c. 40A, § 3.

B. Section 3.0 – Agricultural Uses

The Table, Section 3.0, "Agricultural Uses," regulates agricultural uses. The following agricultural uses are prohibited in the LPWP district on parcels of land with 5 acres or less as follows: (1) agriculture, horticulture, floriculture, or viticulture (Section 3.1); (2) the raising of hogs, pigs, or fur-bearing animals[2] (Section 3.3); (3) nurseries[3] (Section 3.4); and (4) farm stands (Section 3.6). In addition, the use of farm stands is prohibited in the LPWP on parcels of land with 5 acres or more. Further, the uses of: (1) raising of hogs, pigs or fur-bearing animals on parcels of land with more than five acres (Section 3.2) and (2) commercial kennels or stables and riding schools on parcels of land with not fewer than three acres (Section 3.7) are prohibited in all districts except the AG district where these uses are allowed by special permit (Section 3.7). Finally, lumbering, portable sawmills and portable planting mills are prohibited in all districts except the AG district where the use is allowed by right (Section 3.8).

We encourage the Town to consult with Town Counsel to ensure that these portions of the Table are applied consistent with G.L. c. 40A, § 3, that provides exemption from local zoning by-laws for certain agricultural uses and provides in relevant part as follows:

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[2] We note that in Section 3.3 of the Table the use of "Raising of Hogs, Pigs or Fur-bearing Animals on parcels of land with fewer than 5 acres" is prohibited in the LPWP district but the Table is blank as to this use in the other three districts (AG, R and B). The Town should consult with Town Counsel both to ensure the proper application of Section 3.3 as discussed above in more detail and to determine if a future amendment to the Table is needed to address the blank spaces.

[3] This use is also prohibited in the B district.

> No zoning…by-law…shall…prohibit unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products.....

General Laws Chapter 128, Section 1A, defines agriculture and includes the raising of horses and the "keeping of horses as a commercial enterprise," in pertinent part as follows:

> "Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

Agricultural uses including the raising of pigs and fur-bearing animals; growing and harvesting of agricultural, floricultural or horticultural commodities; the keeping of horses as a commercial enterprise; and forestry or lumbering activities, are included in the definition of agriculture and enjoy the protections accorded to agriculture under state law. In addition, in some circumstances, commercial kennels that include the breeding and raising of dogs may be considered agricultural uses and entitled to the protections provided under G.L. c. 40A, § 3. See Sturbridge v. McDowell, 35 Mass. App. Ct. 924, 926 (1993).

These statutes together establish that, to the extent the use of land or structures constitutes commercial agriculture, the Town cannot require a special permit for, unreasonably regulate, or prohibit such activities: (1) on land zoned for agriculture; (2) on land that is greater than five acres in size; and (3) on land of 2 acres or more if the sale of products from the agricultural use generates $1,000 per acre or more of gross sales. In instances where agricultural uses enjoy the protections given to agricultural uses under state law the Town cannot prohibit, require a special permit, or unreasonably regulate such use. The Town must apply these portions of the Table consistent with the protections given to agriculture under G.L. c. 40A, § 3. The Town should consult with Town Counsel with any questions on this matter.

C. Section 5.0 – Wholesale, Transportation and Industrial Use; Solar Uses

As amended under Article 25, the Table now categorizes ground mounted solar photovoltaic installation (solar installations) uses as large, medium or small solar installations and provides as follows: [4]

	Use	AG	R	B	LPWP	Notes
5.3	Large Ground Mounted Solar Photovoltaic Installation	SP	N	N	N	See sections VIII & IX
5.4	Medium Ground Mounted Solar Photovoltaic Installations	SPA	N	N	N	See sections VIII & IX
5.5	Small Ground Mounted Solar Photovoltaic Installations	Y; SPA*; SP/SPA**	Y; SPA*; SP/SPA**	Y; SPA*; SP/SPA**	N	See sections VII & IX [5]

We approve these Table amendments because we cannot conclude that they amount to an unreasonable regulation of solar facilities in conflict with G.L. c. 40A, § 3. See Tracer Lane II v. City of Waltham, 489 Mass. 775, 779, 781 (2022) (to evaluate the validity of a solar by-law under G.L. c. 40A, § 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.") However, the Town must ensure that the Table provisions, as well as its existing by-law (Section VIII, "Ground Mounted Solar Photovoltaic Installations") are applied consistent with the protections granted to solar installations, as explained in more detail below.

1. Zoning Protection Granted to Solar Installations by G.L. c. 40A § 3

Solar energy facilities and related structures have been protected under G.L. c. 40A, § 3 (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

[4] Prior to the amendments adopted under Article 25, the Town's existing Table had a line item for only "Ground Mounted Solar Photovoltaic Installations" and allowed that use by special permit (SP) in the AG and LPWP districts and prohibited that use in the R and B districts.

[5] Section 5.5 of the Table regarding small solar installations includes annotations based on whether the small solar installation is less than 9 feet; between 9 and 20 feet; or greater than 20 feet in height. The annotations provide that in the AG, R and B districts a small solar installation less than 9 feet is allowed by right (Y); between 9 and 20 feet is allowed by site plan approval (SPA*); and greater than 20 feet is allowed by special permit and site plan approval (SP/SPA**).

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.

2. The Solar Related Provisions Must be Applied Consistent with G.L. c. 40A, § 3 Protected Uses

We approve the solar related amendments to the Table (Sections 5.3-5.5) adopted under Article 25 because we cannot conclude that the amendments amount to an unreasonable regulation of solar facilities and related structures in conflict with G.L. c. 40A, § 3. Large and medium solar installations are allowed only in the AG district but are prohibited in the remaining three districts (R, B and LPWP). Given these siting limitations, it is not clear whether there is sufficient land in the Town to accommodate a large or medium solar installation. If these provisions are used to deny a solar installation, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems and related structures, such application would 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 the solar energy provisions of G.L. c. 40A, § 3.) The Town should consult further with Town Counsel to ensure the proper application of these Table provisions.

Finally, according to Section 5.3 of the Table, large solar installations are allowed by special permit (SP) in the AG district. However, the Town's existing zoning by-laws, Section VIII, "Ground Mounted Solar Photovoltaic Installations," Section 8.2, "Applicability," Subsection 8.2.2, provides that large solar installations require a special permit and site plan approval (SPA). Therefore, the Table does not appear to match the requirements of Section 8.2.2. The Town should consult with Town Counsel to determine if a future amendment is needed to address this issue.

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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cc: Town Counsel Mark R. Reich