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September 20, 2021

Oak Bluffs, MA
Town Clerk's Office
September 20 2021
Rec'd for Record
AT H M M
10:35AM

Colleen E. Morris, Town Clerk
Town of P.O. Box 2490
Oak Bluffs, MA 02557

Re: Oak Bluffs Annual Town Meeting of May 15, 2021 -- Case # 10220
Warrant Article # 40 (Zoning)
Warrant Articles # 36, 38, 39, 43 and 45 (General)

Dear Ms. Morris:

Articles 36, 38, 39, 40, 43 and 45 - We approve Articles 36, 38, 39, 40, 43 and 45 from the May 15, 2021 Oak Bluffs Annual Town Meeting. Our comments regarding Articles 39, 40 and 45 are provided below.

Article 39 - Article 39 amends the Town's general by-laws to add a new Chapter XXIX, "Stretch Energy Code." The purpose of the new by-law is to regulate the design and construction of buildings for the effective use of energy in accordance with 780 CMR, Appendix 115.AA. Section 4, "Effective Date," provides in relevant part as follows: "The Stretch Code is enforceable by the inspector of buildings or building commissioner and effective as of 1 July 2021."

Pursuant to G.L. c. 40, § 32, a by-law approved by the Attorney General must be posted or published before it goes into effect:

> Before a by-law or an amendment thereto takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town.

Therefore, the new "Stretch Energy Code" by-law does not become effective until the Town satisfies the posting/publishing requirements of G.L. c. 40, § 32. The Town should consult with Town Counsel with any questions on this issue.

Article 40 – Article 40 amends the Town's zoning by-laws to insert a new Section 12.7, "Large-Scale Ground-Mounted Solar Photovoltaic Installations, As-of-Right." The purpose of the new by-law is to "promote the creation of new large-scale ground-mounted photovoltaic

installations" by providing standards for same in order to, among other things, address public safety and minimize impacts on scenic, natural and historic resources. Section 12.7.1, "Purpose." The by-law applies to large-scale ground-mounted solar photovoltaic installations ("solar installations"), as defined in Section 12.7.4, "Definitions," but does not apply to solar installations that are smaller than 250kW or those which are not ground mounted. Section 12.7.2, "Applicability." The by-law also provides for specific "Designated Locations" where solar installations may be sited as of right. See Section 12.74. In addition, the by-law requires solar installations 250kW or larger to undergo site plan review as well. Section 12.7.6, "Site Plan Review."

We approve Article 40 because it does not present a clear conflict with state law or the Constitution. Amherst v. Attorney General, 398 Mass. 793, 798, n. 8 (1986). However, the Town must apply the amendments adopted under Article 40 consistent with the protections given to solar energy systems and the building of structures that facilitate the collection of solar energy under G.L. c. 40A, § 3, that provides 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.

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, there are number of Land Court decisions that provide some guidance.

Most recently, the Land Court in Tracer Lane II Realty, LLC v. City of Waltham, 2021 WL 861157 * 5 (March 5, 2021), concluded that a categorical prohibition of solar facilities in a majority of the city without a showing that the prohibition is "necessary to protect the public health, safety or welfare" of the city is inconsistent with G.L. c. 40A, § 3's protections. In reaching its decision, the Land Court rejected as irrelevant the fact that solar energy facilities would be allowed as of right in four small areas of the city.[1] Similarly, in Northbridge McQuade, LLC v. Northbridge Zoning Bd. of Appeals, Mass. Land Ct., No. 18 Misc 000519 * 2 (June 17, 2019) (Piper, C.J.), the court concluded that before a Town may regulate or prohibit a proposed solar installation on any site in the town, there must be an analysis of the need to prohibit or regulate the solar installation measured against the legislatively determined public interest in allowing the solar energy installation. (See Order Granting Partial Summary Judgment). In addition, in PLH LLC v. Ware, 2019 WL 7201712, at *3 (December 24, 2019). (Piper, C.J.), the Land Court upheld a special permit requirement applicable to solar energy projects but ruled that "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."

However, in Duseau v. Szawlowski Realty Inc., 2015 WL 59500, * 8 (January 2, 2015) the Land Court concluded that a 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 Duseau the court acknowledged that G. L. c. 40A, § 3's

[1] On April 5, 2021 the City filed a notice of appeal of this decision. This appeal is currently pending in the Appeals Court, case # 2021-P-0429. See Appeals Court docket: https://www.ma-appellatecourts.org/docket/2021-P-0429 .

exemption would invalidate such a prohibition "if it can be demonstrated that restricting solar energy systems only to the industrial districts is an 'unreasonable' regulation, and that such a regulation is not necessary to protect the public health and welfare." See also Briggs v. Zoning Board of Appeals of Marion, 2014 WL 471951 * 5 (February 6, 2014) (a zoning board of appeals' decision upholding a division between commercial solar energy and residential accessory solar energy was reasonable and did not violate G.L. c. 40A, § 3).

Based upon the limited record available to us in our review of town by-laws we do not have the complete factual record necessary to determine if Article 40 would satisfy the test in Tracer Lane and G.L. c. 40A, § 3. If Article 40 is challenged, the Town would need to demonstrate that it has engaged in the requisite balancing of interests required by G.L. c. 40A, § 3. The Town should consult closely with Town Counsel when applying Article 40 to ensure that the Town does not run afoul of the solar use protections in G.L. c. 40A, § 3.

In light of the protections provided to solar installations, we offer the following comments on certain specific amendments in the new Section 12.7 regarding solar installations.

1. Section 12.7.2 – Applicability

Section 12.7.2 provides in relevant part as follows with emphasis added: "[t]his section applies to large-scale ground-mounted solar photovoltaic installations proposed to be constructed after the effective date of this section [voted April 14, 2015, approved August 4, 2015 and published June 10, 2015]. We note that the reference to the 2015 dates relates to the adoption of Section 12.0, "Solar Energy Systems" as a whole, and not to the adoption of this particular section of the by-law (Section 12.7, "Large-Scale Ground-Mounted Solar Photovoltaic Installations, As-of-Right). In applying Section 12.7.2 to solar installations allowed as of right pursuant to Section 12.7, the relevant date is May 15, 2021, the date that Article 40 (adding Section 12.7) was adopted by Town Meeting. The Town should consult with Town Counsel with any questions on this issue and to ensure that Section 12.7.2 is applied properly.

2. Section 12.7.15 – Decommissioning Requirements

Section 12.7.15 (E), "Financial Surety," requires the owner of the solar installation to provide a form of surety to cover the cost of decommissioning the solar installation. General Laws Chapter 44, Section 53, requires that performance security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of the Town's general fund (and subject to future appropriation), unless the Legislature has expressly made other provisions that are applicable to such receipt. An example of such legislative authority is G. L. c. 44, § 53G ½ that allows the deposit of surety proceeds into a special account under certain circumstances, as follows:

> Notwithstanding section 53, in a...town that provides by by-law...rule, regulation or contract for the deposit of cash, bonds, negotiable securities, sureties or other financial guarantees to secure the performance of any obligation by an applicant as a condition of a license, permit or other approval or authorization, the monies or other security received may be deposited in a special account. Such by-law...rule or regulation shall specify: (1) the type of financial guarantees required; (2) the treatment of investment earnings, if any; (3) the performance required and standards for determining satisfactory completion or default; (4) the procedures the applicant must follow to obtain a return of the monies or other security; (5) the use of monies in the account upon default; and (6) any other conditions or rules as the...town

> determines are reasonable to ensure compliance with the obligations. Any such account shall be established by the municipal treasurer in the municipal treasury and shall be kept separate and apart from other monies. Monies in the special account may be expended by the authorized board, commission, department or officer, without further appropriation, to complete the work or perform the obligations, as provided in the by-law...rule or regulation. This section shall not apply to deposits or other financial surety received under section 81U of chapter 41 or other general or special law.

For the Town to deposit surety proceeds into a special account, the Town must comply with the requirements of G.L. c. 44, § 53G ½. Otherwise, surety proceeds must be deposited into the Town's general fund, pursuant to G.L. c. 44, § 53. The Town should consult with Town Counsel with any questions regarding the proper application of Section 12.7.15 (E).

Article 45 - Article 45 amends the Town's general by-laws to add a new Water and Soft Drink Bottle Bylaw. The by-law provides as its purpose to restrict the sale and distribution of water and soda bottles made of plastic because such plastic bottles are "hazardous to health, economy, and the environment." Section 1, "Findings and Purpose." As further explained below, we approve the by-law because we find no conflict with state law or the state Constitution.[2]

The new by-law prohibits the sale and distribution of "(a) non-carbonated, unflavored water, and (b) soft drinks in plastic (including polyethylene terephthalate – PET) bottles of less than 34 ounces in the Town." Section 2, "Regulated Conduct." The by-law defines "soft drink" as "any beverage containing carbonated water, a sweetener (including fruit juice) and/or a flavoring." Section 2. The by-law provides for exemptions for the sale and distribution of drinking water in plastic bottles related to a declaration of emergency affecting the availability or quality of drinking water. Section 2. The by-law also establishes fines and provides for enforcement by the Board of Selectmen pursuant to G.L. c. 40, § 21D. Section 3, "Enforcement Process and Violations." Lastly, the by-law's effective date is May 1, 2022. Section 5, "Effective Date."

In addition to by-laws similar to Article 45 here (see footnote # 1), this Office has also approved several bans on the sale of plastic water bottles.[3] Because the analysis is substantially the same as that for the ban on plastic water bottles, we approve Article 45 because it presents no conflict with state law or the Constitution.

The state constitution's Home Rule Amendment, as ratified by the voters in 1966, confers broad powers on individual cities and towns to legislate in areas that previously were under the Legislature's exclusive control. Home Rule Amendment, Mass. Const. amend. Art. 2, § 6. Towns have used these home-rule powers to prohibit, within their borders, certain commercial activities that state statutes generally recognize as lawful and that are widely accepted in the remainder of the Commonwealth; for example, coin-operated amusement devices, or self-service gas stations. Amherst v. Attorney General, 398 Mass. 793, 798, n. 8 (1986). The Supreme Judicial Court has

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[2] We have approved similar by-laws adopted by the Towns of: Tisbury dated October 2, 2020 (Case # 9866); Aquinnah dated November 15, 2019 (Case # 9602); West Tisbury dated October 4, 2019 (Case # 9358); and Chilmark dated October 4, 2019 (Case # 9602).

[3] See our decisions to the Towns of: Concord dated September 5, 2012 (Case # 6273); Lincoln dated July 2, 2018 (Case # 8807); and Great Barrington dated October 3, 2018 (Case # 8866).

upheld such by-laws and has overturned the Attorney General's disapproval of them where they did not create any specific conflict with state law. Amherst, id.; *see also* Milton v. Attorney General, 372 Mass. 694, 695-96 (1977). The Attorney General thus has no power to disapprove a by-law merely because a town, in comparison to the rest of the state, has chosen a novel, unusual, or experimental approach to a perceived problem.

In addition, G.L. c. 40, § 21, specifically authorizes municipalities to adopt certain categories of local legislation, including "[f]or directing and managing their prudential affairs, preserving peace and good order...", and "[c]onsiderable latitude is given to municipalities in enacting local by-laws." Mad Maxine's Watersports, Inc. v. Harbormaster of Provincetown, 67 Mass. App. Ct. 804, 807 (2006). 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.[4]

Based on the Town's broad home-rule power and the Attorney General's standard of review, we approve Article 45 because it presents no conflict with state law or the Constitution.

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 Michael Goldsmith

[4] Our review of Article 45 included the possible preemptive effect of G.L. c. 94, §§ 321-327, ("the Bottle Bill") and its associated regulations, 301 CMR §§ 4.01-4.09. The Bottle Bill and its regulations do not, however, expressly preempt local action; nor does Article 45 conflict with the regulations. The objective of the Bottle Bill is to encourage the conservation of materials and energy, and to reduce litter, through the recycling and reuse of containers. All Brands Container Recovery. Inc. v. Merrimack Valley Distributing Co., 54 Mass. App. Ct. 297, 298 (2002). To achieve this end, the statute provides a financial incentive, through deposits, refunds, and handling fees, to encourage the return of empty beverage containers. Id. Article 45 seeks to reduce the generation of plastic bottles that must then be recycled or otherwise disposed of. Although the Bottle Bill and Article 45 share an overall goal of reducing the number of beverage containers that consumers introduce into the solid waste stream, they seek to accomplish that goal by entirely different mechanisms. See our decision to the Town of Concord dated September 5, 2012, approving its plastic water bottle ban (Case # 6273) for more details on this issue.