



Save the Pine Barrens
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June 22, 2023

Joint Committee on Telecommunications, Utilities and Energy
Hon. Mike Barrett
Senate Chair
Mike.Barrett@masenate.gov

Hon. Jeffrey Roy
House Chair
Jeffrey.Roy@mahouse.gov

Re: CLWC-Save the Pine Barrens

S. 2164: An act to allow municipalities to reasonably regulate solar siting: SUPPORT

H. 3230: An act to allow municipalities to reasonably regulate solar siting: SUPPORT

Dear TUE:

We write in support of the above-referenced bills to allow municipalities to reasonably regulate solar energy.

We are a public interest, non-profit network of groups and individuals seeking to preserve, protect and steward our unique and finite land and water resources. They are irreplaceable and we are losing them fast.

These bills are necessary in order to address an outdated 40-year old provision of the state Zoning Act that provides undue protection for industrial scale solar energy: the G.L. c. 40A, Section 9 "Dover Amendment" protection for solar. This protection was never intended to extend to large ground mounted solar and battery storage. It was adopted in 1985 at a time when there was no such thing as large industrial ground mounted solar and battery storage. It is

an outdated law being used in a way that 1980s legislators would never have intended nor would they have envisioned this. The Dover Amendment protections for solar must be modified.

Solar siting in Massachusetts is accomplished only through local land use planning through the exercise of home rule and zoning powers. There is no state level planning for the siting of industrial scale projects. Instead, the Department of Energy Resources (DOER) is engaged in de facto land use planning through the SMART solar program distribution of ratepayer subsidies for large solar and battery storage. This is not an appropriate means or method to ensure that solar is properly sited and our climate goals are met.

The results of DOER's de facto land use planning have been a disaster: our coalition is dealing with hundreds of solar projects that have not been properly sited. Solar developers target rural and environmental justice communities who are surrounded by relatively inexpensive land. We are watching volunteers boards spend thousands of hours annually to address all of the siting issue: concerns of abutters about vegetated buffers that protect water, hydrology, battery storage safety and emergency response, recycling of solar panels, and decommissioning; stormwater runoff is a particular concern because these projects completely denude the land, stripping vegetation and stumps and leaving the land in a condition where nothing can grow again in human time, in many instances.

Borrego Solar proposed to dump 150 acres of solar panels at the Wareham Transfer Station until the Planning Board asked hard questions.

The dual use solar program is resulting in harm to wetlands. We have had over 3,000 copper chromated arsenic poles installed in the sole source aquifer.

Solar developers are using the 40A, Section 3 Dover Amendment protection for solar as a weapon to sue local communities. This is not NIMBY-ism; the people of Massachusetts in local communities have the right to stand up for the protection of wetlands, their aquifer, and open space to ensure proper solar siting.

Municipalities have to deal with all aspects of the solar panels, inverters, transformers etc themselves-from construction, safety specs, decommissioning, surety bonds, etc. but also the industrial scale Battery Energy Storage Systems (BESS) installed with them. These have a totally different kind of safety health environmental issue to deal with.

We urge TUE to consider the upcoming study to be issued by MassAudubon and Harvard Forest in the summer of 2023, "Gaining Carbon," for the deployment of solar without destroying forests and landscapes, with no net loss of forest carbon.

Please visit YouTube Channel: [Save the Pine Barrens](#) to see examples of "solar gone wrong" and why we need to address the Dover Amendment for solar.

Electricity from large, industrial ground-mounted solar that destroys forests and farmland is not clean, not green, and a false solution to the climate emergency.

DOER's siting regulations are irreversibly flawed and force taxpayers and ratepayers to subsidize the destruction of our forests, waterways and communities.

We stand in solidarity with urban environmental justice communities bearing the cost of air pollution from the burning of fossil fuels in vehicles. Our rural communities cannot, however, continue to be exploited in the current manner to build large industrial solar projects. The Town of Wareham, for example, already has 19 ground mounted solar projects and is facing an onslaught of 1,400 more acres. BE RE LLC-Colorado is suing the Town of Wareham over the Conservation Commission's decision to deny a permit for a large-ground mounted solar project based on its impact to wetlands. Wareham is an environmental justice community and this is unfair.

We urge you to ensure that the above-referenced bills do not further incentivize improperly-sited ground mounted solar projects. With the state's climate plan calling for another 2 gigawatts of solar our communities are alarmed. We will not stand by while our forests and farmland are sacrificed under energy policies that simply have it backwards: does clear-cutting a forest for a "green" solar project really help the climate? The simple answer is no.

Massachusetts Audubon and Clark University's study shows that over 4,000 acres of Massachusetts forests have been lost to solar development and another 100,000 acres are threatened. While more affluent municipalities have managed to enact zoning bylaws that help protect their communities, real estate values and forests, many in the Southeastern part of the state have not. As a result, we are targeted by reckless solar development. Borrego Solar in particular has a foothold in partnership with the strip mining company, AD Makepeace Co. and have denuded and destroyed hundreds of acres of globally rare ecosystems, Native American sites, filled wetlands and riverfront and imposed the burden of this industrial energy in our residential neighborhoods.

A few pictures are attached. More are available on our website, www.communitylandandwater.org

We will contact your Committee to arrange a meeting in the next legislative session so that you can hear from your constituents directly about this issue.

Thank you for considering our comments. Please contact us if you have any questions or if we can provide any further information.

Sincerely,

Meg Sheehan

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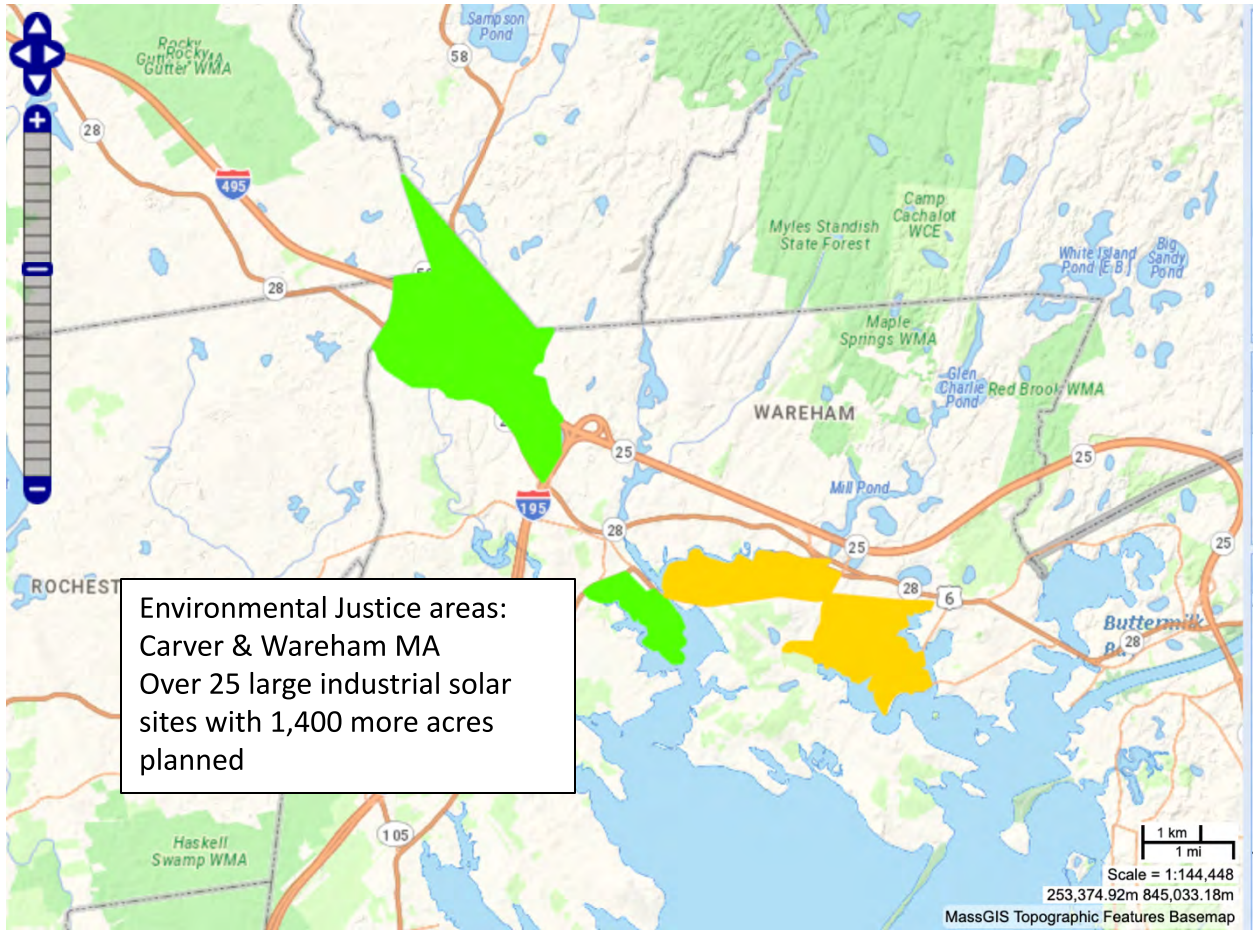
Attachments:
Save the Pine Barrens and Others Amicus Brief



Borrego Solar/AD Makepeace 50 acre project – clear-cut and strip mine of Pine Barrens, Carver MA, Photo Summer 2021



Borrego Solar/AD Makepeace – clear-cut and strip mine of Pine Barrens, c. 2016 to present: 80 acre site Carver (top left), 25 acre site (bottom left) and 50 acre site (right) Wareham c. 2012 to present; solar projects ongoing and expanding here. Image c. 2018



COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13195

Suffolk County, ss

TRACER LANE II REALTY, LLC
Plaintiff-Appellee

v.

CITY OF WALTHAM & another,
Defendant-Appellant

On Appeal From the Land Court

Case No. 19 MISC 000289

BRIEF OF AMICI CURIAE:

**SAVE THE PINE BARRENS, SELECT BOARD OF THE TOWN OF PELHAM,
MASSACHUSETTS, SELECT BOARD OF THE TOWN OF WENDELL,
MASSACHUSETTS, PLANNING BOARD OF THE TOWN OF BUCKLAND,
MASSACHUSETTS, PLANNING BOARD OF THE TOWN OF PELHAM,
MASSACHUSETTS, PLANNING BOARD OF THE TOWN OF SHUTESBURY,
MASSACHUSETTS, PLANNING BOARD OF THE TOWN OF WENDELL,
MASSACHUSETTS, CONSERVATION COMMISSION OF THE TOWN OF WENDELL,
MASSACHUSETTS, SAVE MASSACHUSETTS FORESTS, WAREHAM LAND TRUST,
JONES RIVER WATERSHED ASSOCIATION, CONCERNED CITIZENS OF FRANKLIN
COUNTY, RESTORE: THE NORTH WOODS**

IN SUPPORT OF DEFENDANT-APPELLANT

BY THEIR ATTORNEYS

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Dated: February 14, 2022

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici Save the Pine Barrens, Inc. is a Massachusetts non-profit, membership corporation whose mission is to protect, restore, and steward the lands and waters of Southeastern Massachusetts, and has fiscal sponsorship with Global Justice Ecology Project, a § 501(c)(3) non-profit.

Amici Select Board of the Town of Pelham, Massachusetts is duly elected executive body of the Town of Pelham.

Amici Select Board of the Town of Wendell, Massachusetts is duly elected executive body of the Town of Wendell.

Amici Planning Board of the Town of Buckland is duly established under the authority of G.L. c. 40, § 81A.

Amici Planning Board of the Town of Pelham is duly established under the authority of G.L. c. 40, § 81A.

Amici Planning Board of the Town of Shutesbury is duly established under the authority of G.L. c. 40, § 81A.

Amici Planning Board of the Town of Wendell, Massachusetts is duly established under the authority of G.L. c. 40, § 81A.

Amici Conservation Commission of the Town of Wendell, Massachusetts is duly established under the authority of G.L. c. 40, § 8C.

Amici Wareham Land Trust is a § 501(c)(3) non-profit Massachusetts corporation whose mission is to conserve Wareham's open space and natural resources, to unite citizens in a common

goal of conservation and responsible land use, and to educate the public about the environmental and economic benefits of protecting open space and promoting sustainable development.

Amici Jones River Watershed Association is a § 501 (c)(3) non-profit Massachusetts corporation whose mission is to protect, enhance and restore the quality of the natural resources in Southeastern Massachusetts, in particular the Jones River and Cape Cod Bay, for present and future generations, while cultivating effective stewardship of the regional environment through science, advocacy and education.

Concerned Citizens of Franklin County is an unincorporated 501(c)(3) corporation whose mission is to protect Western Massachusetts' forests.

Save Massachusetts Forests is a project of RESTORE: The North Woods, a non-profit § 501(c)(3) whose mission is to protect Massachusetts forests from development and resource extraction and to protect forests for biodiversity, climate change and human health.

RESTORE: The North Woods is a non-profit § 501(c)(3) Massachusetts-based membership organization whose mission is to restore, preserve, and defend wildlife, wilderness, and public lands through advocacy, public awareness, and citizen activism.

RULE 17(C)(5) DECLARATION

Amici and their counsel declare that they are independent from the parties and have no economic interest in the outcome of this case. None of the conduct described in Appellate Rule 17(c)(5) has occurred:

a. No party or party's counsel authored this brief in whole or in part;

b. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;

c. No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and

d. No amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues; no amicus curiae or its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ISSUES ADDRESSED BY AMICI

The Court's request for Amicus Briefs identified a single question, quoted below from the Supreme Judicial Court's Docket.

Where G. L. c. 40A, § 3, ninth par., precludes zoning ordinances or by-laws that "prohibit or unreasonably regulate the installation of solar energy systems" (except to protect public health, safety or welfare), whether allowing solar energy facilities in certain areas of a municipality but prohibiting them in other areas is permissible or whether it constitutes unreasonable regulation in contravention of the statute.

Amici submit that the answer is that it is permissible and further G. L. c. 40A, § 3, par. 9 does not apply to utility scale ground-mounted solar installations such as that at issue in *Tracer Lane II Realty, LLC vs. City of Waltham & another*, 2021 WL 861157 (Land Ct. 2021).

SUMMARY OF THE ARGUMENT

This is a case of first impression requiring the Court to determine whether G.L. c. 40A, § 3, par. 9 ("par. 9") of the Zoning Act applies to commercial ground mounted solar energy generating facilities (hereafter, "utility scale solar"). The clear answer is par. 9 does not apply because utility scale solar does not fall within the definition of "solar energy system" as used in the enacting legislation, Chapter 637 of the Acts of 1985. The par. 9 term "solar energy system" makes sense only when applied to residential and accessory solar uses. Chapter 637 intended to protect access to the sun for solar panels and to encourage their use to reduce reliance on imports of foreign oil and use of fossil fuels. The statute did not anticipate future utility scale commercial projects. Par. 9 cannot be read alone but must be viewed in the context of Chapter 637, which made ten changes to state law regarding solar, with four to the Zoning Act, to promote solar energy use. The application of par. 9 protection to utility scale solar has absurd results. Unlike any other Dover Amendment protection, par. 9 has been interpreted to allow commercial, industrial and manufacturing uses in any zoning district, completely overriding local zoning, unless the municipality is able to show a connection to a specific public health or safety concern.

The energy industry claims utility scale solar is entitled to zoning protection because it is necessary to address the climate crisis. However, utility scale solar has a negative impact when improperly sited. The state's SMART program is eliminating forests, destroying wetlands, and harming agricultural lands and communities. The SMART program is statutorily mandated to reduce emissions of greenhouse gasses (GHG) such as carbon dioxide (CO2) to the atmosphere. The program's implementation has resulted in the loss of over four thousand acres of Massachusetts forests between 2010 and 2020. The current pace of deforestation and conversion of agricultural lands to industrial energy generation for solar is alarming. The Massachusetts Executive Office of Energy and Environmental Affairs ("EEA") has targeted an additional 158,000 acres of forested lands for conversion to utility scale solar by 2030. The latest report from the Intergovernmental Panel on Climate Change ("IPCC") released in 2021 raised the alarm over the accelerating climate emergency to the highest level yet, a "code red for humanity." The only available means for achieving removal of CO2 from the atmosphere at anywhere near the scale required to mitigate the climate crisis is to enhance accumulation of carbon in natural ecosystems, especially forests and wetlands. This means preserving forests and wetlands, not destroying them. Local zoning, unencumbered by par. 9 is a

critical tool - if not the only tool - available to protect forests and wetlands from the state's misaligned SMART solar subsidy program.

Land use planning is a function of municipal governments under zoning, not the EEA and the state's energy agencies. Applying par. 9 to protect utility scale solar from zoning undermines both local land use powers and the Commonwealth's climate goals. The Court should find that par. 9 applies only to residential solar systems consistent with legislative intent.

ARGUMENT

I. BACKGROUND ON DOVER AMENDMENT FOR SOLAR AND STATE SUBSIDY PROGRAMS

A. The Solar Provisions of the Zoning Act

G.L. c. 40A, § 3 is known as the "Dover Amendment" and was enacted in 1950 in response to local zoning laws that prohibited religious schools in residential neighborhoods. The Dover Amendment has been expanded to give certain land uses more favorable treatment with certain controls. *Boyajian v. Ganzunis*, 212 F.3d 1, 5 (1st Cir. 2000).

In 1985 the Legislature passed *An Act Promoting Solar Energy and Protecting Access to Sunlight for Solar Energy Systems* adding to the Dover Amendment protection for "solar energy systems." 1985 St. 185, c. 637 ("Chapter 637").¹ Chapter

¹ H.R. 6667, 1985 Leg., Reg. Sess. (Mass. 1985).

637 made four changes to the Zoning Act, G.L. c. 40A ("the Solar Provisions") and six changes to other state laws for solar energy. Chapter 637 added definitions for "solar access" and "solar energy system" under G.L. c. 40A, § 1A; authorized solar energy permits under by adding § 9B to G.L. c. 40A; expanded the authority of historic commissions under G.L. c. 40C, § 7; expanded planning board authority under G.L. c. 41; and legalized solar easements under G.L. c. 184 and G.L. c. 187. Nothing in Chapter 637 refers to commercial, industrial or utility scale solar energy generation facilities owned and operated by private corporations for sale to the electrical grid.

B. Solar Massachusetts Renewable Target

The Solar Massachusetts Renewable Energy Target ("SMART") program is a tariff based incentive program implemented by the Department of Energy Resources ("DOER") pursuant to Section 6 of the Global Warming Solutions Act ("GWSA")². 225 CMR 20.00. The GWSA was adopted in 2008, twenty three years after the Solar

² Chapter 298 of the Acts of 2008 enacted the GWSA and added to the General Laws Chapter 21N, the *Climate Protection and Green Economy Act* intended to reduce greenhouse gas emissions. Section 6 of the GWSA directed the Commonwealth and its agencies to promulgate regulations that, *inter alia*, "encourage renewable sources of energy in the sectors of energy generation, buildings and transportation." The SMART regulations were revised and incentives expanded in 2018.

Provisions. It was the first Massachusetts legislation to set targets for reducing greenhouse gas emissions.

In 1990, five years after the Solar Provisions were adopted, the Commonwealth adopted a Renewable Energy Portfolio Standard program ("RPS") requiring all "retail electricity suppliers" to provide a minimum percentage of kilowatt-hours to end-users in the Commonwealth from renewable energy generating sources. G.L. c. 25A, §11F. The RPS is a market-based incentive to encourage the use of "renewable energy." Solar electricity is included in the definition of renewable energy without specificity.

In 1998, Massachusetts deregulated the energy sector shifting the generation of electricity from public utilities into the hands of private energy companies.

In 2021, Massachusetts adopted another climate bill, *An Act Creating A Next-Generation Roadmap for Massachusetts Climate Policy* directing EEA to set targets to put the state on a path to reach "net zero" greenhouse gas emissions by 2050.³

³ *Massachusetts Clean Energy and Climate Plan for 2050 and 2030*, Mass.gov. (2021) [https://www.mass.gov/info-details/massachusetts-clean-energy-and-climate-plan-for-2025-and-2030#development-of-the-clean-energy-and-climate-plan-for-2025-and-2030-](https://www.mass.gov/info-details/massachusetts-clean-energy-and-climate-plan-for-2025-and-2030#development-of-the-clean-energy-and-climate-plan-for-2025-and-2030)

The SMART regulations define a "Solar Tariff Generation Unit" ("STGU")⁴ and ten unique versions thereof. The STGUs obtain a "Statement of Qualification" from DOER authorizing the STGU to sell a renewable energy credit ("REC") to the wholesale electricity market under the RPS program. SMART eligibility criteria and incentive formulas determine the STGU's profitability. 225 CMR 20.05-20.08. STGU over 500 kilowatts must include an energy storage system. 225 CMR 20.05 (5)(k). The SMART financial incentives make utility scale solar profitable and the rush to build these projects is causing the loss of forests and wetlands.

II. THE SOLAR PROVISIONS DO NOT APPLY TO UTILITY SCALE SOLAR INSTALLATIONS

A. The Solar Provisions Should Be Read to Apply to Residential and Accessory Uses, and Not Utility Scale Solar

Principles of statutory construction guide this case.

A fundamental principle of statutory interpretation "is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." . . . Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must

⁴ These are: Agricultural, Behind-the-Meter, Building Mounted, Canopy, Community Shared, Low-Income Community Shared, Low Income, Low Income Property, Public Entity, and Standalone. 225 CMR 20.00.

interpret the statute so as to render the legislation effective, consonant with sound reason and common sense.

Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (Mass. 2006), quoting *Hanlon v. Rollins*, 286 Mass. 444, 447 (Mass. 1934).

Where "[t]he draftsmanship is faulty,... the duty devolves upon [the Court] to give ... a reasonable construction." *Massachusetts Turnpike Authority v. Commonwealth*, 347 Mass. 524, 528 (1964). A statute "should be read as a whole to produce an internal consistency", *Telesetsky v. Wight*, 395 Mass. 868, 873 (1985), and in a way that avoids rendering any part as "meaningless surplusage". *Rockwood v. Snow Inn Corp.*, 409 Mass. 361, 364 (1991).

G.L. c. 40A, § 1A defines "solar energy system" in a manner that when read with the Solar Provisions including the term "solar access" and par. 9 can only reasonably apply to residential or accessory uses. The difference in interpretation suggests the statute is ambiguous.

The definitions in G.L. c. 40A, § 1A state,

"Solar access", is "the access of a solar energy system to direct sunlight."

"Solar energy system" is a "device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating."

Par. 9 of G.L. c. 40A, § 3 states,

[n]o 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.

The language of G.L. c. 40A, § 1A is instructive. Section 1A supplies the definition of solar energy system that determines whether a par. 9 exemption should stand or fall. As shown below, in all of the cases interpreting par. 9, it is assumed that the proposed project meets the definition of § 1A. However, the text of par. 9 and the related Solar Provisions show the opposite is true.

Utility scale solar projects are clearly not "design features" and do not "provide daylight for interior lighting". Nor do they collect, store or distribute solar energy for "space heating or cooling" or for "water heating". The broad implications for public health and safety from any of these residential, on-site uses of solar energy is minimal. Therefore, exempting them from local zoning controls through par. 9 is sensible, provided there is no actual harm to public health, safety or welfare.⁵ Moreover, generating electricity is one small

⁵ G.L. c. 40A, § 9B suggests that there is no broad exemption from local zoning controls when such controls are generally adopted to protect the "health, safety and general welfare" of the public. See G.L. c. 40A, § 1A, definition of "Zoning". Protecting solar uses that are ancillary to another use, rather than a stand alone use, avoids any conflict.

aspect of what makes up a "solar energy system". A small scale residential solar system could include electricity generation, as well as solar water heating and passive solar architecture. App. II, p. 36-48. A stand alone utility scale solar installation exclusively generates electricity.

G.L. c. 40A, § 9B also references solar energy systems, and potentially conflicts with par. 9. § 9B addresses the need to adopt zoning ordinances that promote solar energy systems and solar access. It acts as a corollary to par. 9 by affirming the appropriate adoption of solar regulations. The last sentence of § 9B states, "[s]olar energy systems may be exempt from set back, building height, and roof and lot coverage restrictions." If these restrictions have no application under par. 9, then this language is meaningless surplusage. Giving effect to the legislative intent requires reading § 9B and par. 9 as applying only to residential or accessory solar uses that would already comply with these ordinary zoning restrictions.

Comparison to other Dover Amendment exceptions is helpful. Unlike the § 3 exemptions for religious or education purposes, par. 9 omits any reference to reasonable bulk, height, lot size, setbacks and coverage requirements. If par. 9 were to apply to utility scale solar, then incorporating reasonable bulk, height, lot size, setback and coverage requirements would be a measure against overwhelming local zoning altogether. The absence of any

specified restrictions indicates par. 9 applies to residential or accessory solar alone, and is not intended to exempt large utility scale solar that would, and has⁶, overrun these ordinary and usual zoning practices.

Unfortunately, the cases interpreting the Solar Provisions have avoided considering whether utility scale installations are properly considered "solar energy systems", while still struggling with the proper application of G.L. c. 40A, § 3. The courts' interpretations of par. 9 shown in these cases has narrowed to a case-by-case analysis of whether a particular aspect of a Town's bylaw or ordinance can be supported by specific public health or safety concerns, regardless of where a project is proposed or by whom.

Seven of the eight reported cases interpreting par. 9 deal with private corporations seeking protection from zoning in order to site, build and operate utility scale solar using residential land.⁷ In every case, the court assumes the project

⁶See *Northbridge McQuade LLC v. Northbridge Zoning Board of Appeals et al*, 18 MISC 000519, order on summary judgment, (Land Ct., June 22, 2020) (remanding to ZBA to determine reasonableness of dimensional restrictions as applied to this specific project).

⁷ Two additional cases do not specifically address par. 9 but also involving solar installations. In *Lafond v. Grandy*, 2015 LCR 185 (Land Ct. 2015), aff'd 18 Mass. App. Unpub. LEXIS 313 (2018)(appeal rejected for failure to exhaust administrative remedies), the Plymouth building inspector unilaterally concluded that the private developer's ground mounted solar project was not a specified use under the bylaw. Because it was

qualifies as a "solar energy system" protected by par. 9. The cases have been decided without consideration of the other provisions of Chapter 637, adopted simultaneously with the Solar Provisions, which have a direct bearing on legislative intent.

One of the first cases to address the issue, *Briggs v. Zoning Bd. of Appeals of Marion*, 22 LCR 45 (Land Ct. 2014) distinguished between a residential "accessory solar energy use" and a "light manufacturing" commercial solar project. The 3,250 solar panel installation in a wooded area lent itself to "light manufacturing". The Court assumed the utility scale solar project met the definition of a "solar energy facility" under par. 9. Finding in favor of the abutters, the Court concluded that defining a commercial solar project as "light

prohibited, par. 9 prevented any regulation of utility scale solar. He effectively designated commercial and industrial solar an allowed use in any district, including the residential district at issue. The project resulted in denuding 24 acres of forested land, in an Area of Critical Environmental Concern (ACEC) designated under c. 21A §2 and §7, and 201 CMR 12.00 due to the quality, uniqueness and significance of the natural and cultural resources present. This was also land within a BioMap 2 habitat, land designated as the most critical for ensuring the long term persistence of rare and other nature species and their habitats. App. III, p.11-12, par. 22-26, Heller Aff.

Mirkovic v. Guercio, 25 LCR 696 (Land Ct. 2017) involved a controversy over whether the Town violated Article 97 by leasing approximately 25 acres of Town forest to SolarCity for a utility scale solar project. The utility scale project located on land zoned rural residential and water supply and wellhead protection overlay district required the forest and vegetation to be cleared. The Town considered the project a "public utility" for zoning purposes.

manufacturing” did not violate G.L. c. 40A, § 3, and that “maintain[ing] the division between commercial solar energy systems and residential accessory solar energy uses” was reasonable. *Id.* at 48.

In *Duseau v. Szawlowski Realty, Inc.* 2015 WL 59500 (Land Ct. 2015) the Court again overturned the Boards grant of a permit. A private solar developer sought a complete exemption from Hatfield’s zoning bylaw to “generate electricity...to sell to utility companies on a ‘wholesale basis’”. Hatfield Solar does not intend to provide or sell electricity directly to retail customers.” WL 59500 (Land Ct. 2015) at 2. Defendants argued that because the zoning bylaw prohibited, by omission, solar in a residential zone, the utility scale project was exempt. The Court disagreed and found the solar project was regulated as a “by-right” industrial use under the bylaw. It then annulled the Hatfield zoning board of appeals decision to grant a permit and remanded for a specific finding on reasonableness of the zoning bylaw, stating “[t]he § 3 Solar Provision does not provide the blanket exemption suggested by the Board's finding.” *Id.* at 7.

Waller v. Mohammed Alqaraghuli, 25 LCR 529 (Land Ct. 2017) upheld the Board’s grant of a permit citing par. 9. *Waller* involved a solar canopy proposed for the roof of an existing parking garage. The Newton zoning board of appeals construed par. 9 to exempt the commercial rooftop system because the city

had no regulation for solar in place in any district, and the court affirmed. Importantly, the installation was accessory to an existing use and therefore met all required setbacks, and the court would have independently dismissed for lack of standing.

PLH LLC v. Town of Ware 2019 WL 7201712 (Land Ct. 2019) shows a shift in the Court's view of par. 9. On cross motions for summary judgment the court affirmed special permit requirements for solar projects, but only because doing so was not a "prohibition". Again, the court assumed par. 9 otherwise applied to a commercial solar project.

While the plaintiff solar company PHL LLC argued that the town's special permit requirement resulted in a denial of "full SMART program funding" which "cost plaintiff a favorable position in the advantageous government financing program which plaintiff otherwise would have received", 2019 WL 7201712, at 2, the court questioned "just how far did the legislature go in restraining the hand of municipalities in the way in which they enact, interpret, and carry out their bylaw provisions, as they are applied to this particular favored solar use?" *Id.* Oddly, the court noted the absence of special permit requirements in par. 9, but ignored § 9B's provision for special permits that was also added by Chapter 637. The court noted, "[t]he purpose of the inclusion of solar use in this section of Chapter 40A is clear: there is no doubt that it is to be protective and

encouraging of these kinds of uses, and the court acknowledges the urgency of some of the reasons why the legislature has given favored treatment to this category of use.” The court was apparently unaware that the 1985 legislation never addressed the climate crisis, and did not have the benefit of current science about climate change and the role of forests and wetlands in addressing climate change.

In *Northbridge McQuade, LLC v. Northbridge Zoning Board of Appeals, et al.*, 18 MISC 000519 (Land Ct. 2019), the land court issued its most expansive interpretation of par. 9. The court had previously determined that “a categorical district-wide prohibition” of a commercial use in a residential district was unlawful due to par. 9, and further, that neutral dimensional requirements must be yield to par. 9 unless they specifically protect a public health or safety concern. In the third summary decision, the court again annulled the decision of the Board, and ordered the permit to issue subject to a non-discretionary site plan review. This is an extraordinary imposition into the reasonableness of neutral zoning, as well as the intricacies of a board’s decisions and concerns over clearly industrial projects.

ASD Three Rivers MA Solar, LLC v. Planning Bd. of the Town of Wilbraham, 29 LCR 124, at 28 (Land Ct. 2021) involved a utility scale project on 21.7 forested acres on land zoned

residential. The utility scale solar project proposed by AMP, “a global owner, operator and developer of renewable energy projects”, would be surrounded by residential homes. Despite favorable zoning, the board’s denial of a special permit was fatal where they had previously allowed two similar solar projects, and is evidence of the difficulty towns have in adapting to this new reality.

Nextsun Energy LLC v. Fernandes, 29 LCR 52 (Land Ct. 2021), involved a commercial SMART “Agricultural STGU” on a residentially zoned cranberry bog in a floodplain district. NextSun, a “limited liability company based in Colorado that specializes in the development, financing, construction, and operation of commercial and utility scale solar photovoltaic projects” would lease land from a private individual. The court ultimately found that “[the Board” was required to approve the amended application ... much in the way of [non-discretionary] site plan approval”, and only with those conditions that would not prevent it. This case demonstrates the ineptness of state oversight through par. 9 in siting commercial utility scale projects, the improper siting of such projects in floodplain districts, and the burden imposed on local, volunteer boards and community members in attempting to protect natural resources and the value of land and buildings from SMART-incentivized projects and private developers.

In *Tracer Lane II Realty, LLC v. City of Waltham & another*, 2021 WL 861157 (Land Ct. 2021), at 3, the City of Waltham is faced with defending its zoning laws from a SMART funded commercial solar project that will clear forested lands and use residential land for an access road to build and operate the utility scale project in another town. The court found the city's decision to deny a permit to use residentially zoned land to access the solar project an "unreasonable regulation" because it meant the project would be limited to the industrial district, which constituted only 2% of the city's land. *Id.* In doing so, the court took it upon itself to conduct a mapping analysis to see how much land was available for industrial or commercial solar, ignoring the 98% of the land where rooftop, canopy or other onsite solar could be located. This also demonstrates the inappropriate extent to which courts are being inserted into energy policy decisions via the back door of DOER SMART solar subsidies.

These cases show that private corporations, often multinationals, are using the Solar Provision as a weapon to force municipalities into approving projects. The misapplication of the Solar Provisions to utility scale solar has also resulted

in many weak solar bylaws drafted with the fear that they may run afoul of par. 9 if “unreasonable”.⁸

In light of the textual analysis above, and the lack thereof in the case law, concluding that par. 9 applies only to residential or accessory solar uses is reasonable. The legislative history further supports this interpretation.

B. Legislative History and External Sources Prove That the Solar Provisions Protect Residential Solar Only

Where statutory language is “sufficiently ambiguous to support multiple rational interpretations” the court should look to external sources. *Peterborough Oil Co. LLC. v. Dept. of Envi. Protection*, 474 Mass. 443, 448 (2016). External sources that may be referenced for statutory interpretation purposes include legislative history, development of the statutory provision, the law’s progression through the Legislature, prior legislation on the same subject, and the history of the times. *81 Spooner Rd. LLC v. Brookline*, 452 Mass. 109, 115 (Mass. 2008). An examination of the legislative history, development of the Solar Provisions, progression through the legislature, history of the times and external sources shows that par. 9 was not intended to

⁸ About half of Massachusetts’ municipalities have adopted solar bylaws, ranging from limiting them to solar overlay districts (Northfield) or limiting size to five acres or less on land that has not been cleared in the last five years (Plymouth).

protect utility scale solar in the manner or the extent provided by decisional case law.

The Solar Provisions were enacted by House Bill 6667, *An Act Promoting Solar Energy and Protecting Access to Sunlight for Solar Energy Systems*.⁹ House Bill 6667 contained thirteen sections on solar energy (and one severability clause). Individually and as a whole, House Bill 6667 demonstrates a specific legislative intent to address the "mischief or imperfection" whereby solar panels might be prevented from accessing the sun by a neighboring property's structures or vegetation.

In a memorandum dated December 12, 1985, to the legislature, the Energy Secretary describes the purpose of the bill as "authorizing local communities, **at their option**, to enact solar-conscious ordinances and by-laws" and to authorize planning boards to "promulgate solar-conscious subdivision requirements." App. II, pp. 51-54 (emphasis supplied). The memorandum further states that "private easements of sunlight **over a neighbor's property** are authorized" and "[l]ocal communities **may also choose** to establish a hearing process to issue permits protecting solar access." *Id.* (emphasis supplied)

⁹ Following three Senate readings House 6667 was enacted on December 23, 1985. 1985 St. 185, c. 637. House Bill 6667 and all subsequently referenced legislative materials and history are contained in Appendix II hereto.

This memorandum explicitly addresses the "option" provided to municipalities regarding land use tools to promote residential solar. Par. 9 has been distorted and is being used to force municipalities to approve utility scale solar in clear violation of the purpose of the law.

The bill that included par. 9, House 6667, § 1 declared in 1985:

Solar energy is a renewable, non-polluting energy source and the increased use of solar energy will **reduce the dependence of the commonwealth on foreign non-renewable energy sources**, support local solar industries, create more domestic jobs and reduce the air and water pollution which results from the use of nuclear and fossil fuels. Therefore, it is found that it is in the public interest to encourage the use of solar energy systems and **protect the access of such systems to direct sunlight**. (Emphasis supplied)

Thus, House Bill 6667 sought to address the oil crisis of the 1970s by reducing reliance on foreign oil, increasing energy independence and doing so by, in part, increasing solar access for solar panel owners. Nowhere does the legislation mention utility scale solar or protection for private corporations generating electricity for sale to the grid.

A "solar energy system" was described very specifically by the U.S. Department of Housing and Urban Development in a 1977 booklet, *Solar Energy and Your Home*. This booklet is part of the solar energy files of the Dukakis Administration. App. II, pp.38-49. It describes and illustrates the design of residential

solar energy systems, costs, and installation. Like Chapter 637, it describes the need to reduce reliance on imported oil and the "serious environmental issues" associated with "coal and nuclear energy exploitation." *Id.* at p. 4. It does not mention climate change or greenhouse gas emissions. This booklet is key to understanding the legislative intent behind the use of "solar energy system" in par. 9 of the Solar Provisions of Chapter 40A.

The legislative intent of par. 9 is found in the ten sections of Chapter 637 that amended the general laws to promote solar energy. Section 2 added the solar definitions to G.L. c. 40A, § 1A. Section 3 amended G.L. 40A, § 9 to promote solar by authorizing special permits under local zoning for increases in density and population "in a proposed development" upon certain conditions including the "installation of solar energy systems". This reference to solar energy systems in a "development" clearly means a residential or business development where solar is generated and used onsite. Chapter 637, §§ 4 and 5, also amending G.L. c. 40A, § 9 provided that when open space is required "within the development" the use of such space to "promote and protect maximum solar access within the development" will qualify to meet the open space requirement. (These have been repealed). Again, the use of open space in a "development" reflects an intent to promote solar energy in a

residential or business development and says nothing about stand alone utility scale projects.

Section 6 of Chapter 637 amended G.L. 40A by inserting a new section, § 9B, providing that municipalities may encourage the use of solar energy systems and protect solar access by regulating the "orientation of streets, lots and buildings, maximum height limits, minimum set back requirements, limitations on the type, height and placement of vegetation and other provisions", may establish buffer zones and additions districts that protect solar access which overlap other districts, and regulate the "planting and trimming of vegetation on public property to protect the solar access of private and public solar energy systems and buildings, and authorizing exemptions from certain zoning restrictions. Section 6 also provided for "solar access permits." This demonstrates a legislative intent to encourage municipalities to tailor their bylaws to promote on site - not utility scale systems which would not be benefited or burdened by the orientation of streets and lots nor the height of neighboring buildings because these stand alone systems occupy their own lots.

Section 7 of Chapter 637 amended the "Historic Districts" statute, G.L. c. 40C by authorizing consideration by a historic commission "policy of the commonwealth to encourage the use of solar energy and protect the access to direct sunlight of solar

energy systems" in decision making. Historic commissions oversee existing buildings and areas within a municipality indicating this applies to such structures and areas, not to utility scale stand alone projects.

Section 8 and 9 of Chapter 637 address planning board powers under G.L. c. 41, to "encourage the use of solar energy systems and to protect to the extent feasible the access to direct sunlight of solar energy systems." Sections 10 and 11 of Chapter 637 amended G.L.c. 184 and c. 187, to legalize instruments and easements for solar access.

In sum, Chapter 637 in its entirety reflects a legislative intent to encourage residential onsite solar energy production and to protect access to the sun for these systems. Absent is any legislative intent to protect utility ground mounted scale solar energy generating facilities systems such as those incentivized under the SMART program.

House 6667's preamble references four other solar bills referred to the Committee on Energy in 1985. This contemporaneous legislation supports the conclusion that par. 9 was never intended to provide the level of protection from zoning for utility scale projects found in the cases. First, House 0101 (1985), *An Act Protecting Solar Energy Access for Owners of Solar Energy Units* proposed to

amend Chapter 40A of the General Laws to provide for the issuance by local cities and towns of "solar energy building permits" to protect access to the sun **for residents** who install solar energy units. The new law would **provide protection for both the owner of a solar energy unit and for owners of nearby property.**¹⁰ (Emphasis supplied)

This concept of solar energy permits was incorporated into House 6667 and adopted in § 6 of Chapter 637, amending G.L. c. 40A, to add § 9B.

Second, House 2921 (1985), *An Act Relative To Creation Of A Right To Light For Solar Energy Devices*, proposed to amend G.L. c. 187, § 1 to create an "easement over the land of another" for solar, stating,

The erection of solar panels or any type of solar collection device by the owner of property shall be deemed to create an implied easement over the property of another for reasonable access to the [sun] necessary for the effective use of the said solar devices. Neither building or vegetation in excess of or of a type different from that existing at the time of erection of the solar devices shall be permitted to block such easement except by agreement of the parties. (Emphasis supplied)

The obvious intent of House 2921 was to prevent a neighboring property owner from erecting a structure or vegetation that would block an on-site solar panel's access to the sun. This was incorporated into the final bill, Chapter 637 as described above. Third, House 0767 (1985), *An Act Protecting Solar Energy Access for Owners of Solar Energy Units*, proposed a

¹⁰ H.R. 0101, 1985 Leg., Reg. Sess. (Mass. 1985).

"solar energy building permit" to provide "protection for solar energy access for owners of solar energy units", prohibiting a neighboring property from erecting a structure that would create an "impermissible inference for which a solar energy building permit has been granted..." House 0767 would have also created a zoning process for obtaining such a permit. Finally, House 0106, *An Act Protecting Solar Energy Access for Owners of Solar Energy Units* also provided for solar energy building permits and prohibited a neighbor from interfering with the collection of solar energy through erection of a structure or vegetation.

No provision of House 6667, Chapter 637 or any contemporary legislative history or legislation references zoning protection for stand-alone, utility scale energy generating facilities such as Plaintiff Appellant Tracer Realty's STGU, tariff programs or subsidies for independent corporations generating electricity for sale to the grid. The Solar Provisions were about promoting solar energy as it existed at the time and focused on protecting access to sunlight via zoning mechanisms such as a "solar access permit" and preventing a neighboring structure or vegetation from impeding access to the sun. They were never intended to have the effect of exempting a STGU from local zoning - which is the effect of the Land Court decision.

The extensive zoning powers¹¹ of municipalities are not to be narrowly construed. See, e.g. *Sturges v. Town of Chilmark*, 380 Mass 246, 253 n. 11 (1980).¹² The Zoning Act "must be read in conjunction with the Home Rule Amendment", Mass Const., Amend. LXXXIX. Bobrowski, M., *Handbook of Massachusetts Land Use and Planning Law* §2.02. The intent of the Home Rule Amendment is to,

reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters subject to the provisions of this article and to such standards and requirements as the general court may establish by law and in accordance with the provisions of this article.

Mass Const., Amend. LXXXIX, Article II.; *Boyajian v. Ganzunis*, 212 F.3d 1, 5 (1st Cir. 2000) (confirming that protected uses require consideration of the adverse effects on the community and developers do not have an absolute right to build in residential zones). Par. 9 should not be used to undermine these zoning powers.

¹¹ Zoning powers are manifested in the "ordinances and by-laws adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants." G.L. c. 40A, § 1A.

¹² The purposes of the Zoning Act include "to lessen congestion in the streets; to conserve health; ... to prevent overcrowding of land, to avoid undue concentration of population; ... to conserve the value of land and buildings ...; to encourage the most appropriate use of land throughout the city or town,"⁸¹ *Spooner Road LLC v. Brookline*, 452 Mass. 109, 112(2008); 1975 Mass. Acts 808, § 2A.

The history of the times is highly relevant to ascertaining the purpose and intent of par. 9. Chapter 637, the four contemporaneous bills nor any legislative history from the 1985 session mention climate crisis or need for greenhouse reductions. While Chapter 637 references air pollution from fossil fuel and nuclear power energy, the greenhouse gasses that contribute to global warming were not declared "air pollutants" under the federal Clean Air Act until 2007 in the case of *Massachusetts v. EPA*, 549 U.S. 497, 500 (2007). The 1985 legislative session occurred well before the climate crisis was in the public consciousness and driving legislation, campaigns and economic choices. The climate crisis entered the public consciousness slowly after NASA scientist and Woods Hole Research Director James Hansen warned the world and testified before Congress in 1988.¹³

In 1985, solar energy was an emerging technology, the energy industry was regulated, neither the RPS nor the GWSA were part of Massachusetts law and there were no SMART tariff incentives. Against this backdrop it is clear that the legislature intended to retain for municipalities their zoning and home rule powers to regulate utility scale, private solar

¹³Philip Shabecoff, *Global Warming Has Begun, Expert Tells Senate*, N.Y. Times (June 24, 1988) <https://www.nytimes.com/1988/06/24/us/global-warming-has-begun-expert-tells-senate.html>.

energy generating facilities just like they could regulate any other commercial, industrial, manufacturing or utility use - without the Dover Amendment protection of par.9 used by private solar developers today.

The energy, cultural and scientific understandings of climate, forests and natural landscapes, and societal norms have changed since 1985 but the Solar Provisions have not. Instead, the Solar Provisions are being exploited by corporations and investors seeking to profit from Massachusetts solar subsidy incentives, open space and improperly applied zoning laws. The Legislature did not intend that today's private energy generating corporations building large scale ground-mounted installations could use the Solar Provision to argue an entitlement to the sun's rays regardless of the land use restrictions of local zoning laws - yet that is the absurd result of the application of the Solar Provision to today's STGUs. The erroneous application of the Solar Provisions to utility scale projects has tied the hands of municipal officials, leading them to believe that their zoning powers over industrial and commercial solar utility projects are constrained to the point where they must allow them in residential districts, such as in *Tracer*, and cannot use the full extent of their police powers to protect the public health, safety and welfare.

The extent to which the Solar Provision has been distorted with negative, unintended results is demonstrated clearly by the *Tracer* case. It is absurd to argue that Tracer's complaint that barring its use of a residential lot for a road is tantamount to barring solar "access to the sun" and that local zoning should be cast aside for a utility scale private STGU.

These external sources and history of the times show that the Solar Provisions were simply not intended to provide the level of zoning protection for large ground-mounted solar projects such as the Tracer SGTU that will result if the case is upheld.

III. EVEN IF THE SOLAR PROVISIONS ARE UNAMBIGUOUS, THEIR APPLICATION TO UTILITY SCALE SOLAR HAS ABSURD RESULTS

Even if the Court finds the Solar Provisions unambiguous, applying them to utility scale solar that causes the loss of forests and wetlands is an absurd result. It also creates an exception to zoning authority that no other protected use under the Dover Amendment has by inserting Industrial and Manufacturing uses into any zoning district.

It is essential that municipalities be able to exercise the full scope of their zoning powers "to protect natural ecosystems so they can continue to accumulate CO2 and provide other ecological services essential for a habitable world." App. III, p.33, par. 30, Affidavit of J. William Stubblefield

("Stubblefield Aff."). State regulatory oversight is inadequate and municipalities must be empowered to fill the gap.

Utility scale solar incentivized by the SMART program is causing the loss of forests and wetlands that accumulate vast amounts of carbon. These natural ecosystems are the only available means for removing CO2 from the atmosphere at anywhere near the scale required to address the climate crisis. *Id.*, par. 10, 14.

Climate modeling is crystal-clear that we need to not only reduce emissions, but actually sequester CO2 that has already been emitted. Restoring and expanding forests is the only means under our control to achieve this at scale. Accordingly, anything that undermines forest carbon uptake is actively undermining climate mitigation. The state should not have a policy that pits forests against solar.

App. I, p. 6, par. 2.

Deforestation for utility scale solar has reached an alarming rate. App. III, p. 33, par. 29, Stubblefield Aff. Concern is widespread and growing in the scientific, municipal and conservation communities. Ten conservation groups have issued a statement on the state's misalignment of solar subsidies, harm to forests, wetlands and climate mitigation and the manner in which DOER's subsidies exacerbate conflicts over renewable energy siting. App. I, pp. 15, 18.

In Massachusetts from 2010 to 2020, 7,926 acres of open space were converted to commercial utility scale solar; about

4,000 acres were intact forests.¹⁴ Between June 2012 and June 2017 alone, about 6,000 acres of natural lands were converted to solar. App. III, p. 32, par. 28, Stubblefield Aff. Protecting ecosystems and biodiversity is of critical importance for a fully functioning biosphere and human survival.¹⁵ App. III, p. 31-32, par. 20-26, Stubblefield Aff. Renewable energy policies that consume large amounts of land risk undermining climate mitigation. App. III, p.32, par. 26, Stubblefield Aff.

The EEA 2020 study of potential pathways for obtaining “net zero” greenhouse gas emissions by the year 2050 identifies the need for 158,000 acres of land for installing utility scale solar in the next twenty eight years. App. II, P.55. In the Town of Wareham alone, 19 utility scale solar projects threaten 1,400 acres of forest and agricultural land.¹⁶ Inappropriate siting of utility scale projects undermines the value of land and buildings, an interest protected by the Zoning Act. The value of

¹⁴DOER Solar Siting Analysis, 2020, App. I, p. 4. Of the 7,926 acres, about 4,000 acres were intact forests, 510 acres were “scrub”, 376 acres were agricultural land and 807 acres were “bare” land (often meaning it was strip mined shortly before solar was installed).

¹⁵*Classification of Natural Communities*, mass.gov (2020) <https://www.mass.gov/service-details/classification-of-natural-communities>. “Scrub” ecosystems include biodiverse globally rare Pitch-Pine Scrub Oak Pine Barrens forest found in Massachusetts.

¹⁶*Wareham MA: 19 ground-mounted industrial solar/battery projects, more threaten water, community, Save the Pine Barrens*, (2021)

<https://savethepinebarrens.org/southeastern-massachusetts/>

homes within a tenth of a mile of utility scale ground mounted solar projects in Rhode Island and Massachusetts declined by 7%.¹⁷

Under the Global Warming Solutions Act, DOER is statutorily mandated to ensure the implementation of GHG emission reduction goals. G.L. c. 21N, §§ 1-9. Clearing forests and destroying wetlands for utility scale solar violates this mandate. DOER's SMART program is based on the false premise that new utility scale solar will be "displacing non-renewable generating sources." 225 CMR 20.01 (Purposes clause of the SMART regulations). Each increment of solar power is **not** matched by an equal or greater reduction in power generated by burning fossil fuels. App. I, p. 6; App. III, p. 30, par. 18, Stubblefield Aff.

The state does not conduct environmental reviews or adequately regulate utility scale solar. EEA, through the Massachusetts Environmental Policy Act (MEPA) office has adopted a legally flawed position exempting almost all utility scale SMART solar projects from review under the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61-62. App. III, p. 112-114. MassWildlife issues "take" permits allowing commercial SMART utility scale projects to kill or destroy the habitat of

¹⁷Todd McLeish, *URI Researcher: Housing prices decline within mile of solar energy arrays*, (Sept. 30, 2020). <https://www.uri.edu/news/2020/09/uri-researcher-housing-prices-decline-within-mile-of-solar-energy-arrays/>

species listed under the Massachusetts Endangered Species Act for projects such as the 50-acre commercial scale solar project on Priority Habitat in Wareham. App. III, p. 115.

In 2021 alone, two private SMART solar projects were penalized \$ 1.245 million federal Clean Water Act and state water and wetland laws in actions brought by the Massachusetts Attorney General. App. III, pp. 37, 119. In Shutesbury, the Conservation Commission is documenting wetlands violations by NextEra's solar project that cleared forest.¹⁸

In the town of Carver, Next/Sun PineGate Renewables obtained DOER approval for a SMART "agricultural STGU" using 3,500 timber poles treated with Copper Chromated Arsenic (CCA), a cancer-causing arsenic pesticide, to mount solar panels on about 100 acres of cranberry bog. The poles are driven 30 feet into the Plymouth Carver Sole Source Aquifer. DOER has denounced any responsibility. After public outcry in October 2021, the Carver Conservation Commission ordered the poles removed, but violated the Wetlands Protection Act by failing to require a new permit application and public hearing, and a citizen lawsuit has been filed.¹⁹ Other agricultural STGUs are in place or proposed

¹⁸*Shutesbury, MA:NextEra ground-mounted solar causes erosion, water pollution*, Save the Pine Barrens, (2021) <https://savethepinebarrens.org/what-a-solar-site-looks-like-after-a-few-years-report-from-shutesbury-ma/>.

¹⁹*Jenness v. Carver Conservation Commission and PineGate Renewables*, 2283 CV 00033, Plymouth Superior Court (2022).

using the same CCA treated poles. In Southeastern Massachusetts, "land clearing" for utility scale solar includes sand mining following deforestation under the ruse of preparing the solar site. App. I, p. 6.

The clearing of forest and removing soils for large scale industrial solar threatens natural resources and Native American culture in Massachusetts. App. III, p. 4-5, Affidavit of Mark Andrews. Areas impacted include the ancestral lands of the Wampanoag people, including the Herring Wampanoag Tribe that has continuously occupied the region and has not ceded its lands. Cultural history in the form of artifacts, burial sites, workshops and settlements are buried in the lands. Id.; Affidavit of Melissa Ferretti, Herring Pond Wampanoag Tribe ("Ferretti Aff.") App. III, p. 6-9. Land clearing and excavation for utility scale solar that disturbs soils has been conducted without adequate review for impacts on Indigenous cultural resources and without consultation with all Tribes. Id. Siting of utility scale solar is often at odds with the Commonwealth's environmental justice policy, particularly with regard to Indigenous rights.²⁰

²⁰*Environmental Justice Policy*, Mass.gov, (2022) <https://www.mass.gov/service-details/environmental-justice-policy>

EEA has announced its intent to “lead planning for ground-mounted solar development” with DOER and the Massachusetts Clean Energy Center to implement “Strategy E4: Continue to Deploy Solar in Massachusetts” as part of the Clean Energy and Climate Plan for 2020 (“CECP”).²¹ App. II, p. 58. This is a strategic plan by EEA to usurp local land use authority and decide for itself where and how utility scale solar is sited, and to use SMART solar subsidies to do so. This is egregious meddling in land use planning which is and always has been a matter of local authority. See, e.g., *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). Land use planning is not within EEA’s statutory mandate. EEA’s policies to promote SMART utility scale projects “represent not a success of the state’s solar energy policy but a failure.” App. I, pg. 6, par. 2. The use of par. 9 to further undercut local zoning in the face of EEA’s overreaching and *ultra vires* solar programs is exacerbating the land use crisis.

In addition to widespread environmental damage, that par. 9 can mandate commercial uses in any district is itself absurd. No other Dover Amendment protection provides this measure of relief. It also goes beyond protecting this use from improper

²¹Request for Comment on Clean Energy and Climate Plan for 2030, (Dec. 30, 2020) <https://www.mass.gov/doc/interim-clean-energy-and-climate-plan-for-2030-december-30-2020/download>

regulation, and shifts the burden onto Town's to show enough harm from each project. This judicial override of neutral local zoning bylaws goes far beyond what the Legislature could have intended or imagined in 1985.

IV. CONCLUSION

For the reasons set forth above, this Honorable Court should find that G.L. c. 40A, § 3 par. 9 applies only to residential and accessory solar uses, and therefore does not protect the utility scale solar proposed by the Appellee.

Amici urge the Court to consider the absurd results demonstrated above, and consider how the application of par. 9 is needlessly eviscerating the one tool - local zoning - available to protect the forests and wetlands we need to address the climate crisis and ensure a livable planet for future generations.

Respectfully submitted,

Amici Curiae

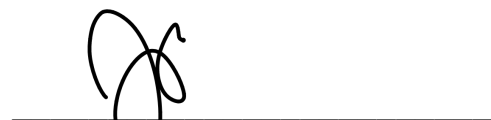
SAVE THE PINE BARRENS
SELECT BOARD OF THE TOWN OF PELHAM, MASSACHUSETTS
SELECT BOARD OF THE TOWN OF WENDELL, MASSACHUSETTS
PLANNING BOARD OF THE TOWN OF BUCKLAND, MASSACHUSETTS
PLANNING BOARD OF THE TOWN OF PELHAM, MASSACHUSETTS
PLANNING BOARD OF THE TOWN OF SHUTESBURY, MASSACHUSETTS
CONSERVATION COMMISSION OF THE TOWN OF WENDELL, MASSACHUSETTS
SAVE MASSACHUSETTS FORESTS
WAREHAM LAND TRUST
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RESTORE: THE NORTH WOODS

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CERTIFICATE OF SERVICE

I, Jonathan M. Polloni, Esq. certify under the penalties of perjury that on February 11, 2022, a copy of the foregoing document was filed electronically through the Court's e-filing system for electronic service to the following registered users:

John F. Farragher, counsel for Tracer Lane II Realty, LLC

Bernadette Dunn Sewell, counsel for City of Waltham



Jonathan M. Polloni, Esq.

CERTIFICATE OF COMPLIANCE

I, Jonathan M. Polloni, Esq., hereby certify pursuant to Mass. R. App. P. 17 that this brief complies with the rules of court that pertain to the filing of amicus briefs. In compliance with Rules 20(a)(3)(E) and 20(a)(4), the brief uses a 12 point monospaced font, one inch top and bottom margins, and 1.5 inch left and right margins. The brief does not exceed 35 pages of countable material.



Jonathan M. Polloni, Esq.