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TO: Pres. Jordan and Members of the Council
FR: Lisa L. Mead, City Solicitor
CC: Mayor Barrett
Jacki Byerly, Planning Director
RE: BESS Zoning amendment
DA: May 12, 2026

MAY 14 PM 2:19
HAYCITYCLERK

Reference is made to the above captioned matter. In that connection, the Council has before it 2 proposed amendments to the Zoning Ordinance related to Battery Energy Storage Systems ("BESS"). I request that you receive and file the proposed ordinance from January 2025. I request that the Council act on the Ordinance filed last month. The Planning Board has held their public hearing and voted to recommend that the Council adopt the Ordinance.

Why a BESS Zoning Ordinance?

The City currently has no Zoning Ordinance regulating the location and use of a BESS facility or any size. In the case of Duxbury Energy Storage, LLC v. the Town of Duxbury Zoning Board of Appeals, Land Court Misc. 000643 (2025) the Land Court decided that the exemption set forth in G. L. c. 40A sec. 3 par. 9 for solar facilities applied to BESS as well. Noting that the Supreme Judicial Court in the case of Tracer Lane II Realty, LLC v. Waltham, 489 Mass 781 determined that Waltham's zoning code violates the Solar Energy Provision, concluding that "[a]n outright ban ... restricts rather than promotes the legislative goal of promoting solar energy. In the absence of a reasonable basis grounded in public health, safety, or welfare, such a prohibition is impermissible under the provision." *Id.* at 782. Further the Court in Duxbury provided that "...evaluating a bylaw's validity under G.L. c. 40A, § 3 requires balancing "the interest that the ordinance or bylaw advances and the impact on the protected use." *Id.* at 781. This requires assessing whether a restriction genuinely furthers a legitimate municipal interest and is rationally related to it, or if it impermissibly restricts the establishment of uses protected by the provision, and so is unreasonable. *Id.*, citing *Rogers v. Norfolk*, 432 Mass. 374, 379 (2000). (at 15). It is with this background that the Duxbury court determined that the exemption under G.L. c. 40A sec. 3 par. 9 applies to BESS facilities. Specifically, they said;

The Solar Energy Provision specifically protects "**the building of structures**" that facilitate the collection of solar energy" (emphasis added). This means any aspects of a project that involve building qualifying structures gain the statute's protection.¹³ This interpretation aligns with how appellate courts have construed other provisions of the Dover Amendment. For instance, in *Watros v. Greater Lynn Mental Health & Retardation Assoc., Inc.*, 421 Mass. 106, 114 (1995), the Supreme Judicial Court held that where G.L. c. 40A, § 3, second par. explicitly exempted "land or structures" from certain zoning regulations, an accessory structure intended for

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educational use qualified for protection, even though it shared a lot with other unprotected residential structures. Thus, even if only the battery cabinets are considered structures – a point the Board 19 concedes and cannot reasonably dispute – building such structures at the Project site would be protected from prohibition or unreasonable regulation, provided they "facilitate the collection of solar energy. Id 18-19.

As a result and based upon the determination in Tracer Lane and its application to BESS facilities in Duxbury, the City should have an Ordinance reasonably regulating BESS facilities on a reasonable amount of land area. Otherwise the City would be at the will of someone who wants to locate one of these facilities anywhere in the City it so chooses given the uses exemption under G.L. c. 40A sec. 3 par. 9.

Further, over the past year, the Department of Energy Resource ("DOER") has promulgated new consolidated permitting regulations related to Solar and BESS facilities, among other energy generating facilities, with which the City must comply by October of this year. The intent of the Act is to streamline and expedite the permitting of such facilities by allowing permit applicants to submit a single, Consolidated Local Permit Application. Municipalities will still handle all local permitting required for "small" projects, which are generally generation projects up to 25MW, battery storage projects up to 100 MWh, transmission or distribution infrastructure in existing rights of way less than 10 miles in length, or a new right of way of less than 1 mile. The state Energy Facilities Siting Board will handle all state and local permitting needed for "large" projects which exceed these thresholds.

Municipal implementation of the consolidated permitting program is anticipated to begin on July 1, 2026, and municipalities must accept consolidated permitting applications by **October 1, 2026**. Under the proposed framework, Applicants will initiate the consolidated permitting process by filing a Notice of Intent with the designated local government representative, identifying basic project features and describing community outreach efforts. The process includes meetings with municipal officials to review project details, identify required permits, and discuss stakeholder engagement. Applicants will conduct a preliminary site suitability assessment to be reviewed and approved by DOER, submit the same for review and feedback from the municipality on potential project modifications prior and as a requirement of filing a complete application. This process must be completed not more than 60 days prior to filing with the municipality, or the application shall be denied without prejudice. Applicants will file a pre-filing checklist with the municipality which must be reviewed by the municipality within 10 days of submission for completeness. If the pre-filing requirements are not complete, the applicant will have an additional 30 days to complete the required items on the checklist, subject to an additional 30-day extension by the municipality. A determination that the pre-filing requirements has not been completed may be contested by the applicant. A single consolidated application will be used statewide and will encompass all approvals required for small clean energy facility projects. Municipalities will designate a permitting authority or coordinating official responsible for serving as a gatekeeper and managing the review process and ensuring coordination among local boards and departments. The municipality must issue a determination regarding completeness within 30 days of receiving an application or within 30 days of receiving any additional materials provided in response to a determination that the application is incomplete.

Notwithstanding the consolidated application process, municipal boards and departments will continue to apply existing state statutes and local bylaws, including but not limited to zoning, wetlands protection, historic preservation, and health regulations. Decisions of individual boards

under any such locally administered processes will be incorporated into a single consolidated local permit decision issued by the municipality.

Under the DOER framework, upon determination by the municipality's designated gatekeeper, that the application is complete, the municipality must issue a final decision under any local permitting scheme within twelve (12) months, absent extensions authorized by statute or regulation, or as may be agreed to by the Applicant. The Planning Director and I will be providing to the Council in the near future, any changes required to the Ordinance to reflect the requirements of the consolidated permitting required by DOER.

Proposed Zoning Ordinance

As a result of the foregoing, without yet providing the Council with a proposed Ordinance related to the Consolidated Permitting, but in light of the fact that there is a developer of BESS examining the possibility of coming into Haverhill, we proposed the attached Ordinance. It should be noted that the Mayor, City staff, Fire, Building, Health, Conservation, Planning, and many more have been intimately involved in the development of this ordinance.

Overall, the proposed ordinance establishes a comprehensive local regulatory framework governing the siting, permitting, construction, operation, maintenance, and decommissioning of Battery Energy Storage System facilities within the City, as noted in the Planning Board report. The ordinance provides for a permitting framework for various sizes of BESS facilities, Tier 1, Tier 2, and Tier 3 classifications, which are defined based upon the size or capacity of the system. Importantly, and in compliance with Tracer Lane as well as the litany of cases governing the exemptions under G.L. c. 40A sec. 3, smaller Tier 1 systems are permitted by right subject to Site Plan Review and applicable code requirements, while larger Tier 2 and Tier 3 facilities require a Special Permit and are limited to the proposed BESS Overlay District.

There is a noted change in the permitting process, different from that which the Council has followed in the past. In the proposed ordinance, an Applicant must file with the Council for a Special Permit after it has been determined that a complete application has been filed. The Council will then schedule and open its public hearing. Following an overview of the application, the public hearing will be continued and the application referred to the Development Review Committee which must thereafter provide to the Council its recommendations on the Applications within 90 days of referral to the Committee. By incorporating the Development Review Committee process into the Special Permit process, any conditions or changes recommended by the Committee will then, if the Council determines they are appropriate or desired, be included in the final decision.

All Tier 2 and Tier 3 BESS are subject to both Special Permit and Major Site Plan Review. The Applicants are required to comply with the Ordinance general special permit criteria as well as the specific Special Permit criteria of the BESS section.

It should be noted that the design requirements, lighting, vegetation, setbacks, emergency access, lot size and other dimensional requirements, fencing and screening, safety requirements and the like were all well vetted by the Fire, Police, Building, Electrical and other code professionals. The decommissioning plan, fund and insurance were modeled after previously approved and enacted ordinances and bylaws and best practices as well.

I look forward to discussing this with you next week.