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2026 WL 822438
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United States District Court, D. Puerto Rico.

PROTECO LANDFILL SUPERFUND SITE GENERATOR PARTIES GROUP, Plaintiff,

v.

MRJ DISTRIBUTORS, INC., ET AL., Defendants.

Civil No. 23-1500 (ADC)
|
Filed 03/25/2026

OPINION AND ORDER

AIDA M. DELGADO-COLÓN United States District Judge

***1** Plaintiff, the PROTECO Landfill Superfund Site Generator Parties Group ("GPG" or "plaintiff") brought claims against Pepsi-Cola Manufacturing Co., Inc ("PepsiCo") and several other defendants under CERCLA's contribution mechanism in an attempt to recover costs associated with the Remedial Investigation/Feasibility Study ("RI/FS") for the PROTECO Site (the "Site"). With the exception of PepsiCo, all other defendants have reached a settlement with plaintiff. **ECF No. 310.** Pending before the Court is PepsiCo's motion to dismiss plaintiff's fourth amended complaint, **ECF No. 251**, pursuant to Fed. R. Civ. P. 12(b)(6). **ECF No. 261**. Plaintiff opposed and defendant replied. **ECF Nos. 266, 298**. For the reasons discussed below, PepsiCo's motion is **DENIED**.

I. Factual and Procedural Background

On October 4, 2023, the GPG filed suit against defendants, alleging that three defendants, Colorcon P.R. LLC, Puerto Rico Investment Development Company, and Thermo King de Puerto Rico, Inc., filled the PROTECO Superfund Site in Peñuelas, Puerto Rico, a Federally listed Superfund Site on the National Priorities List ("PROTECO Site"), with hazardous waste from approximately 1975-1990. **ECF No. 1**, at 3. Plaintiff alleges that defendants are liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") section 107(a) and seeks cost recovery and contribution under CERCLA sections 107 and 113, 42 U.S.C. § 9601 *et seq.*, for response costs that it has expended to date and will expend in the future to complete the RI/FS as required by the Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study as amended ("RI/FS ASAOC") for the PROTECO Site. *Id.*, at 1. Additionally, plaintiff seeks a declaratory judgment on liability for response costs under CERCLA section 107(a), 42 U.S.C. § 9607(a) and/or CERCLA section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B). *Id.*, at 14.

On January 5, 2024, plaintiff amended the complaint to add other parties and PepsiCo as defendants, alleging that "PepsiCo arranged for the disposal of hazardous substances at the PROTECO Site" and that "[w]aste sent by PepsiCo to the PROTECO Site included but was not limited to lab packs, acid liquid, potassium benzoate, caffeine anhydrous, sodium benzoate, citric acid, sodium saccharin, and sodium chloride, and other waste described by a RCRA ledger as "liquid hazardous and solid wastes." **ECF No. 18**, at 10. The first amended complaint further alleges that "hazardous substances sent by PepsiCo to the PROTECO Site ... caused [plaintiff] to incur response costs consistent with the National Oil and Hazardous Substances Pollution Contingency Plan...." *Id.*, at 11.

Plaintiff filed a second amended complaint on June 24, 2024, adding additional defendants. **ECF No. 45**. PepsiCo filed an answer on September 27, 2024. **ECF No**. **129**. Plaintiff tendered a third amended complaint on May 30, 2025, adding an additional defendant. **ECF No. 195**. PepsiCo filed an answer on June 18, 2025, including crossclaims against co-defendants and counterclaims against the plaintiff. **ECF No. 200**.

***2** On November 20, 2024, the Court referred the case to a United States Magistrate Judge for a settlement conference. **ECF No. 167**. After the settlement conference held on July 31, 2025, plaintiff filed the fourth, operative, amended complaint, adding once again an additional defendant. **ECF No. 251**. Settlement conferences were also held on August 26, 2025, **ECF No. 265**, August 28, 2025, **ECF No. 267**, September 19, 2025, **ECF No. 285**, and November 25, 2025, **ECF No. 305**. As a result of these settlement discussions,

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plaintiff settled its claims against all defendants except PepsiCo. **ECF No. 310**.

PepsiCo filed the instant motion to dismiss on August 14, 2025. **ECF No. 261**. PepsiCo's motion to dismiss argues that "[p]laintiff has failed to plead that Pepsi *intended* to dispose of a hazardous substance, as required by *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599, 608–10 (2009), and its progeny." **ECF No.** 261, at 1. Additionally, PepsiCo requests that the Court deny plaintiff further leave to amend its complaint. *Id.*, at 1-2.

II. Legal Standard

A. Motion to Dismiss

When ruling on a motion to dismiss brought pursuant to Fed. R. Civ. P 12(b)(6), courts must "accept the truth of all well-pleaded facts and draw all reasonable inferences therefrom in the pleader's favor." *García-Catalán v. United States*, 734 F.3d 100, 102 (1st Cir. 2013) (quoting *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44 (1st Cir. 2012)). "While detailed factual allegations are not necessary to survive a motion to dismiss for failure to state a claim, a complaint nonetheless must contain more than a rote recital of the elements of a cause of action... [and they] must contain sufficient factual matter to state a claim to relief that is plausible on its face." *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 53 (1st Cir. 2013) (citing, *inter alia, Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)) (citation modified). In order to perform this plausibility inquiry, the Court must "separate factual allegations from conclusory ones and then evaluate whether the factual allegations support a 'reasonable inference that the defendant is liable for the misconduct alleged.' " *Conformis, Inc. v. Aetna, Inc.*, 58 F.4th 517, 528 (1st Cir. 2023) (citing *Iqbal*, 556 U.S. at 678, and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "If the factual allegations in a complaint, stripped of conclusory legal allegations, raise no 'more than a sheer possibility that a defendant has acted unlawfully,' the complaint should be dismissed." *Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263, 270 (1st Cir. 2022) (quoting *Rodríguez-Reyes*, 711 F.3d at 53, and *Iqbal*, 556 U.S. at 678). In sum, "[t]he relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint." *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 13 (1st Cir. 2011).

B. Leave to Amend

Leave to amend is governed by Federal Rule of Civil Procedure 15(a), which allows parties to amend their pleadings once as a matter of course within 21 days of serving their pleading or within 21 days after service of a Rule 12 motion. Additionally, Fed. R. Civ. P. 15(a)(2) allows "a party may amend its pleading only with the opposing party's written consent or the court's leave," and stating that "[t]he court should freely give leave when justice so requires." This rule "was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *United States v. Hougham*, 364 U.S. 310, 316 (1960). Although Rule 15(a)(2) has a liberal amendment policy, the district court also "enjoys significant latitude in deciding whether to grant leave to amend," and a district court's decision on granting or denying leave to amend is reviewed deferentially "if any adequate reason for the denial is apparent on the record." *U.S. ex rel. Gagne v. City of Worcester*, 565 F.3d 40, 48 (1st Cir. 2009).

III. Discussion

A. Motion to Dismiss

3** In support of its motion to dismiss, PepsiCo argues that plaintiff has failed to "plead facts that establish Pepsi[Co] arranged for the disposal of hazardous substances because it fails to allege that Pepsi intended to dispose of any alleged hazardous substance, as is required under *Burlington Northern* and its progeny." **ECF No. 261**, at 3. PepsiCo claims that, because it is alleged to be liable as an "arranger" under CERCLA, plaintiff must also allege proof "that the defendant ***actually intended to dispose of a hazardous substance." *Id.*, at 4 (citing *Burlington Northern*) (emphasis in original). Plaintiff cites to *United States v. Gen. Elec. Co.*, 670 F.3d 377 (1st Cir. 2012), to argue that the "robust and fact-intensive analysis in [the case] demonstrates precisely why [p]laintiff's [c]omplaint here is deficient." **ECF No. 261**, at 5.

In opposition to PepsiCo's motion, plaintiff argues that "intent is not an element of this type of arranger case" and, even if the Court "were to adopt an intent standard, the Fourth Amended Complaint alleges sufficient facts to establish that Pepsi knew, or should have known, the waste it sent to PROTECO contained hazardous substances." Finally, plaintiff argues that

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"[i]n all events, Pepsi[Co]'s arguments are untimely. Pepsi failed to raise them when it had the opportunity not once but twice before, when [plaintiff] filed the exact same claims against Pepsi in its Second and Third Amended Complaints." **ECF No. 266**, at 2. The Court agrees with plaintiff that its fourth amended complaint is sufficiently well-pled as to pass 12(b)(6) muster.[1]

In the light most favorable to plaintiff, a review of the complaint reveals that plaintiff has sufficiently laid out a case to allege PepsiCo's liability under CERCLA section 107(a). Plaintiff plausibly pleads the following six elements required for a *prima facie* CERCLA section 107 case: (1) that the "person" against whom recovery is sought is a "liable person" under section 107(a); and (2) that there has been a release or threatened release; (3) of a hazardous substance; (4) from a facility resulting in; (5) the incurrence of necessary costs of response; (6) that are consistent with the NCP. 42 U.S.C. § 9607(a)(1)-(4)(B). PepsiCo's only objection as to plaintiff's allegations is that PepsiCo is not a "liable person" under section 107. **ECF No. 261**, at 5. Under Section 107(a) four categories of a potentially "liable person," are identified; to wit: (1) current owner and operator at the site, (2) any person that owned or operated the site at the time of disposal of hazardous substances, (3) transporter of hazardous substances for disposal or treatment at the site; and (4) anyone that arranged for disposal or treatment of hazardous substances at the site. 42 U.S.C. § 9607(a). Plaintiff alleges that "PepsiCo arranged for the disposal of hazardous substances at the PROTECO Site" and "may also have arranged for transport of hazardous substances with Servicios Carbareón that were disposed of at the PROTECO Site." **ECF No. 195**, at 13.

At this juncture, plaintiff need only plead "sufficient factual matter to state a claim to relief that is plausible on its face." *Rodríguez-Reyes*, 711 F.3d at 53. Plaintiff has sufficiently pled that PepsiCo "arranged" for the disposal of hazardous substances, which is sufficient to state a claim for liability under CERCLA section 107. The Court need not apply the fact-intensive standard PepsiCo encourages it to apply. Indeed, such case law and a fact-intensive standard may be applicable at the summary judgment stage, but not at this juncture. Accordingly, PepsiCo's motion to dismiss is **DENIED**.

B. Leave to Amend

4** PepsiCo argues that, because plaintiff has "had ***five separate opportunities to submit a complaint that properly pleads its claims," the Court should deny plaintiff any additional opportunity to amend its complaint. **ECF No. 261**, at 9 (emphasis in original). PepsiCo alleges that allowing an amendment would permit plaintiff to " 'wait and see' for defendants such as Pepsi to identify obvious pleading deficiencies in a motion to dismiss, then seek leave to amend yet again in order to cure these deficiencies after-the-fact." *Id.*, at 10. Defendant cites numerous cases where plaintiffs were denied further leave to amend after having had prior opportunities to do so. *See id.*, at 9-10 (collecting cases).

Yet each of the cases to which plaintiff cites evidences the standard that the court may deny a plaintiff further leave to amend *after* plaintiff has once again requested it. *See id*. None demonstrates the court preemptively denying leave to amend before plaintiff has even requested such leave from the court. That is not an accident. The proper juncture at which defendant should present its opposition to plaintiff's request to amend is if – and when – plaintiff seeks to amend its complaint again. Then, defendant may oppose such a request, and the Court will consider defendant's request at such juncture. Defendant's request for the court to deny further leave to amend, is at this time, **DENIED**.

IV. Conclusion

For all of the above reasons, the Court **DENIES** PepsiCo's motion to dismiss at **ECF No. 261**.

SO ORDERED.

At San Juan, Puerto Rico, on this 25th day of March, 2026.

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Footnotes

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1 As to plaintiff's second argument, PepsiCo's motion to dismiss is not "untimely." PepsiCo's second affirmative defense in its answer to the third amended complaint preserves its ability to raise the argument that plaintiff failed to state a claim upon which relief can be granted. **ECF No. 200**, at 39 ("Each claim for relief in the Third Amended Complaint fails to state a claim upon which relief can be granted and is subject to dismissal under Federal Rule of Civil Procedure 12(b)(6)").

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United States District Court, E.D. Louisiana.

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

v.

TIDEWATER **LANDFILL** LLC, ET AL

AND IN RE: LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

CIVIL ACTION NO: 23-6183,
CIVIL ACTION NO: 25-936
|
03/24/2026

SENIOR UNITED STATES DISTRICT JUDGE

SECTION: "B"(5) SECTION: "B"(5)

ORDER AND REASONS

***1** Before the court are the motion for leave to appeal certain orders from Bankruptcy Court by Louisiana Fruit Company ("LFC"; Rec. Doc. 33), a response in opposition to the latter motion by Ironshore Specialty Insurance Company, AIG Specialty Insurance Company, Aspen Specialty Insurance Company, and The Gray Insurance Company (collectively, "Insurers"; Rec. Doc. 34), and transcripts from related proceedings in the Bankruptcy Court held in March and April of 2025 filed by LFC, per court order (Rec. Doc. 36).

Additionally, while the motion for appeal was pending, the Bankruptcy Court on September 8, 2025 transmitted to the Clerk of this court the complete record on appeal. The latter transmittal was docketed in this court as *In re: Louisiana Department of Environmental Quality*, 2:25-cv-00936-ILRL-MBN. Rec. Doc. 8. In response to the latter transmittal and the previously filed notice of appeal, the Clerk of Court for the Eastern District of Louisiana issued a scheduling order with briefing deadlines. Rec. Doc. 9. Therefore, also under consideration are all briefs filed by parties in the latter action, i.e. original and reply briefs by LFC as appellant, Rec. Docs. 10, 13; joint brief by Insurers as appellees, Rec. Doc. 11; and joint brief by Chapter 7 Trustees as appellees Rec. Doc. 12.

For reasons provided below,

IT IS ORDERED that LFC's opposed motion for leave to appeal (Rec. Doc. 33) is **DENIED**.

Alternatively, if leave to appeal had been granted, the following would issue, **IT IS FURTHER ORDERED** that the subject orders of the Bankruptcy Court are **AFFIRMED**, and the appeal is thereby **DISMISSED**. *See* EDLA CA # 25-00936 (hereinafter "APL").

I. BACKGROUND

The instant matter arises from an environmental enforcement litigation initiated by Louisiana Department of Environmental Quality ("LDEQ") concerning a **landfill** on property owned by LFC in Plaquemines Parish, Louisiana. On October 12, 2018, LDEQ filed the Petition for Mandatory Injunction in Louisiana state court against operators of the **landfill**, Tidewater **Landfill**, LLC ("Tidewater") and Environmental Operators (collectively, the "Debtors"), as well as Louisiana Fruit Company ("LFC") as property owners, and several insurers. *See* Bkry. Adversary Proceeding No. 24-1011, ECF Doc. 2. LDEQ alleged mismanagement and improper operation of the **landfill** and sought to close the facility and recover damages under Louisiana Civil Code article 667. *Id*. On various dates in 2019, and again in September 2023, LDEQ amended its petition to add additional insurer defendants, the owners of Debtor entities and several entities they control (the "Guidry Defendants"). *Id*.[1]

A motion for summary judgment was filed by LFC in the Bankruptcy Court to determine indemnity obligations for claims and potential liabilities under a Land Agreement (Bankruptcy Court, Rec. Doc. 93). The Bankruptcy Court denied summary judgment on the basis that it was "premature" to determine the Land Agreement's insurance and indemnity obligations because liability had not been determined. (Bankruptcy Court, Rec. Doc. 126). LFC moved for rehearing (Bankruptcy Court, Rec. Doc. 131), and the motion for reconsideration was denied. (Bankruptcy Court, Rec. Doc. 137).

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***2** The "indemnity, defend, and insure" provision for the Land Agreement states:

> "The Operators [Debtor – Tidewater **Landfill**, LLC] hereby indemnify, hold harmless and agree to defend LFC from any and all claims or liability resulting from the operations of the Operators on the First **Landfill** and the Second **Landfill**. The Operators agree to maintain general liability insurance covering both personal injury and property damage in the minimum amount of $300,000.00 per occurrence and to have LFC named an additional insured under any such policy."[2]

See LTA, Rec. Doc. 33-2, p. 2; and APL, Rec. Doc. 10, pp. 11-12.

Citing 28 U.S.C. § 158(a)(3) and the Federal Rules of Bankruptcy Procedure 8001 and 8004, LFC filed the motion for leave to appeal from the March 13, 2025 Order of the Bankruptcy Court (Bankruptcy Court, Rec. Doc. 126), and the subsequent April 22, 2025 Order of the Bankruptcy Court denying reconsideration of latter order (Bankruptcy Court, Rec. Doc. 137).

In denying LFC's summary judgment ruling, the Bankruptcy Judge stated:

> "So it would be an advisory opinion if I were to define the rights between the two parties on the one side of the "V" with, without regard to what's going on the other side of the "V" where LDEQ sits. It's just premature. That's all, okay? So I'm going to deny it as premature. You're more than welcome to reurge it at any time as we go along, okay?"

See LTA, Rec. Doc. 36-1 at p. 26 – 3/12/25 Hearing Transcript.

Reconsideration of the latter ruling under FRCP 59 (e) was denied. Id., Rec. Doc. 36-2 at p. 20 – April 16, 2025 Hearing Transcript. The Bankruptcy Judge stated:

> "I stand by my interpretation of *Bennett*[3] and the procedural posture in some of the other cases that I read is different from that here in that, again, we're dealing with LDEQ on one side. And then LDEQ is -- and you made a comment that you're, whatever liability you [LFC] possess, the client possesses is derivative of Tidewater and Environmental Operators. I'm not sure that that's what LDEQ has alleged. I think LDEQ has alleged that you [LFC has] have your own liability, your own standalone liability, and then the other two defendants, Tidewater and Environmental Operators, have their own liability.
>
> …
>
> I don't think that we've got any intervening change in controlling law and the availability of new evidence not previously available isn't applicable here. I'm going to deny the motion to reconsider."

See id. Rec. Doc. 36-2 at pp. 19-20.

II. ANALYSIS

Under 28 U.S.C. § 158, district courts have jurisdiction to hear appeals "from final judgments, orders, and decrees" of the bankruptcy court, as well as interlocutory orders and decrees from which the district court has granted leave to appeal. *In re Tullius*, 500 F. App'x 286, 288 (5th Cir. 2012). Because § 158(a)(3) does not provide the standard for the district court's determination on whether to grant leave to appeal, federal courts have looked to the standards set forth in 28 U.S.C. § 1292(b). *In re Turner*, CA # 96-1102, 1996 WL 162110, at *1 (E.D. La. Apr. 3, 1996) (citing *Matter of Ichinose*, 946 F. 2d 1169, 1176 (5th Cir. 1991)).

***3** We are thereby tasked to determine existence of the following grounds under § 1292(b) for allowing the appeal from subject interlocutory orders:

> 1. A controlling issue of law; and
>
> 2. A question where there is substantial ground for difference of opinion; and
>
> 3. An immediate appeal must materially advance the ultimate termination of the litigation.

Matter of Ichinose, 946 F. 2d at 1177. The foregoing grounds must be met for the interlocutory appeal to move forward, without being weighed or balanced. *Panda Energy Int'l, Inc. v. Factory Mut. Ins.*, 3:10–CV–003–K, 2011 WL 610016, at *4 (N.D. Tex. 2011) (citing *Ahrenholz v. Bd. of Tr. of Univ. Of Ill.*, 219 F. 3d 674, 676 (7th Cir. 2000)). Further, "[l]eave to appeal a bankruptcy court's interlocutory order should be granted only in circumstances which justify overriding the general policy of not allowing such appeals." *Powers v. Montgomery*, CIV. A. 3:97-CV-1736-P, 1998 WL 159944, at *2 (N.D. Tex. Apr. 1, 1998); *In re Global Marine, Inc.*, 108 B.R. 1007,

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1009 (S.D. Tex. 1988) (Whether "exceptional circumstances" warrant a grant of immediate appellate review.); *see also Clark–Dietz & Assoc. v. Basic Construction*, 702 F. 2d 67, 69 (5th Cir. 1983).

Unfortunately for LFC, the controlling precedent on indemnity agreements, as here, negates allowance of this appeal under § 1292(b). As discussed below, our review has not found substantial ground for difference of opinion on the controlling law; nor would an immediate appeal likely materially advance the ultimate resolution of the case; and exceptional circumstances warranting leave to appeal are also non-existent. The Bankruptcy Judge has carefully considered the issues and correctly found that the LFC has a right to assert indemnity issues. The decision to defer ruling on entitlement to indemnification and defense is not a final appealable order. *Cf. In re Reilly-Benton Co., Inc.*, No. CV 22-3731, 2022 WL 16683257, at *3 (E.D. La. Nov. 3, 2022) (A controlling issue of law has the potential to affect the course of the litigation when "reversal of the bankruptcy court's decision would result in dismissal of the action." Citing *Dorsey v. Navient Sols., Inc.,* 2015 WL 6442572, at *2 (E.D. La. Oct. 23, 2015). Moreover, "an issue is not seen as controlling if its resolution on appeal would have little or no effect on subsequent proceedings." *In re Cent. La. Grain Co-op., Inc.*, 489 B.R. at 411 (quoting *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 723 (N.D. Tex. 2006). *In re Reilly-Benton Co., Inc.,* 2022 WL 16683257, at *3.

Further, "[i]t is well settled in Louisiana jurisprudence that a contractual indemnity agreement will not be construed to require the indemnitor to indemnify the indemnitee for the indemnitee's own negligence." *Morella v. Bd. of Comm'rs of Port of New Orleans*, 2004-0312, p. 12 (La. App. 4 Cir. 10/27/04), 888 So.2d 321, 327. Rather, an indemnity agreement is only construed to indemnify an indemnitee against losses resulting to him through his own negligent act if that intention was expressed in unequivocal terms. *Id.* (quoting *Polozola v. Garlock, Inc.*, 343 So.2d 1000, 1003 (La. 1977)). For example, in *Polozola*, the subject "agreement state[d] that National Maintenance will indemnify Dow, its agents, servants or employees against claims made by National Maintenance or its subcontractors, agents, servants or employees because of injury '*whether caused by Dow's negligence or otherwise*.' " 343 So.2d at 1002 (emphasis added). The Louisiana Supreme Court held this language established the agreement required National Maintenance to indemnify Dow employees against losses resulting to them through their own negligence. *Id.*, 343 So.2d at 1003.

***4** LFC's reliance upon *Bennett v. DEMCO Energy Services, LLC*, 386 So 3d 270 (La. 2024) is misplaced. In that case, the Louisiana Supreme Court stated:

> "…, **asserting** a claim for indemnity, arising out of the same facts and circumstances, is not premature before a judicial finding of liability. The right to collect on an indemnity agreement is determined upon judgment or finding of liability or loss, but there is **no prohibition on asserting a claim for indemnity in the same proceeding**. Again, to require a party **to file** a separate indemnification action after a finding of liability runs afoul of our well-established principles of judicial efficiency." Emphasis added.

Bennett was further examined in *Anderson v. Briggs*, 2023-0814 (La. App. 4 Cir. 4/25/25), 414 So. 3d 990. The concept of indemnity stems from the general obligation to repair the damage

caused by one's fault under La. C.C. art. 2315 - citing *Bennett*, 2023-01358, p. 3, 386 So.3d at 273 to distinguish between the right to **claim** indemnity and defense and the right to collect same, and limitation of those rights by clear contractual terms. *Anderson*, 414 So. 3d at 1002–03. Emphasis added. Unlike LFC's interpretation of the right to claim or assert its indemnity claim, *Bennett* did not interpret such right to include an ultimate determination of entitlement when there are outstanding factual disputes over liability issues between the indemnitor and indemnitee. Absent also from the Bennett case was any question about ambiguity in the indemnity agreement. The right of action under the latter circumstance does not include a right to collect losses arising from one's own fault, if any, due to the ambiguous nature of the instant agreement.

LSA-C.C. Art. 1805 (Enforcement of contribution) sets forth the mechanism for bringing a claim against a solidary co-obligor for contribution. "A party sued on an obligation that would be solidary if it exists may seek to enforce contribution against any solidary co-obligor by making him a third-party defendant according to the rules of procedure, whether or not that third-party defendant has been initially sued, and whether the party seeking to enforce contribution admits or

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denies liability on the obligation alleged by plaintiff." Id. That right of action is said to be the source of indemnification, and '[s]ubrogation takes place by operation of law...[i]n favor of an obligor **who pays a debt he owes with others or for others and who has recourse against those others as a result of the payment**.' LSA-C.C. art. 1829(3); [internal citation omitted] (Emphasis added). *Bennett,* 386 So. 3d at 276 (citing *Reggio v. E.T.I., et al.*, 07-1433 (La. 12/12/08), 15 So. 3d 951, 960-61.

In following the indemnity principles set forth in *Bennett* and *Morella*, the Louisiana Fourth Circuit court stated "The trial court should have deferred its determination of the import of the indemnity provision between Admiral and Ports America until after the jury made its liability determination…. *See Suire v. Lafayette City-Par. Consol. Gov.*, 2004-1459, 1460, 1466, pp. 17-18 (La. 4/12/05), 907 So.2d 37, 51 (holding the Louisiana Third Circuit Court of appeal erred in finding "a duty to defend, or pay for defense costs, under the terms of the contractual indemnity provision" because the "lawsuit [was] still pending, and no determination of liability ha[d] been made," such that the claim for defense and indemnity needed to be "defer[red]...until the lawsuit ...concluded and liability [was] determined"). *Cf. Bollinger Marine Fabricators, LLC v. Marine Travelift, Inc.*, 2015 WL 4937839, at *4 (E.D. La. 2015) (holding the plaintiff's claim for fees and expenses was not premature because "there [was] no dispute that the underlying lawsuit...concluded and that [the plaintiff]...incurred defense costs" during it).[4] *Anderson v. Briggs*, 2023-0814 (La. App. 4 Cir. 4/25/25), 414 So. 3d 990, 1005.

***5** In reliance upon *Bennett*, the Louisiana Fourth Circuit in *Riggio v. Ports Am. Louisiana, LLC,* 407 So.3d 636, 644 (La. App. 4 Cir. 12/5/24) stated "[a]lthough it was not premature for Ports [Indemnitee] to file its third-party demands before … judicial determination was made, it was premature for the trial court to rule on those demands. *See Bennett*, 23-01358, pp. 8-9, 386 So.3d at 276. Here, the current record does not present a justiciable issue for resolution on the scope of an ambiguous indemnity agreement.

There is nothing in the indemnity provision between LFC and Debtors that unequivocally states that LFC will be indemnified for its own negligence. The subject indemnification agreement stated Operators (Debtors here) would "indemnify, hold harmless and agree to defend LFC from any and all claims or liability resulting from the operations of the Operators [Debrors] on the First **Landfill** and the Second **Landfill**." *See* LTA, Rec. Doc. 33-2, p. 2; and APL, Rec. Doc. 10, pp. 11-12.

Considering the instant indemnity agreement in accordance with the above-stated authorities, we find it did not constitute an agreement by which Debtors would indemnify LFC against losses resulting from LFC's own negligence because the indemnification provision contained no unequivocal intention to that effect. A party cannot be indemnified for its own negligence absent an unmistakable, unambiguous and explicit statement within the four corners of the contract that such is the intent of the parties. As found earlier, there is no clear expression of an intent to indemnify LFC against its own negligence. However, Debtors would be required to indemnify LFC against losses resulting from Debtors' own negligence.

Accordingly, the Bankruptcy Court's rulings at issue are not appealable orders; alternatively, if they were appealable, we find no reversible error and affirm that Court's orders.

New Orleans, Louisiana this 24th day of March 2026

SENIOR UNITED STATES DISTRICT JUDGE

All Citations

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Footnotes

1 The matter was removed to the United States Bankruptcy Court, Eastern District of Louisiana, due to the Debtors filing for bankruptcy relief under chapter 7 of the Bankruptcy Code.

2 LFC asserted a Crossclaim in the civil litigation and a claim in the bankruptcy proceedings (Case No.

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idewater seeking both a full defense and, if necessary, to be indemnified against 20-11646, 20-11648) against T

any liability arising out of Debtor's operations of the **landfill**.

3 *Bennett v. DEMCO Energy Services, LLC*, 386 So 3d 270, 276-277 (La. 2024)

4 In a distinguishable settlement context and basis for review, see *Chevron Oronite Co., L.L.C. v. Jacobs Field Servs. N. Am., Inc*, 951 F.3d 219, 225–26 (5th Cir. 2020) ("As a general rule, one seeking indemnity for a settlement must show actual liability to recover." *Sullivan v. Franicevich*, 899 So. 2d 602, 609 (La. App. 4th Cir.), *cert. denied*, 902 So. 2d 1051 (La. 2005). "An exception to the rule is that the indemnitee need show only potential, rather than actual, liability...where the claim is based on a written contract...." *Vaughn v. Franklin*, 785 So. 2d 79, 87 (La. App. 1st Cir.), *cert. denied*, 798 So. 2d 969 (La. 2001). An indemnitee also need show only potential liability if "the defendant tenders the defense of the action to the indemnitor." *Fontenot v. Mesa Petrol. Co.*, 791 F.2d 1207, 1216–17 (5th Cir. 1986). Those propositions are supported by the overwhelming weight of Louisianaand Fifth Circuit authority.

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2026 WL 820745
Only the Westlaw citation is currently available.
Massachusetts Land Court,
Department of the Trial Court,.
Franklin County.

TOWN OF WENDELL, MASSACHUSETTS, Plaintiff,

v.

ANDREA JOY CAMPBELL, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS, Defendant.

25 MISC 000014 (LER)
|
Dated: March 12, 2026

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

By the Court (Reznick, J.)

***1** The Town of Wendell, Massachusetts (the "Town" or "Wendell"), initiated this lawsuit against the Attorney General after she issued a decision disapproving Wendell's "General Bylaw for the Licensing of Battery Energy Storage Systems" pursuant to G.L. c. 40, § 32 (the "Decision" and "BESS Bylaw"). The Attorney General disapproved the BESS Bylaw on the grounds that it had not been adopted in accordance with the procedural requirements of G.L. c. 40A, § 5 for zoning bylaws and because it would circumvent the legislative protections afforded to solar energy systems and structures by G.L. c. 40A, § 3, ¶ 9. Where municipal bylaws are to be afforded a strong presumption of validity, the Town asserts the Attorney General committed an error of law and exceeded the scope of her review authority under G.L. c. 40, § 32 and c. 40A, § 5 in determining that the BESS Bylaw qualified as a zoning regulation or conflicted with state law.

Before the court are the parties' cross-motions for judgment on the pleadings. Wendell asks the court to annul the Attorney General's Decision and remand the matter with instructions to approve the BESS Bylaw. The Attorney General asks the court to affirm her Decision. For the reasons that follow, the court determines that the Attorney General did not commit an error of law or abuse of discretion in disapproving the BESS Bylaw adopted by the voters of Wendell as a general bylaw instead of a zoning bylaw. Accordingly, the court DENIES Wendell's motion and ALLOWS the Attorney General's motion. The Attorney General's disapproval of Wendell's BESS Bylaw will therefore stand.

PROCEDURAL HISTORY

On January 10, 2025, Wendell filed its Complaint for Judicial Review in the Nature of Certiorari Pursuant to G.L. c. 249, § 4. The court held a case management conference with the parties on March 24, 2025. On April 14, 2025, the Attorney General filed the Administrative Record. On May 14, 2025, Wendell filed its Motion for Judgment on the Pleadings, and on June 13, 2025, the Attorney General filed her Memorandum in Opposition to Plaintiff's Motion for Judgment on the Pleadings and in Support of Defendant's Cross-Motion for Judgment on the Pleadings. Wendell filed its Reply Brief and Opposition to Defendant's Cross-Motion for Judgment on the Pleadings on June 27, 2025.

The court held a status conference with the parties on July 17, 2025 and granted the parties leave to file supplemental briefs addressing the impact, if any, of the Land Court decision issued in *Duxbury Energy Storage, LLC v. Town of Duxbury*, 33 LCR 293 (June 23, 2025) (Case No. 23 MISC 000643) (Reznick, J.), 2025 WL 1743026, and the Appeals Court decision issued in *Sunpin Energy Servs., LLC v. Zoning Bd. of Appeals of Petersham*, 105 Mass. App. Ct. 641 (July 9, 2025), application for further appellate review granted, 496 Mass. 1112 (Dec. 11, 2025). Neither party asked the court to stay this action pending the outcome of further appeals. On August 5 and 7, 2025, respectively, Wendell and the Attorney General filed supplemental briefs. After a hearing held on September 9, 2025, the court took the cross-motions for judgment on the pleadings under advisement.

STANDARD OF REVIEW

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The Attorney General's Review of Municipal Bylaws Pursuant to G.L. c. 40, § 32

***2** Before a newly enacted municipal bylaw takes effect, the Attorney General is charged with reviewing it for procedural and substantive compliance with state law. G.L. c. 40, § 32; *Town of Wendell v. Att'y Gen.*, 394 Mass. 518, 523-24, 539 (1985); *Town of Amherst v. Att'y Gen.*, 398 Mass. 793, 795-96 (1986).[1] The "Attorney General's power to disapprove town by-laws is limited," and the "Attorney General is guided in the exercise of h[er] limited power of disapproval by the same principles that guide" a court reviewing a municipal bylaw. *Town of Amherst*, 398 Mass. at 795. The Attorney General, like the court, may not disapprove of a bylaw based on disagreement with its underlying policy. *Town of Concord v. Att'y Gen.*, 336 Mass. 17, 24-26 (1957). The Attorney General must also make every presumption in favor of the validity of the bylaw. *Town of Amherst*, 398 Mass. at 795-96.

Certiorari Standard of Review

An action for judicial review in the nature of certiorari under G.L. c. 249, § 4 is the appropriate vehicle to review the Attorney General's disapproval of a town bylaw.[2] *Town of Reading v. Att'y Gen.*, 362 Mass. 266, 269-70 (1972). "[A] civil action in the nature of certiorari, pursuant to G. L. c. 249, § 4, 'is a limited procedure reserved for correction of substantial errors of law apparent on the record created before a judicial or quasi-judicial tribunal.' " *Cumberland Farms, Inc. v. Bd. of Health of Braintree*, 495 Mass. 225, 231 (2025), quoting *Indeck v. Clients' Sec. Bd.*, 450 Mass. 379, 385 (2008); *State Bd. of Ret. v. Woodward*, 446 Mass. 698, 704 (2006), citation omitted ("[A] court that undertakes certiorari review 'is bound to determine, upon an inspection of the whole record, whether the proceedings are legal or erroneous.' "). Because "[j]udgment on the pleadings under rule 12(c) lies only when the text of the pleadings produces no dispute over material facts," *Tanner v. Bd. of Appeals of Belmont*, 27 Mass. App. Ct. 1181, 1182 (1989), and "review under G.L. c. 249, § 4 is limited to correcting 'substantial errors of law that affect material rights and are apparent on the record[,]' .... [t]he proper vehicle for review is a motion for judgment on the pleadings." *Drayton v. Comm'r of Corr.*, 52 Mass. App. Ct. 135, 136 n.4 (2001), citations omitted, quoting *City of Gloucester v. Civ. Serv. Comm'n*, 408 Mass. 292, 297 (1990); Land Court Standing Order 2-06(4) ("A claim for judicial review on the administrative record shall be resolved through a motion for judgment on the pleadings, Mass. R. Civ. P. 12(c), unless the court's decision on any motion ... has made such a resolution inappropriate."). The court's review "extends to the entire record of the proceedings that are the subject of the complaint for relief in the nature of certiorari, or to such portions of the record as the parties agree are necessary." *Woodward*, 446 Mass. at 704.

***3** The standard of review applied by the court is "flexible and case specific," *Hoffer v. Bd. of Registration in Med.*, 461 Mass. 451, 458 n.9 (2012), but "the disposition must ultimately turn on whether the agency's decision was arbitrary and capricious, unsupported by substantial evidence, or otherwise an error of law." *Langan v. Bd. of Registration in Med.*, 477 Mass. 1023, 1025 (2017), citation omitted; *see Durbin v. Bd. of Selectman of Kingston*, 62 Mass. App. Ct. 1, 5 (2004) ("In the absence of substantial legal error, we review the record to determine whether that decision was supported by substantial evidence."); *Fafard v. Cons. Comm'n of Reading*, 41 Mass. App. Ct. 565, 568 (1996), citing *Lovequist v. Cons. Comm'n of Dennis*, 379 Mass. 7, 18 (1979). Here, the statute empowering the Attorney General to review town bylaws, G.L. c. 40, § 32, "do[es] not contain 'narrow and objective criteria,' but rather refer[s] to a broad standard," which "tends to indicate that judicial review is limited to a search for 'error of law or abuse of discretion, as measured by the arbitrary or capricious test.' " *Yerardi's Moody St. Rest. and Lounge, Inc. v. Bd. of Selectmen of Randolph*, 19 Mass. App. Ct. 296, 300 (1985), quoting *Caswell v. Licensing Comm'n for Brockton*, 387 Mass. 864, 878 (1983); *see Town of Amherst*, 398 Mass. at 795.

In sum, "[s]ince review is confined to the record and is for the purpose of correcting legal error," the court must determine whether, based on the administrative record, the Attorney General's disapproval of the BESS Bylaw was authorized by the scope of her review under G.L. c. 40, § 32 or was premised on a substantial error of law rendering the Decision arbitrary and capricious. *City of Gloucester*, 408 Mass. at 297; *Drayton*, 52 Mass. App. Ct. at 136 n.4; *Delapa v. Cons. Comm'n of Falmouth*, 93 Mass. App. Ct. 729, 733-34 (2018).

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BACKGROUND & FACTS

The background and undisputed facts are taken from the certified Administrative Record ("AR") filed with the court on April 14, 2025. Further facts from the Administrative Record are reserved for the discussion.

Article XIV of Wendell's Zoning Bylaws

1. On March 1, 2023, the Attorney General issued a decision approving in part and disapproving in part Article 30, an amendment to Article XIV of the Town of Wendell's Zoning Bylaws that addressed Ground-Mounted Solar Electric Generating Installations ("solar installations"). AR pp. 200-08. The Attorney General's decision approved the amendments adopted under Article 30 "[e]xcept for the prohibition of standalone battery energy storage facilities and the limitation on the use of herbicides and pesticides that we disapprove because they conflict with state law...." AR p. 207. The Attorney General's decision reasons that the ban on stand-alone battery energy storage facilities in all zoning districts "violates G.L. c. 40A, § 3, and is not grounded in articulated evidence of public health, safety or welfare concerns sufficient to justify the prohibition." AR p. 200.

2. As amended by the approved portions of Article 30, Article XIV of Wendell's Zoning Bylaws "applies to the construction, operation, repair, and/or removal of Large-Scale and Very Large-Scale Ground-Mounted Solar Electric Generating Installations, with or without an accessory battery storage system..." Article XIV, § C.[3]

***4** 3. In the Town's designated Solar Overlay District, Large-Scale and Very Large-Scale solar installations without an "Accessory Battery Energy Storage Facility"[4] are allowed by right but require site plan review; those with an accessory BESS require site plan review and a special permit. Article XIV, § C(3). Outside the Solar Overlay District, site plan review and a special permit are required for any Large-Scale solar installations with or without an accessory BESS on one or more adjacent parcels in common ownership. Article XIV, § C(5). Medium-Scale solar installations may be installed inside or outside the designated Solar Overlay District, subject to site plan review. Article XIV, § C(4).

4. Solar installations, with or without accessory BESS, may occupy up to ten acres of land in the Solar Overlay District, and up to five acres of land outside the Solar Overlay District. Article XIV, §§ B & C.

5. No more than one acre of forest may be removed for Large- or Very-Large Scale solar installations, with or without an accessory BESS. Article XIV, § F(1)

6. A BESS accessory to a Medium-, Large-, or Very Large-Scale solar installation must be sized to accommodate only the electricity generated on the site and requires site plan review, a special permit, and a safety review approval from the Town's fire officials. Article XIV, § C(7).

7. A BESS accessory to Large-Scale and Very Large-Scale solar installations must meet the standards set forth in the National Fire Protection Association's NFPA 855 Standard for the Installation of Stationary Energy Storage Systems, 2020 Edition (NFPA 855), as amended and updated. Article XIV, § D(1).

8. In relevant part, any solar installations (with or without accessory BESS) that require a special permit and/or site plan review must provide the following:

a. A list of any hazardous materials for the solar installation components and any BESS, fire suppression equipment or materials, and structural elements used to construct the solar installation that could produce leachate and potentially contaminate air or water or impair air or water quality (Article XIV, § E(2)(c)(i));

b. A Hazard Mitigation & Hazardous Materials Plan, which must include measures to contain the release of hazardous materials in the event of fire, particularly with respect to solar installations that have an accessory BESS (Article XIV, § E(2)(g));

c. Proof of insurance in an amount sufficient to cover loss or damage to person(s) and structure(s) occasioned by the use or failure of the solar installation and any accessory BESS including coverage for fires, explosions and flooding events (Article XIV, § E(2)(i));

d. Financial surety to be provided in the event of approval of the application and which shall be held by the Town, to

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cover the cost of removal, recycling, and disposal of the installation and remediation and/or restoration of the site in the event the Town must remove the installation and remediate and/or restore the site to its natural preexisting condition (Article XIV, § E(2)(j)).

The BESS Bylaw

***5** 9. On May 1, 2024, Wendell held a Town Meeting on Article 1, a proposed amendment to the Town's general bylaws submitted by petition of 111 registered voters in Wendell. AR p. 14.

10. Article 1 proposed a bylaw entitled "General Bylaw for the Licensing of Battery Energy Storage Systems," which "adds a new general bylaw for the Town of Wendell dealing with the licensing of Battery Energy Storage Systems (BESS), including those powered by lithium-ion batteries, for the purpose of protecting the health, safety and welfare of residents of Wendell and its natural and built environment .... limits unnecessary forest land conversion and clear-cutting, reducing the loss of all other forest benefits, and promotes the reuse of already developed sites for battery energy storage systems." BESS Bylaw, § A.[5]

11. The BESS Bylaw sets forth a licensing scheme for BESS based on power rating. BESS Bylaw §§ C-G. BESS with a power rating of less than 1 MW (megawatt) do not require a license, BESS with a power rating greater than 1 MW and less than 10 MW require a license, and BESS with a power rating greater than 10 MW are not eligible for a license. BESS Bylaw, § C.

12. The BESS Bylaw makes no distinction on the application of its provisions based on whether the BESS is "standalone" on a site or whether it is accessory to a solar installation or any other residential, commercial, or industrial use. *See generally* BESS Bylaw.

13. Regardless of power rating, no BESS site may exceed five acres. BESS Bylaw, § C(3).

14. All BESS must meet the standards of the National Fire Protection Association's Standard for the Installation of Stationary Energy Storage Systems (that is, NFPA 855) in effect at the time of construction. BESS Bylaw, § C(1).

15. An applicant seeking a license for a BESS must provide:

a. A training plan approved by the Town Fire Chief to respond to any emergency incident involving BESS (BESS Bylaw, § D(1)(e));

b. An emergency operations plan and hazard mitigation analysis that follows the standards set forth by the National Fire Protection Association (BESS Bylaw, § D(1)(f)-(g));

c. A description of the battery components and their chemical and physical makeup and compositions (BESS Bylaw, § D(1)(h));

d. An air dispersion model and analysis addressing the effects of a thermal runaway event affecting at least half of the battery cells of the proposed BESS (BESS Bylaw, § D(1)(i)-(j));

e. An emergency response plan detailing the manpower and equipment needs to respond to such a thermal runaway event (BESS Bylaw, § D(1)(k));

f. Proof of liability insurance (BESS Bylaw, § G(1)); and

g. A decommissioning plan that accounts for the estimated cost of removal and site remediation, and proof of financial surety in that amount, which is to be provided to the Town to hold for such purpose if the license is approved (BESS Bylaw, § G(2)).

16. The BESS Bylaw provides guidelines on the siting of BESS and restrictions on clear-cutting forest land to build new BESS:

3. To the maximum extent feasible, all new BESS shall be located on previously-developed commercial industrial sites, **landfills**, repurposed building pads or roadways. Construction on undeveloped land of any kind shall be minimized to the extent possible, but in no case shall exceed 25% of the total gross square footage of the proposed site. Total site square footage per applicant shall not exceed five acres.

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***6** 4. To minimize forest land conversion, any BESS project defined in this bylaw shall not include clear-cutting of forest land in excess of one-half (.5) of an acre.

BESS Bylaw, § C(3)-(4).

17. The BESS Bylaw creates a Licensing Board consisting of the Selectboard of Wendell and the following additional appointees: one member appointed by the Conservation Commission; one member appointed by the Board of Health; one member appointed by the Planning Board; one member appointed by the Zoning Board of Appeals; one member appointed by the Energy Committee; one member appointed by the Municipal Light Board; and one member appointed from the Finance Committee. BESS Bylaw, § B.

18. The Licensing Board must make the following six findings before issuing a BESS license:

1. The EOP [Emergency Operation Plan], HMA [Hazard Mitigation Analysis], evacuation plan, and other emergency response documents are sufficient in content and detail to protect the public health, safety, convenience, and welfare;

2. The manpower, equipment, and other resources available to the Town's emergency responders are sufficient to respond to a potential hazard or emergency response scenario associated with the proposed BESS equipment;

3. The applicant has adequately and completely identified all hazards associated with the operation of the BESS system equipment in the location proposed;

4. The BESS equipment will be in a location that avoids or minimizes risk, and will not cause undue or excess risk, to the public health, safety, convenience, and welfare;

5. The potential hazards associated with the BESS equipment in the particular location proposed can be appropriately managed and minimized; and

6. There are no other considerations that would result in operation of the BESS system equipment in the particular location creating an undue or unacceptable risk to the public health, safety, convenience, and welfare, and the project to the greatest extent feasible has avoided or minimized adverse impacts to the health, safety, convenience and welfare of the town of Wendell.

BESS Bylaw, § E.

19. Approved BESS, regardless of power rating or storage capacity, must comply with all other local bylaws and regulations, including Article XIV, which applies to solar installations and BESS accessory to such solar installations. BESS Bylaw, § C(1).

20. The BESS Bylaw includes a supremacy clause that states: "If any provisions of this bylaw are found to be in conflict with provisions of other town bylaws, the provisions of this bylaw shall supersede the other bylaws." BESS Bylaw, § H.

21. At the Town Meeting held May 1, 2024, a quorum of voters (102 out of 756, 13.5%) passed the BESS Bylaw with a 100-1 vote in favor. AR pp. 12, 233.

22. The Town thereafter submitted the BESS Bylaw to the Municipal Law Unit of the Office of the Attorney General for review pursuant to G.L. c. 40, § 32. AR pp. 1-29.

23. During the course of review, the Attorney General considered the BESS Bylaw, the existing Zoning Bylaws of the Town of Wendell, including Article XIV as amended by Article 30, a letter in support of the BESS Bylaw and attachments in support from the Town dated July 19, 2024 (AR pp. 232-98), and the following communications from interested parties: (1) a letter in opposition to the BESS Bylaw from James M. Avery, Esq., Pierce Atwood, LLP on behalf of Wendell Energy Storage 1, LLC dated June 10, 2024 (AR pp. 33-38), (2) a letter in support of the BESS Bylaw submitted by Gloria Kegeles dated June 30, 2024 (AR pp. 62-66) and further communications from Gloria Kegeles on August 6, 2024 (AR pp. 299-300) and November 14, 2024 (AR pp. 89-91), and (3) a letter in support of the BESS Bylaw from the Town of Leverett Board of Selectman dated July 2, 2024 (AR pp. 92-94).

***7** 24. On November 14, 2024, the Attorney General issued the Decision disapproving the BESS Bylaw in its entirety. AR pp. 210-22.

DISCUSSION

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In her disapproval Decision, the Attorney General concluded that, on balance, Wendell's BESS Bylaw "regulates the use of land and therefore should have been adopted as a zoning bylaw (rather than a general by-law)." Decision p.1. After a thorough description of the applicable law and the provisions of the BESS Bylaw, the Attorney General found that the BESS Bylaw "seeks to regulate and manage 'typical concerns usually reflected in the zoning process,' " including the objectives outlined in Wendell's own zoning bylaws. *Id*. at p. 8, quoting *Lovequist*, 379 Mass. at 14. The Attorney General also concluded the Town has a history of regulating BESS through zoning regulations. *Id*. at p. 9. Wendell had previously sought to regulate all BESS through its zoning power with the adoption of Article 30 in 2023, opting to prohibit BESS as a principal use of land (though, the Attorney General later disapproved the ban). *Id*. at p. 9, citing AR pp. 200-08; *see Spenlinhauer v. Town of Barnstable*, 80 Mass. App. Ct. 134, 140 (2011). Additionally, through the approved portions of amended Article XIV, Wendell currently regulates BESS accessory to solar installations. Decision p. 9; *see Rayco Inv. Corp. v. Bd. of Selectmen of Raynham*, 368 Mass. 385, 393 (1975). The Attorney General observed that several provisions of the BESS Bylaw would conflict with Article XIV, concluding that the BESS Bylaw therefore constitutes an attempt to amend Wendell's Zoning Bylaws without following the procedures set forth in G.L. c. 40A, § 5. Decision pp. 9-11; *see Rayco*, 368 Mass. at 393-94. The Attorney General further concluded that regulating BESS through a general bylaw circumvents the substantive protection afforded to solar energy systems and related structures by G.L. c. 40A, § 3. Decision pp. 11-13; *see Lovequist*, 379 Mass. at 12.

Wendell disputes the Attorney General's findings and characterizations, arguing that the BESS Bylaw was enacted to address non-zoning related interests – the protection of Town residents and the environment from fire risk and other safety hazards presented by BESS – and that any impact on land use is secondary to those aims. *See Lovequist*, 379 Mass. at 13; *Haven Ctr., Inc. v. Town of Bourne*, 490 Mass. 364, 370 (2022). Wendell argues that its prior attempt to prohibit BESS through a zoning bylaw amendment and any overlap between the BESS Bylaw and its current zoning bylaws are irrelevant to the required analysis because the Town does not have a "comprehensive" zoning scheme addressing BESS. *See Rayco*, 368 Mass. at 393; *Lovequist*, 379 Mass. at 13-14; *Spenlinhauer*, 80 Mass. App. Ct. at 141-42. The Town also contends that, by invoking G.L. c. 40A, § 3, the Attorney General is conflating all BESS with BESS that are accessory to solar installations. Wendell argues that applicants under the BESS Bylaw will not be precluded from raising as-applied challenges under G.L. c. 40A, § 3 if they can demonstrate their threshold entitlement to such protections for solar energy systems or structures.

***8** Upon considering the Administrative Record, the arguments raised by the parties, and the factors for determining whether a municipal bylaw qualifies as zoning regulation, the court determines that the Attorney General's Decision disapproving Wendell's BESS Bylaw is neither arbitrary, capricious, nor erroneous. Further, the Attorney General did not err in taking into consideration that the BESS Bylaw may evade the protections afforded by G.L. c. 40A, § 3. Accordingly, the court affirms the Attorney General's Decision.

Whether the BESS Bylaw Is an Exercise of the Zoning Power

"G.L. c. 40A preempts the manner and method in which a municipality may exercise its zoning power," *Lovequist*, 379 Mass. at 12, by "provid[ing] certain protections to preexisting land uses and establish[ing] procedural requirements for voting on zoning bylaws." *Haven Ctr*., 490 Mass. at 367-68, citing G.L. c. 40A, §§ 5-6; *see Town of Canton v. Bruno*, 361 Mass. 598, 604-05 (1972) and cases cited. "Action taken beyond the authority conferred[,] or not in compliance with the terms and conditions governing [the exercise of the zoning power,] is invalid." *Town of Canton*, 361 Mass. at 604-05, citations omitted. The Attorney General may therefore disapprove of a bylaw passed under the general police power if the general bylaw is in fact an exercise of the zoning power. *Haven Ctr.*, 490 Mass. at 367-68.

The parties' arguments focus on four key appellate cases, *Rayco*, *Lovequist*, *Spenlinhauer*, and *Haven Center*, which analyze whether a challenged general bylaw should have been enacted as a zoning bylaw. The overarching inquiry is whether the bylaw should be "subject to the requirements of G. L. c. 40A in light of its 'nature and effect,' and 'the historical context in which it [has] been enacted.' " *Haven Ctr.*, 490 Mass. at 369, internal citations omitted quoting *Rayco*, 368 Mass. at 392 and *Lovequist*, 379 Mass. at 14.

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Factors relevant to evaluating the nature and effect of the bylaw "include whether the bylaw is intended to 'prohibit or permit any particular listed uses of land' and whether the dominant purpose of the bylaw pertains to interests typically addressed by the zoning process." *Haven Ctr.*, 490 Mass. at 369, quoting *Lovequist*, 379 Mass. at 13-14. Factors relevant to historical context include "whether other municipalities have adopted similar bylaws as zoning bylaws, and whether the municipality whose bylaw is being scrutinized previously has regulated the topic at hand through 'comprehensive' zoning ordinances." *Id.*; *see Lovequist*, 379 Mass. at 14; Rayco, 368 Mass. at 393-94; *Spenlinhauer*, 80 Mass. App. Ct. at 141-42.

"We do not consider all ordinances or by-laws that regulate land use to be zoning laws." *Lovequist*, 379 Mass. at 12; *Haven Ctr.*, 490 Mass. at 369 ("The mere fact that a bylaw regulates land use does not automatically mean that it is a zoning bylaw."). Where there is "no evidence ... that there is or ever has been a comprehensive zoning by-law governing" the subject matter, "municipal regulations that simply overlap with what may be the province of a local zoning authority" need not be "promulgated in accordance with the requirements of G.L. c. 40A." *Lovequist*, 379 Mass. at 14. However, where a general bylaw addresses the same subject matter as a zoning bylaw and "necessarily modifie[s]" it, the bylaw "ought to be considered as an amendment to the zoning by-law." *Rayco*, 368 Mass. at 393; *see Spenlinhauer*, 80 Mass. App. Ct. at 140. As several reviewing courts have noted, to allow otherwise would bypass the substantive and procedural protections of Chapter 40A and defeat its legislative purpose. *Lovequist*, 379 Mass. at 12; *Town of Canton*, 361 Mass. at 605; *Rayco*, 368 Mass. at 393-94; *Valley Green Grow, Inc. v. Town of Charlton*, 27 LCR 99, 105 (2019) (Case No. 18 MISC 000483) (Foster, J.), 2019 WL 1087930 at *9, citations omitted ("A general bylaw can only treat the subject matter of a zoning bylaw through regulations that supplement the terms of the zoning bylaw, through, for example, setting the terms of particular uses on individual applications through a licensing process. The general bylaw may not, however, contradict or restrict the use that is controlled by the zoning bylaw."); *see* G.L. c. 40A, § 5 ("Zoning ordinances or by-laws may be adopted and from time to time changed by amendment, addition or repeal, but only in the manner hereinafter provided.").

***9** Considering each of these factors, the court finds that the Attorney General did not err in concluding that the BESS Bylaw "demonstrates 'the nature and effect' of a zoning by-law." Decision p. 9, quoting *Rayco*, 368 Mass. at 392.

1. The Purpose and Effect of the BESS Bylaw Is in the Nature of Zoning

The first considerations for determining whether a bylaw is an exercise of the zoning power include whether the bylaw has a dominant purpose (not just a secondary impact) of regulating particular land uses and whether the bylaw addresses concerns typical of zoning, "including, but not limited to, 'the character of the community and the compatibility of nearby land uses.' " *Haven Ctr.*, 490 Mass. at 369, quoting *Lovequist*, 379 Mass. at 13-14 (a bylaw with a dominant purpose that is not typical of zoning that nevertheless has a secondary impact on land use, can, depending on other factors, be passed as a valid general bylaw, such as a wetlands protection bylaw). Wendell emphasizes that the dominant purpose of the BESS Bylaw is "protecting the health, safety, and welfare of residents of Wendell and its natural and built environments" and, more specifically, addressing the risk of fire, explosion, and release of toxic gases from BESS. BESS Bylaw § A. Where municipalities may use their police power to enact bylaws "as they may judge most conducive to their welfare," G.L. c. 40, § 21, Wendell contends the BESS Bylaw was properly adopted as a general bylaw and the Town was not required to regulate this subject using only its zoning power.

In the court's view, the generalized health, safety, and welfare purposes stated in the BESS Bylaw do not shed much light on the required analysis. Local zoning regulations are an exercise of the general police power conferred by the Home Rule Amendment. *Rayco*, 368 Mass. at 392 n.4 ("The zoning power is, of course, merely one category of the more general police power, concerned specifically with the regulation of land use."); *see Leahy v. Insp. of Bldgs. of City of New Bedford*, 308 Mass. 128, 131 (1941); *Lovequist*, 379 Mass. at 12. However, the local exercise of the police power to regulate land use is not unfettered. The Zoning Act, set forth in Chapter 40A, places both substantive and procedural restrictions on bylaws "adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to

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protect the health, safety and general welfare of their present and future inhabitants." G.L. c. 40A, § 1A (emphasis added); *see Rayco*, 368 Mass. at 393-94; *Lovequist*, 379 Mass. at 12. While the court does not doubt the voters of Wendell passed the BESS Bylaw to protect the health, safety, and general welfare of the Town and its residents, that motive is not inconsistent with the Attorney General's conclusion that the BESS Bylaw's purpose and effects are in the nature of zoning regulation. *See Rayco*, 368 Mass. at 394, quoting *Bd. of Appeals of Hanover v. Hous. Appeals Comm. in the Dep't of Cmty. Affs.*, 363 Mass. 339, 360 (1973) (exercise of municipal police power cannot be considered in a vacuum given that the underlying query must assess whether the municipality has exercised its police powers "in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature").

***10** Wendell likens the BESS Bylaw to the wetlands protection general bylaw upheld in *Lovequist*, arguing its impacts on land use are only secondary or incidental to its dominant purpose to protect public health and safety and mitigate risks from fire or toxic releases. However, in *Lovequist*, the Supreme Judicial Court observed that the wetlands bylaw's

> impact on land use follows only from its dominant purpose to protect wetlands values e. g., public or private water supply, groundwater, flood control, erosion control, storm damage, water pollution, fisheries, shellfish, wildlife, recreation, and esthetics. These wetland values, moreover, do not include air pollution, noise, demands for sewers and other municipal services or the character of the community and the compatibility of nearby land uses, all typical of the concerns usually reflected in the zoning process.

379 Mass. at 13-14. Here, the BESS Bylaw's stated purpose is not only to protect public health, safety, and welfare by addressing the risk of BESS-related fire or other hazards, it also seeks to protect the Town's "natural and built environment" from the same risks, and "limits unnecessary forest land conversion and clear-cutting, reducing the loss of all other forest benefits, and promot[ing] the reuse of already developed sites for battery energy storage systems." BESS Bylaw § A.[6] These stated objectives are directly concerned with "the compatibility of nearby land uses," evidencing that the effect of the BESS Bylaw on land use is not separate from or secondary to its predominant purpose.[7] AR p. 112 (Article I of the Town's Zoning Bylaws); *see Lovequist*, 379 Mass. at 14. Further supporting this conclusion is that the BESS Bylaw requires the Licensing Board to consider the particular location proposed for a BESS project in four out of the six findings necessary to grant a license. BESS Bylaw § E(3)-(6). In addition to compatibility with the particular location proposed, the BESS Bylaw addresses other concerns typical of zoning, such as "air pollution" and "demands for ... municipal services." *Lovequist*, 379 Mass. at 14; BESS Bylaw §§ D(1)(i) (applicant must provide an air dispersion model and analysis); D(1)(e) and (k), D(2), and E(1)-(2) (applicant must detail, and Licensing Board must find, that local emergency response can be adequately trained and has adequate resources to address BESS fires and thermal runaway events).

***11** For similar reasons, Wendell's comparison of the licensing scheme established in the BESS Bylaw to the application process in *Lovequist* is not persuasive. While the wetlands protection general bylaw at issue in *Lovequist* required that "permission be obtained from the commission based on factual circumstances surrounding individual applications," it did "not prohibit or permit any particular listed uses of land or the construction of buildings or the location of businesses or residences in a comprehensive fashion." *Lovequist*, 379 Mass. at 13. The same cannot be said of the BESS Bylaw at issue here, which prohibits specific land uses (constructing BESS over 10 MW or on over five acres, and clearing more than one-half acre of forest land for the construction of BESS), regulates the construction of BESS anywhere in the Town, imposes restrictions on the siting of BESS, and mandates that the Licensing Board consider the particular location for any proposed BESS project relative to its surroundings. BESS Bylaw §§ C, E(3)-(6).

Overall, the Attorney General's conclusion that the "purposes and requirements" of the BESS Bylaw "are 'typical of the concerns usually reflected in the zoning process'" is supported. Decision p. 8, quoting *Lovequist*, 379 Mass. at 14.

2. Wendell Has Historically Addressed BESS Through Zoning

The caselaw further instructs the Attorney General and reviewing courts to consider "whether other municipalities

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have adopted similar bylaws as zoning bylaws, and whether the municipality whose bylaw is being scrutinized previously has regulated the topic at hand through 'comprehensive' zoning ordinances."[8] *Haven Ctr.*, 490 Mass. at 369. In particular, the existence of a comprehensive zoning scheme on the subject matter "evinces the town's historical reliance on the zoning bylaw" to deal with that issue. *Spenlinhauer*, 80 Mass. App. Ct. at 141.

Here, the Attorney General concluded that Wendell has historically relied on zoning to address BESS because the Town currently regulates BESS accessory to solar installations through Article XIV of its Zoning Bylaws. Decision p. 9; Zoning Bylaws Art. XIV § C; *see Lovequist*, 379 Mass. at 14; *Spenlinhauer*, 80 Mass. App. Ct. at 140. Moreover, the Attorney General highlights that Wendell previously passed and sought approval of a version of Article XIV that addressed all BESS in the Town (Article 30 in 2023, see Background Facts No. 1, *supra*), though the Attorney General disapproved the portions banning standalone BESS. Decision p. 9; AR p. 206.

Wendell disagrees and contends the Town has no "comprehensive" zoning scheme addressing all BESS. Wendell argues this factor cuts against the Attorney General's conclusion because the Town's current Zoning Bylaws only address BESS accessory to solar installations through Article XIV.

It is true, as Wendell argues, that the Town does not currently have a "comprehensive" zoning regulation addressing all BESS. *Haven Ctr.*, 490 Mass. at 369-70; *Lovequist*, 379 Mass. at 13-14. However, this is the case only because the Attorney General disapproved of Wendell's prior effort at "comprehensive" zoning regulation of BESS that included a ban on BESS as a principal use of land (i.e. "standalone"). AR pp. 200-08; Zoning Bylaw Article XIV. But for the Attorney General's disapproval of those portions of Article 30, Wendell would today be regulating *all BESS* through Article XIV of its Zoning Bylaws in a comprehensive zoning scheme. The court thus does not find any substantial error in the Attorney General's reasoning that Wendell has historically regulated (or sought to regulate) BESS through its zoning power. The Administrative Record supports this finding. *See Lovequist*, 379 Mass. at 14; *Spenlinhauer*, 80 Mass. App. Ct. at 141.

3. The BESS Bylaw Conflicts with Wendell's Existing Zoning Bylaws

***12** Another aspect the Attorney General and reviewing courts should take into account in determining whether a proposed bylaw is properly categorized as zoning is whether, considering the substance of the bylaw's provisions and their relation to preexisting zoning laws, the bylaw under scrutiny "ought to be considered as an amendment to the zoning by-law." *Rayco*, 368 Mass. at 393. In considering this question in her Decision, the Attorney General notes substantial overlap and highlights that several provisions of the BESS Bylaw conflict with – and therefore supersede – Article XIV of Wendell's Zoning Bylaws. Decision pp. 9-10; BESS Bylaw, § I (supremacy clause). By way of example, she cites Article XIV, § F(1), which allows solar installations, including those with accessory BESS, to clear up to one acre of forest land, while the BESS Bylaw only allows the clearing of up to one-half acre of forest land for any BESS licensee, BESS Bylaw § C(4). Decision pp. 9-10. Similarly, Article XIV permits Very Large-Scale Solar Installations occupying between five and ten acres of land, including those with accessory BESS, in the Town's Solar Overlay District with a Special Permit. Article XIV, § C. However, this allowance conflicts with the BESS Bylaw, which prohibits any BESS licensee from occupying over five acres anywhere in the Town. BESS Bylaw § C(3); Decision p. 10. The BESS Bylaw expressly contemplates its application to BESS accessory to solar installations, *see* BESS Bylaw § C(1) (noting that, where the town "Solar Energy Bylaw" is applicable, compliance is a prerequisite to granting a general BESS license), but overrides any conflicting bylaws, including Article XIV, *see id.* § I ("If any provisions of this bylaw are found to be in conflict with provisions of other town bylaws, the provisions of this bylaw shall supersede the other bylaws."). The Attorney General thus concludes that the BESS Bylaw constitutes an attempt to amend Wendell's Zoning Bylaws without following the procedures required by G.L. c. 40A, § 5. Decision p. 10; *see Rayco*, 368 Mass. at 393-94.

In response, Wendell argues that the lack of any comprehensive zoning bylaw regulating all BESS in the Town belies the Attorney General's conclusion that the BESS Bylaw operates as an amendment to its zoning laws. Wendell maintains that the BESS Bylaw is a valid

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establishment of a licensing scheme on a subject that is not yet comprehensively regulated by the Town and that enacting "municipal regulations that simply overlap with what may be the province of a local zoning authority" does not require the overlapping regulation to be passed as a zoning bylaw. *Lovequist*, 379 Mass. at 14.

While the existence (or lack) of a comprehensive local zoning bylaw on the subject is an important factor to be weighed in the analysis of the BESS Bylaw, Wendell's argument both overstates the significance of this consideration over others and understates the extent of its existing zoning regulations of BESS, discussed *supra*.[9] The Attorney General's assessment that the BESS Bylaw directly conflicts with Article XIV of Wendell's existing Zoning Bylaws is factually unrefuted in the record. Moreover, her analysis that these conflicts operate to amend Wendell's Zoning Bylaws without the required compliance with G.L. c. 40A finds support in the caselaw. *See Rayco*, 368 Mass. at 393-94; *see also Hancock Village I, LLC v. Town of Brookline*, 27 LCR 444, 451 (2019) (Case No. 18 PS 000192) (Speicher, J.), 2019 WL 4189357 at *11.

Additionally, Wendell's reliance on *Lovequist* is misplaced. In *Lovequist*, the Supreme Judicial Court upheld a wetlands protection general bylaw against a challenge that it was inconsistent with state law, both G.L. c. 40A and the Commonwealth's Wetlands Protection Act. 379 Mass. at 11. In upholding the enactment as a general bylaw, the Supreme Judicial Court rejected "the generalized view that all local wetlands enactments are zoning measures," and observed that "no evidence has been introduced that there is or ever has been a comprehensive zoning by-law governing the wetland activities proposed by the plaintiffs." *Id*. at 12, 14. Here, in contrast, the inconsistencies and conflicts detailed by the Attorney General are not just with a generalized failure to adopt the bylaw at issue in accordance with G.L. c. 40A, § 5, it is Wendell's own Zoning Bylaws with which the BESS Bylaw conflicts.

***13** Wendell also seizes on the *Lovequist* Court's distinguishing of *Rayco*, noting the *Rayco* decision "nowhere suggests that municipal regulations that simply overlap with what may be the province of a local zoning authority are to be treated as zoning enactments which must be promulgated in accordance with the requirements of G.L. c. 40A." *Id*. at 14. But the characterization that the regulations in *Lovequist* "simply overlapped" with local zoning authority was a direct corollary of the Court's findings that no actual "conflicts," "inconsistencies," or "disparities" existed between the wetlands general bylaw at issue and the state laws. *Id*. at 14-16. Not so here. The BESS Bylaw more than overlaps with "what may be the province of a local zoning authority;" it directly modifies what is permissible under Wendell's existing Zoning Bylaws. *Id*. at 14; *Haven Ctr.*, 490 Mass. at 369 & n.14 (discussing circumstances under which a general bylaw would frustrate the Zoning Act). This Wendell may do only through a zoning amendment. *See* G.L. c. 40A, § 5.

Each of the subsequent cases confirm the principle recognized in *Rayco*: a general bylaw that effectively amends a zoning bylaw (and does not merely supplement it) should be categorized as zoning. *Lovequist*, 379 Mass. at 14, citing *Rayco*, 368 Mass. at 393; *Spenlinhauer*, 80 Mass. App. Ct. at 140; *see Valley Green Grow*, 27 LCR at 105, 2019 WL 1087930 at *9. It is of no moment that Article XIV of Wendell's Zoning Bylaws is not "comprehensive" insofar as it does not currently regulate *all BESS*. Where, as here, the BESS Bylaw, if enacted, would necessarily modify the regulations and requirements applicable to BESS projects governed by Article XIV, the Attorney General did not err in concluding that the BESS Bylaw constitutes an attempt to amend a zoning bylaw through a general bylaw.

Whether the BESS Bylaw Bypasses the Protections of G.L. c. 40A, § 3

An additional rationale for disapproval set forth by the Attorney General is that the BES Bylaw, if passed as a general bylaw, would elide the protections of G.L. c. 40A, § 3, ¶ 9, which states: "No 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 Attorney General contends that where a BESS is used in connection with the collection of solar energy, it qualifies for protection from prohibition or unreasonable regulation under ¶ 9.[10] Decision pp. 11-12.[11] When asked at oral argument why the BESS Bylaw would evade challenge or judicial review under G.L. c. 40A, § 3, ¶ 9, the Assistant Attorney General reasoned that § 3 could be

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read only to apply to zoning bylaws, rendering the substantial subset of BESS used to collect solar energy unprotected from prohibition or unreasonable regulation enacted through general bylaws.[12]

***14** Wendell disagrees, reasoning that applicants under the BESS Bylaw may still challenge license denials on an as-applied basis, invoking G.L. c. 40A, § 3, ¶ 9 if the proposed BESS would qualify under the statutory language. Wendell points out that, by relying on G.L. c. 40A, § 3, ¶ 9, the Attorney General is improperly assuming all BESS would qualify for solar energy protections. Wendell contends that is a determination to be made on individual license applications.

A review of the applicable caselaw shows that the law is unsettled as to whether G.L. c. 40A, § 3 applies to general ordinances and bylaws. On one hand, § 3 specifically says that it applies to a "zoning ordinance or by-law." Further, the Supreme Judicial Court has refused to apply G.L. c. 40A, § 3 to the City of Boston Zoning Code, because the City of Boston's exercise of its police power through zoning is not restricted by Chapter 40A. *Emerson Coll. v. City of Bos.*, 393 Mass. 303, 305 (1984) (protection of educational uses by a nonprofit educational corporation does not apply to the Boston Zoning Code). This suggests that bylaws not subject to the requirements of Chapter 40A are also not restricted by G.L. c. 40A, § 3. *Id.*; *see Trustees of Bos. Univ. v. Licensing Bd. of Bos.*, 24 Mass. App. Ct. 475, 478-80 (1987). On the other hand, in *Newbury Junior Coll. v. Town of Brookline*, 19 Mass. App. Ct. 197 (1985), the Appeals Court applied the protections of the Dover Amendment, G.L. c. 40A, § 3, ¶ 2, to lodging house licenses for school dormitories. In that case, the Town of Brookline asserted it had total discretion over whether to grant a lodging house license, including to school dormitories. *Newbury Junior Coll.*, 19 Mass. App. Ct. at 205. The Appeals Court held "that a municipality may not, through the exercise of its power under G.L. c. 140, § 23, undo the Dover Amendment by forbidding the use of land for educational purposes on general grounds of adverse impact on the neighborhood or similar land use consideration." *Id.* at 207; *see Barry v. Murphy*, 27 LCR 28, 32 (2018) (Case No. 18 MISC 000474) (Lombardi, J.), 2018 WL 7051068 at *7 (In *Newbury Junior Coll.*, "the issue was not that the boarding house license procedure should have been a zoning enactment; it was that a municipality could not thwart a legitimate Dover Amendment use, whether by zoning, general by-laws, or licensing procedures. "); *see Morse Brothers, Inc. v. Town of Halifax*, 106 Mass. App. Ct. 1107, 2025 WL 3022303 at *2 (2025) (Rule 23.0 Decision) (G.L. c. 40A, § 3 applies to the "nonzoning police power to regulate earth removal under G. L. c. 40, § 21(17)" because G.L. c. 40, § 21 "includes an express limitation of a local government's authority to regulate earth removal, prohibiting towns from acting in a manner that is 'repugnant to law' " and "G. L. c. 40A, § 3, expressly prohibits towns from requiring a special permit to engage in agricultural activity."). *But see Trustees of Bos. Univ.*, 24 Mass. App. Ct. at 479-80 (*Newbury Junior Coll.* stands for the proposition that "the range of discretion afforded licensing authorities reviewing dormitory applications under the lodging house statute was not so broad as to include general public interest and land use considerations," one of which is the protections afforded to educational uses by the Dover Amendment).

In her review of a town bylaw under G.L. c. 40, § 32, the Attorney General must make every presumption in its favor. *Town of Concord*, 336 Mass. at 25. However, a town is not free to adopt a bylaw that is "inconsistent with the constitution or laws enacted by the general court." Home Rule Amendment, Mass. Const. amend. Art. 2, § 6. The Attorney General is also charged with ensuring that town bylaws do not "prevent the achievement of a clearly identifiable purpose of State legislation." *Town of Amherst*, 398 Mass. at 797, citing *Town of Wendell*, 394 Mass. at 524. In light of the clearly identifiable purpose of G.L. c. 40A, § 3 to protect certain land uses from local interference, *see Tracer Lane II Realty, LLC v. Waltham*, 489 Mass. 775, 779 (2022), and where the law is unsettled on the application of § 3 to general bylaws, the court finds that it was neither arbitrary, capricious, nor an error of law for the Attorney General to consider that the BESS Bylaw (or the licensing scheme that it would institute) could evade meaningful review under G.L. c. 40A, § 3.

CONCLUSION

***15** While all presumptions of validity are owed to a municipal bylaw, "the law is clear that a municipality's 'independent police powers ... cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature....' " *Rayco*, 368 Mass. at 393-94, quoting *Bd. of Appeals of*

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Hanover, 363 Mass. at 360. Here, the Administrative Record supports the Attorney General's conclusions that (1) the BESS Bylaw's nature and purpose address concerns typical of zoning and its effects on land use are predominant, not incidental or secondary; (2) Wendell has a history of regulating (or attempting to regulate) the health, safety, and welfare risks posed by BESS land uses through its zoning laws; (3) the BESS Bylaw supersedes and modifies the Town's existing Zoning Bylaws addressing solar installations and accessory BESS; and (4) license decisions made pursuant to Wendell's BESS Bylaw may evade review under G.L. c. 40A, § 3, frustrating legislative intent to protect solar energy uses from local interference. The record therefore supports the Attorney General's determination that Wendell's BESS Bylaw should have been passed, if at all, as a zoning bylaw under the requirements of G.L. c. 40A, § 5. Accordingly, the court finds that the Attorney General did not act arbitrarily or capriciously, nor did she commit a substantial error, in disapproving the BESS Bylaw.

Plaintiff's motion for judgment on the pleadings is therefore **DENIED** and the Attorney General's cross-motion for judgment on the pleadings is **ALLOWED**. Judgment affirming the Attorney General's disapproval Decision shall enter accordingly.

SO ORDERED.

All Citations

Not Reported in N.E. Rptr., 2026 WL 820745

Footnotes

1 Municipalities in Massachusetts derive their power to enact bylaws and ordinances from the general police power conferred by the Home Rule Amendment, Art. 2, § 6, of the Amendments to the Constitution of Massachusetts, as amended by Art. 89, and the Home Rule Procedures Act, G.L. c. 43B. The Legislature may preempt this general police power granted to municipalities through state law. *Town of Canton v. Bruno*, 361 Mass. 598, 605 (1972). Preemption by the Legislature can completely prevent municipalities from regulating a certain subject, or it can take the form of substantive or procedural limitations on a municipality's ability to regulate a particular subject matter. *See, e.g., Leahy v. Insp. of Bldgs. of City of New Bedford*, 308 Mass. 128, 131 (1941). An example of the latter form of preemption is that zoning bylaws must be enacted pursuant to the Zoning Act, G.L. c. 40A, which imposes more stringent procedural requirements for enacting zoning bylaws compared to bylaws promulgated under the general police power. *See id.*; *Lovequist v. Cons. Comm'n of Dennis*, 379 Mass. 7, 12 (1979).

2 The Land Court is the proper jurisdictional venue for a certiorari action "if the matter involves any right, title or interest in land, or arises under or involves the subdivision control law, the zoning act or municipal zoning, or subdivision ordinances, by-laws or regulations." G.L. c. 249, § 4; *see also* G.L. c. 185, § 1(r) (Land Court has original concurrent jurisdiction over "[a]ctions brought pursuant to section 4 or 5 of chapter 249 where any right, title or interest in land is involved, or which arise under or involve the subdivision control law, the zoning act, or municipal zoning, subdivision, or land-use ordinances, by-laws or regulations.").

3 The Administrative Record certified and submitted to the court on April 2, 2025 does not include a copy of the current certified version of the Town's Zoning Bylaws. The Assistant Attorney General reported at oral argument that the parties were unable to obtain a certified copy of the Town's Zoning Bylaws reflecting the amendments to Article XIV made by the approved portions of Article 30 in time for submission to the court as required by Land Court Standing Order 2-06(2). The Town of Wendell included a copy of Article XIV as Exhibit 6 to its Motion for Judgment on the Pleadings, which it represents to be the current version as amended by the approved portions of Article 30. It is apparent from the Administrative Record, and no party disputes, that the Attorney General relied on the current version of Article XIV in rendering the Decision now before the court in this action. In light of the foregoing, the court relies on the Town's submission of Exhibit 6 for the contents of Article XIV.

4 "Accessory Battery Energy Storage Facility" is defined as "A battery storage system that is ancillary to a Small-Scale, Medium-Scale, Large-Scale, or Very Large-Scale Ground-Mounted Solar Electric Generating Installation." Article XIV, § B. "Battery Energy Storage Facility" is defined as "a system of mechanical, electrical, chemical or electrochemical devices

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that charges or collects energy from the local electric grid or an electric generating facility and then discharges that energy at a later time to provide electricity to the grid or homes and businesses." *Id*. Throughout the Administrative Record and the parties' filings, the terms "Battery Energy Storage Facility," "Energy Storage Facility (ESF)," and "Battery Storage System (BSS)" all appear to be used as other terms for a BESS. Neither party has drawn the court's attention to any relevant distinction among these terms used in the record and, as to the legal issue before the court, the parties have treated the terms as synonymous. The court will do the same.

5 A copy of the BESS Bylaw in its entirety is located in several places in the Administrative Record. *E.g*., AR pp. 6-12, 15-21, 23-29.

6 This notably mirrors the language used in Article XIV of Wendell's Zoning Bylaws regulating solar installations: "Solar electric energy generation is prioritized for previously developed areas such as on rooftops, parking lots, **landfills** and other degraded areas to minimize environmental impacts and to prevent erosion from the removal of forested areas." Zoning Bylaws Art. XIV, § A. Indeed, Wendell already addresses the risk of fire and other hazards presented by BESS accessory to solar installations in Article XIV, demonstrating that these purposes are not inherently distinct from the purposes of zoning. *See Hancock Village I, LLC v. Town of Brookline*, 27 LCR 444, 451 (2019) (Case No. 18 PS 000192) (Speicher, J.), 2019 WL 4189357 at *10 (where the "mechanisms by which the [ ] Bylaw sets out to achieve [its] objectives replicate ... those already present in the Zoning Bylaw," the general bylaw should have been passed as a zoning bylaw).

7 Wendell's stated purpose of limiting forest land conversion and the requirement that any BESS project shall not include clear-cutting more than one-half acre of forest land, BESS Bylaw §§ A, C(4), also mirrors the objectives of "natural resource protection zoning" as defined in G.L. c. 40A, § 1A, which include "zoning ordinances or by-laws enacted principally to protect natural resources by promoting compact patterns of development and concentrating development within a portion of a parcel of land so that a significant majority of the land remains permanently undeveloped and available for agriculture, forestry, recreation, watershed management, carbon sequestration, wildlife habitat or other natural resource values."

8 The Administrative Record does not contain information about whether other municipalities have used zoning bylaws to regulate BESS and the Attorney General's Decision does not rely on this factor. Accordingly, this factor does not provide support for the Decision under review.

9 The existence of a current or prior comprehensive zoning scheme covering the subject matter can indeed be dispositive of the analysis. As the Supreme Judicial Court notes in *Haven Center*:

> In certain circumstances, whether the municipality previously has regulated the topic at hand through "comprehensive" zoning ordinances ***independently may determine*** whether a bylaw has the "nature and effect" of a zoning bylaw. *Rayco Inv. Corp*., 368 Mass. at 392-394 (discussing circumstance in which viewing bylaw as exercise of "municipal police power" would frustrate Zoning Enabling Act).

Haven Ctr., 490 Mass. at 369 n.14 (emphasis added). However, the inverse of this principle does not follow. Even where there is not an existing or prior comprehensive zoning bylaw on the subject, or the town's zoning bylaw only partially regulates the subject, that is just one of several factors the Attorney General and court should consider in determining whether the town may properly regulate the subject through its general bylaws. *Id*. at 369 (reiterating that "in determining whether a bylaw should be viewed as a zoning bylaw, we consider factors such as ... whether the municipality whose bylaw is being scrutinized previously has regulated the topic at hand through 'comprehensive' zoning ordinances").

10 This court reached a similar conclusion in *Duxbury Energy Storage, LLC*, 33 LCR at 300-02, determining that a battery energy storage facility (ESF) that would collect electricity from the grid composed of 20-25% solar-generated energy was entitled to the protections of G.L. c. 40A, § 3, ¶ 9 as "the building of structures that facilitate the collection of solar energy."

11 The Attorney General explains that her Decision makes "no determination as to whether the amendments [of the BESS Bylaw] would be found consistent with the G.L. c. 40A, § 3 protections afforded to solar energy systems and related

structures such as BESS, had the amendments been adopted in accordance with G.L. c. 40A, § 5 as a zoning by-law rather than under Article 1 as a general by-law." Decision p. 12, n.8.

12 Assuming *arguendo* that the BESS Bylaw passes facial muster, the Assistant Attorney General's view at oral argument was that this could prevent applicants from challenging license denials on an as-applied basis under G.L. c. 40A, § 3, ¶ 9.

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