Jim Lamphere

From:	Eric Bibler <ebibler@gmail.com>
Sent:	Wednesday, May 12, 2021 7:43 AM
To:	Alfred W. DiOrio; James Lamphere; Talia Jalette; Ron Prellwitz; Carolyn Light; Keith Lindelow; Emily Shumchenia; John Pennypacker
Cc:	Margaret Hogan; Stephen Moffitt; Sharon Davis; Bob Marvel; Scott Bill Hirst; Geary, Michael J {FLNA}; Stephen Sypole
Subject:	Re: Objections to Approval of Master Plan Application for Comolli Granite Solar Proposal

Mr. James Lamphere
Town Planner
Town of Hopkinton

Mr. Alfred DiOrio
Chair
Hopkinton Planning Board

May 12, 2021

Re: Unresolved Legal Questions Regarding Compliance, or Non-Compliance, of Comolli Solar Proposal with Hopkinton Code of Ordinances

Dear Mr. Lamphere, Chairman DiOrio and members of the planning board,

I would appreciate it if you would include a copy of the correspondence below in the planning board packets for the meeting of May 19, 2021 and post a link to this document to the town's website in connection with that meeting.

I understand that the planning board has a motion on the floor concerning the question of the subject matter jurisdiction of the planning board with respect to the Comolli Solar proposal in view of the fact that the applicant did not follow the prescribed procedures under RIGL 45-23-61 and under the Hopkinton Subdivision Regulations under Section 3.2.2. for "Precedence of Approvals."

I note that the planning board has never addressed two other issues that I have repeatedly raised as items #4 and #5 in my letter of January 6, 2021, which have been subsequently reiterated by me on several occasions.

Item #4 asks the planning board to make a determination whether the town council has any authority to waive, or alter, the provision in the PSES enacted on January 22, 2019 (by unanimous vote of the Council) which restricts the maximum lot coverage of a solar project that has been rezoned from the RFR-80 zone to the lesser of 3% or 3 acres. A corollary question is whether the town council has the authority to dictate to the planning board that the planning board should be obligated to render a finding that such a waiver, or adjustment, is warranted owing to "the unique characteristics of the parcel"

or if the planning board has the authority to render its own finding on this matter during the master plan approval process. Please note that I have been unable to find any state statute or town ordinance that would allow the town council to compel the planning board to make such a finding.

Item #5 asks the planning board to make a determination whether the proposed "split zoning" of subject lot (AP 2, lot 73) requires a separate approval of a lot subdivision from the planning board. This question was asked by me during the town council hearings, but the former town solicitor declined to answer the question. Instead, the former town solicitor invited the applicant's attorney to give her opinion which, not surprisingly, favored the applicant's interpretation that no lot subdivision was necessary. I note that the applicant's attorney never offered any support for her interpretation that a "land condominium" *already* constitutes a legal lot subdivision - or some sort of unexplained zoning subdivision - and that I can find no statute or town ordinance that supports this opportunistic, and apparently unfounded, legal opinion. I note further that neither the applicant's attorney nor the former town solicitor have the authority to decide this issue. On the contrary, the planning board has the responsibility, under the applicable state statutes and under Section 3.5.2 of the Land Development and Subdivision Regulations to make a "positive finding" that "the proposed development complies with the *Hopkinton Zoning Ordinance."*

Please also note that the possible "split zoning" of a residential property to create a new "commercial special" zone to accommodate the installation of a commercial solar power plant has been proposed on at least two prior occasions, specifically for the Carapezza and Cherenzia solar proposals. In both instances, the former town solicitor stated unequivocally that the split zoning of the properties *would* require separate approval of a lot subdivision by the planning board. Unless the applicant can cite some provision in the law that grants the owner of a "land condominium" the unique privilege of receiving the benefit of a lot subdivision without the approval of the planning board, or some other provision that allows a land condominium to enjoy the unique privilege of being designated as a separate "zone" - even when it is not actually a lot - then it seems logical to me that the planning board must render a finding that the owner is obligated to follow the normal procedure. The planning board can only interpret the laws that exist and has no authority to render an arbitrary finding that is not based upon any facts.

Finally, since the planning board's vote, if any, concerning the subject matter jurisdiction of the planning board over the Comolli application, in view of the failure to follow the correct procedure under RIGL 45-23-61, will have a material impact upon the planning board's review of the Skunk Hill proposal, I respectfully ask that the town planner consider making the Comolli matter the first item on the planning board agenda.

Thank you in advance for your consideration of these requests.

Sincerely,

Eric Bibler

Cc: Attorney Paul Ryan

On Tue, May 4, 2021 at 4:14 PM Eric Bibler <ebibler@gmail.com> wrote:

Mr. James Lamphere
Town Planner
Town of Hopkinton

Mr. Alfred DiOrio
Chair
Hopkinton Planning Board

May 4, 2021

Re: Objections to Approval of Master Plan Application for Comolli Granite Solar Proposal

Dear Mr. Lamphere, Chairman DiOrio and Members of the Hopkinton Planning Board,

I respectfully resubmit the following list of specific objections to master plan approval by the planning board of the above referenced solar proposal.

I also respectfully request that the objections enumerated in this letter be posted to the town's website with other documents that have been submitted for the planning board's consideration in hearing and deciding this land development application.

As you know, under the applicable state statutes enumerated under RIGL 45-23-60 and under Chapter 3.5 of the Hopkinton Land Development and Subdivision Regulations, the planning board is required to make certain "positive findings of fact" as a condition of approval.

If a majority of the members board cannot make these positive findings - *regardless of any opposing opinions expressed by the town council, town solicitor, town planner or other town official* - then the planning board must deny the application.

This authority belongs to the planning board alone.

None of the above referenced entities or officials can instruct or compel the planning board to make any findings of fact that are contrary to the planning board's own determination regarding compliance with these requirements.

In the event of any controversy, the applicant or any other party that disagrees with the decision of the planning board may appeal the decision to the Zoning Board of Appeals and to Superior Court. But nothing should deter the planning board from performing its duty to render its own independent judgement on all of the required findings, based upon the evidence presented, without surrendering any of the

responsibility or authority that is invested in the planning board by the General Assembly through the enactment of Chapter 45-23.

I believe that it should be evident that all of the considerations listed below must be resolved by the planning board prior to the issuance of any findings of fact.

On September 1, 2020, the planning board decided by unanimous vote to issue a negative advisory opinion on the proposed zone change to enable a plan for commercial solar development *on a land condominium* within the lot designated as AP 2, Lot 73 after determining that the proposed **zone change** was "not consistent with the Hopkinton Comprehensive Plan." The planning board cited several specific reasons why it could not recommend the requested zone change for this specific plan (see planning board opinion attached).

Notwithstanding the negative assessment of the planning board by unanimous vote, the Hopkinton Town Council voted on November 2, 2020 by a vote of 3-2 to grant "conditional zoning approval" for the proposed zone change.

This "conditional approval" is ***subject to*** all further required approvals of the planning board, including master plan approval. And the master plan approval is ***subject to*** a "positive finding" by the planning board - *exercising its sole discretion* - that the proposed solar development is "consistent with the Hopkinton Comprehensive Plan.

On May 5, 2021, the applicant is now reappearing before the planning board seeking master plan approval *for a specific* ***plan for development*** that is slightly revised from the proposed plan that was outlined on September 1, 2020.

In this instance, the planning board must decide whether the **plan for development** - as opposed to the proposed zoning - is consistent with the Hopkinton Comprehensive Plan.

The planning board is now tasked with exercising its own best judgement as to whether the proposed **development plan** is consistent with the comprehensive plan.

I invite the planning board members to read the list of objections that were cited by the planning board on September 1, 2020 and ask whether any of these objections to the proposed zone change have been magically erased by any actions of the Hopkinton Town Council or the applicant?

If not, the planning board should cite all of the same objections - as they relate to the master plan application for this specific plan, regardless of the zone - and deny the application on the basis that it is *still* "not consistent with the town's comprehensive plan for development."

As we are all aware, the town council, as a legislature, has the final determination over all *zoning* approvals - *except when such approvals are "conditional approvals" that require further approvals from the planning board or another board.*

But the planning board has the sole authority - and the responsibility - to make the "positive findings" that are required for approval of any master plan application.

The planning board's duty to make an unequivocal "positive finding" that a master plan application for a particular land development proposal is "consistent with the comprehensive plan" (regardless of any interference by the town council) is familiar terrain for the planning board.

What is less familiar to the board is the requirement under the state statute that the planning board make a "positive finding" that *"the proposed development is in compliance with the standard's and provisions of the municipality's zoning ordinance."*

I have personally raised three (4) significant and well-documented concerns as to whether *"the proposed development is in compliance with the standard's and provisions of the municipality's zoning ordinance"* as enumerated below in items #2 through #5.

As of this writing, NONE OF THESE CONCERNS HAS BEEN ADDRESSED BY THE PLANNING BOARD.

As with the question of whether the proposed development is consistent with the Hopkinton Comprehensive Plan, it does not matter whether the *opinion* held by the applicant or any town official differs from the opinion of the planning board on any of these points.

It is the responsibility of the **planning board** to render its **own** opinion as to whether the proposed development is *"in compliance with the [applicable] standards and provisions."*

It is *the planning board* that has the sole authority to use its own best judgement to make the required "positive findings" on all of these controversial points.

It would be absurd for any member of the planning board, reading these instructions from the General Assembly under RIGL 45-23-60, to make a "positive finding" on any point, based upon the opinion of some other entity, if the board member held the exact opposite conviction on this point.

The planning board is not directed to "go along to get along"; or to submit to the preference or the authority or a previous town council; or to avoid legal controversy stemming from the courage of the convictions of its members.

On the contrary, the planning board is directed to make its own findings on whether or not the application has truly met ALL procedural requirements under the applicable ordinances - including all of those implicated below.

Clearly, the planning board also has the authority to disagree with my conclusions on whether the requirements enumerated below have been met.

But I would submit that the planning board does not have the luxury of ignoring these questions and that they must be resolved in order for the planning board to faithfully complete its due diligence in evaluating this master plan application.

I respectfully beg the planning board to publicly consider and address all of these questions in its findings, all of which have been raised on multiple occasions over the past several months.

Respectfully submitted,

Eric Bibler

On Wed, Feb 3, 2021 at 9:06 PM Eric Bibler <ebibler@gmail.com> wrote:

Dear Chairman DiOrio and Members of the Planning Board,

Please see below my letter of January 6, 2021 to which I referred at the planning board meeting this evening which itemizes the critical legal questions that I believe should be addressed by the planning board solicitor to the satisfaction of the planning board.

Thank you.

Eric Bibler

On Wed, Jan 6, 2021 at 4:33 PM Eric Bibler <ebibler@gmail.com> wrote:

Please see below (PDF copy also attached).

Mr. Alfred DiOrio
Chair
Hopkinton Planning Board

Mr. James Lamphere
Town Planner
Town of Hopkinton

January 6, 2021

Re: Objection to Certification of Master Plan Application for Major Land Development Project – Photovoltaic Solar Energy System – Comolli Solar – AP 2, Lot 73 – 0 Chase Hill Road, Unit 2. Centrica Business Solutions, applicant

Dear Mr. DiOrio, Mr. Lamphere and Members of the Planning Board,

I am writing to register my objections to any certification by the town planner of the completeness of any master plan application, or the approval by the planning board of a master plan, for the above referenced project proposal for the reasons discussed below.

It should be evident to the town planner, the planning board and the planning board solicitor that the unusual circumstances of this application have raised multiple substantive concerns about its legal validity.

Since the town planner and the planning board are not qualified to address these concerns, I respectfully insist that the town planner and the planning board ask the planning board solicitor to review all of them and provide a written opinion to the planner and the planning board to advise the planner and the board how to interpret these concerns and what appropriate actions may be required or taken.

As part of this process, I hope that the planning board solicitor will also advise both parties as to the duties and responsibilities of the town planner and planning board, respectively, as it relates to these issues and the proper application of the law under their jurisdiction.

1. On September 2, 2020, the planning board voted unanimously (4-0) to issue a negative advisory opinion that the applicant's request for a Future Land Use Amendment and Zoning Amendment for Land Condominium Unit #2 within the property designated AP2, Lot 73 was "not consistent with the Hopkinton Comprehensive Plan."

Any master plan application submitted to the planning board for construction of a commercial solar facility on this site that bears any resemblance to the plan previously reviewed by the planning board would be inconsistent with the town's comprehensive plan, regardless of any mitigation of specific adverse impacts.

2. The applicant failed to follow the procedure required under R.I.G.L. § 45-23-61 entitled "Precedence of Approvals" for applications such as this one that require approval from both the planning board and the town council.

The Rhode Island Development Review Act mandates the required procedures that every city and town in Rhode Island must follow when any application requires approval by more than one (1) municipal authority.

Contained within the Act is the following section:

R.I.G.L. § 45-23-61. Procedure - precedence of approvals between planning board and other local permitting authorities

b) City or town council. - Where an applicant requires both planning board approval and council approval for a zoning ordinance or zoning map change, the applicant shall first obtain an advisory recommendation on the zoning change from the planning board, as well as conditional planning board approval for the first approval stage for the proposed project, which may be simultaneous, then obtain a conditional zoning change from the council, and then return to the planning board for subsequent required approval(s).

The applicant failed to obey the requirements of the Act because they never applied for nor did they receive conditional approval from the Hopkinton Planning Board for the first approval stage for the proposed project, and then apply for and obtain a conditional zoning change from the Town Council, which would permit them to return to the planning board for subsequent required approvals.

3. The applicant failed to follow the procedure required in the Hopkinton Land Development Subdivision Regulations under Section 3.2 entitled "Procedure for Approvals Between Planning Board and Other Local Permitting Authorities" for applications such as this one that require approval from both the planning board and the town council.

Pursuant to the authority granted to Planning Boards in Rhode Island's cities and towns by

The Development Review Act, above, the Town of Hopkinton Planning Board adopted regulations governing land development and the subdivision of land entitled "Land Development and Subdivision Regulations" on November 29, 1995, revised on August 16, 2000 and which were again revised on September 3, 2014. Contained within those Regulations is the following section:

3.2 PROCEDURE FOR APPROVALS BETWEEN PLANNING BOARD AND OTHER LOCAL PERMITTING AUTHORITIES

3.2.2 Town Council

Where an applicant requires both Planning Board approval and Town Council approval for a Zoning Ordinance or Zoning Map change, the Applicant shall first obtain an advisory recommendation on the zoning change from the Planning Board as well as conditional Planning Board approval for the first approval stage for the proposed project, which may be simultaneous, then obtain a conditional Zoning Change from the Town Council, and then return to the Planning Board for subsequent required approval(s).

Applying for and obtaining conditional approval for the first approval stage for a proposed project is a condition precedent to the right of any applicant to apply for and obtain a Zoning Change from the Town Council, where Development Plan Approval is required from the Planning Board; as a result, any action taken by the Town Council on the request for a Zoning Change, without the applicant having first obtained conditional approval for the first approval stage for a proposed project from the Planning Board renders any action taken by the Town Council on the Zoning Change null and void.

4. Under the defective conditional zoning approval provided by the town council – in violation of the state statute and town ordinance on Procedure – Precedence of Approvals – the applicant's proposed project violates the lot coverage restriction in Chapter 246 for the regulation of Non-Residential Photovoltaic Solar Energy Systems (PSES).

The relevant part of Chapter 246 (the PSES) reads as follows (emphasis added):

> *13. Solar panels and all associated equipment are considered structures. The entirety of all structures and associated equipment constituting the PSES shall cover no more than 75% of Commercial and Manufacturing zoned parcels.* ***If the parcel is zoned RFR-80, and the applicant is seeking to re-zone the parcel, then the maximum requested coverage may be the lesser of 3% or 3 acres.*** *For purposes of a PSES, lot coverage includes all of the land area upon which all structures and associated equipment are placed, including all of the land lying directly below the solar panels and associated equipment, as well as the interstitial spaces between the solar panels, and all of the land enclosed by any perimeter fencing. RFR-80 re-zone requests are not guaranteed approval. The Town of Hopkinton encourages PSES on former gravel banks, brownfields and landfills. Such locations shall be consistent with the Hopkinton Comprehensive Plan and shall strive to minimize the visual impacts of these systems from streets and neighboring properties. In the event the Town Council has re-zoned a parcel to allow a PSES installation and use, then the proposed PSES project shall be referred to the Planning Board for Master Plan approval.* ***As part of its Advisory Opinion to the Town Council on a proposed zone change, the Planning Board may recommend an appropriate lot coverage for a proposed PSES based upon the unique characteristics of the parcel and in a manner that is consistent with the Town's Comprehensive Plan, with the intent to balance environmental and aesthetic concerns, as well as the rights of the property owner to develop the parcel.***

Chapter 246 clearly limits the *maximum* lot coverage ratio of the project to "the lesser of 3% or 3 acres" for the entirety of any area covered by structures and associated equipment. The proposed project exceeds this lot coverage ratio.

The town council does *not* have the authority to grant waivers or variances to dimensional regulations, or other specific limitations on lot coverage ratios in the Code of Ordinances, at its whim.

Chapter 246 provides a specific authority to the town council to consider an adjustment to the maximum lot coverage ratio, *"based upon the unique characteristics of the parcel and in a manner that is consistent with the Town's Comprehensive Plan"* – but only in the instance when the planning board *"recommends" a different, and appropriate, lot coverage ratio, "in a manner consistent with the Comprehensive Plan."*

The planning board did not recommend that the town council consider and approve a lot coverage ratio greater than *"the maximum requested coverage [equal to] the lesser of 3% or 3 acres."*

By the applicant's own admission during the public hearings before the town council, not only did the planning board not recommend a larger lot coverage ratio, the planning board rejected the project outright, deeming the entire concept to be *"inconsistent with the Hopkinton Comprehensive Plan."*

Furthermore, it is clear from the transcripts and the video record of the public hearings that were held by the town council to discuss, approve and enact Chapter 246 – which was unanimously approved by the Council on January 22, 2019 – that it was the clear intent of the Council that the lot coverage ratio should **only** be amended after receiving an **affirmative recommendation** from the planning board to endorse both the expanded coverage ratio and the planning board's concurrence that the requested adjustment could be granted *"in a manner consistent with the Town's Comprehensive Plan."*

Neither of these two necessary conditions to permit a larger lot coverage ratio were satisfied. On the contrary, the planning board issued a recommendation to deny the application for the requested amendments to the Future Land Use Map and rezoning.

Counsel for the applicant may take note of the following sentence in the above paragraph of Chapter 246, which was inserted in the October 2018 draft of the ordinance approved on January 22, 2019, and which attempts to legitimize the previous town council's serial violations of the Precedence of Approvals procedure that is stipulated under both R.I.G.L. § 45-23-61216 and the Hopkinton Land Subdivision Regulations, Section 3.2:

"In the event the Town Council has re-zoned a parcel to allow a PSES installation and use, then the proposed PSES project shall be referred to the Planning Board for Master Plan approval."

But the fact is that the town council has **no authority** to violate *"Section 3.2 Procedure For Approvals Between Planning Board And Other Local Permitting Authorities"* or, especially, the superior authority of the state statute under R.I.G.L. § 45-23-61216.

It should be noted that there have already been two complaints filed in Superior Court against the Hopkinton Town Council that allege a systematic, *"wanton and reckless disregard of the law"* for its pattern of violating the Precedence of Approvals in numerous prior requests for a Future Land Use Map Amendment and zoning amendment in which the planning board has issued a negative advisory opinion, but in which the town council nonetheless usurped the authority of the planning board and proceeded to deliberate and stipulate plan details and specifications **before** any of the proposals had satisfied the condition precedent of receiving master plan approval from the planning board.

Just because the previous two town councils have *repeatedly* violated this required procedure – whose purpose when it was enacted by the legislature and when the legislature *mandated* that every town in Rhode Island include the provision in its Code of Ordinances – was to ensure the separation of authority between the planning board (for planning issues) and the town council (to provide the necessary legislation to approve the necessary ordinances).

More fundamentally, a primary purpose of this law is to ensure that the interests of all stakeholders – especially abutters, residents and taxpayers – are protected by requiring that the town council have the benefit of a thorough review of all of the planning and design issues performed by the planning board, resulting in master plan approval, **prior to** any consideration of the necessary zone changes by the town council.

To violate this condition precedent violates the law and violates the interests of the residents of Hopkinton, whose interests the law is designed to protect.

5. The plan for the proposed project proposes that the subject parcel (AP 2, lot 73), which is currently zoned RFR-80 and includes three "land condominiums," may be split zoned into separate commercial and residential components, with Unit 2 being rezoned as "commercial special" for the solar project and Units 1 and 3 remaining in the residential RFR-80 zone.

Contrary to the assertions of the applicant's counsel during the hearings before the town council – which occurred in violation of the Procedure laid out in R.I.G.L. § 45-23-61216 and the Hopkinton Land Subdivision Regulations Section 3.2 – Unit 2 *cannot* be "rezoned" to "commercial" or "commercial special" designation *without* prior approval by the planning board of a land subdivision of the entire parcel, AP2, lot 73.

The division of the property, AP2, lot 73, into land condominium units, by mutual agreement of the owners of the individual units and approval of the town, did not subdivide the parcel into separate properties that could be individually rezoned. On the contrary, the Condominium Declarations for the property provide that the individual owners of the condominium units on this residential property shall have shared use of a "Common Element" of the property, which is specified as a 10-foot-wide strip around the entire perimeter of the property, except where it abuts the Pawcatuck River.

The former town solicitor gave his public opinion on two recent previous solar proposals (Carapezza on Woodville Road; Cherenzia on Chase Hill Road) that *these* proposals to "split zone" a residential property into a "commercial" zone for the solar project and a residual "residential" zone to accommodate a dwelling *would* require approval by the planning board of a land subdivision.

The former town solicitor *further* opined that any approval by the town council for a Future Land Use Amendment or zoning amendment would only be *"conditional"* because it would be **dependent** upon planning board approval of the necessary land subdivision.

The former town solicitor went on to say that if the planning board *declined* to grant the necessary lot subdivision on these projects – both of which had *also* proceeded in violation of R.I.G.L. § 45-23-61216 "Precedence of Approvals" and the Hopkinton Land Subdivision Regulations Section 3.2 *despite* adverse advisory opinions from the planning board in both instances – then this would effectively "kill the project."

It is *not surprising* that the applicant should try to argue that no land subdivision is required, as a necessary condition of approval of the proposed rezoning, from the very board that has already determined the project to be *"inconsistent with the Hopkinton Comprehensive Plan"* and whose members are able to read the plain language of Chapter 246, which *requires the prior affirmative recommendation of the planning board* in order for the town council to *consider* an amendment to the lot coverage restriction.

But the inconvenient fact remains that a land condominium unit is *not* a pre-existing subdivision and cannot be zoned independently of the other units, absent a proper subdivision of the parcel, *approved by the planning board.*

Conclusion

It is the sworn duty of the town planner and the planning board to faithfully apply the laws of the State of Rhode Island and the Town of Hopkinton during the process of reviewing and/or approving any application for development.

The former town council and former town solicitor have no authority to relieve the town planner or planning board of this responsibility or to instruct them to violate the law.

I respectfully urge the town planner and the planning board to request that the planning board solicitor review these issues and produce a written opinion to advise them, in a form that can be publicly disseminated to clarify the disposition of these issues for the benefit of every future applicant and every Hopkinton resident.

Thank you in advance for considering and acting upon these concerns.

Sincerely,

Eric Bibler
Hopkinton resident

Cc: Town Council
Cc: Town Solicitor

Attachments: For copies of some relevant documents pertaining to this project, including hearing transcripts and Condominium Declarations, please see the link below:

https://www.dropbox.com/sh/ji03xtxq6h4w1v5/AACX80W8qVl70pskaYzzOkeWa?dl=0