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Members of the Hopkinton Town Council
Members of the Hopkinton Planning Board
Members of the Hopkinton Zoning Board
Town of Hopkinton Town Solicitor
Town of Hopkinton Town Manager
Town of Hopkinton Town Planner

Ladies and Gentlemen:

As many of you know, I represent the interests of the Hopkinton Citizens for Responsible Planning.

I have also represented, and still represent, quite a number of abutters to several large parcels of land that are presently zoned for RFR-80 residential use whose owners have requested that the Hopkinton Town Council change the existing Hopkinton Comprehensive Plan and the existing Hopkinton Zoning Ordinance to amend the zoning district designations for their respective properties to enable the owners to pursue a manufacturing land use that is *prohibited* on residential property – i.e. industrial scale, commercial solar development.

Hopkinton Citizens for Responsible Planning, and the many abutters whom I represent in various neighborhoods of Hopkinton, have engaged my services not because they oppose the concept of solar energy systems in general. I was hired because these residents share a common interest in preserving the integrity of the planning and zoning process; in defending the statutory rights of abutters, nearby property owners and all residents of the town; and in ensuring that town officials scrupulously abide by the concepts, rules and regulations that are set forth in both the Hopkinton Comprehensive Plan and Hopkinton Zoning Ordinance, the purpose of which is to defend and protect the rights of all citizens of the Town of Hopkinton.

When it became clear to my clients that commercial developers had come to view the entire Town of Hopkinton as a single large potential development area for the installation of industrial-scaled solar energy systems - and that Hopkinton's elected officials were not willing, or able, to defend their property interests, or were intent themselves on pursuing actions be contrary to their property interests - these citizens and residents of the Town of

Hopkinton joined together to protect the value of their homes; the quality of their lives; the reasonable use and enjoyment of their property; their reasonable expectations that the town's zoning laws would be duly enforced; and the joy and satisfaction that they derive from living in such a beautiful town.

As members of the Hopkinton town government well know, there have been numerous requests made to change both the Comp Plan and the Zoning Ordinance by developers who are interested in installing "Non-Residential Photovoltaic Solar Energy Systems ("PSES")", on properties that are currently zoned only for residential and agricultural uses. The installation of such systems on these residential properties is specifically prohibited and abutting residential properties surround them. During the past two years, there have been at least FIFTEEN (15) such requests made to the Town Council for rezoning of residential property.

As members of the town government are also aware, the Town Planner, members of the Planning Board and/or the Town Council met on numerous occasions, beginning in April of 2018, to draft comprehensive amendments to the town's solar ordinance. The Town Council enacted that new and revised ordinance on January 22, 2019.

There have been claims made by developers, town officials, and others that from the very moment a developer (or any property owner) simply makes a *request* to the Town Council to change the Comp Plan and the Zoning Ordinance, in order to change the zoning district designation for their particular property (from residential to commercial or manufacturing use), the requesting developer (or property owner) is entitled to so-called "grandfathered" rights, or "vested" rights, and can then proceed in accordance with the Zoning Ordinance and/or Planning Regulations as they existed at the time that the requests for re-zoning were made to the Town Council.

More specifically, relative to the current circumstances, some have claimed that any property owner, or developer, who has requested a zone change from a current zoning for RFR-80 residential use to accommodate the installation of a commercial solar facility is entitled, by law, to have his request considered under the PSES ordinance as it existed prior to January 22, 2019.

In fact, those claims are categorically, and demonstrably, wrong under the law. The assertions that these "requests for rezoning" can perfect a "right" or a "privilege" to enable those property owners to file applications for land development in the future under the old ordinance, as it existed before its amendment in January 2019, reflect a severely flawed and anecdotal "understanding" of the concept of "vested rights".

The legal concept of "vested rights" pertaining to land development arises from statutes enacted by the General Assembly, as courts of competent jurisdiction have interpreted them. The statutes and published opinions of the courts dictate what is legally *required* before a property owner can even file an application to acquire vested rights when undertaking a land development project.

I am writing to you today to explain to you in detail why no property owner possesses a "vested right" to rely upon the provisions of the zoning ordinance or the planning

regulations as they existed prior to the time that the Town Council adopted the amended version of Chapter 246, (Non-Residential PSES) on January 22, 2019.

I am also writing to request that the Town Council ensure that the appropriate Town of Hopkinton representatives advise all parties who have requested changes to the zoning district designations for their properties, or who may make such requests in the future, that the controlling ordinance for establishing their rights to develop their land is the revised Non-Residential PSES (Chapter 246 of the Hopkinton Code of Ordinances, as adopted by the Town Council on January 22, 2019).

I make this request in an effort to save the members of the Town Council, the Town Manager, the Town Planner, the Town Clerk, the Town Solicitor and other Town employees, as well as Members of the Planning Board and the other dedicated volunteers who serve on the town's boards and commissions, from wasting any more of their valuable time and resources on hearings which *cannot* provide to the developers, or other property owners, what they are seeking: the ability to construct large, industrial-scale solar facilities on properties located within the RFR-80 Zoning District under any terms *other than* those provided under the current version of the Non-Residential PSES ordinance enacted on January 22, 2019.

I also make this request to spare those property owners and developers who have requested that the Town Council amend the Comp Plan and the Zoning Ordinance to change the zoning district designations for their properties – but who have not yet achieved this milestone – from any further wasting of their time, money and efforts by having them continue to proceed under the mistaken presumption that they have been endowed with "grandfathered rights" to pursue proposals for solar that do not conform to the requirements of the *current* version of the PSES ordinance enacted as Amended Chapter 246 on January 22, 2019.

Finally, I make this request in an effort to save the citizens and residents of the Town of Hopkinton – your constituents - from incurring significant further expenses; from expending their time and efforts attending endless hearings that will ultimately serve no useful purpose; and, most importantly, to assuage their legitimate concerns that their property values will be diminished as their legal rights are ignored.

I am not providing you with **my opinion** of how you should act as a member of the Hopkinton Town Council.

Instead, I have prepared a comprehensive Memorandum, which explains the legal and factual bases for the conclusions I am providing to you. These conclusions are based upon Rhode Island statutes, the United States Constitution, the Rhode Island Constitution and the published legal opinions issued by Rhode Island and the United States Federal Courts, in addition to the applicable Town of Hopkinton Ordinances, Rules and Regulations. A copy of my memorandum and the cited authorities referenced therein accompany this letter.

Vested rights have been recognized by the U.S. Supreme Court, Federal Courts, Rhode Island Courts, and Rhode Island statutes **to be an actual property right that is a right that presently exists within the holder of the vested right**. Although technically not a

constitutional right (because they are based on state laws rather than the U.S Constitution) the rights are guaranteed to residents of the state by virtue of the operation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Vested rights are not rights that one hopes to gain in the future. Vested rights exist in the present based upon a property owner's bundle of "ownership rights" and the statutes, rules and regulations, which exist at the time a property owner exercises his or her ownership rights.

The legislature and the courts have determined that the manner in which an owner exercises "ownership rights", in the context of a building or zoning application, is that moment when an application for land development that is substantially complete is submitted for approval with the appropriate review agency. That moment must also be prior to the time of the enactment of a new zoning ordinance or amendment.

To be clear, property owners cannot be "vested" in an *intention*, a *desire* or an *aspiration* to acquire development rights that they do not presently possess.

In fact, property owners who claim to have a "vested right" to install industrial solar facilities on residential property in the RFR-80 zone, based upon a "hoped for" rezoning of their property by the Town Council in response to a request for a zone change, are perversely claiming a "vested right" to pursue a commercial use of the land that is expressly prohibited *unless* they are successful in persuading the Town Council, acting as a legislature, to *grant* them *new* rights that they do not currently enjoy. According to this logic, if the Town Council *declines* to grant the zoning change, the presumed "vested right" to develop commercial solar energy will mysteriously *vanish*.

The decisions of the Rhode Island Supreme Court, in accordance with the majority of the states, reflect the requirement that a landowner show entitlement to a permit or approval by strictly adhering to the statutes, rules and regulations that provide a purported property right.

In **Pitocco v. Harrington**, 707 A.2d 692, 695-696 (R.I. 1998) the court found that the landowner was entitled to a building permit because the building official "had no authority whatsoever 'other than to determine that the proposed construction conform[ed] precisely to the terms of the pertinent provisions of the zoning ordinance.'" 707 A.2d at 696.

In **Brunelle, v. Town of South Kingstown**, 700 A.2D 1075 (R.I. 1997) 700 A.2d at 1084, the court questioned whether the Plaintiff "possessed a protected property interest in the granting of a zoning changed petition."

In **L.A. Ray Realty v. Town Council of Cumberland**, 698 A.2d 202 (R.I.1997) the Court concluded that a landowner had an entitlement to final approval of a proposed subdivision where the planning board had only denied the subdivision based on an invalid amendment to a town zoning ordinance. 698 A.2d at 210 (citation omitted). In contrast, the Court found that the same landowner did not have an entitlement to a second distinct proposed subdivision because that particular subdivision was "still at a preliminary stage" and the planning board "could have denied [it] for a myriad of unforeseeable reasons." Id.

In determining whether a landowner has an "entitlement" to a property interest the Court's decisions in **Pitocco v. Harrington**, **L.A. Ray**, and **Brunelle** are instructive. In each of those cases, the Supreme Court looked to the degree of discretion that the relevant authority possessed to deny or approve the landowner's application; the greater the discretion, the more difficult the proof of entitlement.

Rhode Island law is specific in establishing that real property (land) owners are entitled *to the rights that they presently possess at the time that a statute, an ordinance, a rule, a regulation or a law is enacted - IF they have submitted an application for "land development" that is a "substantially complete application" with the "appropriate local review agency in the city or town" at a time "prior to enactment of the new ordinance or amendment".*

The meaning of each of the terms highlighted above is addressed in detail in the attached Memorandum.

ALL of those conditions must be present if a property owner is to make a valid claim to have any "vested rights" to develop real property in accordance with the rules, regulations, etc. that were in effect at the time that these conditions precedent were satisfied *in full*. There is no aspirational aspect to the legal definition of "vested rights" and there is no provision in the law to provide new "vested rights" based upon a stated intention or desire, especially one that requires a discretionary legislative action (in this case by the Town Council) to grant the rights that are desired.

As discussed in the accompanying Memorandum, the "vested rights" that each property owner in Hopkinton legally possesses derive (1) from the existing zoning district designation (2) at the time (3) when the property owner files an application for development of property, (4) that is substantially complete, (5) that has been submitted for approval to the appropriate review agency in the Town of Hopkinton (6) prior to the enactment of Chapter 246 on January 22, 2019.

As the Memorandum further explains, it is essential to grasp that these steps must be followed, and these milestones achieved, *in the proper sequence* for such rights to be "vested."

Thus, for example, a developer cannot properly file an application with the Planning Board (the appropriate review agency in the Town of Hopkinton) to develop an RFR-80 property for a use that is not permitted – commercial solar energy – because this use is expressly prohibited in the RFR-80 zoning district.

And it follows, that if the developer cannot file an application to pursue a prohibited use, then his application cannot be "substantially complete" before he is even allowed to file it!

And since a developer cannot file an application for a prohibited use, it follows that the entire process of achieving "vested rights" cannot properly begin until *after* the developer has succeeded in persuading the Town Council to grant the rezoning.

All of these definitions and principles are clearly laid out in various Rhode Island statutes and fully supported by the numerous court cases that have been cited.

Each of the specific properties discussed in the Memorandum - all of which are on the Town Planner's Solar Department Overview as properties that "need" a zone change - have vested rights based upon the zoning district in which each property was located on January 22, 2019, which would only enable the owner to develop the property for uses that were permitted in the RFR-80 zone district on that date. Commercial solar energy was then, and remains now, prohibited in the RFR-80 zone.

Under the circumstances, we respectfully urge the Town Council to inform all of those property owners that their requests to rezone Residential RFR-80 property to the Commercial or Manufacturing zone, for the purpose of installing commercial solar facilities, must comply with the terms of the *current* PSES ordinance, Chapter 246.

As noted above, if the Town Council continues on its present course and hears and decides the nine (9) pending requests for rezoning, the Planning Board, Town Council, numerous town employees and dozens of residents can expect to spend the next several months attending a minimum of two to three dozen meetings to hear these requests under the terms of the old ordinance – all of which will prove to be an utterly useless waste of time when they are ultimately subjected to a simple legal challenge.

If the Town Council proceeds in the current manner, it will perversely be committing itself to hearing the NINE (9) current requests for rezoning that have been filed under terms that are starkly different from the terms prescribed by the enactment of the current PSES on January 22, 2019 – the enactment of which represented the culmination of countless hours of effort and months of laborious public hearings and *whose very purpose was to amend the former solar ordinance in order to make it <u>more consonant</u> with the development goals and objectives of Hopkinton and the preferences of its residents!*

What purpose could be served by stubbornly adhering to the provisions of the old ordinance – in contravention of Rhode Island law – when those provisions do not reflect the needs of Hopkinton and were revised for that very reason?

Please be advised that we are taking the liberty of sending a copy of this Memorandum to the legal counsel for the two Atlantic Solar projects for which hearings are currently scheduled on April 15th (Main Street) and April 22nd (Skunk Hill and Lisa Lane).

Please also be advised, that if the Town does not agree with this analysis and does not inform the solar petitioners of the need to ensure that their proposals conform to the requirements of the current PSES ordinance, we will object to any continued pursuit of these hearings under the auspices of an ordinance that is no longer in effect.

The Town Council decided that any property owner who requests and obtains a change in zoning district designation from the RFR-80 Zoning District to either the Commercial Zoning District or the Manufacturing Zoning District after January 22, 2019, for the development as a site for a Non-Residential Photovoltaic Solar Energy System, shall be allowed only the lesser of 3% or 3 acres as the maximum allowable coverage for that system on any parcel of land. While many requests for rezoning have been filed, none of those requests have yet been approved.

In practice, it appears that town officials have inadvertently confused the process of submitting *a petition to the Town Council to request a zone change* with the legal process *of filing an application for land development*; and that the improper, or casual use of the term "application," in referring to these petitions to request zoning changes have furthered, and perpetuated, the confusion.

Now would be the appropriate time to resolve that apparent confusion,

Thank you for your consideration of this urgent matter.

Very truly yours,

James A. Donnelly
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