State of Rhode Island

Washington, SC

Town of Hopkinton

Town Council

In Re Zone Amendment & Comprehensive
Plan Future Land Use Map Amendments For
Properties Requesting Change Of Zoning Use
District Designation From Residential To Either
Commercial or Manufacturing

**Memorandum - Filed On Behalf Of**

**The Hopkinton Citizens For Responsible Planning**

## Introduction

According to a report compiled by the Town of Hopkinton Town Planner, James M. Lamphere, entitled "Hopkinton Solar Development Overview" and dated January 24, 2019[1], the following proposed "solar energy projects" have been identified as "Projects needing Zone Change" before they could be developed as sites for the construction of "Non-Residential Photovoltaic Solar Energy Systems (PSES)" would be permitted:

**(1)** Atlantic Solar (2.46 DC MW, 10 Acres);

**(2)** Arcadia Road / Lisa Lane – Skunk Hill Road, LLC (8.63 DC MW, 19.2 Acres);

**(3)** 145 Skunk Hill Road – Skunk Hill Solar, LLC (20.34 DC MW, 44.87 Acres);

**(4)** 201 Chase Hill Road – (Cherenzia, 2.7 DC MW, 12.89 Acres);

**(5)** 10 Grantville Extension (Church, .9 DC MW, 3.74 Acres);

**(6)** 40 Maxson Hill Road – (Sposato, .5 DC MW, 1.94 Acres);

**(7)** 10-A Crandall Lane – (Fothergill, 3.9 DC MW, 15.32 Acres);

**(8)** 0 Wich Way – (Fated Farmer, 3.4 DC MW, 10.57 Acres); and

**(9)** Woodville Road – (Clearway Energy, AC MW, 30 Acres)

[1] See copy of Memo of James M. Lamphere, Town Planner, dated January 24, 2019, entitled "Hopkinton Solar Development, Overview, attached as **Exhibit A**.

It has been stated by Town of Hopkinton Officials at Public Meetings that the developers of these potential projects have "vested rights" based upon their requests that the Town Council change both the existing Town of Hopkinton Comprehensive Plan and the existing Town of Hopkinton Zoning Ordinance and "rezone" their respective properties from Residential Zoning Districts to Commercial and/or Manufacturing Districts. The purpose of this Memorandum is to educate Town Council members, members of the Town of Hopkinton Boards and Commissions, Town of Hopkinton employees and the residents and citizens of the Town of Hopkinton as to the meaning of the term "vested rights" in relation to land development in the State of Rhode Island.

## "The Projects needing Zone Change"

**Proposed Project No. 1:** Atlantic Solar (2.46 DC MW, 10 Acres)

This proposed project consists of three (3) lots, Lot 32 on Tax Assessor's Plat 7, Lot 87 on Tax Assessor's Plat 10 and Lot 35 on Tax Assessor's Plat 11[2]. **Each of the three (3) lots is currently zoned RFR-80**. The RFR-80 Zoning District permits only residential and agricultural uses as a matter of right. The construction and operation of a "Non-Residential Photovoltaic Solar Energy System (PSES)" in the RFR-80 Zoning District is not permitted. On August 20, 2018 a representative of this developer submitted a request to the Hopkinton Town Council that the existing Hopkinton Comprehensive Plan and the existing Hopkinton Zoning Ordinance be changed so that the parcels would be rezoned to "Commercial Special"[3]. A hearing is scheduled to commence before the Town Council on those requests on April 15, 2019.

**Proposed Project No. 2:** Arcadia Road / Lisa Lane – Skunk Hill Road, LLC (8.63 DC MW, 19.2 Acres)

This proposed project consists of two (2) lots, Lots 8 and 13 on Tax Assessor's Plat 18.[4] **Each of the two (2) lots is currently zoned RFR-80**. The RFR-80 Zoning District permits only residential and agricultural uses as a matter of right. The construction and operation of a "Non-Residential Photovoltaic Solar Energy System (PSES)" in the RFR-80 Zoning District is not permitted. On October 22, 2018 a representative of this developer submitted a request to the Hopkinton Town Council that the existing Hopkinton Comprehensive Plan and the existing Hopkinton Zoning Ordinance be changed

[2] See copies of Tax Assessor's Tax Cards for Lot 32 on Plat 7, Lot 87 on Plat 10 and Lot 35 on Plat 11, attached as **Exhibit B.**
[3] See copy of letter from Woodward & Currant dated August 20, 2018 seeking Comprehensive Plan and Zoning Ordinance changes for Plat 7 Lot 32, Plat 10 Lot 87 and Plat 11 Lot 35, attached as **Exhibit C.**
[4] See copies of Tax Assessor's Tax Cards for Lots 8 and 13 on Assessor's Plat 18, attached as **Exhibit D.**

so that the parcels would be rezoned to "Commercial Special"[5]. A hearing commenced before the Town Council on those requests on March 25, 2019 and was continued for further hearing to April 22, 2019.

**Proposed Project No. 3:** 145 Skunk Hill Road – Skunk Hill Solar, LLC (20.34 DC MW, 44.87 Acres)

This proposed project consists of one (1) lot, Lot 14 on Tax Assessor's Plat 18.[6] **The lot is currently zoned RFR-80.** The RFR-80 Zoning District permits only residential and agricultural uses as a matter of right. This parcel is currently the site of one (1) single-family home. The construction and operation of a "Non-Residential Photovoltaic Solar Energy System (PSES)" in the RFR-80 Zoning District is not permitted. On October 22, 2018 a representative of this developer submitted a request to the Hopkinton Town Council that the existing Hopkinton Comprehensive Plan and the existing Hopkinton Zoning Ordinance be changed so that the parcel would be rezoned to "Commercial Special"[7]. A hearing commenced before the Town Council on those requests on March 25, 2019 and was continued for further hearing to April 22, 2019. Proposed Projects Nos. 2 and 3 have been combined for the purpose of hearings before the Town Council for the requested changes to the existing Hopkinton Comprehensive Plan and the existing Hopkinton Zoning Ordinance.

**Proposed Project No. 4:** 201 Chase Hill Road – (Cherenzia, 2.7 DC MW, 12.89 Acres)

This proposed project consists of one (1) lot, Lot 32 on Tax Assessor's Plat 2.[8] **The lot is currently zoned RFR-80**. The RFR-80 Zoning District permits only residential and agricultural uses as a matter of right. This parcel is currently the site of one (1) single-family home. The construction and operation of a "Non-Residential Photovoltaic Solar Energy System (PSES)" in the RFR-80 Zoning District is not permitted.

**Proposed Project No. 5:** 10 Grantville Extension (Church, .9 DC MW, 3.74 Acres)

This proposed project consists of one (1) lot, Lot 11A on Tax Assessor's Plat 15[9]. **The lot is currently zoned RFR-80.** The RFR-80 Zoning District permits only residential and agricultural uses as a matter of right. This parcel is currently the site of one (1) single-family home. The construction

[5] See copy of letter from Woodward & Currant dated October 22, 2018 seeking Comprehensive Plan and Zoning Ordinance changes for Plat 18 Lots 8 and 13, attached as **Exhibit E.**
[6] See copies of Tax Assessor's Tax Cards for Lot 14 on Assessor's Plat 18, attached as **Exhibit F.**
[7] See copy of letter from Woodward & Currant dated October 22, 2018 seeking Comprehensive Plan and Zoning Ordinance changes for Plat 18 Lot 14, attached as **Exhibit G.**
[8] See copy of Tax Assessor's Tax Card for Lot 32 on Assessor's Plat 2, attached as **Exhibit H.**
[9] See copy of Tax Assessor's Tax Card for Lot 11A on Assessor's Plat 15, attached as **Exhibit I.**

and operation of a "Non-Residential Photovoltaic Solar Energy System (PSES)" in the RFR-80 Zoning District is not permitted.

**Proposed Project No. 6:** 40 Maxson Hill Road – (Sposato, .5 DC MW, 1.94 Acres)

This proposed project consists of one (1) lot, Lot 38 on Tax Assessor's Plat 4[10]. **The lot is currently zoned RFR-80.** The RFR-80 Zoning District permits only residential and agricultural uses as a matter of right. This parcel is currently the site of one (1) single-family home. The construction and operation of a "Non-Residential Photovoltaic Solar Energy System (PSES)" in the RFR-80 Zoning District is not permitted.

**Proposed Project No. 7:** 10-A Crandall Lane – (Fothergill, 3.9 DC MW, 15.32 Acres)

This proposed project consists of one (1) lot, Lot 1 on Tax Assessor's Plat 2[11]. **The lot is currently zoned RFR-80.** The RFR-80 Zoning District permits only residential and agricultural uses as a matter of right. This parcel is currently the site of two (2) single-family homes. The construction and operation of a "Non-Residential Photovoltaic Solar Energy System (PSES)" in the RFR-80 Zoning District is not permitted.

**Proposed Project No. 8:** 0 Wich Way – (Fated Farmer, 3.4 DC MW, 10.57 Acres)

This proposed project consists of one (1) lot, Lot 17C on Tax Assessor's Plat 7[12]. **The lot is currently zoned RFR-80.** The RFR-80 Zoning District permits only residential and agricultural uses as a matter of right. The construction and operation of a "Non-Residential Photovoltaic Solar Energy System (PSES)" in the RFR-80 Zoning District is not permitted.

**Proposed Project No. 9:** Woodville Road – (Clearway Energy, AC MW, 30 Acres)

This writer has no information about the location of this proposed project.

[10] See copy of Tax Assessor's Tax Card for Lot 38 on Assessor's Plat 4, attached as **Exhibit J.**
[11] See copy of Tax Assessor's Tax Card for Lot 1 on Assessor's Plat 2, attached as **Exhibit K.**
[12] See copy of Tax Assessor's Tax Card for Lot 17C on Assessor's Plat 7, attached as **Exhibit L.**

## "Vested" or "Grandfather" Rights in land development in Rhode Island

The Rhode Island Supreme Court reviewed the legislative history of land development statutes in the State of Rhode Island in ***Generation Realty, LLC v. Catanzaro,*** 21 A.3D 253 (R.I. 2011), observing:

> "In 1988, the General Assembly enacted the Rhode Island Comprehensive Planning and Land Use Regulation Act [2] as part of an effort " to totally rewrite the major land use enabling legislation in Rhode Island," which, prior to 1988, consisted of " an assortment of separately enacted and amended statutes, stretching over six decades." Andrew M. Teitz, How the Law Is Really Made: A Participant's View of the Drafting of a New Zoning Enabling Act, 41 R.I. Bar J. 11, 11 (1992).
>
> The Comprehensive Planning and Land Use Regulation Act " provided for each municipality to enact a real comprehensive plan, with state government review of such plan, and carrot-and-stick incentives to make the municipalities comply." Id.
>
> As part of that same effort to overhaul Rhode Island's land use enabling legislation, in 1991 the General Assembly enacted the Rhode Island Zoning Enabling Act. Teitz, 41 R.I. Bar J. at 11. Among other things, the Zoning Enabling Act set forth the notice and hearing requirements for the adoption, repeal, and amendment of zoning ordinances."

The "Rhode Island Zoning Enabling Act of 1991"[13] required that any zoning ordinance or amendment of the ordinance after January 1, 1992 be in conformance with the provisions of the Act. In addition, every city and town within the State of Rhode Island was required to review its zoning ordinance and make amendments or revisions that were necessary to bring its zoning ordinance into conformance with the Act by December 31, 1994.[14]

In 1992 the Rhode Island Legislature enacted the "Rhode Island Land Development and Subdivision Review Enabling Act of 1992", also known as the "Development Review Act"[15]. Pursuant to the terms of the Act every municipality in the state was required to adopt land development and subdivision review regulations in compliance with the provisions of the Act.

All municipalities were required to establish the standard review procedures for local land development and subdivision review and approval as specified in the Act[16]. The Legislature made sections 45-23-25 through 45-23-74 of the Act applicable to all cases of subdivisions of land, to all cases of land development projects and to all cases of development plan review as provided for in

[13] See copy of RIGL § 45-24-27 attached as **Exhibit M.**
[14] See copy of RIGL § 45-24-28 attached as **Exhibit N.**
[15] See copy of RIGL § 45-23-25 attached as **Exhibit O.**
[16] See copy of RIGL § 45-23-26 attached as **Exhibit P.**

§ 45-24-49[17] of the Zoning Enabling Act of 1991, where a municipality has established, within their zoning ordinance, the procedures for planning board review of applications[18].

"Vested rights" afforded to applicants seeking approval for land development projects in Rhode Island **derive only from the statutory authorities** enacted by the Rhode Island General Assembly under the provisions of the Comprehensive Planning and Land Use Regulation Act, the Zoning Enabling Act or the Development Review Act.

In R.I.G.L. § 45-24-44 of the Zoning Enabling Act the legislature established the requirements for the recognition of "vesting rights" for the benefit of applicants in land development projects under the zoning ordinances of cities and towns in Rhode Island.

Section 45-24-44[19] of the Rhode Island Zoning Enabling Act is set forth at length below:

**§45-24-44. General provisions – Creation of vested rights.**

(a) A zoning ordinance provides protection for the consideration of applications for development that are substantially complete and have been submitted for approval to the appropriate review agency in the city or town prior to enactment of the new zoning ordinance or amendment.

(b) Zoning ordinances or other land development ordinances or regulations specify the minimum requirements for a development application to be substantially complete for the purposes of this section.

(c) Any application considered by a city or town under the protection of this section shall be reviewed according to the regulations applicable in the zoning ordinance in force at the time the application was submitted.

(d) If an application for development under the provisions of this section is approved, reasonable time limits shall be set within which development of the property must begin and within which development must be substantially completed.

History of Section.
(P.L. 1991, ch. 307, § 1.)

For applicants who are proceeding with land development projects under the Rhode Island Land Development and Subdivision Review Enabling Act of 1992 the legislature established the

[17] See copy of RIGL § 45-24-49 attached as **Exhibit Q**.
[18] See copy of RIGL § 45-23-27 attached as **Exhibit R.**
[19] See copy of RIGL § 45-24-44 attached as **Exhibit S.**

requirements for the recognition of "vesting rights" for those engaged in the planning approval process in R.I.G.L. 45-23-40.

Section 45-23-40 of the Rhode Island Land Development and Subdivision Review Enabling Act is set forth at length below:

> **§ 45-23-40.** General provisions - major land development and major subdivision – master plan
> (g) Vesting.
> (1) The approved master plan is vested for a period of two (2) years, with the right to extend for two (2), one-year extensions upon written request by the applicant, who must appear before the planning board for the annual review. Thereafter, vesting may be extended for a longer period, for good cause shown, if requested by the applicant, in writing, and approved by the planning board. Master plan vesting includes the zoning requirements, conceptual layout, and all conditions shown on the approved master plan drawings and supporting materials.
> Cite as R.I. Gen. Laws § 45-23-40
> History. Amended by 2017 Pub. Laws, ch. 175, §1, eff. 6/30/2017.
> Amended by 2017 Pub. Laws, ch. 109, §1, eff. 6/30/2017.
> Amended by 2016 Pub. Laws, ch. 527, §2, eff. 8/11/2016.
> P.L 1992, ch. 385, § 1; P.L. 1999, ch. 157, §1; P.L. 2008, ch. 224, §1; P.L. 2008, ch. 294, §1; P.L. 2008, ch. 464, §1.
>
> (2) The initial four-year (4) vesting for the approved master plan constitutes the vested rights for the development as required in § 45-24-44.

The term "vested rights" was defined in Section 45-23-32 (55) of the Rhode Island Land Development and Subdivision Review Enabling Act for applicants proceeding under the planning approval process.

Section 45-23-32 (55) of the Rhode Island Land Development and Subdivision Review Enabling Act is set forth at length below:

> **§ 45-23-32. Definitions**
>
> Where words or phrases used in this chapter are defined in the definitions section of either the Rhode Island Comprehensive Planning and Land Use Regulation Act, § 45-22.2-4, or the Rhode Island Zoning Enabling Act of 1991, § 45-24-31, they have the meanings stated in those acts.
>
> Additional words and phrases may be defined in local ordinances, regulations and rules under this act. The words and phrases defined in this section, however, shall be controlling in all local ordinances, regulations, and rules created under this chapter. See also § 45-23-34. In addition, the following words and phrases have the following meanings:

**(55)** Vested rights. The right to initiate or continue the development of an approved project for a specified period of time, under the regulations that were in effect at the time of approval, even if, after the approval, the regulations change prior to the completion of the project.

In compliance with the Comprehensive Planning and Land Use Regulation Act, the Zoning Enabling Act and the Development Review Act the Town of Hopkinton adopted a comprehensive plan, enacted the town's zoning ordinance and enacted regulations for the process known as "Development Plan Review" in its code of ordinances to conform to those acts.

Pursuant to the authority granted to the cities and towns by **R.I.G.L. §45-24-44** of the Zoning Enabling Act the Hopkinton Town Council enacted its Zoning Ordinance including Section 12[20], which closely reflected the vested rights set forth in the statute, and provided to applicants the following "vested rights":

**Section 12. - Substantially complete applications/creation of vested rights.**

Applications for development that are substantially complete and have been submitted for approval to the appropriate agency in the town prior to the enactment of this ordinance or any amendment hereto shall be reviewed according to the regulations applicable in the zoning ordinance in force at the time the application was submitted.

For a development application to be deemed substantially complete for purposes of this section, it shall have been submitted with all required data and/or evidence required by the applicable ordinance provisions or regulations or have been granted a waiver from furnishing said data and/or evidence by the official, agency or board with authority to do so.

If an application falling within this section is approved, development must begin within six (6) months of said approval and be substantially completed within twelve (12) months after the commencement of such development.

(Ch. 134, § 12, 12-19-94)

Both R.I.G.L 45-24-44 and Section 12 of the Zoning Ordinance contain words that are critical to understanding the legal meaning of the term "vested rights", particularly as those words apply to the requests that have been made to the Hopkinton Town Council to amend the existing Town of Hopkinton Comprehensive Plan and the existing Town of Hopkinton Zoning Ordinance and to thereby

[20] See copy of Section 12 of the Hopkinton Zoning Ordinance, attached as **Exhibit T.**

change the zoning district (and use) designations for the lots listed in the section entitled "The Projects needing Zone Change", above.

The zoning enabling statute and the zoning ordinance provide vested rights for **(1)** "applications for development" **that are (2)** "substantially complete" **and (3)** "have been submitted for approval" **to (4)** "the appropriate review agency in the town" **prior to (5)** "enactment of the new zoning ordinance or amendment". Each of those requirements is a condition precedent to any finding of "vested rights" under the law. Unless every requirement is met there can be no finding of entitlement to vested rights. Each requirement of the zoning enabling act and the zoning ordinance will be addressed separately below:

## Requirement No. 1 - "Application for development"

The word **"application"** under the zoning enabling act is defined in R.I.G.L. § 45-24-31 (8)[21] [22] as:

***"Application.*** **The completed form, or forms, and all accompanying documents, exhibits, and fees required of an applicant by an approving authority for development review, approval, or permitting purposes."**

Under the Hopkinton Zoning Ordinance the term "development review" is defined (in Section 2, Definitions) as:

**"Development plan review. The process whereby authorized local officials review the site plans, maps, and other documentation of a development to determine the compliance with the stated purposes and standards of the ordinance."**

The requirements of the Town of Hopkinton's "Development Plan Review Ordinance" are set forth in Section 15[23] of the Zoning Ordinance as:

Section 15. - Development plan review.

(A) Development plan review of applications for **uses that are permitted under the zoning ordinance** is required for **any permitted use other than single-family and two-family residential and accessory structures** thereto, but the **review shall only be based on specific and objective guidelines** as set forth **in chapter 109 [Ch. 13.5, §§ 13.5-70—13.5-73]** of the Code of Ordinances of the Town of Hopkinton. **The review body is the planning board.** A rejection of the application shall be considered an appealable decision pursuant to section 24 of this ordinance and shall be taken in accordance with the procedures delineated in section 24(B).

(B) Development plan review may be conducted by the planning board at the request of the zoning board or town council for applications for uses requiring a special use permit, a variance, a zoning ordinance amendment, and/or a zoning map change. The review, conducted by the planning board, shall be advisory to the permitting authority.

(C) Nothing herein shall be construed to permit waivers of any regulations unless approved by the permitting authority pursuant to the zoning ordinance and the Zoning Enabling Act.

(Ch. 134, § 15, 12-19-94)

[21] See copy of R.I.G.L. 45-24-31 – Definitions – Effective until March 1, 2019, attached as **Exhibit U.**
[22] See copy of R.I.G.L. 45-24-31 – Definitions – Effective on March 1, 2019, attached as **Exhibit V.**
[23] See copy of Section 15 of the Town of Hopkinton Zoning Ordinance, attached as **Exhibit W.**

The clear language makes "Development plan review" mandatory for uses that are **permitted** under the zoning ordinance . . . . . for any **permitted use other than single-family and two family residential and accessory structures**.

Utility-scale solar energy installations designed to generate and sell electricity to National Grid are not single-family or two-family residential structures or accessory structures to either single-family or two-family residential structures.

Utility-scale solar energy installations designed to generate and sell electricity to National Grid **are not "permitted uses"** in the RFR-80 Zoning District. They have never been permitted uses in the RFR-80 Zoning District.

Section 15 (Development Plan Review) names the planning board as the "designated review body" authorized to conduct any required "Development Plan Review".

Section 15 provides that the review conducted "shall only be upon specific and objective guidelines as set forth in chapter 109 (Sec. Ch. 13.5, §§ 13.5-70—13.5-73] of the Code of Ordinances of the Town of Hopkinton.

The referenced Chapter 13.5-70 – 13.5-73[24] of the Hopkinton Code comprehensively addresses the scope and requirements for "Development Plan Review" and the forms, documents and information that must be filed by an applicant seeking development plan review. The chapter confirms that development plan review **applies to all permitted land uses** of the Town of Hopkinton Zoning Ordinance, **except for single-family and two-family structures and other structures** located on the same site and which are customary and incidental to single-family or two-family residential structures.

Section 13.5-70 of the Code of Ordinances provides that:

> **No building permit** may be issued for any building within the purview of this section, **except in conformance with an approved site plan**. No certificate of occupancy may be issued for any building not exempted from this ordinance unless the building is constructed or used, or the land is developed or used in conformity with an approved site development plan. **Every application to the building inspector for a building permit shall be accompanied by a**

[24] See copy of Chapter 13.5-70 – 13.5-73 of the Hopkinton Code of Ordinances, attached as **Exhibit X.**

**statement in writing from the town planner that the said plan meets all the specific applicable requirements of this ordinance**. (Emphasis added)

**Not one of the developers** for the proposed projects identified by the Town Planner in his report referenced in footnote 1 as Exhibit A, above, has filed **any application** for land development in the Town of Hopkinton.

As previously noted, each of the proposed projects listed in the Town Planner's report is located in a Residential Zoning District. "Solar projects" are not permitted in Residential Zoning Districts.

**Not one of the developers** for the proposed projects has filed an application(s) for a building permit to construct a "solar project" on their property for the simple reason that such a project is not a "permitted use" within a residential zoning district.

The building official would be without authority to accept or act upon an application for a building permit for a solar project in a residential zoning district in any event. As our Supreme Court held in ***Zeilstra v. Barrington Zoning Bd. of Rev***., 417 A.2d 303, 308 (R.I. 1980) at 308 (quoting ***Arc-Lan Co. v. Zoning Board of Review of North Providence,*** 106 R.I. 474, 476, 261 A.2d 280, 282 (1970)), "[w]hen presented with petitioner's application for a building permit, the inspector 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.'**

**Not one of the developers** for the proposed projects has filed an application seeking the issuance of a zoning variance or a special use permit pursuant to the Zoning Ordinance to permit the construction of a "solar project" in a residential zoning district.

**Not one of the developers** for the proposed projects has filed an application for "Development Plan Review" by the Planning Board according to the requirements of Section 15 of the Zoning Ordinance, in the manner described in Chapter 13.5-70 – 13.5-73 of the Hopkinton Code Of Ordinances.

**Not one of the developers** for the proposed projects **could have filed** an application for "development plan review" to be conducted by the Planning Board according to the requirements of

Section 15 of the Zoning Ordinance, in the manner described in Chapter 13.5-70 – 13.5-73 of the Hopkinton Code Of Ordinances for the simple reason that each of the properties was located in a residential zoning district where non-residential solar energy systems are prohibited.

Even if that use were permitted in a residential zoning district, an applicant would have been required to undertake development plan review because the proposals were not for single-family or two-family residential use. Further, applicants would have been required to file both an "approved site plan" and a written statement from the Town Planner that the plan "**meets all the specific applicable requirements of this ordinance**." Requirements that were never fulfilled.

In each of these cases the only things that were ever **"filed"** (for the purpose of determining whether the developers possess "vested rights") were **requests** that the Town Council change both the existing Comprehensive Plan and the existing Zoning Ordinance to alter the zoning district designations for those properties so that, **if the changes were in fact made**, **then, in that event only**, **they could submit applications for their intended uses.**

Filing requests with the Town Council to change the comp plan and the zoning maps are a far cry from "filing land development applications" when such development applications could only be filed **after a change** in the existing zoning district designation was made in the discretion of the Town Council.

No "applications for development" have been filed with any "approving authority for development review, approval, or permitting purposes" by any of the developers who have requested that the Town Council change the existing Town of Hopkinton Comprehensive Plan and the existing Town of Hopkinton Zoning Ordinance.

In the case of the "Skunk Hill Project" the developers' requests to the Town Council to change the existing Town of Hopkinton Comprehensive Plan and the existing Town of Hopkinton Zoning Ordinance for Tax Assessors Plat 18, Lots 8 and 13 and 14 were dated October 22, 2018 and stamped "received" by the Town of Hopkinton on October 23, 2018.

The requests were not "applications for development" as no such application(s) could have been submitted at that time because those three (3) properties were then zoned "RFR-80", which permitted only residential or agricultural development as specified in the use table of the zoning ordinance.

The requests to change existing Town of Hopkinton Comprehensive Plan and the existing Town of Hopkinton Zoning Ordinance for the lots described above, were the subject matter of a hearing before the Town Council, which began on March 25, 2019 and which has been next continued for hearing on April 22, 2019.

In the case of the "Atlantic Solar Project" the developers' requests to the Town Council to change the existing Town of Hopkinton Comprehensive Plan and the existing Town of Hopkinton Zoning Ordinance for Tax Assessors Plat 7, Lot 32, Plat 10, Lot 87 and Plat 11, Lot 35 were dated August 20, 2018.

The requests were not "applications for development" as no such application(s) could have been submitted at that time because those three (3) properties were then zoned "RFR-80", which permitted only residential or agricultural development as specified in the use table of the zoning ordinance.

When the developers of the "Atlantic Solar Project" made their requests for changes in both the Comprehensive Plan and the Zoning Ordinance on or about August 20, 2018 and when the developers of the "Skunk Hill Project" made their requests for changes in both the Comprehensive Plan and the Zoning Ordinance on or about October 22, 2018, Chapter 246, adopted on July 18, 2016, entitled "Non-Residential Photovoltaic Solar Energy Systems (PSES), was then in effect.

That ordinance, amending the previous Section 5.3 of the Zoning Ordinance, listed the following requirements:

> "6. No PSES shall be erected, constructed, installed or modified as provided in this Ordinance without first **obtaining development plan approval from the Planning Board in accordance with the Development Plan Review Ordinance**." and
>
> "7. The construction and operation of all such proposed **PSES shall be consistent with all applicable local, state and federal requirements**, including but not limited to, all applicable safety, construction, environmental, electrical, communications and aviation requirements."

**Requirement No. 2 - "Substantial completion"**

There is no definition of "substantial completion" in State Law governing the definition of that term. In order to determine whether an application has been "substantially completed" an inquiry must be made to see what "completed form or forms and all accompanying documents, exhibits and fees" have been filed with the "approving authority for development review, approval, or permitting purposes".

The framers of the Enabling Act contemplated, in R.I.G.L. § 45-24-44, that formal procedures would be established whereby, upon submission of a substantially complete application for development submitted for approval to the appropriate review agency in the city or town, a party proposing development would gain vested rights to have the conformity of that development judged by existing ordinances.

R.I.G.L 45-24-44 creates vested rights in an applicant to have its zoning application considered under the ordinance in effect at the time of submission of the application, as long as the application is substantially complete before any change in the ordinance. The statute does not define the term "substantially complete," but instead leaves it to "[z]oning ordinances or other land development ordinances or regulations [to] specify the minimum requirements for a development application to be substantially complete" for vesting purposes.

An examination of "what" was filed, viewed against "what" must be filed in accordance with the provisions of Section 15 of the Zoning Ordinance (Development Plan Review) and the mandatory documents that must be filed according to Section 13.5-70 – 13.5-73 of the Hopkinton Code of Ordinances shows conclusively that a "substantially complete" application was never filed.

The requirements set forth in Section 13.5-72 are mandatory.

The mandatory pre-application conference with the Town Planner for plans to be viewed by the planning board was not held. As a result, no discussion about the land involved in the plan, the proposed type of development, the requirements of the ordinance or the scheduling for the planning board's agenda ever occurred. No plans or fees for the costs of the planning review were ever submitted or paid. No application form, no name of the proposed development, no names and addresses of the property owners, no names of registered professionals preparing stamped plans, no locus maps at a scale of one (1) inch equals one thousand (1,000) feet were submitted for planning

review. No plans showing zoning setbacks, aerial photographs, or written development impact statements or documentation that assesses short and long-term impacts and proposed mitigation measures were submitted. No existing conditions, plans, plans showing access and parking or architectural renderings were submitted. No plans addressing environmental issues, landscaping, or soil erosion and stormwater controls were submitted. In the absence of any of the required submissions no application that was "substantially complete" was ever filed.

**Requirement No. 3 - "Have been submitted for approval"**

No application for land development has been submitted for approval with regard to the nine (9) proposed projects identified in James Lamphere's report. The Town Council is not authorized to "approve" applications for land development projects in any event. The Town is authorized to amend the zoning ordinance under certain circumstances. Even if a zoning district designation change was to be made **in the future**, that change in the zoning district designation would not constitute the approval for a land development project.

"Use Code 486", which **now** permits the construction and maintenance of Non-Residential Photovoltaic Solar Energy Systems (PSES) in certain zoning districts in the Town of Hopkinton first appeared in the Zoning Ordinance when Chapter 210 of the Hopkinton Code of Ordinance was adopted by the then sitting Town Council on July 20, 2009.[25] When it was adopted Use Code 486 only applied to an "Electric Substation". That use was allowed by Special Use Permit in the Manufacturing Zoning District. The use was permitted in the "Aquifer Primary District" and the "Aquifer Secondary District". The use was expressly prohibited in the RFR-80, RES-1, Neighborhood Business and Commercial Zoning Districts.

On January 6, 2014 the Town Council adopted Chapter 232 of the Hopkinton Code of Ordinances.[26] That Chapter expanded Use Code 486 to include a "Photovoltaic Solar Energy System (PSES)" as a "use" contained within the Hopkinton Zoning Ordinance. That new use was permitted in the Commercial, Manufacturing, Aquifer Primary and "Overlay Secondary" Zoning Districts. Photovoltaic Solar Energy Systems (PSES) were expressly prohibited in the RFR-80, RES-1 and Neighborhood Business Zoning Districts by Chapter 232.

On July 18, 2016 the Town Council adopted Chapter 246 of the Hopkinton Code of Ordinances.[27] Chapter 246, entitled "Non-Residential Photovoltaic Solar Energy Systems (PSES)" comprehensively addressed the specifics about the allowance of those systems within the Town of Hopkinton. By its terms the ordinance "applies to all PSES to be constructed after the effective date of this ordinance" and to "any upgrade, modification, or structural change that materially that alters the size or placement of an existing PSES". The ordinance mandated that every prospective owner of a

[25] Chapter 210 - Code of Ordinances - Adopted 2009-7-20, attached as **Exhibit Y.**
[26] Chapter 232 - Code of Ordinances enacted on January 6, 2014, attached as **Exhibit Z.**
[27] Chapter 246 - Code of Ordinances adopted on July 18, 2016, attached as **Exhibit AA.**

proposed PSES (the only person eligible to do this) file an application to the Planning Board for Development Plan Review Approval. The ordinance imposed, in addition to the requirements of the Development Plan Review Ordinance, specific requirements for submissions to the Planning Board by every applicant.

Chapter 246 did not change the designated zoning districts within which Non-Residential Photovoltaic Solar Energy Systems (PSES) could operate that had been set forth in Chapter 232 enacted on January 6, 2014. The use continued to be a permitted use in the Commercial, Manufacturing, Aquifer Primary and "Overlay Secondary" Zoning Districts. Photovoltaic Solar Energy Systems (PSES) continued to be expressly prohibited in the RFR-80, RES-1 and Neighborhood Business Zoning Districts.

On January 22, 2019 the Town Council enacted a completely new "Chapter 246" of the Code of Ordinances. That enacted ordinance unanimously approved "revisions and amendments to Chapter 246" and stated that the revisions and amendments shall replace the existing Non-Residential Photovoltaic Solar Energy Systems (PSES) dated July 18, 2016 IN ITS ENTIRETY.

The "new" Chapter 246[28] of the Hopkinton Code of Ordinance, enacted on January 22, 2019, represented the end of a long process. It was a comprehensive document prepared after a lengthy period of study and debate. According to a Memo prepared by the Town Planner, James M. Lamphere[29], the process had begun with a Joint Town Council / Planning Board Workshop on April 23, 2018. That initial joint workshop was followed by Planning Board Meetings, another joint workshop and three (3) public hearings. The public interest was such that one (1) public hearing (scheduled for October 15, 2018) had to be rescheduled because the number of people attending had exceeded the legal occupancy of the Hopkinton Town Hall.

By its terms the ordinance enacted on January 22, 2019 (like its predecessor enacted on July 18, 2016) still "applies to all PSES to be constructed after the effective date of this ordinance" and to "any upgrade, modification, or structural change that materially alters the size or placement of an existing PSES". The ordinance enacted on January 22, 2019 (like its predecessor enacted on July 18, 2016) still mandates that every prospective owner of a proposed PSES (the only person eligible to do this) file an

[28] See copy of superceding Chapter 246 - Code of Ordinances adopted on January 22, 2019, attached as **Exhibit BB.**
[29] See copy of Town Planner James M. Lamphere's Memo dated January 11, 2019, entitled "Solar Ordinance Public Hearing – January 14, 2019, attached as **Exhibit CC.**

application to the Planning Board for Development Plan Review Approval. The ordinance imposed, in addition to the requirements of the Development Plan Review Ordinance, more intensive specific requirements for submissions to the Planning Board by every applicant.

The new Chapter 246 of the Code of Ordinances enacted on January 22, 2019 also added specific area densities for the future development of PSES after the date of its enactment based upon the zoning district in which a property for such a development was located. A limitation of 75% lot coverage for all solar panels and associated equipment on projects located within the Commercial and Manufacturing Zoning Districts. As before, Use Code 486 - Non-Residential Photovoltaic Solar Energy Systems (PSES), remained a prohibited use in the residential zoning districts (RFR-80 and RES-1) and in the Neighborhood Business District. The ordinance required that if any parcel was located in the RFR-80 Zoning District and the applicant sought to rezone the parcel to a district in which the use was permitted, then, in that event, the maximum requested coverage would be the lesser of 3% or 3 acres.

Each and every one of the nine (9) potential projects identified in the Town Planner's listing of "Projects needing Zone Change", referenced in footnote 1 (Exhibit A), above, was located within the RFR-80 Zoning District when the Town of Hopkinton Town Council created Use Code 486 by enacting Chapter 210 of the Hopkinton Code of Ordinances on July 20, 2009.

Each and every one of the nine (9) potential projects identified in the Town Planner's listing of "Projects needing Zone Change", referenced in footnote 1 (Exhibit A), above, was located within the RFR-80 Zoning District when the Town of Hopkinton Town Council expanded Use Code 486 to include "Photovoltaic Solar Energy Systems (PSES)" by enacting Chapter 232 of the Hopkinton Code of Ordinances on January 6, 2014.

Each and every one of the nine (9) potential projects identified in the Town Planner's listing of "Projects needing Zone Change", referenced in footnote 1 (Exhibit A), above, was located within the RFR-80 Zoning District when the Town of Hopkinton Town Council adopted its first ordinance governing Non-Residential Photovoltaic Solar Energy Systems (PSES) by enacting Chapter 246 of the Hopkinton Code of Ordinances on July 18, 2016.

Each and every one of the nine (9) potential projects identified in the Town Planner's listing of "Projects needing Zone Change", referenced in footnote 1 (Exhibit A), above, was located within the

RFR-80 Zoning District when the Town of Hopkinton Town Council revised and amended the original Chapter 246 of the Code of Ordinances (which had been adopted on July 18, 2016) governing Non-Residential Photovoltaic Solar Energy Systems (PSES) by enacting a new and more comprehensive Chapter 246 of the Hopkinton Code of Ordinances on January 22, 2019.

Each and every one of the nine (9) potential projects identified in the Town Planner's listing of "Projects needing Zone Change", referenced in footnote 1 (Exhibit A), above, is located within the RFR-80 Zoning District as of this date.

The ordinance enacted on January 22, 2019 made no changes to the designated zoning districts in which Non-Residential Photovoltaic Solar Energy Systems (PSES) were allowed as permitted uses. The zoning districts in which the use was allowed has remained the same since the date that the Town of Hopkinton's first "solar energy ordinance" was enacted by the Town Council on January 6, 2014.

From January 6, 2014 to today's date Use Code 486 (Non-Residential Photovoltaic Solar Energy Systems (PSES) have continued to be a permitted use in the Commercial, Manufacturing, Aquifer Primary and "Overlay Secondary" Zoning Districts. From January 6, 2014 to today's date Use Code 486 (Non-Residential Photovoltaic Solar Energy Systems (PSES) have also continued to be expressly prohibited in the RFR-80, RES-1 and Neighborhood Business Zoning Districts.

**Requirement No. 4 - "To the appropriate review agency in the town"**

Since the adoption of the Town of Hopkinton's first "solar energy ordinance" on January 6, 2014, there has been no change to the requirement that any applicant desiring to establish a Use Code 486 – Photovoltaic Solar Energy System (PSES), the "appropriate review agency in the town" has been, and continues to be, the Town of Hopkinton Planning Board.

No application has been submitted to the Planning Board for Development Plan Review by any of the developers of the nine (9) potential projects identified in the Town Planner's listing of "Projects needing Zone Change", referenced in footnote 1 (Exhibit A) at any time.

The powers of the Town Council are set forth in Article III, Sections 3100 through 3170 of the Hopkinton Home Rule Charter and in Chapter 2 of the Hopkinton Code of Ordinances. The Town Council has no power to act as the "appropriate review agency" authorized to give or withhold approval for land development projects in the Town of Hopkinton.

The authorized agencies within the Town of Hopkinton to review and give or withhold approval for land development projects are (1) the building official for uses that are specifically permitted uses under the zoning ordinance (upon receipt of a letter confirming the site plan from the Town Planner); (2) the Planning Board in cases requiring development plan review under the zoning ordinance; and (3) the Zoning Board of Review for uses requiring either special use permits or variances under the zoning ordinance. Other than the enactment of the zoning ordinance or amendments thereto, the Town Council has no role in the land development approval process in the Town of Hopkinton.

**Requirement No. 5** - **"Prior to enactment of the new zoning ordinance or amendment"**

As noted in detail, above, no application was submitted to the Building Official, the Zoning Board or the Planning Board for the approval of a land development project by any of the developers of the nine (9) potential projects identified in the Town Planner's listing of "Projects needing Zone Change", referenced in footnote 1 (Exhibit A) at any time.

"Any time" as used in the preceding sentence includes the time "prior to the enactment of the new zoning ordinance or amendment", Chapter 246 of the Hopkinton Code of Ordinances, modifying and amending the previous Chapter 246 in its entirety on January 22, 2019.

**What does this mean with respect for those properties that are still located within Residential Zoning Districts at this time?**

**Each of the proposed projects** listed on Town Planner Lamphere's listing of properties as "Projects needing Zone Change" on his Memo dated January 24, 2019, including the projects for which "zoning district" changes have already been denied by the Town Council (350 Woodville-Alton Road – Townsend Property and Brushy Brook), remain situated in a Residential Zoning District and **have "vested rights"** in being able to use their properties **for whatever purpose(s) is/are allowed in residential zoning districts** under the provisions of the Town of Hopkinton Zoning Ordinance.

**Each of the proposed projects** listed on Town Planner Lamphere's listing of properties as "Projects needing Zone Change" on his Memo dated January 24, 2019, including the projects for which "zoning district" changes have already been denied by the Town Council (350 Woodville-Alton Road – Townsend Property and Brushy Brook), remain situated in a Residential Zoning District **have no "vested rights"** in being able to use their properties **for whatever purpose(s) other than those that is/are allowed in residential zoning districts** under the provisions of the Town of Hopkinton Zoning Ordinance.

**None of the proposed projects** listed on Town Planner Lamphere's listing of properties as "Projects needing Zone Change" on his Memo dated January 24, 2019, including the projects for which

"zoning district" changes have already been denied by the Town Council (350 Woodville-Alton Road – Townsend Property and Brushy Brook) and which remain situated in a Residential Zoning District **have "vested rights"** in being able to use their properties **for whatever purpose(s) that is/are allowed in either the Commercial Zoning District or the Manufacturing Zoning District** under the provisions of the Town of Hopkinton Zoning Ordinance, because their respective properties are presently located within residential zoning districts.

**Each of the proposed projects** listed on Town Planner Lamphere's listing of properties as "Projects needing Zone Change" on his Memo dated January 24, 2019, including the projects for which "zoning district" changes have already been denied by the Town Council (350 Woodville-Alton Road – Townsend Property and Brushy Brook), remain situated in a Residential Zoning District **have "vested rights"** in being able to use their properties **for whatever purpose(s) is/are allowed in residential zoning districts** under the provisions of the Town of Hopkinton Zoning Ordinance, subject to the provisions of Chapter 246 of the Town of Hopkinton Zoning Ordinance, enacted by the Town Council on January 22, 2019.

**In the event** that any of the proposed projects listed on Town Planner Lamphere's listing of properties as "Projects needing Zone Change" on his Memo dated January 24, 2019, including the projects for which "zoning district" changes have already been denied by the Town Council (350 Woodville-Alton Road – Townsend Property and Brushy Brook), has its request for a change in zoning district designation from the **RFR-80 Zoning District** granted and its zoning district designation is thereby changed to either the **Commercial Zoning District or the Manufacturing Zoning District**, then, **in that event only**, the property **shall have "vested rights"** in being able to use their properties for the purpose(s) specified in accordance with the entirety of Chapter 246 of the Town of Hopkinton Code of Ordinance, as enacted by the Town Council on or about the 22nd day of January 2019.

**In the event** that any of the proposed projects listed on Town Planner Lamphere's listing of properties as "Projects needing Zone Change" on his Memo dated January 24, 2019, including the projects for which "zoning district" changes have already been denied by the Town Council (350 Woodville-Alton Road – Townsend Property and Brushy Brook), has its zoning district designation from the **RFR-80 Zoning District** granted and its zoning district designation is thereby changed to either the **Commercial Zoning District or the Manufacturing Zoning District**, by a lawful vote of the Hopkinton Town Council, then, **in that event only**, in accordance with said Chapter 246 of the

Town of Hopkinton Code of Ordinances, as Section 2 – Definitions and Section 5.3 – Photovoltaic Solar Energy Systems – Photovoltaic Solar Energy Systems (PSES) Requirements (A) – General Requirements (13), enacted by the Town Council on or about the 22nd day of January 2019, such projects **shall then be subject to the requirements** therein contained, meaning **that any Non-Residential Photovoltaic Solar Energy System(s) (PSES) approved by the Planning Board under the requirements of Development Plan Review shall be approved under the condition that**:

> **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 rezoned to allow a PSES installation and use, then the proposed PSES 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.

**Why?**

The short answer is that none of the developers/owners of the "proposed projects" properties have yet made any "applications for development that are substantially complete and have been submitted for approval to the appropriate review agency in the city or town prior to enactment of the new zoning ordinance or amendment."

The requests to change the zoning for properties is only a request to be put into a position of being **able** to file such an application. The latest version of Chapter 246 of the Code of Ordinances, enacted on January 22, 2019, is therefore the operative ordinance, which will be applicable to any applications for land development that may be filed in the future. There is no guarantee that the Town Council will grant the various requests for zoning. The "discretion" involved in the Town Council review of zoning change requests received as a legislative act could never be characterized as a present vested right in the respective properties discussed above. Vested rights are rights that exist in the present and they don't exist because of some discretionary decision of a government body that might or might not occur in the future. If the Town Council does grant those requests, then, at that time only, could an application be filed for land development as a "solar energy" site. Given that any decision on any request will necessarily occur in the future and Chapter 246, as amended on January 22, 2019 is not in the future – it is now in the past!!

The long answer is contained in a review of the rulings of the Rhode Island Supreme Court, the United States Supreme Court and Rhode Island statutes which are set forth below.

**1. Nardi v. City of Providence (R.I. 1959)**

In ***Nardi v. City of Providence***, 153 A.2D 136 (R.I. 1959) the Court held, that the **reclassification** of a property's zoning district designation is made in accordance with the provisions of the applicable enabling act (in this case the Rhode Island Zoning Enabling Act of 1991) the owner of the property has no "vested right" to the classification in which the property was placed prior to the reclassification. In ***Nardi v. City of Providence,*** citing ***1 Yokley on Zoning Law and Practice (2d ed.)*** § 35, p. 58, the Court held that even if the reclassification caused a substantial decrease in the value of the property, the reclassification would be valid if it was otherwise constitutional.

**2. Board of Regents of State Colleges v. Roth (U.S. Supreme Court 1972)**

In ***Board of Regents of State Colleges v. Roth***, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972), the Supreme Court of The United States held, that "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

**3. Golden Gate Corporation v. Town of Narragansett (R.I. 1976)**

In ***Golden Gate Corporation v. Town of Narragansett***, 359 A.2D 321 (R.I. 1976) the Court held, that "the well-established rule which holds that an existing zoning classification of property in and of itself confers no vested right in the continuance of such classification because all property is subject to a municipality's exercise of its police power. See ***Norbeck Village Joint Venture v. Montgomery County Council***, 254 Md. 59, 66, 254 A.2d 700, 705 (1969); ***Thomas v. Town of Bedford***, 11 N.Y.2d 428, 434, 230 N.Y.S.2d 684, 687-88, 184 N.E.2d 285, 287 (1962); ***Gosselin v. City of Nashua***, 114 N.H. 447, 450, 321 A.2d 593, 596 (1974); ***Gray v. Trustees of Monclova Township,*** 38 Ohio St.2d 310, 315, 313 N.E.2d 366, 369 (1974)***; Edelbeck v. Theresa***, 57 Wis.2d 172, 180, 203 N.W.2d 694, 698 (1973)."

In ***Golden Gate Corporation v. Town of Narragansett***, citing ***1 Rathkopf, The Law of Zoning and Planning***, § 6.04 at 6-9 (4th ed. 1975) the Court also held that "a zoning ordinance is not to be considered confiscatory merely because the property may not be put to its most profitable use."

**4. Ocean Road Partners v. State of Rhode Island (R.I. 1992)**

In ***Ocean Road Partners v. State of Rhode Island***, 612 A.2d 1107, at 1111 (R.I.1992) the Court held, that even when purchasing property with the purpose of putting the property to a particular use in light of a then-existing zoning ordinance is a patently insufficient basis upon which to invoke the doctrine of equitable estoppel, because statutes and ordinances are subject to change, they do not constitute a continuing representation by the municipality upon which citizens can indefinitely rely.

**5. Alegria v. Keeney (R.I. 1997)**

In ***Alegria v. Keeney,*** 687 A.2D 1249 (R.I. 1997), citing ***Annicelli v. Town of South Kingstown***, 463 A.2d 133, 140 (R.I.1983), the Rhode Island Supreme Court held that when the rezoning of a

property causes a diminution of the value of the property the owner has no action for damages because “"that pecuniary loss or diminution in value is not controlling on the issue of confiscation because a property owner does not have a vested property right in maximizing the value of his property."

**6. Brunelle v. Town of South Kingstown (R.I. 1997)**

In ***Brunelle v. Town of South Kingstown***, 700 A.2D 1075 (R.I. 1997) the Rhode Island Supreme Court cited ***Board of Regents of State Colleges v. Roth***, in its decision when it held, that “where the town’s zoning ordinance did not permit Brunelle's intended use of the lot until the town council amended the zoning ordinance” long after Brunelle purchased the property. The Court noted that had an application been made to develop the property before the zoning ordinance amendment was enacted permitting what had been Brunelle’s “intended use of the lot” when he purchased it, “the building permit would have been a nullity” as the “building inspector at that time had no authority to issue a building permit for use not authorized by the zoning ordinance” citing ***Town of Charlestown v. Beattie***, 422 A.2d 1250, 1252 (R.I.1980) (and cases cited therein) in support of its holding.

**7. Pitocco v. Harrington (R.I. 1998)**

In ***Pitocco v. Harrington***, 707 A.2D 692 (R.I. 1998), the Rhode Island Supreme Court held, that because a local building official is a municipal administrative officer who is bound to follow the zoning ordinance and applicable statutory provisions pursuant to which he or she is authorized to act, and only where a building permit application shows that the proposed construction conforms to the building code and to other applicable laws, would any applicant be entitled to the permit.

In ***Pitocco v. Harrington,*** the Court also held that, "when presented with petitioner's application for a building permit, the inspector 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.' "*** ***Zeilstra v. Barrington Zoning Bd . of Rev.***, 417 A.2d 303, 308 (R.I. 1980) (quoting ***Arc-Lan Co. v. Zoning Board of Review of North Providence***, 106 R.I. 474, 476, 261 A.2d 280, 282 (1970)).

## 8. Town of Johnston v. Pezza (R.I. 1999)

In ***Town of Johnston v. Pezza***, 723 A.2D 278 (R.I. 1999) a municipal building official decided that a proposed asphalt plant did not mix with applicable town ordinances and revoked a building permit issued by his predecessor. On appeal a Superior Court trial justice concluded otherwise and found that, in revoking the permit, the new building official did not give the asphalt plant a fair shake.

On appeal, the Rhode Island Supreme held that "Because the asphalt-plant applicant failed to comply with applicable **conditions precedent** to obtaining a building permit--including without limitation, failing to submit a proper site plan to the municipality's planning board--and because the town's former building official had no authority to waive the applicant's compliance with these conditions precedent to the issuance of the building permit we reverse and uphold the successor building official's revocation of the permit."

The Zoning ordinance required an applicant for a proposed industrial use to submit a site plan to the planning board for its review and approval **before any submission of a building-permit application**. Because the Defendants failed to do so, the Court found that "the town's building official properly revoked the permit for this reason alone."

Further the Court stated, "A building-permit applicant's compliance with zoning ordinance 796 **does not constitute a mere empty formality**. The ordinance is laden with substantive site-plan requirements that must be satisfied (and monitored for compliance throughout the construction process) before the industrial-use applicant can even apply for a permit, much less obtain a certificate of occupancy. Thus, this was no mere procedural exercise. Moreover, a muscular rule of law depends on regular procedural exercise for its continued vitality." The Court added, "In fact, such a submission is a condition precedent to the later submittal and potential building-permit approval by the town's building official."

The Court determined that according to the town's zoning ordinance, the building official possessed the authority to grant a building permit for an industrial use only after the board had approved a proposed site plan and transmitted it to him. The building official, however, had no authority either to waive submission of the site plan to the board and/or to approve a building permit without the planning board having conveyed to him an approved site plan.

**9. Munroe v. Town of East Greenwich (R.I. 1999)**

In ***Munroe v. Town of East Greenwich***, 733 A.2d 703, 710 (R.I. 1999), the Rhode Island Supreme Court held, that "zoning, land development and subdivision regulations constitute a valid exercise of a municipality's police power".

None of the cases cited above have been overruled to this date. The Rhode Island cases cited were all decisions of the Rhode Island Supreme Court and represent the "final say" on the issues that they ruled upon.

Numerous decisions by Justices of the Rhode Island Superior Court have cite discussed what must occur for a property owner to have "vested rights" in the development of their property sufficient to allow them to proceed in accordance with the rules, regulations and statutes as they existed at the time that a substantially complete application for land development is submitted for approval to the appropriate review agency within a city or town.

Citations for some of those Superior Court decisions are included on the "Chronological Listing of Cases" attached. They have not been specifically cited within this Memorandum as they are inferior to the Supreme Court and their decisions do not represent the final decisions that come before them.

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