

In Re Zone Amendment & Comprehensive  
Plan Future Land Use Map Amendment –  
Donald Gordon, Gordon Excavating, Inc.,  
Hopkinton Land 1, LLC and Skunk Hill  
Solar, LLC, for Tax Assessor’s Plat 18,  
Lots 8, 13 and 14

**MEMORANDUM FILED ON BEHALF OF THE HOPKINTON CITIZENS FOR RESPONSIBLE PLANNING,  
JORGE E. BENADVIDES, LYNNE E. BENAVIDES, RONALD K. BRYANT, ELIZABETH C. BRYANT, LOUIS  
K. CABRAL, ALEXANDER J. DENETTE, ERIN K. DENETTE, JAMES M. DILLON, JR., PATRICIA DILLON,  
DANIEL A. JEANLOZ, KRISTIAN A. JEANLOZ, BRIAN LYNCH, EMILY LYNCH, THOMAS R. McCORMICK,  
LOUANNE R. McCORMICK, KEVIN M. MESSIER, KRISTEN M. MESSIER, DAVID W. PIERCE, SHARIN B.  
PIERCE, ROBERT E. RATHBUN, JANE RATHBUN, AJAY K. STANZIONE, KELLY L. STANZIONE  
COLLEEN E. STEPHAN, MEAGHAN E. BOBAR, MICHAEL L. TAPLEY, JANICE P. TAPLEY, THOMAS W.  
TASSIAS AND AMANDA N. TASSIAS**

**The History of Solar Development in the Town of Hopkinton, Rhode Island or “ How Hopkinton  
has failed, and continues to fail, to follow applicable Rhode Island Statutes and Town of Hopkinton  
Ordinances in processing the many requests to change the Comprehensive Plan and Rezone  
properties to permit the erection of large-scale Photovoltaic Solar Energy Systems”**

**A. Background: Three (3) PSES Zoning Ordinances – 2014, 2016 and 2019**

**No. 1 Chapter 232: Enacted on January 6, 2014 – in effect until July 18, 2016**

On **January 6, 2014**, the Hopkinton Town Council enacted **Chapter 232<sup>1</sup>** of the Town of Hopkinton Code of Ordinances making it effective as of that date. The enactment represented the first time that “PSES” appeared in the Hopkinton Zoning Ordinance. The Chapter provided that such systems were **permitted** as of right in the **Commercial, Manufacturing, Aquifer and Overlay Zoning Districts** only. The use was specifically **prohibited** in **RFR-80, RES-1, and Neighborhood Business Zoning Districts**.

Section 5.3 of Chapter 232 set forth the requirements that apply to **any PSES**, where a PSES is the “principal use of the property”. The requirements were simple and essentially dealt with the property dimensions for setbacks, size, fencing and lighting.

**The districts in which a PSES as the “principal use of the property” is either permitted or prohibited have remained the same since Chapter 232 was enacted on January 6, 2014.**

**No. 2 Chapter 246: Enacted on July 18, 2016 – in effect until January 22, 2019**

On **July 18, 2016**, the Hopkinton Town Council enacted **Chapter 246<sup>2</sup>** of the Town of Hopkinton Code of Ordinances, making it effective as of that date. The Chapter was much more elaborate in the way it addressed the “PSES” use. Again spatial requirements were provided but additional requirements were made applicable to any PSES erected with the main purpose of “generating energy for sale back in to the energy grid system”.

Under the “general requirements” of Chapter 246 listed in paragraph 6 on page 3, was the provision that **no PSES** could be permitted without first obtaining **Development Plan Approval** from the **Planning Board** in accordance with the **Development Plan Review Ordinance**.

The Planning Board review appeared under **Section D** on **page 5** of Chapter 246. That section required that the “**prospective owner**” of any proposed PSES was the **only party eligible** to **submit an application** to the **Planning Board seeking Development Plan Approval** for a prospective PSES.

In addition to the regulations under the Development Plan Review Ordinance, requirements were also set forth in Chapter 246 describing the information that the prospective owner **must provide** to the Planning Board when any applicant (the “**prospective owner**” of any proposed PSES) seeks **Development Plan Approval** from the Planning Board.

**No. 3 Chapter 246: Enacted on January 22, 2019 replaced the entirety of Chapter 246 that had been enacted on July 18, 2016 – remains in effect to date**

On **January 22, 2019**, the Hopkinton Town Council enacted a replacement **Chapter 246<sup>3</sup>** of the Town of Hopkinton Code of Ordinances, making it effective as of that date. The new Chapter 246 replaced in its entirety the earlier Chapter 246 “PSES” Ordinance dated July 18, 2016.

Many provisions from the repealed 2016 Ordinance were repeated in the Ordinance adopted on January 22, 2019. The newly enacted Chapter 246 provided that **no PSES** could be permitted without first obtaining **Development Plan Approval** from the **Planning Board** in accordance with the **Development Plan Review Ordinance**.

The January 22, 2019 Chapter 246 of the Zoning Ordinance made clear that the Ordinance was applicable to all “photovoltaic solar energy systems whose main purpose is to generate energy for sale back into the energy grid system.” In addition, all applicants are required to “consult with the **Fire Marshall prior** to the **submission of any material** to the **Planning Board for review**”, to ensure that “proposed PSES shall be designed and constructed in accordance with all applicable fire codes as such may be interpreted by the Fire Marshall”.

Under the “General Requirement” section of Chapter 246 enacted and effective as of January 22, 2019 (in paragraph 13 on page 4 of the Ordinance), provided that **if a parcel was rezoned from the RFR-80 Zoning District to either the Commercial or Manufacturing District** then, in that event, the **maximum requested lot coverage** for any system would be the **lesser of 3% of the parcel area or 3 acres**. In addition if there has been a rezoning of any parcel to allow a PSES installation, as stated above, then the prospective PSES project must be referred to the **Planning Board for Master Plan Approval**.

Since Chapter 246 was enacted on July 18, 2016 all applicants seeking permission to install any PSES in the Town of Hopkinton have been required to submit **applications** to the **Town of Hopkinton Planning Board for Development Plan Review and Approval** by the **Town of Hopkinton Planning Board**.

Since Chapter 246 was enacted on July 18, 2016 the “**appropriate authority**” to which **all applicants** must **submit applications** for **Development Plan Review and Approval** has been the **Town of Hopkinton Planning Board**.

Since the new enactment of Chapter 246 on January 22, 2019, all applicants seeking permission to install any PSES in the Town of Hopkinton must still submit **applications** to the **Town of Hopkinton Planning Board for Development Plan Review and Approval** by the **Town of Hopkinton Planning Board**.

Since the new enactment of Chapter 246 on January 22, 2019 the “**appropriate authority**” to which **all applicants** must **submit applications** for **Development Plan Review and Approval** is still the **Town of Hopkinton Planning Board**.

Since the new enactment of Chapter 246 on January 22, 2019 for any prospective PSES project which would require a rezoning of a parcel to allow a PSES installation the application for approval must be submitted to the **Planning Board for Master Plan Approval**.

**B. Requirements: The Statutes (State of Rhode Island) and Ordinances (Town of Hopkinton) Governing Land Development in Rhode Island**

During the 1991 Session of the Rhode Island General Assembly the Legislature enacted Chapter 307 of the 1991 Public Laws, the “Rhode Island Zoning Enabling Act of 1991”, hereinafter referred to as

“The Zoning Enabling Act.” The Zoning Enabling Act<sup>4</sup> mandated that all lawfully adopted zoning ordinances be brought into conformance with the act by December 31, 1994. After the Zoning Enabling Act was enacted each city and town was required to review its zoning ordinance and make amendments or revisions necessary to bring the zoning ordinance into conformance with the act.

During the 1992 Session of the Rhode Island General Assembly the Legislature enacted Chapter 385 of the 1992 Public Laws, the "Rhode Island Land Development and Subdivision Review Enabling Act of 1992", hereinafter referred to as, “The Development Review Act.” In a similar fashion, the Development Review Act<sup>5</sup> mandated that all land development and subdivision review ordinances, regulations, rules or amendments be brought into conformance with the act by December 31, 1995. All municipalities were required to adopt land development and subdivision regulations and to establish the standard review procedures for local land development and subdivision review and approval as specified in the act. The stated intent of the legislature in enacting the act<sup>6</sup> was “to provide thorough, orderly, and expeditious processing of development project applications.”

A number of provisions (**mandatory requirements**) in both the **Zoning Enabling Act** and the **Development Review Act** are relevant to the discussion of how land development decisions must be made in Rhode Island’s cities and towns in order for those decisions to be “legal”.

**1. Development Plan Review:**

The Zoning Enabling Act **mandates** how cities and towns **must** conduct a Development Plan Review. Contained within the Act is the following section:

**a. RIGL § 45-24-49<sup>7</sup>. Special provisions – Development plan review.**

(a) A zoning ordinance may permit development plan review of applications for uses requiring a special-use permit, a variance, a zoning ordinance amendment, and/or a zoning map change. The review shall be conducted by the planning board or commission and shall be advisory to the permitting authority.

(b) A zoning ordinance may permit development plan review of applications for uses that are permitted by right under the zoning ordinance, but the review shall only be based on specific and objective guidelines which must be stated in the zoning ordinance. The review body shall also be set forth in and be established by the zoning ordinance. A rejection of the application shall be considered an appealable decision pursuant to § 45-

24-64.

(c) Nothing in this subsection shall be construed to permit waivers of any regulations unless approved by the permitting authority pursuant to the local ordinance and this act.

The Development Review Act also mandates how cities and towns who choose to provide for development Plan review as part of their local regulations must conduct a proper review to ensure consistency with the intent and purposes of the act and with Section 45-24-49 of the Zoning Enabling Act.<sup>8</sup>

Pursuant to the authority granted to Rhode Island's cities and towns by The Zoning Enabling Act, the Town of Hopkinton Town Council adopted Chapter 134 of the Town of Hopkinton Code of Ordinances on December 19, 1994, the "Zoning Ordinance", which included Section 15 entitled, "Development Plan Review"<sup>9</sup>. In accordance with the statutory requirements Section 15 of the Hopkinton Zoning Ordinance **mandates** how Development Plan Review **must** be conducted **by the Town of Hopkinton Planning Board** as follows:

**b. Section 15 of the Hopkinton Zoning Ordinance. - 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]<sup>10</sup> 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)

**2. Major Land Development - Master Plan Approval:**

The Development Review Act **mandates** how cities and towns **must** proceed when any project requires review and approval as a Major Land Development Project. The Act describes the three (3) stages of Major Plan Review that must be conducted by the Planning Board for applications for land

development<sup>11</sup>. The three (3) stages of review, master plan, preliminary plan and final plan follow the mandatory pre-application meeting(s)<sup>12</sup>. Also required are the public informational meeting and the public meeting.

The Master Plan stage and the submission requirements for that stage for any applicant are set forth in the Act.<sup>13</sup> The Preliminary Plan stage and the submission requirements for that stage for any applicant are also set forth in the Act.<sup>14</sup> Mandatory public hearing and notice requirements for Major Land Developments are also contained within the Development Review Act.<sup>15</sup> The requirements regarding the submission requirements, certifications and approvals for Final Plans are addressed.<sup>16</sup> For those municipalities which provide for land development projects under the Development Review Act, all local regulations adopted by those cities and town must include the procedures mandated by the Act.<sup>17</sup>

The Town of Hopkinton did choose to provide for land development project review pursuant to the authority granted by the Development Review Act. The Hopkinton Planning Board adopted regulations for Major Land Developments, which closely mirror the State of Rhode Island requirements.

As previously stated in the Memorandum to this Town Council submitted at the last hearing for this project, the Development Review Act provides for the “vesting” of land development projects when a Major Land Development has acquired Master Plan Approval.

A review of Planning Board agendas for the period from January 6, 2016 through April 3, 2019 shows that the Planning Board has issued quite a number of “Advisory Opinions” to the Town Council in cases where requests have been made to change the Hopkinton Comprehensive Plan and the Hopkinton Zoning Ordinance.<sup>18</sup>

A review of Planning Board agendas for the period from January 6, 2016 through April 3, 2019 shows that the Planning Board has also addressed a large number of applicants who have requested Development Plan Review for projects, including those involving solar projects.<sup>19</sup> What is notable about the applications for Development Plan Reviews that have been received is that not one of the applicants who requested changes to their Zoning District Designations requested Development Plan Review for the simple reason that they were not able to do so until after their requests for rezoning were approved. To request Development Plan Review the “use” must first be a “permitted use” under the Zoning Ordinance.

### 3. **Precedence of approvals:**

The Development Review Act **mandates** how cities and towns **must** proceed when a project requires approval by more than one (1) municipal authority.

Contained within the Act is the following section:

- a. **§ 45-23-61<sup>20</sup>. 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).**

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<sup>21</sup>" on November 29, 1995, revised on August 16, 2000 and 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)**.

The **words** employed by the legislature in the “The Development Review Act” and the **words** employed by the Hopkinton Planning Board in the “Hopkinton Land Development and Subdivision Regulations” are **identical**.

The only differences are the capitalization of the terms “Planning Board”, “Town Council”, “Zoning Ordinance” and “Zoning Map” in the Hopkinton Land Development and Subdivision Regulations adopted by the Town of Hopkinton Planning Board.

**C. Application: How the requirements for Development Plan Review, Major Land Development Application and the Precedence of Approvals apply when an applicant requires both Planning Board approval and Town Council approval for a zoning ordinance or zoning map change**

At all times since the enactment of Chapter 232 of the Town of Hopkinton Code of Ordinances on January 6, 2014, Photovoltaic Solar Energy Systems have been a “**permitted use**” **only** within the Commercial, Manufacturing, Aquifer and Overlay Zoning Districts.

At all times since the enactment of Chapter 232 of the Town of Hopkinton Code of Ordinances on January 6, 2014, Photovoltaic Solar Energy Systems have been a “**prohibited use**” within the RFR-80, RES-1, and Neighborhood Business Zoning Districts.

At all times since the enactment of Chapter 246 of the Town of Hopkinton Code of Ordinances on July 18, 2016, all applications for permission to install Photovoltaic Solar Energy Systems in the Commercial, Manufacturing, Aquifer and Overlay Zoning Districts have been subject to Development Plan Review and Approval by the Town of Hopkinton Planning Board.

At all times since the enactment of Chapter 246 of the Town of Hopkinton Code of Ordinances on July 18, 2016, Development Plan Review has only been available only for permitted uses, except for single-family and two (2) family residences and accessory structures thereto.

Since the enactment of Chapter 246 of the Town of Hopkinton Code of Ordinances on January 29, 2019, all applications for permission to install Photovoltaic Solar Energy Systems in the Commercial,

Manufacturing, Aquifer and Overlay Zoning Districts have been subject to review as a Major Land Development and Approval by the Town of Hopkinton Planning Board.

At all times since the enactment of Chapter 246 of the Town of Hopkinton Code of Ordinances on January 22, 2019, review for Major Land Development Projects has only been available only for permitted uses, except for single-family and two (2) family residences and accessory structures thereto.

The projects that are currently pending, including Skunk Hill, Atlantic Solar Main Street and those listed in the Town Planner's Overview of Solar Projects have **never filed any applications for development plan review** by the Town of Hopkinton planning board. The **Development Plan Review** that is **necessary and required before any PSES project is permitted on any parcel in any district** is set forth in Section 15 of the Zoning Ordinance and in Article III of the Subdivision and Land Development Regulations.

Under both Section 15 and Article III Development Plan Review is required for any **permitted use** other than single family, two-family residential construction and accessory structures thereto.

As set forth in Section 15 in the event of a rejection of an Application for Development Plan Review an appeal of the Planning Board Decision may be made to the Planning Board of Appeals, i.e., the Zoning Board sitting as the Planning Board of Appeals.

The nuts and bolts of the Development Plan Review process are set forth in Article III. No building permit can be issued except in conformance with a **site plan approved** by the Planning Board. In fact, **every application** to the **Building Official** for a **building permit** must be accompanied by a statement in writing from the Town Planner that the **plan** meets with all of the applicable requirements of the Development Plan Review Ordinance

Section 13.5-7.2 of Article III sets forth the **mandatory application process**. A **pre-application conference must be held with the town planner** before plans can be reviewed by the planning board. The required specifics of the plan are outlined in the regulations and the duties of the Planning Board are described. Most importantly, the **Development Plan Review** process is **only applicable to permitted land uses** described within the Hopkinton zoning ordinance.

No developer among those who either have applications pending for a zoning change or are described in the Town Planner Overview, has filed an application for Development Plan Review under Chapter 15 of the Zoning Ordinance or Article III of the Planning Regulations. None of these prospective developers have a right to request Development Plan Review because the properties which they own do not allow the installation of PSES as a “permitted land use” under the Hopkinton Zoning Ordinance.

If, and when, the town council decides to re-zone any of the residential parcels owned by the above referenced developers, then, at that time, they **will be required (and allowed)** to file an application with the Planning Board for Development Plan Review.

No developer yet has that right. Each of the developers should they obtain a rezone of the property from RFR-80 to either the Commercial or Manufacturing Zoning District will be subject to the requirements set forth in the Ordinance Chapter 246 Amendment enacted on January 22, 2019. Those potential projects will then be subject to Development Plan Review. In addition, for projects obtaining the rezoning, they will be subject to Master Plan Review. All these things could happen in the future, only if the Town Council grants their rezoning requests. If the requests for rezoning are denied the prospective developers will remain where they are today. Unable to even start the process for Development Plan Review, which is only provided for permitted uses.

The provisions of R.I.G.L. 45-23-61 are clear and expressed in simple words. As in all of the statutes which authorize the local review and approval of land development in Rhode Island under the Zoning Enabling Act of 1991 and the Rhode Island Land Development and Subdivision Review Enabling Act of 1992 the Legislature chose to use the word “shall” in describing the requirements.

The meaning of the word “shall”, when appearing in statutory provisions of Rhode Island law has been interpreted on a number of occasions by the Rhode Island Supreme Court.

In **Gerald P. Zarrella Tr. v. Town of Exeter, 176 A.3d 467**, 470 (R.I. 2018) (quoting **Town of Warren v. Bristol Warren Reg'l Sch. Dist., 159 A.3d 1029**, 1039 (R.I. 2017) the Court repeated the oft cited holding, It is well-settled that “[w]hen confronted with a clear and unambiguous statute, [the Court’s] task is straightforward: [it is] bound to ascribe the plain and ordinary meaning of the words of the statute and [the] inquiry is at an end.”

In **Shine v. Moreau, 119 A.3d 1**, 13 (R.I. 2015) (quoting 1A Norman J. Singer and J.D. Shambi Singer, *Statutes and Statutory Construction* § 25:4 at 589 (7th ed. 2009)) the Court stated, “ [u]nless the context otherwise indicates, use of the word 'shall' \* \* \* indicates a mandatory intent”.

The Rhode Island Supreme Court’s decisions interpreting the meaning of the word “shall” are not of recent vintage. In its 1991 decision, **Conrad v. State of Rhode Island-Medical Center-General Hospital, 592 A.2d 858**, 860 (R.I.1991) (quoting **Brown v. Amaral, 460 A.2d 7**, 10 (R.I.1983) the Court explained that there exists no clearer language that the General Assembly to convey the mandatory nature of a provision, stating We have held that the use of the word " shall" contemplates something mandatory or the " imposition of a duty."

Not one of the projects for which requests were made to the Hopkinton Town Council to change both the Town of Hopkinton Comprehensive Plan and the Town of Hopkinton Zoning Ordinance and rezone specific properties from the RFR-80 District was process in the manner by required by the Zoning Enabling Act and the Town of Hopkinton Ordinances. The Town Council’s actions in entertaining and in some cases granting Zoning Amendments were unlawful and the purported “permissions” granted are null and void ab initio.

As far as the hearing before you my clients respectfully request that the requests be denied and dismissed for the failure of the applicants to follow the mandatory of the Rhode Island Zoning Enabling Act of 1991, the Rhode Island Land Development and Subdivision Review Enabling Act of 1992 and the Town of Hopkinton Code of Ordinances.



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- <sup>1</sup> Chapter 232 of the Town of Hopkinton Code of Ordinances, enacted on January 6, 2014, attached as **Exhibit A**.
  - <sup>2</sup> Chapter 246 of the Town of Hopkinton Code of Ordinances, enacted July 18, 2016, attached as **Exhibit B**.
  - <sup>3</sup> Chapter 246 of the Town of Hopkinton Code of Ordinances, enacted January 22, 2019, attached as **Exhibit C**.
  - <sup>4</sup> RIGL 45-24-28, attached as **Exhibit D**.
  - <sup>5</sup> RIGL 45-23-28, attached as **Exhibit E**.
  - <sup>6</sup> RIGL 45-23-26, attached as **Exhibit F**.
  - <sup>7</sup> RIGL 45-24-49, attached as **Exhibit G**.
  - <sup>8</sup> RIGL 45-23-50, attached as **Exhibit H**.
  - <sup>9</sup> Section 15 of the Hopkinton Zoning Ordinance, Chapter 134, enacted December 19, 1994, attached as **Exhibit I**
  - <sup>10</sup> Chapter 109 [Ch. 13.5, §§ 13.5-70—13.5-73]<sup>10</sup> of the Hopkinton Code of Ordinances, attached as **Exhibit J**.
  - <sup>11</sup> RIGL 45-23-39, attached as **Exhibit K**.
  - <sup>12</sup> RIGL 45-23-35, attached as **Exhibit L**.
  - <sup>13</sup> RIGL 45-23-40, attached as **Exhibit M**.
  - <sup>14</sup> RIGL 45-23-41, attached as **Exhibit N**.
  - <sup>15</sup> RIGL 45-23-42, attached as **Exhibit O**.
  - <sup>16</sup> RIGL 45-23-43, attached as **Exhibit P**.
  - <sup>17</sup> RIGL 45-23-49, attached as **Exhibit Q**.

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<sup>18</sup> Summary of Planning Board Agendas showing Advisory Opinions for period from January 6, 2016 to April 3, 2019, attached as **Exhibit R**

<sup>19</sup> Summary of Planning Board Agendas showing Development Plan Reviews for period from January 6, 2016 to April 3, 2019, attached as **Exhibit S**

<sup>20</sup> RIGL 45-23-61, attached as **Exhibit T**

<sup>21</sup> Land Development and Subdivision Regulations, adopted November 29, 1995, revised August 16, 2000 and revised September 3, 2014, attached as **Exhibit U**