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Town Council Members
Town of Hopkinton
One Townhouse Road
Hopkinton, Rhode Island

Re: Opinion of Hopkinton Town Solicitor on "Vested Rights" and
Applicability of R.I.G.L. 45-23-61 to all requests for rezoning of properties

Dear Town Council Members:

As the legal representative for many residents and citizens of the Town of Hopkinton I have presented a number of detailed, documented and legally supported analyses to this Town Council and to its predecessor Town Council regarding the legal principles the courts in the State of Rhode Island have determined cities and towns in Rhode Island must apply to land development within the State of Rhode Island, including within the municipality known as the "Town of Hopkinton".

After reading the transcript of Town Solicitor McAllister's remarks made at the hearing of April 22, 2019 about whether the "Skunk Hill Project" is subject to Chapter 246 of the Zoning Ordinance enacted by you on January 22, 2019, and his answer to that query, I sit here appalled.

I am appalled, but not without words to respond, because I finally realized that Mr. McAllister had apparently chosen not to read a word of the information that I presented to the Town Council prior to the hearing of April 22, 2019.

That particular submission was my legal analysis consisting of a seven (7) page cover letter; a thirty (30) page legal Memorandum; a two (2) page index of exhibits; a three (3) page listing of the cases cited within the Memorandum; a one (1) page listing of the statutes and ordinances cited in the Memorandum; and more than one hundred twenty (120) pages of exhibits and other documents I discussed at the hearing.

I provided my analysis to you on April 10, 2019 (in digital form via email with a hard copy by regular mail) twelve (12) days before the last hearing so that you could read, contemplate and hopefully understand my points **before** beginning the continued hearing on April 22, 2019.

The April 10, 2019 memorandum and documentation was not my first submittal, as I have been involved in hearings before the Town Council since August 2018 on similar matters. I have submitted previous memoranda on this and other topics closely connected to the laws governing the performance of your legal duties as Town Councilor and the manner in which land development is regulated in the State of Rhode Island and in the United States of America. I provided all of that information to you not because my clients object to solar energy development projects but as an objection to the unorthodox methods employed by some Town Council members to change the rules so they could facilitate the development large-scale PSES in residential neighborhoods in varying areas all around the Town of Hopkinton in August 2018.

I gave the materials to you so long before the meeting of April 22, 2019 because I expected that you might need that information to intelligently review the requests made for what I call the "Skunk Hill Development". I also thought it would prove helpful for your review of other requests for zoning changes that are in the pipeline.

I have been surprised, that although these materials were provided in both digital and hard copy form, the subject has not even appeared on any of the agendas for the intervening Town Council meetings. Not even as an acknowledgement that correspondence was received! These are important issues. The citizens of the Town of Hopkinton are entitled to answers from the Town Council.

I provided information to you and to Mr. McAllister analyzing the meaning of "vested rights" in land development regulation. I have explained how the statutes and the rulings of the courts **must** be applied to the issue. I have tried to teach the Council Members and Mr. McAllister about the subject. **Unfortunately, I cannot understand the subject for Mr. McAllister.** That is work for him to do. But, without reading anything, there is little chance for him to learn or to understand what the law actually requires in the area of land development in the State of Rhode Island.

As Councilors you **should care** about the subject so that you can properly protect the legal rights of the residents of the Town of Hopkinton.

Attorney McAllister characterized my submissions to you as "**some legal arguments**[i]" in his words "**in general about the effective date of the new PSES ordinance.** " Quite a "short hand method" to describe the extensive legal analyses of many different questions involved in the hearings before you over the last ten (10) months concerning rezoning numerous properties within the town to facilitate large scale electrical generation plants in residential neighborhoods with little regard for good planning practices or the requirements of Rhode Island law.

To refresh your memories, I have set forth below the content of the Town Solicitor's remarks made near the end of the hearing on April 22, 2019 (pages 89 to 92 of the Transcript of proceedings).

Before providing his personal opinion to those at the hearing on April 22, 2019, Town Solicitor McAllister **correctly** stated:

> "the **only** or the true **legal question** that's before you as a **council**, as a **legislative body** on whether or not to **change the zoning and the plan** to the future land use map part of the comprehensive plan, the **only legal standard** which boils down for your consideration is whether or not the project as proposed, **if the zone change is granted**, would be **consistent with** the **town's comprehensive plan**. I think everybody agrees that **that's the legal standard for a zone change.**" (Emphasis added)

I was heartened that he so accurately stated the role that the Town Council was fulfilling when it entertains the requests for changes to the Comprehensive Plan and to the Zoning Ordinance. As he stated with regards to those requests you are sitting as a **LEGISLATIVE BODY**, empowered to enact amendments to the Comp Plan and the Zoning Ordinance.

What he did not tell you was that the Town Council never sits as a body empowered to approve applications for land development. You are not the body authorized by law to make such decisions.

Ironically, after making his statement about the Town Council's role, the Solicitor then contradicted himself, telling those present that the Town Council effectively **had more than a legislative role in this matter**.

For sure, the Town Council does have the authority to amend both the Comprehensive Plan and the Zoning Ordinance, so long as it follows the proper legal procedures for doing so.

The Town Council has no power whatsoever to act as a permitting or approving agency for the purpose of approving or denying land development within the Town of Hopkinton. That power and authority has been assigned to others: the boards and individuals who are statutorily empowered by the State of Rhode Island to make those decisions.

Attorney McAllister next stated his "**opinion**" as to whether the PSES Ordinance enacted by the Town Council on January 22, 2019 was applicable to the three (3) properties which were seeking changes to the Comprehensive Plan and the Zoning Ordinance, the subject of the April 22, 2019 hearing using the following words:

> "So, this question was asked of me several times before relative to other projects, and I would point out to the council that after the new council took place I sent a memo dated **December 5th, 2018** to each of the council members, and it was like **a compendium of opinions** that I had been asked or **given previously**, and opinion number 4, which is part of the compendium in that memo, I asked, I labeled it this, the topic was whether changes in the town's current ordinances related to solar projects can be given retroactive effect on a **substantially completed project application on file with the town**, and I wrote then, and I believe this today, my answer to this issue presented is no. [ii]" (Emphasis added)

adding

> "There are **general constitutional** and **legal provisions** I **could cite here** concerning the general **prohibition** against **ex post facto law**. Rather than go into all of that, I can simply cite to you Rhode Island General Laws Section **45-24-44** C which states verbatim as follows: "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**."
>
> "These **applications** that are **before you tonight** were **submitted** before the enactment and **deemed to be substantially completed** before January of January of 2019. Therefore, this statute mandates that the then existing, then, being at the time the applications were filed, that's the conditions, zoning conditions, that apply to this, not what was enacted in late January of 2019. So, Mr. Donnelly has expressed a different opinion than me, but I can tell you that is my opinion, literally answered in this statute, and it's also supported by constitutional and clearly defined prohibitions against passing ex post facto laws. It's

> the equivalent of changing the rules after the game is already underway. So I'm trying to give you an unequivocal answer, and my answer is no, we have, the council has to consider this under the old PSES ordinance."
>
> "I just wanted to close by saying I'm not an advocate for this project or against this project. I'm giving you my **honest opinion** about whether or not the new PSES ordinance applies, and I am stating quite unequivocally that it does not. Thank you."
> (Emphasis added)

That's it. That is the totality of the response given to the boatload of legal precedent that has been spoon-fed to Mr. McAllister over the last ten (10) months. No recitation of any facts. No articulation of the requirements of the applicable statutes and court rulings. A plain, bare, "honest opinion" stating his "conclusion" without providing any basis for anyone outside of his own head to understand how he reached his conclusion, what statutes or case decisions he reviewed and/or applied to the facts upon the record and/or how he applied what he understood to be the law and the facts in reaching his conclusion.

That is not how lawyers perform their duties. Yes, I said "duties". As sworn "officers of the Court" and practicing attorneys we have duties to our clients to act like lawyers; to research and analyze situations in order to protect our clients and to stay abreast of the requirements imposed by law.

As the old saying goes, "ignorance of the law is no excuse". That saying applies in triplicate to lawyers representing their clients.

As law students (many years ago) we learned about the law by the so-called "case method". In the areas of law we studied, published decisions of courts are gathered together and published in textbooks called "casebooks". The reports of actual case decisions by courts are read, analyzed, discussed and debated in classes, with the hope being that the student is then able to "deduce" the principles of law that those cases represent.

While a different teaching method than those employed in other academic fields, for lawyers it's an effective way to learn how to be a lawyer and how to provide sound legal advice to clients. People seeking assistance don't often come to lawyers with a deep (or most often, any) understanding of the law. Clients don't start by asking questions about the "Rule Against Perpetuities", the "Statute of Frauds" or the elements of a crime that must be proven to either support or defend a prosecution. No. People come

in with a story. It is the work of the lawyer listen to that story, to get the facts, understand the facts, determine the status of the applicable law, and then apply the current legal requirements to the facts presented.

By performing those tasks diligently, lawyers work to get to the point where they can provide the client a **sound legal opinion**, which is supported by the facts and the law.

Obviously, no one lawyer knows “everything” about all aspects of the law. As a result most practicing lawyers initially are fact gatherers. Lawyers get a sense of what areas of law relate to the facts obtained from the client and/or other sources. The lawyer is required to “research” the law to determine what statues apply and the relevant conclusions courts have made in the areas of law that relate to the client’s factual recitations.

For every situation that arises there is never one (1) pat answer. States often disagree about the requirements of the law. There are both “majority” views and “minority” views in many areas regarding how cases containing very similar factual circumstances should be decided. The court of “competent jurisdiction” in any given state is that state’s highest court. In Rhode Island, as elsewhere, governing law can be made “legislatively” (by the General Assembly) or through the courts’ analyses of the cases and controversies that are brought to them by litigants.

In the final analysis, whether an enforceable legal principle results from lawfully enacted legislation or from a court’s precedential ruling, it is the highest court in each jurisdiction that determines the requirements of law and how those requirements must be applied. The principles of law do not remain static. Societal views change and principles of law evolve over time.

As lawyers, when we read the published legal opinions of cases we are attempting to “deduce” the applicable principles of law that have been applied by the courts, which could either assist or undermine the successful resolution of our own client’s issues.

Legal opinions do not consist of conclusions that sound like: “Mr. Smith shot Joe Baker; a trial was held; and Mr. Smith was guilty”. Such a recitation would not explain or enlighten anyone as to the requirements of the law nor would it predict how a court might view a similar issue at another time. Court decisions are published to explain to and inform the public about how the decision-making process was conducted in the case, i.e. what the facts were, what laws were involved, and how the identified law(s) were applied to

the facts. Case decisions are usually divided into sections explaining the details of the facts found, the applicable law and how the case was decided.

As lawyers, the training we received in law school was only the beginning, the application of that training remains something we must practice as long as we are engaged in the practice of law.

Unfortunately for you, as Town Councilors who require sound and thoughtful legal advice, and unfortunately for the citizens of the Town of Hopkinton, who you represent, Mr. McAllister's "honest opinion" is not sound legal advice upon which you can rely.

His cursory and apparently unscripted comments came straight off the top of his head. They were not made as the result of any ascertainment of the facts, knowledge of the law or application of legal principles to the facts made upon the record. His statement was more the realm of a gut reaction than it was a legal opinion. Gut reactions can often be wrong. Particularly when we don't understand all the "facts" that actually occurred.

Attorney McAllister's pronouncement lacks any facts. As a result, we have no idea what "facts" he considered before he announced his "honest opinion." We have no idea whether any facts he considered are actually "facts" or merely his version of "what happened". His unsupported claims that "these applications" were "deemed to be substantially completed" for instance, lack any foundation factually or legally.

His pronouncement also lacks any reference to the rules, regulations, statutes, ordinances, court rulings or other controlling laws that he may have applied to the as yet undisclosed facts, in reaching the "honest opinion" that he announced at the April 22, 2019 hearing.

His pronouncement lacks any explanation of the process he undertook to formulate his opinion, which he said he made prior to the time he provided "Opinion Number 4" in a memo dated December 5, 2018 to the Town Council. That opinion apparently was formed long before a word was ever uttered or substantial documents were provided regarding the three (3) requests for zoning district changes, which were the subjects of the April 22, 2019 hearing.

Absent a recitation of the facts, an identification of the laws applied to the (unknown) facts and a description of the process utilized in reaching his opinion about a very important legal issue (at least to my clients), Solicitor McAllister's "honest opinion" ranks right up there with a couple of my own.

In my "honest opinion" the Red Sox are going to win the World Series again this year. In my "honest opinion" I am going to win a Powerball Jackpot in excess of Five Hundred Million Dollars ($500,000,000.00) during 2019. Would any Council Member, or thinking human being, believe that I was providing a "legal opinion".

My "honest opinions", stated above, will not harm the citizen(s) of the Town of Hopkinton in the event that either (or both) doesn't come true.

No reasonable person could consider neither of my "honest opinions" as products reached by the diligent performance of my legal duties for a client who pays me and who relies upon the soundness of my legal advice to them. Take them for what they are. My "honest opinions" were pulled from the ether and represent nothing more than whimsical fancy produced by my daydreams.

The complete absence of any indication that Solicitor McAllister's opinion was in the nature of a "legal opinion", or amounted to anything more than the personal preference of Mr. McAllister, renders that statement of "mere legal conclusions" of no evidentiary value or significance to the matters you are hearing.

<u>The "applications" to which the Solicitor referred:</u>

The "**applications"** being considered at the Town Council hearing of April 22, 2019 were actually two (2) letters dated October 22, 2018, **addressed** to the "**Hopkinton Town Council**" **submitted** to the **Town Clerk** and stamped as "received" on that same date. (Copies of those two (2) letters were previously provided as Exhibits E and G to the Memorandum submitted on April 10, 2019 for the April 22, 2019 hearing)

Each of the two (2) letters requested that the **Town Council** **amend** both the **Hopkinton Comprehensive Plan** and the **Hopkinton Zoning Ordinance** for the benefit of three (3) specific parcels located within the Town of Hopkinton.

One (1) letter concerned a property owned by "landowner Hopkinton Land 1" located at 145 Skunk Hill, being otherwise described as Lot 14 on the Town of Hopkinton Tax Assessor's Plat 18.

The other letter was a joint request concerning two (2) properties: one (1) property owned by Gordon Excavating Inc. located at 0 Arcadia Road, being otherwise described as Lot 8 on the Town of Hopkinton Tax Assessor's Plat 18; and one (1) property owned by Donald G. Gordon located at 0 Lisa Lane, being otherwise described as Lot 13 on the Town of Hopkinton Tax Assessor's Plat 18.

At the time the two (2) letters were received by the Town Clerk on behalf of the Town Council, all three (3) of the separately owned properties were located in the RFR-80 Zoning District.

At the time this letter is being written, all three (3) separately owned properties are still located in the RFR-80 Zoning District.

All three (3) of the owners of those three (3) separately owned properties requested that the Town Council amend both the Hopkinton Comprehensive Plan and the Hopkinton Zoning Ordinance and change the existing Zoning District designations for those properties.

The letter about Lot 14 on Tax Assessor's Plat 18 requested that the Zoning District designation for the lot be changed from RFR-80 to "**Commercial Special and limit the use to solar energy collection by special use permit**."

In the same vein, the joint letter for Lots 8 and 13 on Tax Assessor's Plat 18 also asked that the Zoning District designations for the lots be changed from RFR-80 to "**Commercial Special and limit the use to solar energy collection by special use permit**."

As the Town Solicitor aptly pointed out, the Town Council, **acting as a legislative body, is authorized** to **amend** the **Town of Hopkinton Comprehensive Plan** and the **Town of Hopkinton Zoning Ordinance.**

The mandatory procedures that must be followed by the Town Council when faced with a request to amend the Town's Comprehensive Plan are set forth in Rhode Island statutes and in the Town of Hopkinton's Code of Ordinances as they existed on the 22nd day of October 2018, the date that the request was made.

On information and belief, no changes have been made to either the Rhode Island statutes or to the Town of Hopkinton Code of Ordinances that govern the mandatory process by which the Town of Hopkinton Comprehensive Plan can be amended since October 22, 2018.

The mandatory procedures that must be followed by the Town Council when faced with a request to amend the Town's Zoning Ordinance are set forth in Rhode Island statutes and in the Town of Hopkinton Ordinances as they existed on the 22nd day of October 2018, the date that the request was made.

On information and belief, no changes have been made to either the Rhode Island statutes or to the Town of Hopkinton Code of Ordinances that govern the mandatory process by which the Town of Hopkinton Zoning Ordinance can be amended since October 22, 2018.

The only legal authority referenced by Mr. McAllister in his statement at the April 22, 2019 hearing, was to a section of the Zoning Enabling Act of 1991, R.I.G.L. 45-24-44. **I repeat that last sentence for emphasis – R.I.G.L. 44-25-44 is contained in the Zoning Enabling Act of 1991.** The section provides as follows:

> S**ection 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.)

The last section entitled, "History of Section", confirms that that particular section of the Zoning Enabling Act of 1991 was enacted by the Rhode Island General Assembly as part of the Public Laws of 1991, in Chapter 307 in Section 1. The lack of any further date(s) under "History of Section" confirms that the section has not been amended since it was enacted in 1991.

On the faces' of **the above-referenced letters** from the property owners to the Town Council **as a matter of law**, the letters making **requests for changes** to the Hopkinton Comprehensive Plan and the Hopkinton Zoning Ordinance **do not and cannot constitute "applications for development" under either the Zoning Enabling Act or the Town of Hopkinton Zoning Ordinance,** enacted under the authority of that Zoning Enabling Act of 1991.

In the event that requests for changes to the Comprehensive Plan and/or the Zoning Ordinance are granted by the Town Council at some point in the future (given that no vote has yet occurred on the requests as of this date), **those requests, if approved, could theoretically result** in new Zoning District designations for Lots 8, 13 and 14 on Tax Assessor's Plat 18.

If approved, and the zoning district designations for each of the lots are changed in both the Comprehensive Plan and the Zoning Ordinance, then, at that time, the owners of those properties would be authorized to file "applications for development" for those lots under the terms of the Zoning Enabling Act, the Town of Hopkinton Zoning Ordinance, or even the Town of Hopkinton Land Development and Subdivision Regulations **as they exist at that future time.**

Until any such requests are approved if the owners of those properties wish to submit applications for land development for approval by the appropriate reviewing authority any such applications must be made under their present zoning designations, i.e. parcels located within the RFR-80 Zoning District.

Obviously, any such future "**applications for development**" would have to be submitted for **approval with the appropriate reviewing agency** within the Town of Hopkinton.

When analyzing the requirements imposed upon cities and towns by the legislature's enactment of RIGL 45-24-44, it is important to remember that there are **two distinct statutes in Rhode Island addressing the regulation of land use**.

Mandatory provisions contained in each of those acts must be referenced as each of the Acts have roles to play in determining the absence or presence of "vested rights" for parties seeking changes to the zoning district designations for their respective properties.

The first, the Rhode Island Zoning Enabling Act of 1991 (Zoning Enabling Act), requires all towns and cities to develop zoning regulations in accordance with a comprehensive plan. Secs. 45-24-17 et seq.; **West v. McDonald**, 18 A.3d 526, 533 (R.I. 2011) (summarizing the requirements regarding comprehensive plans and zoning regulations in Rhode Island).

The second, Rhode Island General Laws 1956 §§ 45-23-25 et seq., the Rhode Island Land Development and Subdivision Review Enabling Act of 1992 (Development Review Act), enables municipalities to enact land development and subdivision review regulations.

Given that the statute cited, RIGL 45-24-44, is part of the Zoning Enabling Act of 1991, reference must be made in all instances to the **Zoning Enabling Act** when determining what applications are afforded protections under RIGL 45-24-44.

Under the Zoning Enabling Act, **on October 22, 2018**, the term "**application**" was defined as:

> **§ 45-24-31. Definitions. [Effective until March 1, 2019.]**[iii]
>
> Where words or terms used in this chapter are defined in § 45-22.2-4 or 45-23-32, they have the meanings stated in that section. In addition, the following words have the following meanings. Additional words and phrases may be used in developing local ordinances under this chapter; however, the words and phrases defined in this section are controlling in all local ordinances created under this chapter:
>
> (8) ***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 Zoning Enabling Act, as of **March 1, 2019**, the term "**application**" was defined as:

> **§ 45-24-31. Definitions. [Effective March 1, 2019.]** [iv]
>
> Where words or terms used in this chapter are defined in § 45-22.2-4 or 45-23-32, they have the meanings stated in that section. In addition, the following words have the following meanings. Additional words and phrases may be used in developing local ordinances under this chapter; however, the words and phrases defined in this section are controlling in all local ordinances created under this chapter:

(8) ***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 Zoning Enabling, on October 22, 2018, the term "**applicant**" was defined as:

§ 45-24-31. Definitions. [Effective until March 1, 2019.

(7) *Applicant.* An **owner**, or **authorized agent** of the **owner**, **submitting** an **application** or **appealing** an **action** of any **official**, **board**, or **agency**.

Under the Zoning Enabling Act, as of March 1, 2019, the term "applicant" was defined as:

§ 45-24-31. Definitions. [Effective March 1, 2019.]

(7) *Applicant.* An **owner**, or **authorized agent** of the **owner**, **submitting** an **application** or **appealing** an **action** of any **official**, **board**, or **agency**.

Under the Zoning Enabling Act, **on October 22, 2018**, the **following terms** contained within the definition of **"application"** were defined as follows:

(20) ***Development****.* The construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any structure; any mining, excavation, landfill, or land disturbance; or any change in use, or alteration or extension of the use, of land.

(21) ***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.

(55) ***Permitted use****.* A use by right that is specifically authorized in a particular zoning district.

(58) ***Preapplication conference****.* A review meeting of a proposed development held between applicants and reviewing agencies as permitted by law and municipal ordinance, before formal submission of an application for a permit or for development approval.

(60) ***Site plan.*** The development plan for one or more lots on which is shown the existing and/or the proposed conditions of the lot.

(62) ***Special use****.* A regulated use that is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42. Formerly referred to as a special exception.

(65) ***Use.*** The purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained.

(66) ***Variance****.* Permission to depart from the literal requirements of a zoning ordinance. An authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, that is prohibited by a zoning ordinance. There are only two (2) categories of variance, a use variance or a dimensional variance.

(i) ***Use variance.*** Permission to depart from the use requirements of a zoning ordinance where the applicant for the requested variance has shown by evidence upon the record that the subject land or structure cannot yield any beneficial use if it is to conform to the provisions of the zoning ordinance.

ii) ***Dimensional variance.*** Permission to depart from the dimensional requirements of a zoning ordinance, where the applicant for the requested relief has shown, by evidence upon the record, that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations. However, the fact that a use may be more profitable or that a structure may be more valuable after the relief is granted are not grounds for relief.

(70) ***Zoning certificate.*** A document signed by the zoning-enforcement officer, as required in the zoning ordinance, that acknowledges that a use, structure, building, or lot either complies with, or is legally nonconforming to, the provisions of the municipal zoning ordinance or is an authorized variance or modification therefrom.

(71) ***Zoning map.*** The map, or maps, that are a part of the zoning ordinance and that delineate the boundaries of all mapped zoning districts within the physical boundary of the city or town.

(72) ***Zoning ordinance.*** An ordinance enacted by the legislative body of the city or town pursuant to this chapter and in the manner providing for the adoption of ordinances in the city or town's legislative or home rule charter, if any, that establish regulations and standards relating to the nature and extent of uses of land and structures; that is consistent with the comprehensive plan of the city or town as defined in chapter 22.2 of this title; that includes a zoning map; and that complies with the provisions of this chapter.

(73) ***Zoning-use district.*** The basic unit in zoning, either mapped or unmapped, to which a uniform set of regulations applies, or a uniform set of regulations for a specified use. Zoning-use districts include, but are not limited to: agricultural, commercial, industrial, institutional, open space, and residential. Each district may include sub-districts. Districts may be combined.

Under the Zoning Enabling Act, as of March 1, 2019, the following terms contained within the definition of **"application"** were still defined as follows:

(20) ***Development.*** The construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any structure; any mining, excavation, landfill, or land disturbance; or any change in use, or alteration or extension of the use, of land.

(21) ***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.

(55) ***Permitted use.*** A use by right that is specifically authorized in a particular zoning district.

(58) ***Preapplication conference.*** A review meeting of a proposed development held between applicants and reviewing agencies as permitted by law and municipal ordinance, before formal submission of an application for a permit or for development approval.

(60) ***Site plan.*** The development plan for one or more lots on which is shown the existing and/or the proposed conditions of the lot.

(62) ***Special use.*** A regulated use that is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42. Formerly referred to as a special exception.

(65) ***Use.*** The purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained.

(66) ***Variance.*** Permission to depart from the literal requirements of a zoning ordinance. An authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, that is prohibited by a zoning ordinance. There are only two (2) categories of variance, a use variance or a dimensional variance.

> (i) ***Use variance.*** Permission to depart from the use requirements of a zoning ordinance where the applicant for the requested variance has shown by evidence upon the record that the subject land or structure cannot yield any beneficial use if it is to conform to the provisions of the zoning ordinance.
>
> ii) ***Dimensional variance.*** Permission to depart from the dimensional requirements of a zoning ordinance, where the applicant for the requested relief has shown, by evidence upon the record, that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations. However, the fact that a use may be more profitable or that a structure may be more valuable after the relief is granted are not grounds for relief.

(70) ***Zoning certificate.*** A document signed by the zoning-enforcement officer, as required in the zoning ordinance, that acknowledges that a use, structure, building, or lot either complies with, or is legally nonconforming to, the provisions of the municipal zoning ordinance or is an authorized variance or modification therefrom.

(71) ***Zoning map.*** The map, or maps, that are a part of the zoning ordinance and that delineate the boundaries of all mapped zoning districts within the physical boundary of the city or town.

(72) ***Zoning ordinance.*** An ordinance enacted by the legislative body of the city or town pursuant to this chapter and in the manner providing for the adoption of ordinances in the city or town's legislative or home rule charter, if any, that establish regulations and standards relating to the nature and extent of uses of land and structures; that is consistent with the comprehensive plan of the city or town as defined in chapter 22.2 of this title; that includes a zoning map; and that complies with the provisions of this chapter.

(73) ***Zoning-use district.*** The basic unit in zoning, either mapped or unmapped, to which a uniform set of regulations applies, or a uniform set of regulations for a specified use. Zoning-use districts include, but are not limited to: agricultural, commercial, industrial, institutional, open space, and residential. Each district may include sub-districts. Districts may be combined.

Under the Zoning Enabling Act, on October 22, 2018, the three (3) categories of "**application**" (under the **<u>definition of application)</u>** that could be submitted to an "appropriate authority" for approval by that approving authority were the following:

a. Application for development;
b. Application for approval; and
c. Application for permitting purposes.

Under the Zoning Enabling Act, as of March 1, 2019, the three (3) categories of "**application**" (under the **definition of application)** that could be submitted to an "appropriate authority" for approval by that approving authority continue to be the following:

a. Application for development;
b. Application for approval; and
c. Application for permitting purposes.

The definition of "application" also defined (and continues to define) the "**application**" as being 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**.

All of **these requirements are mandatory** as stated in the preamble to RIGL 45-24-31. . Each of the requirements is straightforward and easy to understand.

The Rhode Island Supreme Court has repeatedly ruled on how statutes must be interpreted.

> "[W]hen the language of a statute or a zoning ordinance is clear and certain, there is nothing left for interpretation and the ordinance must be interpreted literally." Id. Where statutory provisions appear unclear or ambiguous, courts ""examine the entire statute to ascertain the intent and purpose of the Legislature."' **Jeff Anthony Properties v. Zoning Bd. of Review of Town of N. Providence**, 853 A.2d 1226, 1230 (R.I. 2004) (quoting **Cummings v. Shorey**, 761 A.2d 680, 684 (R.I. 2000)).
>
> "In interpreting a statute, [courts] must determine and effectuate the Legislature's intent and attribute to the enactment the meaning most consistent with its policies or obvious purposes.'" Id. (quoting **Keystone Elevator Co. v. Johnson & Wales University**, 850 A.2d 912, 923 (R.I. 2004)) (internal quotation marks omitted).

It is well settled in Rhode Island that the rules of statutory construction apply equally to the construction of a municipal zoning ordinance. **Mongony v. Bevilacqua**, 432 A.2d 661, 663 (R.I.1981).

When analyzing the requirements imposed upon cities and towns by the legislature's enactment of RIGL 45-24-44, it is important to remember that there are **two distinct statutes in Rhode Island addressing the regulation of land use**. Each of the acts must be referenced as they both have roles to play in determining the absence or presence of "vested rights" for the parties seeking changes to the zoning district designations for their respective properties.

The two (2) enabling acts, the "Rhode Island Zoning Enabling Act of 1991" and the "Rhode Island Land

Development and Subdivision Review Enabling Act of 1992" viewed together (and the local ordinances enacted under the authority of those two (2) enabling acts) provide the <u>**only legal bases**</u> for valid claims of "vested" rights within the context of land development in Rhode Island.

When the defined terms from RIGL 45-24-31, described above, are applied to the requirements of the Zoning Enabling Act of 1991 and to the municipal zoning ordinances adopted under the authority of that Act, it becomes clear beyond any reasonable doubt that the **Town Council cannot ever be considered to be the "appropriate reviewing agency" to which "applications for development" are "submitted for approval".**

Under the first type of application described in the definition, an "application for development", we have to look to the rest of the Zoning Enabling Act and the zoning ordinance adopted in Hopkinton and use our common sense to determine what applications must be submitted to what reviewing authority for approval before we can even start discussing whether the application submitted was "substantially complete", let alone whether the application(s) are entitled to "vested rights" under RIGL 45-24-44.

The applications that can be submitted under the Zoning Enabling Act are described below.

1. Building Permits for Permitted Uses: The Building Official

<u>**For permitted uses only:**</u>

The Rhode Island Supreme Court ruled in <u>***Pitocco v. Harrington***</u>, 707 A.2D 692 (R.I. 1998), "In Rhode Island the 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. See generally R.I.G.L.1956 § 23-27.3-107.1. If a building permit application shows that the proposed construction conforms to the building code and to other applicable laws, the applicant is entitled to the permit. See § 23-27.3-114.1(a) ("If the building official is satisfied that the proposed work conforms to the requirements of this [building] code and all laws applicable thereto, he or she shall issue a permit.")."

In addition, the Rhode Island Supreme Court ruled in Zeilstra v. Barrington Zoning Bd . of Rev., 417 A.2d 303, 308 (R.I. 1980) (quoting Arc-Lan Co. v. Zoning Bd. of Rev. of North Providence, 106 R.I. 474, 476, 261 A.2d 280, 282 (1970)). e, "If a building permit is denied upon a ground other than one that comes within the scope of the official's authority, it constitutes an arbitrary act because "[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.' "

2. Development Plan Review For Permitted Uses: The Planner and the Planning Board

For permitted uses only:

Under the Development Review Act, **local planning boards** are charged with enforcing the regulations as enacted. (See R.I.G.L. Sec. 45-23-26) A party affected by a planning board's decision may appeal to the local zoning board acting as a board of appeal. (See R.I.G.L Sec. 45-23-66) The aggrieved party may subsequently appeal the zoning board's decision to the Superior Court pursuant to R.I.G.L 45-23-71.

Under the Development Review Act "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". (See R.I.G.L. 45-23-40 (g))

As authorized by the Development Review Act, the Town of Hopkinton enacted its own ordinances governing the particulars for Development Review in Hopkinton, as follows:

> "Pursuant to Section 12 of the Zoning Ordinance, any **application for a building permit** that has been **submitted** and has **been deemed complete** **prior** to the adoption of this amendment, shall have **vested rights** to proceed with the application and receive a building permit or CO without requiring the payment of an impact fee." ***(See Section 13.5-120 of the Land Development and Subdivision Regulations.)***
>
> Section 12 of the Zoning Ordinance also provides as follows:
>
> "**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**." ***(See Section 12 of the Zoning Ordinance)***

The ordinances fit within the parameters of state law, which sets strict deadlines for the processing of Master Plan developments by local planning offices. Section 45-23-40(b) of the Rhode Island General Laws requires that an application be certified by the local planner as complete or incomplete within twenty-five days of its submission.

If the town planner does not act within 25 days, the application is deemed complete. Section 45-23-40(e) requires approval or rejection of the Master Plan by the local planning commission within ninety days of the certificate of completeness. Local planning officials are on a statutorily designed tight schedule. Even though an application is still in the review stages, the ordinance above clarifies that certain rights vest once the application is certified as complete. Hopkinton's statutory scheme provides significant protections to mere applicants at an early stage.

3. Permitting for "variances" and/or "special use permits" The Zoning Board

Under the Zoning Enabling Act, local zoning boards administer and enforce the provisions of the Zoning Enabling Act, which usually involve requests for variances and special-use permits. Secs. 45-24-54—45-24-61. Building officials make the decisions regarding the issuance of building permits. The actions of that municipal employee (the building official) are also reviewed in accordance with the Zoning Enabling Act.

An aggrieved party may appeal the refusal of the building official to issue a building permit can be appealed to the Zoning Board of Review. In the event of the denial of building permit, a variance or a special use permit, an aggrieved party may appeal a zoning board's decision to the Superior Court pursuant to § 45-24-69. An appeal taken under this Act requires an appellant to provide notice of the appeal to "those persons who were entitled to notice of the hearing set by the zoning board of review." Sec. 45-24-69.1.

The hearings for the "Skunk Hill Project" and other property owners requesting changes submissions for changes in Zoning District designations were made to the Town Council, not to the Planning Board and not to the Zoning authorities.

No "Application for Development Plan Review" (under the pre-January 22, 2019 Chapter 246) has been made to the Town Planner.

No "Application for Master Plan Review" (under the post-January 22, 2019 Chapter 246) has been made to the Town Planner.

No "Zoning Application" has been filed in these cases and the jurisdiction of the Zoning Board is not

implicated.

No "Building Permit Application" has been filed in these cases, nor could any such application be filed as none of the properties seeking zoning district changes for the respective properties as those properties are located in the RFR-80 Zoning District, which does not allow PSES as a "permitted use".

If the Town Council approves the changes to the Zoning District Designations of those requesting those changes the owners of those parcels will be allowed to file an application for a building permit, request Development Plan Review and/or Major Development Approval, etc. according to the provisions applicable to "permitted uses" within the Zoning District in which they are then located.

"Ex Post Facto Laws"

Attorney McAllister claimed that "There are **general constitutional** and **legal provisions** I **could cite here** concerning the general **prohibition** against **ex post facto law**" that would somehow support the opinion he expressed. The first observation is that he provided no such constitutional and/or legal provisions concerning the general prohibition against ex post facto law.

The plain truth is that if he did cite "constitutional and legal provisions" "concerning the general prohibition against ex post facto law" in support of his and claimed that they were based on the laws of the State of Rhode Island or on the United States of America, **he would be wrong.**

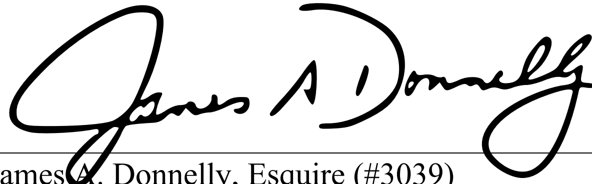
Solicitor McAllister is correct, generally speaking, that "ex post facto" laws are prohibited by the State and Federal Constitutions. The dictionary defines the term "ex post facto" as coming from the Latin for "from a thing done afterward." The ex post facto clause is most often applied under the criminal laws. The clause prohibits a law that makes illegal an act, which was legal when it was committed; increases the penalty for that act; or changes a pertinent rule of evidence to make conviction for that crime easier.

In Rhode Island, our Supreme Court has held that "**A violation of the ex post facto clause occurs only when there is retrospective application of law that disadvantages an offender 'by altering the definition of criminal conduct or increasing the punishment for the crime**.'" See Town of W. **Warwick v. Local 1104, Int'l Ass'n of Firefighters, AFL-CIO, CLC**, **745 A.2d 786**, 788 (R.I. 2000) (quoting **State v. Desjarlais**, **731 A.2d 716**, 717-18 (R.I. 1999) (per curiam)).

The Court made it clear that the ex post facto clauses found in both the Rhode Island and United States Constitutions prohibit only retroactive "penal legislation". See **Town of West Warwick v. Local 1104**, above.

Both the State and US Constitutions prohibit "ex post facto" laws that "shall impair the obligations of contracts." That application of the clause is most often discussed in cases similar to those generated by the recent overhaul of the Rhode Island pension system. Many of the changes to that system were challenged on the basis that the changes to the pension laws could not and should not affect the pensions of retired employees, which objectors claimed to be an "impairment of a contractual obligation."

The term "ex post facto" has no relationship whatsoever to land development in the State of Rhode Island. In regards to land development, protections have been provided by statute only. The Rhode Island Legislature has enacted statutes to afford protection for "vested rights" in the context of land development.



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