Talia Jalette

From:	Eric Bibler <ebibler@gmail.com>
Sent:	Wednesday, May 12, 2021 10:55 AM
To:	Alfred W. DiOrio; James Lamphere; Talia Jalette; Ron Prellwitz; Carolyn Light; Keith Lindelow; Emily Shumchenia; John Pennypacker
Cc:	Margaret Hogan; Stephen Moffitt; Sharon Davis; Bob Marvel; Scott Bill Hirst; Geary, Michael J (FLNA); Stephen Sypole; S. Paul Ryan
Subject:	Unresolved Procedural Questions Relating to Skunk Hill Master Plan Application
Attachments:	1. Donnelly Cover letter of 4-10-19.pdf; 2. Donnelly Memorandum of 4-10-19.pdf; 2019.05.13_Letter to Town Council.pdf; 2019.05.13_Memo on Procedures.pdf; 2018.11.07_Epps Testimony on _Concept Plan_ and applicability of new solar ordinance_Hopkinton Planning Board Meeting.pdf

Mr. James Lamphere
Town Planner
Town of Hopkinton

Mr. Alfred DiOrio
Chairman
Hopkinton Planning Board

May 12, 2021

Re: Unresolved Procedural Questions Relating to Skunk Hill Master Plan Application

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

As you know, I have written to the town planner and the planning board to raise some important procedural questions relating to the master plan application for the proposed Skunk Hill solar project.

Now that the Skunk Hill master plan application has finally reached the planning board's agenda, I would appreciate it if you would include the correspondence below and the other attachments to this letter in the planning board's packet for the meeting of May 19, 2021. I would also appreciate it if you would make these materials available on the town website in connection with the planning board's deliberations on this topic.

Although I am not an attorney, I believe that it is appropriate for the planning board to address these questions, if only to consider and dismiss them.

As you know, none of these questions are new and all of them have been raised in other venues relating to the Skunk Hill proposal.

On April 10, 2019, Attorney James Donnelly provided a detailed memorandum to the town council and the applicant questioning whether there was any point in hearing a

proposal to construct a 53 acre solar project on the subject properties after the town council amended the PSES on January 22, 2019 that imposed a maximum coverage ratio of the lesser of 3% or 3 acres (see cover letter and memorandum attached). The focus of the memorandum was an explanation of when an applicant achieves "vested rights" under the town ordinances in effect at the time of the triggering event, which made it clear that the applicant was not "grandfathered" under the prior version of the PSES enacted in 2016.

In response, the former town solicitor publicly stated that the issue was complicated but that he was very confident that Mr. Donnelly was wrong. But neither the former solicitor nor the attorneys for the applicant ever offered any substantive rebuttal of Mr. Donnelly's legal analysis.

On May 13, 2019, Attorney James Donnelly provided a detailed memorandum to the town council and the applicant questioning whether the town council hearings for conditional zoning of the proposed project should be allowed to proceed in violation of RIGL 45-23-61 and Section 3.2.2 of the Land Development and Subdivision Regulations, particularly in view of the adverse opinion of the planning board, by unanimous vote, that the proposed project was "inconsistent with the comprehensive plan" (see attached).

Neither the former town solicitor nor the applicant offered any rebuttal to this objection.

On June 5, 2019, Attorney Donnelly and I appeared before the planning board and presented a wealth of information on these two issues and, more generally, on the various duties and authorities invested by the General Assembly in the planning board. We did so in the full knowledge that it would someday be the planning board's responsibility to make a positive determination as to whether the Skunk Hill application - and raft of other solar applications - had been properly reviewed according to the provisions of RIGL 45-23-61 and the related town ordinances.

On **February 23, 2021**, Attorney S. Paul Ryan provided the planning board with a memorandum that discussed the issue of when an application is deemed to have "vested rights" under any particular version of the applicable town ordinances (see attached). As you know, this memorandum again cited the unequivocal test for "vested rights" set forth in both the applicable state statutes and the town ordinances, which clearly state that the ordinances that are *in effect at the time that a master plan application is certified complete by the town planner* constitute the controlling authority for review.

We believed then, as now, that it is the planning board's responsibility to apply the applicable ordinance(s) in effect at the time that any master plan application is "certified complete" by the town plan. This is not a judgement call. This is a statutory requirement.

In fact, the applicant himself, Mr. Frank Epps, is on record as having publicly stated to the planning board, on **October 7, 2018**, that he *fully understood* that the solar land development project that he was proposing to the planning board on that date would be

subject to any amendments to the PSES that the town council might make (see transcripted remarks of the public testimony of Mr. Epps to the planning board below and attached).

Mr. Epps understood then - as now - that the mere fact of voicing his *desire* to construct a solar energy facility was not enough to "grandfather" any right to be heard under an ordinance, or ordinances, that would be obsolete by the time the master plan application was "certified complete."

I am reminding the planning board of the above referenced Donnelly memos dated April 10, 2019 and May 13, 2019 not because I expect the planning board to render any opinion on the lawfulness, legitimacy or appropriateness of the town council's prior actions but for the following reasons:

1. Regardless of any prior actions of the town council, or any previously expressed opinions of the town council, the planning board is obligated to follow the law;

2. It is not for the town council to determine whether the planning board has subject matter review over the application for Skunk Hill, in light of the failure to follow the approval process prescribed under RIGL 45-23-61 and Section 3.2.2 of the Subdivision Regulations, or to determine when a master plan application has achieved "vested rights" under the town ordinances, or which set of rules should be applied by the planning board. These are determinations that must be made by the planning board in the exercise of its own independent authority and judgement.

3. The planning office and the planning board received copies of these memoranda at the time that they were issued, and on more than one subsequent occasion.

4. The applicant cannot make any argument for "estoppel" or "detrimental reliance" in the event that his application is denied on the basis of these objections because the town council's opinion on these controversies is not determinative, nor can the Council's opinion relieve the planning board of the responsibility to make its own determination of these questions. Moreover, the applicant was officially notified through these memoranda - *more than two years before his master plan application was finally "certified complete"* - that the objecting parties believed his application to be fatally flawed.

On **April 19, 2021**, the current town council made further amendments to the town's master solar ordinance, Chapter 246, which had the effect of making the industrial production of solar energy for commercial sale *a non-permitted use in every zone in Hopkinton.*

It was not until **April 29, 2021** that the town planner finally notified the applicant that the Skunk Hill solar application was "certified complete," *as of this date.*

In light of all of the foregoing, it should be apparent to the planning board that the board has no jurisdiction to accept, and hear, the master plan application for Skunk Hill as it is currently constituted because:

a) the applicant did not comply with RIGL 45-23-61 of the Subdivision regulations section 3.2.2. as required, and thus the application is not in order for review; and

b) by the time the applicant finally managed to submit a master plan application and obtain a "certificate of completeness" from the town planner on April 29, 2021, the request for approval was moot by virtue of the town council's amendment to the master solar ordinance on April 19, 2021. The planning board cannot approve a land development application for a non-permitted use of land.

I sincerely hope that the planning board will address both of these procedural questions before the applicant is allowed to present any further details of a master application that the planning board has no jurisdiction to consider.

Sincerely,

Eric Bibler

---------- Forwarded message ---------
From: **Eric Bibler** <ebibler@gmail.com>
Date: Thu, Feb 11, 2021 at 1:21 PM
Subject: Skunk Hill Solar / Atlantic Solar Main Street
To: Jim Lamphere <planner@hopkintonri.org>
Cc: Talia Jalette <tjalette@hopkintonri.org>, Alfred W. DiOrio <al@awdrls.com>, Ron Prellwitz <Battruck40@yahoo.com>, Emily Shumchenia <emily.shumchenia@gmail.com>, Carolyn Light <4hiheelz@gmail.com>, Keith Lindelow <kdglindelow@yahoo.com>, John Pennypacker <john@pennypacker.net>, Margaret Hogan <mhoganesq@verizon.net>, Stephen Moffitt <smoffitt11@yahoo.com>, Bob Marvel <bob.marvel7@gmail.com>, Sharon Davis <sadavis1000@gmail.com>, Scott Bill Hirst <scottbillhirst@gmail.com>, Geary, Michael J {FLNA} <michael.j.geary@pepsico.com>, Stephen Sypole <ssypole@gsm-law.com>, James Marusak <jpm@gsm-law.com>

Dear Jim,

Thank you for responding about the status of the Skunk Hill and Atlantic Solar/ Main Street applications.

I would like to highlight the following issues that have recently been raised, but which, to my knowledge, have not yet been resolved:

1. Applicable solar ordinance

Planning board member Carolyn Light raised an issue at the Pre-Application meeting for Atlantic Solar on November 4, 2020 concerning the maximum lot coverage ratio for the proposed development. Member Light stated that her reading of the applicable ordinances provides that the maximum lot coverage ratio should not exceed the lesser

of 3 acres of 3%. The applicant stated that the proposed lot coverage ratio is approximately 35%, more than ten times the maximum coverage allowed under the current PSES.

http://www.hopkintonri.org/wp-content/uploads/2020/12/PB-Minutes-11-4-20-Approved.pdf

The same question applies to the Skunk Hill Proposal. According to the minutes of the Pre-Application meeting with the planning board on October 7, 2020, the applicant states that the solar array will occupy approximately 53 acres of the combined 168 acre total area. This is more than 17 times the maximum lot coverage ratio of 3 acres under the current PSES.

http://www.hopkintonri.org/wp-content/uploads/2020/11/PB-Minutes-10-7-20-Approved.pdf

As you know, I have also written to the town planner and the planning board to ask for clarification on this issue.

As you know, the applicable state statutes and Article I of the Hopkinton Subdivision Regulations provide both stipulate that a land development application does not achieve "vested rights" under applicable ordinances until a master plan application is "certified complete" by the town planner:

1.6.4 Vested Rights Guidelines

Vesting is triggered by the issuance of a "Certificate of Completeness" by the Town Planner.

The term "Vested Rights" is defined in the Subdivision Regulations as follows:

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 completion of the project.

Again, the plain language of the Subdivision Regulations defines the necessary "approval" that serves as the "trigger" for "vested rights" to be the "Certificate of Completeness" of the master plan application issued by the town planner.

It should also be noted that it is *the planning board* - and not the town council - is the town board that is invested with the duty and the authority of making the "required finding" that the development plan complies with all applicable regulations:

3.5.2 The proposed development complies with the Hopkinton Zoning Ordinance.

As you know, Mr. Frank Epps, principal of Atlantic Solar systems, the applicant for both Skunk Hill and Atlantic Solar / Main Street, publicly admitted on November 17, 2018 that the proposals would be subject to the PSES that was the subject of public town

council hearings at that time and which was later enacted a few weeks later on January 22, 2019.

Notwithstanding all of the foregoing, it is evident from the recent Pre-Application meetings that the applicant for both of the proposed solar installations at Atlantic Solar and Skunk Hill is proceeding based upon a questionable assumption that the proposed developments are "grandfathered" under an obsolete version of the PSES that was replaced by the current version on January 22, 2019, *even though there is no legal foundation for asserting this privilege*.

In my opinion, this question should have been settled long ago, but it is extremely troubling that the applicant, the planning board, abutters and other Hopkinton residents were not offered any definitive "guidance" on this question at the respective Pre-Application meetings prior to allowing the applicant to proceed.

Since this is a question of legal interpretation, and since the determination of the planning board on this question is a matter of critical interest to all Hopkinton residents, I urge the planner to seek a formal opinion from the planning solicitor on this question and to ask that this opinion be shared with the public.

2. Authority of Planning Board to Make a "Required Finding" Concerning the Consistency with the Comprehensive Plan for the Proposed Developments

At the Pre-Application meeting for Skunk Hill on November 4, 2020, planning board member Emily Shumchenia noted that the planning board had provided an advisory opinion to the town council, in November 2018, finding by unanimous vote of the board that the proposed development is not consistent with the Comprehensive Plan. Ms. Shumchenia further noted:

"[T]he changes to the plan since that initial Planning Board review that the applicants are describing as 'the zoning process' don't make it magically consistent with the Comprehensive Plan, especially specific portions of the Comprehensive Plan that were cited by the Planning Board back then as reasons for inconsistency, such as preserving, protecting the significant natural resources of the Town as an endowment for the future, et cetera, et cetera."

The Hopkinton Subdivision Regulations require that planning board members make a series of positive "Required Findings" as a prerequisite for approval of any master plan application.

As you know, the town council has approved a "*conditional zoning change*" pursuant to the *"Zoning Ordinance Amendment Applications"* filed by the applicants for both of these development proposals. As should be evident from the form of "Zoning Ordinance Amendment Applications" filed in 2018 for the respective requests, these requests pertain to zoning, not land development.

To my knowledge, there is no provision in the Hopkinton Subdivision regulations or applicable state statutes that allows the planning board to decline to make the "Required Finding" on "consistency with the Comp Plan" for any master plan application; nor is

there any provision that allows the town council to veto, or overrule, or void or dicated the "required findings" of the planning board on any of the specified criteria, including this one.

Member Shumchenia has raised a critical point concerning the proper exercise of authority of the planning board - and the planning board's obligation to exercise this statutory authority in making the required findings. This is a point that must be clarified for the sake of the planning board, the applicant and all Hopkinton residents before the process of review and approval proceeds to the next stage.

The pertinent question is whether a "conditional zoning change" by the town council - which itself is explicitly subject to obtaining all necessary approvals by the planning board - can make the proposed development "magically consistent with the Comprehensive Plan" if none of the prior disqualifying objections of the planning board have been resolved.

Or - to put the question another way - is the planning board now effectively prevented from rendering an independent opinion and effectively ***obligated*** to find the proposed development "consistent with the Comprehensive Plan" - even though none of the planning board's substantive objections have been resolved?

If so - i.e. if the planning board's opinion on consistency with the Comprehensive Plan is rendered irrelevant - what justification can, or should, the planning board offer in its "Required Findings" to square the circle between a unanimous finding that the plan is "inconsistent" with the Comp Plan with a plan approval that finds that the same development plan is "miraculously consistent with the Comp Plan"?

Again, I urge the town planner to seek a formal opinion from the planning solicitor on this legal interpretation concerning the duties and responsibilities of the planning board, including any possible curtailment of the same.

3. Precedence of Approvals

As previously noted, the Hopkinton Subdivision Regulations Article 3.2.2 and RIGL 45-23-61 require that any proposed land development proposal that requires both planning board approval and a zone change "shall" follow a specific procedure in a specific order. Here is the citation from the Hopkinton Subdivision regulations:

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).

Clearly, if the planning board and town council had followed this mandatory procedure,

there would be no controversy over the questions raised by Member Light and by Member Shumchenia.

Since the applicants for both of these projects were obliged to obtain master plan approval *prior to* seeking "conditional Zoning Change from the Town Council," there would be no argument over the applicable solar ordinance. As stipulated by the Subdivision Regulations and state statute, the applicant's "vested rights" would be "triggered" by the town planner's issuance of a "Certificate of Completeness" for the master plan application, which obviously would be required before the planning board provided master plan approval. And, as the statute states, the application could not proceed to the town council until the planning board had granted master plan approval.

Similarly, there would be no conflict over the question as to whether a "conditional Zoning Change from the Town Council" could possibly subvert, or override, or interfere with, the authority of the planning board and its responsibility to make an independent determination of the "required findings" for approval of the master plan - as required under both the Hopkinton Subdivision regulations and applicable state statutes. Again, if the planning board made it "required findings" on master plan approval *prior to* referring the matter to the town council - *as the law requires* - then the "required findings" on "consistency with the Comprehensive Plan would have been issued based *solely upon the merits of the master plan application*, without any question of improper exercise of authority or influence by the town council.

As you know, a member of the town council recently cited RIGL 45-24-51 - an element of the Zoning Enablling Act - as justification for the town's habitual practice of ignoring the mandatory requirements of RIGL 45-23-61 and Section 3.2.2. of the Hopkinton Subdivision regulations, suggesting that this zoning statute provides some sort of alternate path that may be pursued by the town to avoid the Precedence of Approvals.

That would *only* be true, however, if the applicant was applying for a Zoning Amendment *which did not contemplate, or require, planning board approval for a specific land development project*.

Clearly, this was *not* the case for the applications that were filed for Skunk Hill Solar or Atlantic Solar / Main Street - or for any of the thirteen (13) most recent applications for zoning amendments to facilitate the installation of commercial solar facilities in the residential zone. The planning board rendered adverse advisory opinions on all thirteen (13) of these "Zoning Ordinance Amendments." All 13 of them failed to follow the requirements stipulated under the Precedence of Approvals, instead proceeding directly to the town council before obtaining master plan approval.

Please note that the narrative descriptions and supporting documents for *both* the Skunk Hill and Atlantic Solar applications (and all thirteen recent applications) *explicitly state* that the *reason* for the requested "Zoning Ordinance Amendments" was *to facilitate solar development in the residential zone.*

When the applicant appeared before the planning board on October 3, 2018 to request an Advisory Opinion for Atlantic Solar / Main Street, the applicant gave an extremely

granular detailed description of the proposed development, including the proposed area of the solar array, cleared area, placement of the array on the lot, setbacks, height of panels, fencing, road access, and even a description of the panel layout from east to west.

http://www.hopkintonri.org/wp-content/uploads/2018/12/PB-Minutes-10-3-18-approved.pdf

When the applicant appeared before the planning board one month later, on November 7, 2018 to request an Advisory Opinion for Skunk Hill, the applicant repeated the performance, providing a similar amount of detail.

http://www.hopkintonri.org/wp-content/uploads/2018/12/PB-Minutes-11-7-18-approved.pdf

In both instances, the applicant provided the planning board with detailed conceptual plans for the projects.

It is beyond dispute that the documentary evidence relating to both of the applications clearly indicated, from inception, that the request for a zoning amendment was an adjunct requirement in the pursuit of approval by the planning board for a specific development plan - and not *merely* a request for a zoning ordinance amendment from the town council for a property, or an entire class of properties, under the auspices of the Zoning and Enabling Act, under RIGL 45-24-51.

I leave it to the planning board and planning solicitor to determine what possible remedies might be available to the planning board under these circumstances in which the requirements under the Subdivision regulations and RIGL 45-23-61 have not been satisfied.

But I believe it is highly relevant for the town planner and planning solicitor to consider this context a it addresses the question raised by Member Shumchenia concerning the planning board's responsibility to make two of the "required findings" that are required under the Hopkinton subdivision regulations and the applicable state statutes.

The Planning Board shall make positive findings on the following standard requirements as part of the proposed project:

3.5.1 The proposed development is consistent with the Comprehensive Community Plan and/or has satisfactorily addressed the issues where there may be inconsistencies;

3.5.2 The proposed development complies with the Hopkinton Zoning Ordinance;

First, as Member Shumchenia rightly asks, how can these projects suddenly be "magically consistent with the Comprehensive Plan" when none of the planning board's objections have been substantively addressed since the initial presentation of these applications to the planning board in 2018?

The answer simply cannot be that the proposed developments are now "magically

consistent with the Comprehensive Plan" by virtue of the operation of an illegal process that ignored the Precedence of Approvals and, according to some former members of the town council and our former town solicitor, now **obligates** the planning board to ignore its own best judgement and bring its "required finding" into line with the town council's "conditional zoning amendment."

Second, under the circumstances, how can the planning board grant master plan approval and make a "required finding" that "*the project development complies with the Hopkinton Zoning Ordinance*" when it is plainly evident that this is not true. The approval process clearly has ***not*** complied with the Hopkinton Zoning Ordinance, including the Subdivision regulations, and the planning board cannot possibly make such a "required finding."

I respectfully request that the town planner request that the planning solicitor consider all of these issues and provide appropriate guidance to the planning board concerning appropriate actions that the planning board may take in the proper exercise of its authority, including the planning board's responsibility to make the appropriate positive required findings as a prerequisite to any plan approvals.

I look forward to your response.

Eric Bibler

Cc: Planning Board
Cc: Planning Solicitor
Cc: Town Council
Cc: Town Solicitor

On Thu, Feb 11, 2021 at 8:40 AM Jim Lamphere <planner@hopkintonri.org> wrote:

Good morning Eric:

Skunk Hill has been submitted. I have not made a determination on completeness as of this time.

Atlantic – no submission yet.

Jim

From: Eric Bibler [mailto:ebibler@gmail.com]
Sent: Thursday, February 11, 2021 7:55 AM
To: James Lamphere
Cc: Talia Jalette
Subject: Re: Skunk Hill Solar / Atlantic Solar Main Street

Hi Jim,

Could you please let me know the status of these applications?

Thank you.

Eric Bibler

On Tue, Feb 9, 2021 at 5:33 PM Eric Bibler <ebibler@gmail.com> wrote:

Hi Jim,

Have the applicants for either of the above referenced development proposals submitted a master plan application to the town planning office?

If so, has the town planner informed the applicants that either of these master plan applications are "certified complete"?

Thanks for your help.

Eric Bibler