ZONING BOARD OF REVIEW, SITTING AS THE BOARD OF APPEALS MEETING
MINUTES – March 30, 2022

State of Rhode Island

County of Washington

In Hopkinton on the thirtieth day of March, 2022 A.D. the said meeting was called to order by Zoning Board of Review Chairman Jonathan Ure at 7:01 P.M. in the Town Hall Meeting Room.

PRESENT: Jonathan Ure, Ronnie Sposato, Joe York, Daniel Harrington, Daniel Baruti, Solicitor Per Vaage of Gidley, Sarli, & Marusak LLP, Alternate Member Chip Heil was attending remotely; Zoning Board Clerk: Tiana Zartman

Absent: Alternate Member Phil Scalise; Town Council Liaison Michael Geary

Sitting as Board for Petition I: Ure, Harrington, York, Baruti, Sposato

Petition I

A petition filed by Peter F. Skwirz, Esq. on behalf of Tom & Cynthia Sculco on an appeal of the decision of the Hopkinton Planning Board; appealing the decision of the Planning Board granting the approval of the master plan application submitted by RI-95, LLC for a large scale photovoltaic solar energy system located on property identified on the Hopkinton Tax Assessor's Map as Plat 11, Lot 47A; addressed as 0 Palmer Circle, Hope Valley, RI 02832 in accordance with R.I.G.L. 45-23-67, as amended. Appeal is made subsequent to the former R.I.G.L reference and Article XV of the Hopkinton Subdivision Regulations.

****A Stenographer was present.****

*****A transcript will be filed as part of this record.*****

Chairman Ure reminds the audience of the procedures of the Board of Appeals. During the proceedings, the Board will only entertain arguments based on evidence

that is already on the record and should not receive or consider any new evidence or factual testimony. The Board of Appeals determines if there was a procedural or legal error, or if there was insufficient evidence on the record to support the findings and conclusions of the Planning Board. The powers of the Board are further detailed in the Land Development Subdivision Regulations within Article 15.

Chairman Ure summarizes the previous arguments from the appellant. There were three essential arguments being made by the appellant. The subject property has a commercial-special zoning and was rezoned for the purpose of the Brayburn Project including a golf course, hotel, conference center, etc. and was not rezoned for any and all commercial uses allowed within a commercial zone. The second argument is that prior to the close of the informational hearing on May 5, 2021, the Planning Board voted unanimously that the doctrine of equitable estoppel prevented it from finding the proposed use was not an allowed use pursuant to the commercial special zoning of the property. The third argument is that a member of the Planning Board falsely and inappropriately made a comment on a Facebook post in regards to the Sculco's at a time when the application was pending before the Planning Board. The Sculco's asked that the member recuse himself as his comment showed a bias. The member's refusal to recuse showed a clear error and a procedural error.

Attorney William Landry presents his arguments as representative of the owner of the subject property, RI-95 LLC. Mr. Landry says the limitations and restrictions placed on the subject property were limitations on that particular project and not limitations to any project on the property. He states the project applied for and received a zoning ordinance amendment. At that time, there were fifteen permitted uses in a commercial zone. With the approved amendment, the project received an additional permitted use stating it was a mixed use and could be one or any mixture of the first fifteen uses permitted in the commercial zone. Mr. Landry states that solar is now a permitted use in a commercial zone subject to Planning Board approval. Mr. Landry concludes that the properties that have come out of the

Brayburn project are allowed to have a combination of uses, including any or all commercial uses, of which solar is a permitted use.

Mr. Landry states this decision has been determined seven different times by town officials and Boards acting within the scope of their authority. The first was in 2011 when Roy Dubs, who owned Lot 47D which was a part of the Brayburn project, presented a proposal to determine what could be done on the site. The solicitors for the Town at the time, Bengtson and Jestings, gave an opinion saying the lot can be used by right or by special use permit in any manner permitted by the current district use table for lots in a commercial district unless limited by the Town Council.

The second determination was by Brad Ward in his capacity as the Zoning Officer to interpret the Zoning Ordinance. He issued a formal determination after conferring with the Town's council, that the subject property may be used as permitted in the manner and with the restrictions identified in the July 2, 1990 amendment, any use that is permitted by right in the Zoning Ordinance and any use as permitted by special use permit in the Zoning Code.

The third and fourth determinations were in 2018 and 2019, respectively. These were made by the Planning Board acting within the scope of its authority granting a development plan review for a solar development on called Palmer Circle I, which was part of the Brayburn tract, finding that the solar use is permitted by right under the current zoning status. A year later, the Planning Board gave a similar finding for a solar project on part of the Brayburn project.

The fifth and sixth determinations came as a series of determinations in 2019. There is testimony on the record by Vincent Murano, the principle member of RI-95 LLC, that he had discussions with both the Town Planner and the Zoning Officer advising that solar is a recognized and permitted use on the property. Mr. Murano also delayed closing on the property to make sure he received in writing that solar would

be a permitted use. This clarification was written by Sherri Desjardins in her capacity for her duties with the Town that the intended use of the property was in accordance with the provisions of the Hopkinton Zoning Ordinance.

The seventh determination came from a law firm that more recently represented the Town, Brennan Recupero Cascione Scungio & McAllister. The opinion they provided confirms the Town's initial opinion and position that solar and other permitted uses in a commercial zone were allowed on this property.

The eighth determination is the decision made by the Planning Board in regards to this project that the proposed development is consistent with the Hopkinton Zoning Ordinance and the Town's long held and relied-upon interpretation of the July 2, 1990 zoning change and is the same use the Town has already approved on two prior applications of solar arrays on land that was part of the 1990 zone change.

Mr. Landry focuses on the Zoning Ordinances, specifically Section 4 which states that commercial special zoning districts composed of parcels of property which were the subject of a zoning map boundary change or amendment, the Commercial district is controlling the use and dimensional regulations to the Commercial Special district, except as the limitations, conditions, and/or restrictions as individually applicable to the property. Mr. Landry says this helps understands the limitations placed upon the subject property and whether it was intended to be exclusive of all the other uses. Mr. Landry says the ordinance states that all other uses continue to be available to the site unless an amendment specifically excludes them.

Mr. Landry continues to the second ground of appeal in regards that the Planning Board shouldn't have used the doctrine of equitable estoppel to vote in favor of the project. He wants to clarify that the Planning Board made their decision based on other findings of fact and the outcome does not fully depend on whether the doctrine of equitable estoppel applies. He states that both grounds on which the

Planning Board's decision independently rest are valid. Mr. Landry defines the doctrine of equitable estoppel as prohibiting a government entity from taking a position that is directly contradictory of its own prior acts. Mr. Landry states that the Planning Board found that the applicant had acted reasonably doing his due diligence in receiving determinations from the Town in regards to this project and that the applicant held off closing on the property until he received reaffirmations of the position.

Mr. Landry mentions a memo written by the previous Town solicitor Kevin McAllister who specifically addressed the doctrine of estoppel. Mr. Landry agrees with Attorney McAllister that a court would likely resolve any ambiguities regarding uses in favor of the landowner under the doctrine of equitable estoppel. Mr. Landry reads from the memo, stating that under the doctrine of equitable estoppel, it would prevent a municipality or Board from reversing an action or determination to the detriment of others who have relied upon that original action or determination.

Mr. Landry then addresses the two cases that Mr. and Mrs. Sculco have cited and states these cases should not be applied. He summarizes the cases and circumstances for each, stating necessary materials had not been submitted and without procedural requirements that building officials require by law. The building permits were withdrawn after it was found that the pre-requisites had not been insisted upon by the building official.

Mr. Landry points to the third argument in regards to the non-recusal by a Planning Board member. He mentions that the Planning Board does not tell a member or individual when to recuse. Attorney Landry states that the post that referred to the Sculco's as NIMBY's was written by another individual and not Mr. Prellwitz, the member of the Planning Board in question. The Sculco's were not parties before the Planning Board. The post was made in reference to something that was pending before the Town Council, not with respect to anything pending before the Planning

Board. Mr. Landry states that Mr. Prellwitz was simply responding in a matter-of-fact way. He continues to say the comment does not indicate any predisposition on Mr. Prellwitz's part with respect to the application that was pending before the Planning Board. The comment was made in regards to an amendment that was pending before the Town Council.

Mr. Landry states when Mr. Prellwitz was asked to recuse, he stated he would base his judgment of the case on its own merits. Mr. Landry mentions the RI Supreme Court has frequently repeated that adjudicators in administrative agencies enjoy a presumption of honesty and integrity. He continues to say any administrator is presumed to be neutral unless proven to be otherwise. He states the proponent of alleged bias, which would be the Sculco's, bears the burden of establishing a lack of impartiality. Mr. Landry claims there was nothing associated showing a lack of impartiality.

Mr. Landry then mentions a court case indicating what circumstances are necessary to show impartiality. He summarizes the case and states those circumstances do not apply in this instance.

Mr. Landry concludes stating there was no prejudicial or procedural error, much less a clear error on the issues described and detailed and that there was more than enough evidence to support the conclusion the Planning Board made.

Member Baruti asks Attorney Landry if the timing of a statement mattered to an application before a Board and if it could rise to a level of obligation to recuse. Mr. Landry answers that if the statement revealed some type of position on the issue, then he would agree that member must recuse. Mr. Landry states the comment made by Mr. Prellwitz did not indicate prejudgment of the project.

Member Baruti asks for clarification on the doctrine of equitable estoppel and asks the counsel if the decisions made by the Town on the issue were wrong, is he

suggesting that it binds the Planning Board to follow those decisions even if it is determined to be incorrect. Mr. Landry states that if it was clear and unequivocal that the proposed use was not allowed per the ordinance, he would agree it would not be permitted, but that is not this circumstance. Mr. Landry says that the Planning Board found the determinations were correct.

Member Harrington asks what the zoning was for the parcel prior to the 1990 amendment. Mr. Landry answers it was partly zoned residential and partly zoned light industrial. Member Harrington asks for clarification on the added sixteenth use made by the Town Council. Mr. Landry states the sixteenth use allowed for a mixed use of any of the previous fifteen allowed uses. Member Harrington asks if Mr. Landry was suggesting that the ordinance allows any commercial use in a commercial special zone unless a modification is made by the Town Council. Mr. Landry states that is correct. Member Harrington asks if the underlying zone is therefore commercial. Mr. Landry agrees since that is what the ordinance states. Member Harrington asks if that is spot zoning. Mr. Landry affirms it is.

Chairman Ure asks if the Hopkinton District Use Table has a mixed use. Mr. Landry states it does now. Chairman Ure asks if it specifies and allows multiple uses. Mr. Landry says it is only allowed if the ordinance allows it. Mr. Landry continues to say it clearly allows it in a commercial zone to stack any of the permitted uses.

Chairman Ure asks the counsel, based on his knowledge, if the estoppel was the primary reason the Planning Board made the decision or if it was just an additional statement to the findings of fact. Mr. Landry thinks it was just an add-on because of the structure of the decision.

Member Baruti asks if the counsel feels if the equitable estoppel argument fails, does the decision still stand based on the evidence in the record. Mr. Landry affirms

and says if the legal argument stands, the equitable estoppel argument isn't necessary.

Member Sposato asks if the Planning Board needed to reference the estoppel argument. Mr. Landry says they didn't have to.

A MOTION WAS MADE BY MEMBER HARRINGTON AND SECONDED BY MEMBER YORK TO BREAK FOR A SHORT RECESS. ALL WERE IN FAVOR.
SO MOVED

A MOTION WAS MADE BY MEMBER YORK AND SECONDED BY MEMBER SPOSATO TO RECONVENE THE MEETING AT 8:37 PM. ALL WERE IN FAVOR.
SO MOVED

Attorney Peter Skwirz addresses the Board. He refers to the seven prior decisions made by the Town because he feels as though that's what determined this case. Mr. Skwirz cites a statement made by the Chair of the Planning Board before approving the project. He states the prior decisions don't carry much weight because they are just opinions offered by solicitors and a zoning certificate which is non-binding. The Sculco's property was outside of the abutter radius for the previously two approved Palmer Circle projects so they never received notice for those projects.

Mr. Skwirz reiterates that a commercial special rezone is a special designation that has limitations and restrictions for the rezoning of the parcel. Mr. Skwirz states those limitations can be found in the minutes of the July 2, 1990 Town Council meeting. Mr. Skwirz continues that if you read the restrictions with common sense, it only leads to one conclusion: this parcel was rezoned for one development for specific uses and it was limited to those uses. He cites the motion made from the minutes of the meeting in which it says "…the motion was made by Counselor

Henson in accordance with their authority under the general laws move to approve the application…for a change of zoning district for the lots…from light industrial and RFR to a mixed use zone as requested for the following reasons and with the following restrictions and/or conditions…" Mr. Skwirz calls attention to the word restrictions and states the common definition is a limitation on what you can do.

Member Baruti asks for clarification if he is stating that this project is the only thing that can be built on the parcel forever until it is changed. Mr. Skwirz attests yes, unless the Town Council rezones the parcel.

Mr. Skwirz points to paragraph eleven that the applications is granted subject to the following restrictions A through D. Mr. Skwirz attests these restrictions state specifically what you are allowed to do on the subject property. He states that Letter B specifically restricts uses by saying "The maximum number of structures and the uses in this zone permitted in connection with this project shall be as proposed…" He states that the verbiage "in connection to this project" is to ensure the restrictions continue in the case the parcel is sold to another developer. He argues if the intent of the council was to allow any of the permitted uses, it would not be a restriction placed upon the parcel.

Mr. Skwirz disagrees with Mr. Landry's interpretations of the cases regarding the estoppel argument. He states the Courts decided the officials did not have the authority to change zoning. He suggests the central question should be what does the commercial special zone allow and are you doing what's allowed in the commercial special zone?

Mr. Skwirz mentions that a purchase and sales agreement can have a condition for the sale to take effect if permits for the proposed project are received and the estoppel argument should not be taken into consideration because the purchaser did not detrimentally rely on those decisions.

Member Baruti asks if the use granted to the Brayburn project was abandoned, and if so, what the status would be. Mr. Skwirz states that Brayburn did not develop the use and the Zoning Ordinance states if they don't take a use within two years, the council can change it back if they want to. Member Baruti asks if it is automatic. Mr. Skwirz states it is not. He explains it attaches to the property and if the council doesn't do anything to change the zoning of the property, the zoning stays the same whether or not development of the property progresses.

Member Harrington asks if the counsel is arguing the seven determinations made by different Town officials were wrong. Attorney Skwirz affirms he does not agree with the opinions because zoning restrictions apply to property and they don't apply to projects or people.

Member Baruti asks what kind of language the counsel would expect to see in the minutes from the council to suggest they had contemplated the full array of commercial uses. Attorney Skwirz states they should have simply rezoned the parcel to commercial to allow everything permitted in a commercial zone. Member Baruti asks if the counsel is suggesting the only thing permitted on that parcel are the restrictions included in the minutes of the July 2, 1990 meeting. Mr. Skwirz affirms stating it is because when they passed it, they added the restrictions and was the intent of the restrictions. He explains that the restrictions can be removed, but it is a different method for removing the restrictions involving getting approval for a Master Plan from the Planning Board, then asking the Town Council to allow the use.

Attorney Maggie Hogan addresses the Board. She explains the Planning Board's decision in regards to the doctrine of equitable estoppel was done at the commencement of the hearings because the Sculco's attorney insisted there was no reason for the Board to go forward since it wasn't an allowable use. She further explains in October of 2020 and in March of 2020, there were extensive briefs and at the October meeting, an argument of the issue, in which the issue needed to be

decided. Ms. Hogan also addresses the Board's previous question if the Planning Board made a substantive decision if it was consistent with the Zoning Ordinance itself. Ms. Hogan highlights the word "and" in the findings of fact stating the Planning Board found the proposed use consistent with the Zoning Ordinance and there was an issue with equitable estoppel.

Chairman Ure invites members of the public to speak, but reminds of the narrow scope of the Board of Appeals and no new testimony may be submitted. No members of the public requested to speak.

Mr. Landry addresses the Board in regards to the zoning certificates mentioned by Mr. Skwirz. Mr. Landry clarifies that the Brad Ward determination was a determination letter under his authority as the Building Official under the State Zoning Enabling Act to interpret the Zoning Ordinance. Mr. Landry disagrees that the courts have ruled zoning certificates as non-binding, but that it is irrelevant in this case. He summarizes there were multiple determinations made by different zoning officials, separate law firms, and separate determinations by the Planning Board supporting the argument that this was an allowable use.

Mr. Landry also states they agree that the restrictions apply to the land and not the owner. Their argument is that the restrictions apply the way the minutes dictate.

Joseph Moreau from Old Depot Road addresses the Board. He summarizes the previous proposals for medical buildings and concern about traffic on the narrow road. He states the developer is doing what's best for the residents and for Hopkinton in that area. He cannot see a critical error made by the Planning Board and believes they went above and beyond of their scope and did research on this project specifically.

Kevin Cronan at 8 Palmer Circle addresses the Board. He states that, as an abutter to the project, he supports having solar as a neighbor as opposed to the proposed hotel, office buildings, and medical buildings.

A MOTION WAS MADE BY MEMBER HARRINGTON AND SECONDED BY MEMBER YORK TO CONTINUE THE MATTER UNTIL MAY 19, 2022. CHAIRMAN URE, MEMBERS YORK, HARRINGTON, AND SPOSATO APPROVED. MEMBER BARUTI OPPOSED. MOTION PASSES.
SO MOVED

A MOTION WAS MADE BY MEMBER YORK AND SECONDED BY MEMBER HARRINGTON TO ACCEPT THE MINUTES FROM THE BOARD OF APPEALS MEETING ON OCTOBER 21, 2021. CHAIRMAN URE, MEMBERS YORK, HARRINGTON, SPOSATO, AND HEIL APPROVED.
SO MOVED

A MOTION WAS MADE BY MEMBER HARRINGTON AND SECONDED BY MEMBER SPOSATO TO ACCEPT THE MINUTES FROM THE BOARD OF APPEALS MEETING ON DECEMBER 16, 2021. CHAIRMAN URE, MEMBERS HARRINGTON AND SPOSATO APPROVED.
SO MOVED

A MOTION WAS MADE BY MEMBER YORK AND SECONDED BY MEMBER HARRINGTON TO ADJOURN THE MEETING AT 9:23 PM. ALL WERE IN FAVOR.
SO MOVED

Respectfully Submitted,
Tiana Zartman
Zoning Board Clerk

Next Scheduled Meeting: May 19, 2021