RE: ATLANTIC/MAIN STREET

REBUTTAL MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS
APPLICATION FOR MASTER PLAN APPROVAL

Unfortunately, with memoranda, rebuttals, a plethora of exhibits totaling ninety-eight (98) pages, we can no longer see the forest through the trees.

Respectfully basic Black Letter Zoning Law has only one result- the application cannot proceed. Under the applicant's and solicitor's arguments the Master Plan Application could be filed a century later and apply the "general" zoning ordinance of 2016. That position clearly is incredible.

It is a fundamental principle that municipal ordinances are inferior in status and subordinate to state statutes. An ordinance which is inconsistent with a statute is deemed invalid and is preempted. Town of East Greenwich v. O'Neil 617AZd104, 109 (R.I. 1992).

An ordinance may be preempted by "conflict preemption" and/or by "field preemption". As stated in City of Providence v. Auger, 44 A.3d 1218, 1229 (R.I. 2012):

> ....**A municipal ordinance is preempted by statute "when either the language in the ordinance contradicts the language in the statute [a.k.a. "conflict preemption"] or when the general assembly has intended to thoroughly occupy the field" [a.k.a. "field preemption"]**. Coastal Recycling, Inc. v. Connors, 854 A.2d 711, 715 (R.I. 2004) (internal quotation marks omitted); see also URI Student Senate v. Town of Narragansett, 631 F. 3d 1, 7(1st Cir. 2011) (applying principles of Rhode Island law regarding preemption); Amico's Inc. v Mattos, 789 A.2d 899, 907 (R.I.2002)....

The Zoning enabling Act contains no authority to enact a zoning ordinance which handcuffs all future city councils. In fact, RIGL 45-24-53 (h) permits the council to change the zoning

designation back to the prior zoning designation after two (2) years. As the statute states in pertinent part:

> "... If the permitted use for which the land has been rezoned is abandoned or if the land is not used for the requested purpose for a period of **two (2) years** or more after the zone change becomes effective, the town or city council may, after a public hearing, **change the land to its original zoning use before the petition was filed**..." 45-24-53 (h)

The applicant and solicitor's argument advocates that a city council may handcuff all future councils in perpetuity.

As Roland F Chase, Rhode Island Zoning Handbook (3rd edition, Lawyers Weekly, Inc.) states:

> **§ 46. Conflict With Provisions of Enabling Act**
>
> **Zoning ordinances must comply** not only with the zoning enabling act's provision requiring consistency with the local comprehensive plan, but also **with** numerous other provisions of **the enabling act**. For the most part they may be summed up by using traditional zoning language: zoning regulations **must serve to promote the "public health, safety and general welfare:'227 Ordinances that fail to relate reasonably or rationally to this standard are *void***, since in zoning law, as in other fields of law, **local ordinances are *invalid* if they conflict with state statutes.** Thus, **if a local zoning ordinance purports to authorize something more or something less than the enabling act, it is a *nullity***, Fn.230 since in its broad outline, at least, **land use regulation is considered a matter of statewide concem**. Fn.231. The power to grant variances, for example, is a direct **grant of authority from the legislature to boards of review and can be neither enlarged nor restricted by provisions contained in local ordinances**.232
>
> > Fn.230. Hartunian v. Matteson, 109 R.I. 509, 288 A.2d 485 (1972) (**any ordinance provision purporting to expand or abridge right contained in enabling act is *void***); American Oil Co. v. City of Warwick, 116 R.I. 31, 351 A.2d 577 (1976). See also Gardiner v. Zoning Bd. of Review, 101 R.I. 681,226 A.2d 698 (1967) (stating under former enabling act that if local ordinance provides that unnecessary hardship must not have been self-imposed, this does not really help objector, since **no such requirement is imposed by state law**). Note, however, that Gardiner was decided under the former enabling act, and that the Zoning Enabling Act of 1991 does contain a self-imposed hardship provision; see R.I.G.L. § 45-24-41(c)(2), discussed in§ 152.

Fn.231. See ***Munroe v. Town of East Greenwich, 733 A.2d 703 (R.I. 1999)*** (stating that ***zoning, land development and subdivision regulations are matters of statewide concern; thus state laws in these areas preempt local legislation embodied in charter, ordinance or other regulation***); **New England Expedition-Providence v. City of Providence, 773 A.2d 259 (R.I. 2001) (local ordinance is *preempted* by zoning enabling act if it disrupts state's overall scheme of regulation**).

§ 158. Land Development Projects - Procedure

A zoning ordinance which permits or requires the creation of land development projects in one or more zoning districts must require that any such projects be referred to the city or town planning board or commission for approval. Fn.78. **Although not mentioned in the enabling act, the municipality can also require zoning board approval in addition to planning board approval for land development projects However, it cannot replace the planning board with another administrative body, such as the city or town council, as the final decision-making agency for land development projects.**

In acting on a land development project application, the **planning body must follow the procedures established by the Development Review Act**, including those for administrative appeal and judicial review and the applicable subdivision ordinances or regulations, whether or not the land development project constitutes a subdivision as defined by law.

Fn.78. R.I.G.L. § 45-24-47(b). See **Munroe v. Town of East Greenwich, 733 A.2d 703 (R.I. 1999) (home rule charter provision naming town council as town's "Platting and Subdivision Board" was superseded by Zoning Enabling Act of 1991 and Development and Subdivision Review Enabling Act of 1992, which require land development projects to be approved by planning board)**.

As Rathkopf's The Law of Zoning and Planning § 48:1 (4th ed.) states:

§ 48:1. An overview

Zoning and other local regulation of the use of land will be held invalid and unenforceable when such regulation is found to be preempted by either state or federal law. **The general rule on this *ultra vires* issue is that local legislation will be held invalid as beyond the scope of local authority when that legislation directly conflicts with state law or policy. But where local legislation either supplements statutory provisions or has reference to purely**

local conditions cognizable under the police powers of local government, courts may find no preempting conflict and hold the ordinance valid.....

§ 48:2. Express preemption

A state statutory provision, which by its terms clearly and expressly preempts local regulation of a particular land use, usually will be held to be determinative of the preemption issue. Such express preemption occurs when state law squarely addresses the land use generally, or when state law affects a particular aspect of the land use, such as the operation or licensing of the land use. In general, the state preemption issue is one of interpretation—whether local authority to regulate under a zoning enabling act or home-rule constitutional provision is preempted by state law or policy.

§ 48:3. Implied preemption

Preemption of local regulation may be found even in the absence of an explicit statutory provision. ***Preemption may be "implied" where courts find implicit in a state regulatory scheme a "clear intent" to supersede local regulation or a "sharp conflict" between state and local regulation which frustrates achievement of a state purpose or policy***. In the absence of a clear statutory intent to preempt local regulation or a direct conflict with a statutory purpose, most state courts grant local governments considerable latitude to legislate concurrently with the state. Many state courts hold that, **where the state legislature has not clearly manifested an intent to occupy the field, a municipality may provide for additional or more extensive regulation of a land use** provided such regulation is consistent with the spirit and intent of the state statute. In this context, **supplemental restrictions usually will be permitted, but stricter local standards will raise a serious preemption issue** and may be held invalid where a clear intent to preempt stricter local standards is found or the stricter standards clearly frustrate the statutory purpose. **When determining this "implied preemption" issue, whether the state has acted in a comprehensive manner or whether there is a need for uniformity with respect to a matter of statewide concern are important factors considered by courts**.....

As Corpus Juris Secundum states:

101A C.J.S. Zoning and Land Planning § 10 Concurrent and conflicting exercise of zoning power by state and local authorities

Local zoning regulations or ordinances may not contravene zoning statutes, and local regulations may be enacted on subjects on which the State has

enacted legislation not relating to zoning only if the State has not preempted the field of legislation on such subjects.

....

A zoning ordinance also must yield where it conflicts with the powers granted by other legislation to the state, to one of its agencies, or to some other governmental unit. Zoning regulations thus may be required to yield to preemptive state action with respect to alcohol beverage control, authorization of racetracks, waste disposal or pollution control, a housing board or commission, or public school authorities. The statutory right of a public utility to maintain facilities within a locality likewise may not be contravened by a zoning ordinance.

On the other hand, a statute regulating matters other than zoning, but not preempting the field of legislation as to such matters, does not bar the adoption of local zoning ordinances, regulations, or resolutions relating to the subject matter of the statute. Thus, when analyzing whether state legislation preempts a municipal zoning ordinance, preemption analysis calls for the answer initially to whether the field or subject matter in which the ordinance operates, including its effects, is the same as that in which the state has acted, and if not, then preemption is clearly inapplicable.

A state statute may not unreasonably and unlawfully limit the enforcement by municipalities of a local zoning ordinance enacted under police powers authorized by the state constitution to municipalities.....

1. R.I. Zoning Enabling Act

§ 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**. (Emphasis and underlining added)

(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.**

Since section (a) states that "a zoning ordinance provides protection for the consideration of applications... that are **substantially complete,**" and since section (a) states that "[a]ny 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**, and since these two sections must be read together (*in pari materia*) so as to make sense, ***an application cannot be considered as having been "submitted" until it is "substantially complete***."[1]

The master plan application was **certified as complete in July 2021**. At that time the general solar ordinance prohibited commercial solar in residential zones such as this project.

Respectfully Submitted,

/s/ S. Paul Ryan
S. Paul Ryan, Esq. (#2264)
201 Washington Road
Barrington, RI 02806
401-289-0184

[1] As stated in 73 Am. Jur. 2d Statutes § 96 entitled "Parts of same statute":

> The different parts of a statute reflect light upon each other, and statutory provisions are regarded as in pari materia where they are parts of the same act. **Courts do not construe statutory phrases in isolation. The court must give effect to the entire act and not just its isolated portions. Hence, a statute should be construed in its entirety and as a whole. A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent.** ***All parts of the act should be considered, and construed together, so as to produce a harmonious whole***. In construing a statute, courts harmonize the various parts of the enactment by considering them in the context of the statutory framework as a whole. When interpreting a statute, the United States Supreme Court construes language in light of the terms surrounding it. Words and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole. Terms ordinarily possess a consistent meaning throughout a statute....