

THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

In re Application of Clipper Traders, LLC, Portsmouth
Lumber and Hardware, LLC, and Iron Horse Properties, LLC,
regarding the property located at 105 Bartlett Street,
and known familiarly as

The North Mill Pond Project

APPEAL OF DECISION OF
PORTSMOUTH PLANNING BOARD

Pursuant to RSA 676:5, III, James A. Hewitt, Elizabeth E. Hewitt, James A Beal, Mary Beth Brady, Mark Brighton, Lenore Weiss Bronson, Nancy Brown, William R. Castle, Lawrence J. Cataldo, Ramona Charland, Lucinda Clarke, Fintan ("Finn") Connell, Marjorie P. Crean, Ilara Donarum, Joseph R. Famularo, Jr., Philippe Favet, Tammy J. Gewehr, Abigail Gindele, Charlotte Gindele, Julia Gindele, Linda Griebisch, Catherine L. ("Kate") Harris, Roy W. Helsel, John E. Howard, Nancy B. Howard, Elizabeth Jefferson, Cate Jones, Robert McElwain, Mary Lou McElwain, Sally Lurie Minkow, Edward Rice, April Weeks, Michael Wierbonics, and Lili Wierbonics (collectively referred-to hereinafter as "the appellants"), all of whom are citizens, residents and/or property owners in the City of Portsmouth, hereby appeal the April 15, 2021 decision of the Portsmouth Planning Board, in which said

Board (a) granted a wetlands conditional use permit to the owner-developers, Clipper Traders, LLC, Portsmouth Lumber and Hardware, LLC, and Iron Horse Properties, LLC, for the above-referenced lot of property located at 105 Bartlett Street, purportedly granting such permit pursuant to Section 10.1017 of the Portsmouth Zoning Ordinance; (b) granted a parking conditional use permit for said property, purportedly pursuant to Section 10.1112 of said Ordinance; (c) approved site plan review of said property; and (d) approved various lot line revisions.

As grounds for their appeal, the appellants state that the Planning Board misconstrued, misinterpreted and/or misapplied a number of provisions of the Portsmouth Zoning Ordinance and, in some cases, failed to observe those provisions altogether. Additionally, the Planning Board's above-described actions were in direct conflict with two prior decisions of this Zoning Board of Adjustment, which on January 22, 2020 denied two requests by the applicants for variances which would have (i) allowed them to erect buildings or other structures blocking the Dover Street view corridor, and (ii) allowed them to erect buildings more than 50' in height.

STANDARD OF REVIEW OF
PLANNING BOARD DECISIONS

The legal standard for review of the Planning Board decisions by the Zoning Board of Adjustment is de novo. Quellette v. Town of Kingston, 157 N.H. 604, 608-12, 956 A.2d 286, 290-93

(2008); 15 Peter J. Loughlin, New Hampshire Practice: Land Use Planning & Zoning § 33.02 n.10 (4th ed. 2010 & Supp. 2020). This Zoning Board of Adjustment is required to consider the applicants' petitions anew, and the ZBA is not required to give any deference to any of the findings and conclusions reached by the Planning Board. Id. In fact, this Board (viz., the ZBA) may substitute its own judgment in toto for that of the Planning Board, if it is so inclined. Id.

GROUNDNS FOR APPEAL

The appellants assign the following, specific grounds for their appeal, consisting of ways in which the Planning Board misconstrued, misinterpreted, misapplied, or, in some instances, altogether failed to observe and follow the provisions of the Portsmouth Zoning Ordinance:

I. Section 10.5A41.10B of the Zoning Ordinance provides that in the CD4-W district, the maximum allowable building length is 200 feet, unless a conditional use permit is issued. On the site plan approved by the Planning Board in its April 15, 2021 decision, Building C is 250 feet in length and Building C is 227 feet in length, and the owner-applicants neither applied for nor obtained a conditional use permit with respect to same. Therefore, the site plan which the Planning Board approved was in violation of said provision of the Ordinance.

II. The Planning Board improperly granted the owner-developers a conditional use permit allowing them to block the

Dover Street view corridor. Section 10.5A42.40 of the Zoning Ordinance provides for the preservation of view corridors to the North Mill Pond area. It states:

All new **buildings** or structures located within 400' of the North Mill Pond shall be located in such a way as to maintain existing public views with a terminal vista of the North Mill Pond from the intersecting **streets** of Dover Street, Cabot Street, Cornwall Street and Langdon Street. Except for existing obstructions, the public view corridor shall be maintained for a minimum width of the existing public right-of-way of the nearest intersecting **street** as listed above.

(Emphasis in original.) Under the site plan for 105 Bartlett Street which was approved by the Planning Board in its April 15, 2021 meeting, the Dover Street view corridor is undisputably blocked by the elevated terrace and landscaping between Buildings A and B, in direct violation of the above-quoted Section 10.5A42.40. A wall is to be built between those buildings, the top of which will be about 6' or 7' above original grade (or 17.5' above sea level), obstructing the view corridor; and, though unclear from the plan, it is possible that portions of Buildings A and B themselves may obstruct that corridor, also. Therefore, the site plan and subdivision plan were approved in a manner which is in direct violation of the requirements of the Zoning Ordinance.

III. Further, not only were the site plan and subdivision plan approved in violation of the terms of the Ordinance in that respect, but they were also approved in contravention of a prior

decision issued by this Zoning Board of Adjustment a year ago. At that time, the owner-developers applied for a variance seeking precisely the same relief which the Planning Board implicitly granted them by approving the site plan: they asked for a variance from the requirements of Section 10.5A42.40 of the Ordinance in order to allow them to block the Dover Street view corridor. On January 22, 2020 this Zoning Board of Adjustment denied their request for that variance, doing so by a 6-0 vote. Thus, the Planning Board's action in approving the site plan and subdivision plan was both contrary to the Zoning Ordinance and contrary to this Zoning Board of Adjustment's own prior ruling.

IV. The Planning Board also erred in granting a wetlands conditional use permit, as the project does not meet the requirements set forth in the wetlands section of the Zoning Ordinance, Section 10.1017.50. Where wetlands are at issue, Section 10.1017.50 requires that the development meet all of the following criteria:

(1) The land is reasonably suited to the **use, activity or alteration.**

(2) There is no alternative location outside the **wetland buffer** that is feasible and reasonable for the proposed **use, activity or alteration.**

(3) There will be no adverse impact on the **wetland** functional values of the site or surrounding properties;

(4) **Alteration** of the natural vegetative state or managed woodland will occur only to

the extent necessary to achieve construction goals; and

(5) The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this Section.

(6) Any area within the **vegetated buffer strip** will be returned to a natural state to the extent feasible.

(Emphasis in original.) Of these six criteria, it is only necessary to consider #2 and #5, for in the final hearing before the Planning Board the developers' representatives admitted that it was both possible and feasible to erect residential buildings outside the wetland buffer and that there were other alternatives which would have had less impact upon the site in question. Although in the appellants' view the developers' plan fails to meet several of the other criteria as well, this concession by itself demonstrates that the Planning Board's decision was wrong and that the plan violates the requirements of the above-quoted section of the Ordinance, § 10.1017.50. There is plainly "[an] alternative location outside the wetland buffer that is feasible and reasonable for the proposed use," § 10.1017.50(2), and it is clear that the developers' present plan is not the alternative "with the least adverse impact to areas and environments under the jurisdiction of this Section." Ordinance § 10.1017.50(5) (emphasis added). The owner-developers admitted as much during the April 15, 2021 hearing before the Planning Board.

A sketch of one such alternative, using the developers' own site plan as a template, is appended hereto as Attachment A as an example. This sketch shows how three buildings could be erected outside the 100' wetland buffer at a location that is both "feasible and reasonable for the proposed use," and moreover this alternative would plainly have "[less] adverse impact to areas and environments under the jurisdiction of" the wetlands ordinance, viz., the North Mill Pond. Portsmouth Zoning Ordinance § 10.1017.50(2), -(5). Further, Attachment A is merely one example. As another approach, it would also be feasible for the developers to simply make their buildings smaller, similarly avoiding encroachment into the 100' wetlands buffer. In any event, Attachment A would also provide the developers with ample means of making a handsome return on their investment, even if there are other plans that would have been more profitable.

The only explanation that the owner-developers have ever offered as to why they cannot adopt and implement a plan which would observe the 100' wetlands buffer and would be less intrusive to the environment is that any alternative plan which they might be able to devise would be less profitable to them than the one which they have proposed. However, relative lack of profitability, or the fact that a given alternative plan does not represent the "highest and best use" which might have been made of the property if no restrictions had existed, is no excuse for flouting the requirements of Portsmouth wetlands ordinance and

the wetlands laws in general. The wetlands ordinance specifically provides that economic considerations alone are not sufficient reason for granting a conditional use permit. Zoning Ordinance § 10.1017.44. By approving the developers' plan on the basis of that rationale, the Planning Board committed clear error.

V. For substantially the same reasons as those given above, the Planning Board erred in voting to grant a conditional use permit for shared parking pursuant to Section 10.1112. There were less intrusive designs that could have been utilized for the project which would have avoided encroachment into the 100' wetlands buffer.

VI. The Planning Board's decision of April 15, 2021 is also infected by a procedural infirmity. Under the City of Portsmouth's scheme for review of site plans and subdivision plans when wetlands issues are implicated, the developer's plan is first to be referred to the Conservation Commission for review and for a report back to the Planning Board concerning the impact of the project on the wetlands and the environment. The Conservation Commission must make a favorable recommendation of the project to the Planning Board before that latter can proceed further. Though the Conservation Commission at its February 10, 2021 meeting voted to approve the developers' plan and recommend it to the Planning Board in the most general terms, the Conservation Commission never reviewed, considered, or made spe-

cific findings concerning the six criteria delineated in Section 10.1017.50, quoted above.

VII. Through architectural sleight-of-hand, the owner-developers are also attempting to circumvent this Zoning Board of Adjustment's January 22, 2020 decision denying them a variance to exceed the five-story, 50' height limit imposed by Sections 10.5A43.31 and 10.5A46.10 of the Zoning Ordinance. In its decision of January 22, 2020, this Zoning Board of Adjustment denied, by a unanimous 6-0 vote, the owner-developers' request for a variance to allow them to exceed the 50' height limit and to erect one of their proposed buildings to a height of 60'. Under the current iteration of their plan, they propose to artificially raise the ground level of the building in question by importing fill and depositing it underneath the foundation, raising the first floor of the building by about 7' to 8', and spuriously calling the bottom of the raised first floor the new "ground level". The fill will encompass a so-called "underground garage," and in practical effect it will add an additional story to the building. As a result, the top of the new building will be about 57' or 58' above the actual ground level, in violation of both the 50' height limit imposed by the above-referenced sections of the Zoning Ordinance and also in violation of this Zoning Board of Adjustment's decision of January 22, 2020, denying the owner-developers' request for a variance from the 50' height limit.

VIII. The project was the product of unlawful "spot zoning". As the developers themselves explained in their presentations to both the Conservation Commission and the Planning Board, they persuaded the City Council to re-zone three adjoining lots and to redraw the lot lines specifically for their benefit, so that the project in question could go forward. The new zoning district (or three new zoning districts, depending upon how one chooses to view them) were tailor-made for their plans, and the result is a massive project which clashes with the character of the adjoining neighborhood: three massive, four- and five-story structures (when taking into account the so-called "underground" parking garages) set beside a predominantly residential neighborhood composed of one- and two-story houses and small industrial buildings, blocking the neighbors' view of the North Mill Pond. Because the subdivision plan and site plan are the products of spot zoning, they must be disapproved.

IX. The provisions of Portsmouth's zoning ordinance pertaining to conditional use permits are invalid on their face, in that, as drafted, they are not authorized by the enabling statute, RSA 674:21. That statute allows a conditional use permit as part of "innovative" land use controls, RSA 674:21, II, and provides examples thereof, RSA 674:21, I. Those examples are:

- (a) Timing incentives.
- (b) Phased development.
- (c) Intensity and use incentive.

- (d) Transfer of density and development rights.
- (e) Planned unit development.
- (f) Cluster development.
- (g) Impact zoning.
- (h) Performance standards.
- (i) Flexible and discretionary zoning.
- (j) Environmental characteristics zoning.
- (k) Inclusionary zoning.
- (l) Accessory dwelling unit standards.
- (m) Impact fees.
- (n) Village plan alternative subdivision.

RSA 674:21, I.

None of these innovations had anything to do with the conditional use permits that were issued to the owner-developers in this case. Nor, more importantly, do they have anything to do with the conditional use provisions of the zoning ordinance itself. The conditional use permits provided-for in Portsmouth's wetlands ordinance are not innovative; on the contrary, they purport to allow the Planning Board to award the functional equivalent of a simple special exception for encroachment into the 100' wetlands buffer. Furthermore, in this instance the Planning Board applied the ordinance in an unsophisticated, non-innovative manner by focusing exclusively on perceived benefits of the project while ignoring its insult to the wetlands buffer. Contrary to the letter and spirit of the statute, the conditional use

permits granted to the developers in this case were nothing more than plain vanilla special exceptions.

CONCLUSION

For all of the foregoing reasons, the Zoning Board of Adjustment should overrule the findings of the Planning Board, should vacate the latter's decision of April 15, 2021, should direct that the applicants' site plan and subdivision plan be disapproved, and should rescind the conditional use permits which have been granted to the applicants.

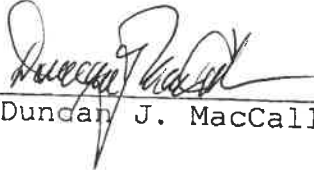


Duncan J. MacCallum
NHBA #1576
536 State Street
Portsmouth, New Hampshire 03801
(603) 431-1230
madbarrister@aol.com
Attorney for Appellants

CERTIFICATE OF SERVICE

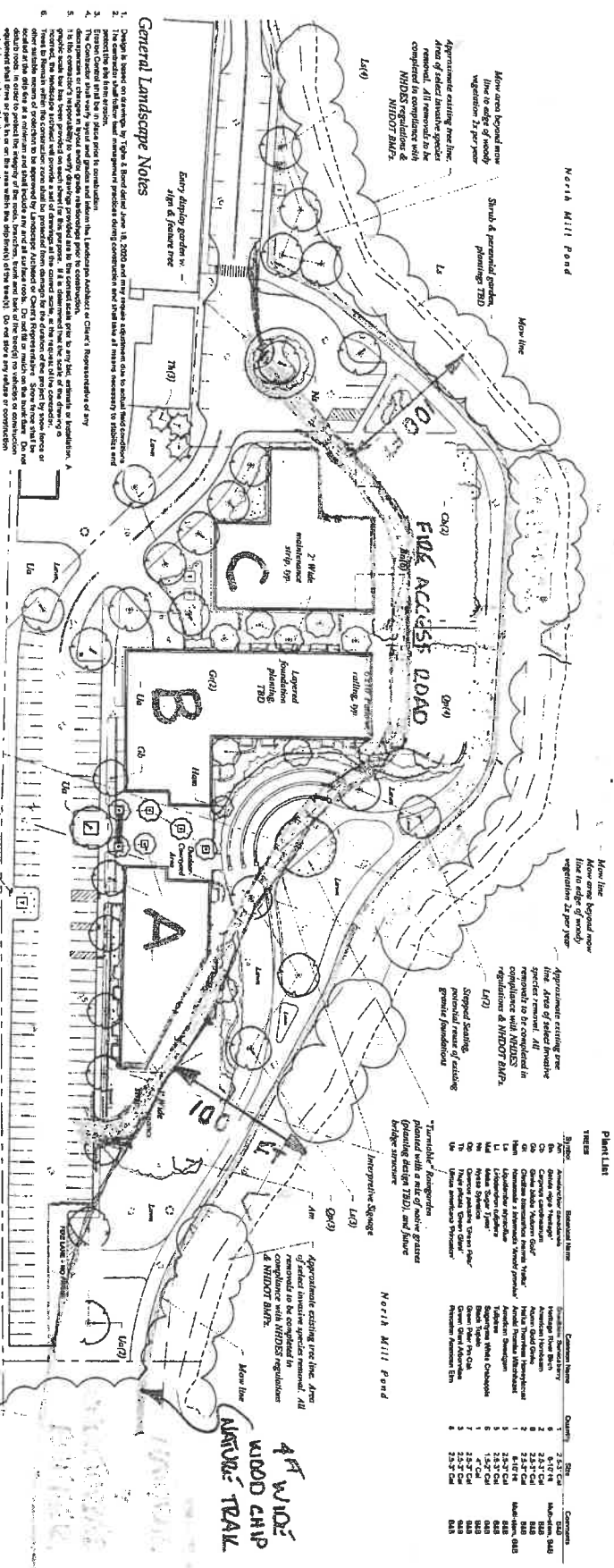
The undersigned, Duncan J. MacCallum, Attorney for Appellants in the within proceeding, hereby certifies that on this 14th day of May, 2021, a true and correct copy of the foregoing Appeal of Decision of Portsmouth Planning Board was served upon the applicants by forwarding same by first class mail, postage prepaid, to the following counsel of record:

Robert A. Previti, Esquire
Stebbins, Lazos & Van Der Beken, LLC
889 Elm Street, 6th Floor
Manchester, New Hampshire 03101


Duncan J. MacCallum

ATTACHMENT A

- ### General Landscape Notes
1. Changes to existing site plan, including but not limited to, shall be subject to the approval of the Planning Director.
 2. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 3. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 4. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 5. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 6. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 7. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 8. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 9. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 10. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 11. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 12. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 13. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 14. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 15. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 16. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 17. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 18. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 19. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 20. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 21. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 22. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 23. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 24. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 25. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 26. The contractor shall be responsible for obtaining all necessary permits for the proposed work.
 27. The contractor shall be responsible for obtaining all necessary permits for the proposed work.



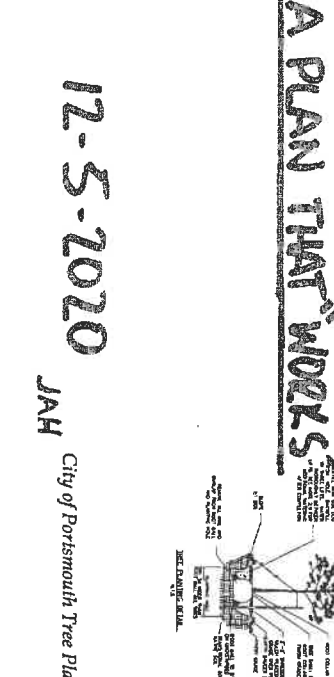
Plant List

TREE	Quantity	Plant Name	Plant Size	Comments
1	1	Large tree	12-15' DBH	Remove
2	2	Medium tree	8-10' DBH	Remove
3	3	Small tree	4-6' DBH	Remove
4	4	Shrub	6-8' H	Remove
5	5	Shrub	4-6' H	Remove
6	6	Shrub	2-4' H	Remove
7	7	Shrub	2-4' H	Remove
8	8	Shrub	2-4' H	Remove
9	9	Shrub	2-4' H	Remove
10	10	Shrub	2-4' H	Remove
11	11	Shrub	2-4' H	Remove
12	12	Shrub	2-4' H	Remove
13	13	Shrub	2-4' H	Remove
14	14	Shrub	2-4' H	Remove
15	15	Shrub	2-4' H	Remove
16	16	Shrub	2-4' H	Remove
17	17	Shrub	2-4' H	Remove
18	18	Shrub	2-4' H	Remove
19	19	Shrub	2-4' H	Remove
20	20	Shrub	2-4' H	Remove
21	21	Shrub	2-4' H	Remove
22	22	Shrub	2-4' H	Remove
23	23	Shrub	2-4' H	Remove
24	24	Shrub	2-4' H	Remove
25	25	Shrub	2-4' H	Remove
26	26	Shrub	2-4' H	Remove
27	27	Shrub	2-4' H	Remove
28	28	Shrub	2-4' H	Remove
29	29	Shrub	2-4' H	Remove
30	30	Shrub	2-4' H	Remove
31	31	Shrub	2-4' H	Remove
32	32	Shrub	2-4' H	Remove
33	33	Shrub	2-4' H	Remove
34	34	Shrub	2-4' H	Remove
35	35	Shrub	2-4' H	Remove
36	36	Shrub	2-4' H	Remove
37	37	Shrub	2-4' H	Remove
38	38	Shrub	2-4' H	Remove
39	39	Shrub	2-4' H	Remove
40	40	Shrub	2-4' H	Remove
41	41	Shrub	2-4' H	Remove
42	42	Shrub	2-4' H	Remove
43	43	Shrub	2-4' H	Remove
44	44	Shrub	2-4' H	Remove
45	45	Shrub	2-4' H	Remove
46	46	Shrub	2-4' H	Remove
47	47	Shrub	2-4' H	Remove
48	48	Shrub	2-4' H	Remove
49	49	Shrub	2-4' H	Remove
50	50	Shrub	2-4' H	Remove
51	51	Shrub	2-4' H	Remove
52	52	Shrub	2-4' H	Remove
53	53	Shrub	2-4' H	Remove
54	54	Shrub	2-4' H	Remove
55	55	Shrub	2-4' H	Remove
56	56	Shrub	2-4' H	Remove
57	57	Shrub	2-4' H	Remove
58	58	Shrub	2-4' H	Remove
59	59	Shrub	2-4' H	Remove
60	60	Shrub	2-4' H	Remove
61	61	Shrub	2-4' H	Remove
62	62	Shrub	2-4' H	Remove
63	63	Shrub	2-4' H	Remove
64	64	Shrub	2-4' H	Remove
65	65	Shrub	2-4' H	Remove
66	66	Shrub	2-4' H	Remove
67	67	Shrub	2-4' H	Remove
68	68	Shrub	2-4' H	Remove
69	69	Shrub	2-4' H	Remove
70	70	Shrub	2-4' H	Remove
71	71	Shrub	2-4' H	Remove
72	72	Shrub	2-4' H	Remove
73	73	Shrub	2-4' H	Remove
74	74	Shrub	2-4' H	Remove
75	75	Shrub	2-4' H	Remove
76	76	Shrub	2-4' H	Remove
77	77	Shrub	2-4' H	Remove
78	78	Shrub	2-4' H	Remove
79	79	Shrub	2-4' H	Remove
80	80	Shrub	2-4' H	Remove

105 BARTLETT ST.

City of Portsmouth Landscape Notes

1. The property owner and all future property owners shall be responsible for the maintenance of the landscape.
2. All required plant materials shall be provided and installed at a nearby growing location (referred to as "planting site") and kept safe and secure.
3. The property owner shall be responsible for removing and replacing dead or damaged plant materials existing within the same species, size and quantity of plant material as the original plant material.



12-5-2020
 JAH
 City of Portsmouth Tree Planting Detail

Drawn By: VJA
 Checked By: RW
 Scale: 1" = 40'-0"
 Date: May 26, 2020
 Worksheet: October 26, 2020

Proposed Multi-Family Development

LANDSCAPE PLAN

105 Bartlett Street Portsmouth, New Hampshire

NDSCAPE ARCHITECTURE