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 at, the "North Mill Pond Project."

INTERVENOR'S MOTION TO DISMISS AND MERITS RESPONSE TO APPELLANTS' APPEAL OF DECISION OF THE PORTSMOUTH PLANNING BOARD

Iron Horse Properties, LLC[1] ("Iron Horse"), by and through its attorneys, Sheehan Phinney Bass & Green, intervenes in the above-captioned matter and submits this Motion to Dismiss and Merits Response to Appellants'[2] Appeal of Decision of the Portsmouth Planning Board.

At its regularly scheduled meeting that commenced on April 15, 2021, with written decision dated April 20, 2021, the Portsmouth Planning Board ("Planning Board") granted site plan approval for Iron Horse's residential development of 105 Bartlett Street (the "Proposed Development"). Specifically, the Planning Board granted Iron Horse's Wetland Conditional Use Permit as presented and its Conditional Use Permit for shared parking with stipulations. The Planning Board also approved Iron Horse's Site Plan and Lot Line Revision, both with stipulations.

On May 17, 2021, Appellants filed a nine-count appeal with the Portsmouth Zoning Board of Adjustment ("ZBA"), challenging all four Planning Board approvals. Seven of Appellants' nine counts are subject to summary disposition. Appellants waived counts I, III,

[1] The Planning Board's decision of April 20, 2021 presently under review was directed to Iron Horse Properties, LLC only and the Site Plan Application appurtenant to this dispute was submitted by Iron Horse Properties, LLC. It is unclear why Appellants have included Clipper Traders, LLC, Portsmouth Lumber and Hardware, LLC, and Iron Horse Properties, LLC in the caption.

[2] Iron Horse adopts the same definition of "Appellants" used in the appeal, consistent with the June 2, 2021 withdrawals of Sally Lurie Minkow and Tammy J. Gewehr.

VIII, and IX by not raising the claims before the Planning Board or otherwise preserving those issues for appeal during the April 15, 2021 meeting. The ZBA also lacks subject matter jurisdiction to hear counts IV, V, and VI because the claims involve the Planning Board's grant of conditional use permits for innovative land use controls pursuant to RSA 674:21. Those counts should have been appealed to the New Hampshire Superior Court. *See* RSA 676:5, III. The ZBA additionally lacks subject matter jurisdiction over count VIII and count IX, which seek to invalidate the duly enacted ordinances of the City of Portsmouth ("the City" or "Portsmouth"). Those counts are procedurally infirm and should be dismissed accordingly.

The remaining counts on appeal (counts II and VII) are meritless. Count II alleges that the Proposed Development violates the North Mill Pond View Corridors Ordinance (section 10.5A42.40) because it includes a terrace that ostensibly blocks the Dover Street view corridor. Appellants' allegation is unfounded. The proposed terrace sits between three and a half and thirteen and a half feet below Dover Street—depending on where one is standing on Dover Street—and could not block any supposed view. Count VII alleges that the proposed building heights exceed the 50-foot control through "architectural sleight-of-hand." This also is unfounded. Measured from the grade plane to the top of the proposed buildings—per the protocol set forth in Portsmouth's Zoning Ordinance—the tallest building is 50 feet. *See* §§ 10.5A43.30, 10.1530. Finally, to the extent not dismissed on procedural grounds, count I incorrectly alleges that two of the proposed buildings exceed the 200-foot "building block length" limit for the CD4-W zone. In actuality, the longest building block length is 185 feet. None of counts I, II or VII withstands scrutiny, and the Planning Board's site plan approval therefore should be affirmed.[3]

[3] Iron Horse has filed an appeal of two conditions set forth in the Planning Board's final site plan with the Housing Appeals Boards and reserves all rights with respect to that appeal.

I. MOTION TO DISMISS COUNTS I (BUILDING BLOCK LENGTH), III (VIEW CORRIDOR), IV (WETLANDS CUP), V (SHARED PARKING CUP), VI (WETLANDS CUP), VIII (SPOT ZONING), AND IX (INVALIDATION OF PORTSMOUTH'S INNOVATIVE LAND USE CONTROL ORDINANCES)

A. The ZBA Lacks Jurisdiction Over Counts I, III, VIII, and IX of Appellants' Appeal Because the Issues Were Not Presented to the Planning Board.

"Zoning boards of adjustment are created by statute, *see* RSA 673:1, IV (Supp. 2013), and have only those powers that are expressly conferred upon them by statute or are necessarily implied by those statutory grants." *Dembiec v. Town of Holderness*, 167 N.H. 130, 134 (2014). One such statutory grant involves appellate jurisdiction related to administrative zoning determinations: "[p]ursuant to RSA 674:33, a zoning board has the power to: (1) '[h]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance,' and 'reverse or affirm, wholly or in part, or ... modify the order, requirement, decision, or determination appealed from and ... make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken …." *Id.* at 135; RSA 676:5, I. "If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section …." RSA 676:5, III.[4]

[4] The second part of RSA 676:5, III, "… provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15[,]" is discussed in section IB below.

The ZBA's authority as an appellate body is limited to the statutory grants referenced above. For example, the ZBA does not possess "general equitable jurisdiction." *Dembiec*, 167 N.H. at 135. Rather, the ZBA may "grant equitable relief from a zoning ordinance only when the statutory prerequisites for an equitable waiver, a variance, or a special exception are satisfied." *Id.* (citing RSA 674:33, :33-a). Similar to the lack of grant of general equitable jurisdiction, there is no statutory authority for the ZBA to consider issues and arguments that were not presented to the Planning Board, when the ZBA exercises its appellate jurisdiction over a Planning Board's determination regarding the zoning ordinance rendered while exercising its statutory obligation regarding site plan review. Nor is the ability to consider issues that were not presented to the Planning Board inherent in the ZBA's appellate function.[5] Consequently, the ZBA lacks appellate jurisdiction over issues and arguments that were not presented to the Planning Board during its site plan review. *See Sklar Realty v. Town of Merrimack,* 125 N.H. 321, 328 (1984) ("parties may not have judicial review of matters not raised at the earliest possible time"); *see also Cogswell Farm Condo Ass'n v. Tower Group, Inc.,* 167 N.H. 245, 253 (2015) (issues deemed waived when not "raised at the earliest possible time"); *Blagbrough Family Realty Trust v. Town of Wilton,* 153 N.H. 234, 238-39 (2006).

The principle that issues must be presented to the local land use board to afford it an opportunity to correct its alleged error is well-established. *See Robinson v. Town of Hudson*, 154 N.H. 563, 567-68 (2006); *Blagbrough Family Realty Trust*, 153 N.H. at 238-39; *Dziama v. City of Portsmouth*, 140 N.H. 542, 545 (1995). This preservation requirement includes decisions of the Planning Board. *Cherry v. Town of Hampton Falls*, 150 N.H. 720, 725 (2004). While the

[5] It is not, for example, like the inherent authority to reconsider motions to deny a rehearing within the 30-day limit for appeal to the superior court. *See 74 Cox Street, LLC v. City of Nashua*, 156 N.H. 228, 231 (2007).

ZBA "may hear appeals *de novo,* based on the broad powers granted to it by statute[,]" *Ouellette v. Town of Kingston*, 157 N.H. 604, 610 (2008), that means only that the ZBA "decides the matter anew, neither restricted nor deferring to decisions" made by the Planning Board. *Id.* at 609. In other words, *de novo* refers to the legal standard by which the ZBA should consider issues properly before it. *Id.* at 610 ("Interpreting language nearly identical to RSA 674:33, the majority of courts hold that the proper standard of review is *de novo*."). Neither *Ouellette* nor any other New Hampshire Supreme Court decision examined in counsel's research holds that the *de novo* standard for a ZBA appeal eliminates the well-established preservation requirement.

None of the following counts in Appellants' appeal were raised during the Planning Board's site plan review: count I (building length requires conditional use permit); count III (site plan and subdivision plan approved in contravention of prior ZBA decision on variance application regarding Dover Street view Corridor); count VIII (project is a product of unlawful "spot zoning"); and count IX (conditional use permit provisions in the City's zoning ordinance are facially invalid). Because counts I, III, VIII, and IX were not presented to the Planning Board, they are not properly before the ZBA. The issues are waived and not preserved for appeal to the ZBA, and therefore, are not within the ZBA's subject matter jurisdiction.

B. The ZBA Lacks Jurisdiction Over Counts IV, V, and VI of the Appeal Because Planning Board Decisions Regarding Innovative Land Use Controls Adopted Pursuant to RSA 674:21 Must Be Appealed to the New Hampshire Superior Court.

Counts IV, V, and VI of Appellants' appeal challenge the Planning Board's approval of a Wetlands Conditional Use Permit and a Conditional Use Permit involving shared parking. Pursuant to RSA 674:21, conditional use permits are innovative land use controls. The ZBA lacks jurisdiction over counts IV, V, and VI because the Planning Board's decision on an

innovative land use control, including a conditional use permit, is appealable only to the New Hampshire Superior Court. RSA 676:5, III.

As noted above, "[z]oning boards of adjustment are created by statute, *see* RSA 673:1, IV, and have only those powers that are expressly conferred upon them by statute or are necessarily implied by those statutory grants." Dembiec, 167 N.H. at 134. RSA 676:5, III states:

> If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided, *however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment*, but may be appealed to the superior court as provided by RSA 677:15.

Id. (emphasis supplied). The statute plainly provides that many planning board decisions made while exercising that board's subdivision or site plan review responsibility that involve the interpretation or construction of the municipality's zoning ordinance are appealable to the ZBA. *Id*. The statute is equally plain, however, that when the zoning ordinance delegates to the municipality's planning board the administration of an innovative land use control, including the granting of a conditional use permit, the planning board's decision cannot be appealed to the ZBA. *Id*. Jurisdiction over an appeal of the planning board's decision instead is vested solely in the superior court.[6] Id.

In counts IV and VI, Appellants challenge the merits and procedural soundness of the conditional use permit granted to Iron Horse under the City's Wetlands Protection ordinance. The merits of the decision were sound, as was the procedure. Section 10.1010 of the Zoning

[6] Claims may also be filed with the recently created Housing Appeals Board panel under RSA 679.

Ordinance addresses wetlands protection. Section 10.1017 provides the process for obtaining a conditional use permit while protecting wetlands. Section 10.1017.10 of the Zoning Ordinance states that "[t]he Planning Board is authorized to grant a conditional use permit for any use not specifically permitted in Section 10.1016.10, subject to the procedures and findings set forth herein. Section 10.1017.40 provides that "[t]he Planning Board shall grant a conditional use permit provided that it finds that all other restrictions in this Ordinance are met and that proposed development meets all the criteria set forth in section 10.1017.50 or 10.1017.60, as applicable."

In count V, Appellants challenge the Planning Board's approval of Iron Horse's conditional use permit for shared parking. Here, too, the merits and procedure were sound. Section 10.1110 of the zoning ordinance addresses off-street parking. Pursuant to Section 10.1112.14, "[t]he Planning Board may grant a conditional use permit to allow a building or use to provide less than the minimum number of off-street parking spaces required by Section 10.1112.30, Section 10.1112.61 or Section 10.1115.20, as applicable, or to exceed the maximum number of off-street parking spaces allowed by Section 10.1115.21." Section 10.1112.62, which specifically addresses "Shared Parking on Separate Lots," empowers the Planning Board to "grant a conditional use permit to allow a reduction in the number of required off-street parking spaces for uses on separate lots, whether in common or separate ownership, subject to [certain conditions]."

The Wetlands Protection and Off-Street Parking sections of the zoning ordinance are innovative land use controls adopted pursuant to RSA 674:21, and the plain language of each delegates administration, including the approval of conditional use permits, to the Planning Board. *See* RSA 676:5, III. The conditional use permits provide for innovative land use controls by balancing various planning objectives with a goal of not unduly constraining development.

See Peter Laughlin, New Hampshire Practice Series Land Use Planning and Zoning, Vol. 15, § 15.07 (2020); RSA 674:21. The Wetlands Ordinance permits development within a waterfront area but only so long as it meets certain objectives, such as, removing impervious surfaces where feasible (Portsmouth Zoning Ordinance 10.1017.24), demonstrating that the proposed site alteration is the alternative with the least adverse impact to areas and environments within the City's jurisdiction (*id*. at 10.1017.24), and providing for a wetland enhancement plan as applicable (*id*. at 10.1017.25). Likewise, the Off-Street Parking ordinance allows a development to use less than the minimum of off-street parking prescribed if, as here, shared parking is provided for on a separate lot, among other controls. *Id*. at 10.1112.142, 10.1112.62. Both ordinances involve adjudication of a conditional use permit by the Planning Board, which may occur if the innovative land use control ordinances have been adopted pursuant to RSA 674:21. *See* Loughlin, § 15.07 ("These innovative land use controls present one of the few instances where the planning board is authorized to issue some type of a 'special use permit,' as opposed to the zoning board of adjustment which traditionally administers zoning ordinances.").

While neither section of the zoning ordinance expressly references RSA 674:21, there can be no dispute that they were adopted pursuant to that enabling statute. The nature and objectives of the sections are consistent with the non-exhaustive list of innovative land use controls set forth in RSA 674:21, I(a)-(n). Moreover, RSA 674:21 is the only statute that authorizes planning boards to issue conditional or special use permits, like sections 10.1017.10, 10.1112.14, and 10.1112.62. Because Portsmouth has created zoning ordinances whereby the Planning Board has jurisdiction to grant or deny conditional use permits, those ordinances must have been adopted pursuant to RSA 674:21. *See Simonsen v. the Town of Derry*, 145 N.H. 382,

386-87 (2000) (RSA 674:21 deemed sole authority for imposition of innovative land use control, impact fees).

Accordingly, counts IV, V, VI of Appellants' appeal must be dismissed for lack of subject matter jurisdiction. Pursuant to RSA 676:5, III, Appellants were required to appeal those claims to the superior court because they involve innovative land use controls promulgated under RSA 674:21 and because the ordinances at issue delegate administration to the Planning Board.

C. The ZBA Lacks Jurisdiction Over Count VIII, Appellants' Untimely "Spot Zoning" Challenge.

In count VIII, Appellants challenge an alleged "spot-zoning" of the Iron Horse property. Appeal, p. 8. While Iron Horse denies the perfunctory allegation, the claim is not properly before the ZBA and even if it were, it would be untimely.

On August 20, 2018, the City Council voted to rezone the Iron Horse property and to make additional changes to the CD4-W district. *See* City Council, August 20, 2018 Action Sheet. Those changes comprise the substance of Appellants' spot zoning claim. Pursuant to RSA 677:2, Appellants had thirty days from the City Council decision dated August 20, 2018 to request a rehearing on the alleged spot zoning. However, because the decision was made by City Council as the "local legislative body," the request for a rehearing could only be made to City Council. *Id.* ("Within 30 days after any order or decision … of the local legislative body … in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and … the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion."); *see* RSA 672:8 (defining "local legislative body" to include "city council"). Then, after a rehearing, if Appellants still believed they were

aggrieved, they could have filed an appeal with the superior court. *See* RSA 677:4. In fact, the ZBA need look no further than the City's own history to discover the proper jurisdictional tree for a spot zoning challenge: a hearing before the City Council, rehearing or reconsideration before the City Council, and appeal to the superior court. *See Portsmouth Advocates, Inc. v. City of Portsmouth,* 133 N.H. 876, 877-78 (1991).

There is no statutory authority for the ZBA to review the City Council's decision on zoning. *See* RSA 674:33 and RSA 676:5. "Zoning boards of adjustment are created by statute, see RSA 673:1, IV (Supp. 2013), and have only those powers that are expressly conferred upon them by statute or are necessarily implied by those statutory grants." *Dembiec*, 167 N.H. at 134. Because the ZBA lacks statutory authority to review the City Council's decision on rezoning, the ZBA should dismiss Count VIII of the Appeal for lack of subject matter jurisdiction.

Even if the spot zoning question were properly before the ZBA, the appeal would be untimely. Pursuant to RSA 676:5, I and Article IV, § 1 of the ZBA's Rules and Regulations, Appellants had 30-days from the August 20, 2018 decision to file an appeal. That window closed on September 19, 2018. Appellants instead waited until Iron Horse received final site plan approval—a year and a half later and at significant expense to Iron Horse—to challenge the rezoning. The claim is waived. Accordingly, the ZBA lacks subject matter jurisdiction over Count VIII and even if the Board had jurisdiction, the spot zoning challenge is time-barred.

D. The ZBA Lacks Jurisdiction Over Appellants' Request to Invalidate Portsmouth's Innovative Land Use Control Ordinances, and Therefore, Count IX Should Be Dismissed.

Count IX asks the ZBA to "invalidate" Portsmouth's Innovative Land Use Control Ordinances. Respectfully, the ZBA lacks authority to grant the relief being requested.

Invalidating a duly enacted ordinance is not within the ZBA's purview. As previously established, ZBAs only have the power conferred upon them by statute. *Dembiec*, 167 N.H. at

134. In this instance, the plain language of RSA 674:33 does not authorize the ZBA to grant the relief Appellants seek. Additionally, innovative land use controls are adopted in accordance with RSA 675:1, II. *See* RSA 674:21, III. Pursuant to RSA 675:1, II, innovative land use controls "shall be adopted in accordance with the procedures required under RSA 675:2-5." RSA 675:2 places the responsibility for the enactment or amendment of a city zoning ordinance in the control of the local legislative body, here, the City Council, or the voters. Because RSA 675:2 bestows specific authority upon the local legislative body, invalidating an ordinance also cannot be impliedly identified as a power conferred upon the ZBA. Nor does RSA 674:33 vest the ZBA with equitable power. *Dembiec*, 167 N.H. at 135 ("The plain language of the pertinent statutes does not confer general equitable jurisdiction upon a zoning board"). Put simply, there is no well of authority from which the ZBA could draw the authority to invalidate the City's ordinances and grant the relief Appellants request. The ZBA should dismiss count IX for lack of subject matter jurisdiction.

II. MERITS RESPONSE TO COUNTS I (BUILDING BLOCK LENGTH), II (DOVER STREET VIEW CORRIDOR), III (DOVER STREET VIEW CORRIDOR), AND VII (BUILDING HEIGHT)

A. Appellants' Challenge to the Building Block Length in Count I of the Appeal Is Factually Inaccurate and Should Therefore Be Denied.

In addition to being subject to dismissal on procedural grounds, count I of the appeal is also substantively infirm. Appellants correctly observe that Section 10.5A41.10B of the Portsmouth Zoning Ordinance limits building block lengths in the CD4-W zone to 200 feet. *Id*. Appellants then proceed to allege that Building C is 250 feet in length and another building, which Appellants also identify as Building C, is 227 feet in length. Appeal, p. 3. Appellants' stated figures are incorrect.

Building block length is measured along the "street, public way, or public greenway." *See* Portsmouth Zoning Ordinance § 10.1530A, Figure 10.5A41.10B. As depicted in the submitted site plan (plat C-102.2), the longest building block length is on Building B, which is situated along the newly designated public greenway. The longest building façade facing the greenway on Building B is 185 feet—fifteen feet shorter than the maximum limit. Iron Horse worked closely with the Planning Board to ensure that all the proposed buildings complied with the prescribed building block length under the Ordinance. Because none of the building block lengths exceed 200 feet, in the event that count I is not dismissed for failure to raise the issue with the Planning Board, *see* § IA above, the ZBA should deny count I and affirm the Planning Board's decision.

B. Count II Incorrectly Alleges That the Proposed Development Blocks the Dover Street View Corridor.

Contrary to Appellants' allegations, the Dover Street View Corridor is not blocked by an "elevated terrace" between Building A and Building B in the Proposed Development. Appeal, p. 4. Appellants have not alleged *how* the terrace would block the public view, presumably because the terrace does not, and could not, block the public view. Iron Horse carefully designed the buildings and their configuration to preserve the Dover Street view corridor. The proposed terrace, after accounting for the regraded site, will be 17.5 feet above sea level. At its lowest point (the intersection with McDonough Street), Dover Street is 21 feet above sea level, and at its highest point (the intersection with Islington Street), Dover Street is 31 feet above sea level.

By its plain terms, the North Mill Pond View Corridors Ordinance is intended to preserve the public view of the terminal vista of North Mill Pond. *See* Portsmouth Zoning Ordinance, 10.54.42.40. Even at its lowest point, Dover Street is still three and a half feet above the proposed terrace. The proposed terrace could not obstruct the view from Dover Street of the

terminal vista of North Mill Pond. Any person standing at the intersection of Dover Street and McDonough Street could look over the terrace, that is three and a half feet below, and see the end of North Mill Pond.

Appellants grievance appears to be that the approved site plan allows for a structure—even a downgradient terrace—to be built within the view corridor. But the North Mill Pond View Corridors Ordinance does not sweep so broadly. The Ordinance provides only that, "all new *buildings* or *structures* located with 400' of the North Mill Pond shall be located in such a way as to maintain *existing public views with the terminal vista* of the North Mill Pond from . . . Dover Street." Portsmouth Zoning Ordinance § 10.5A42.40 (emphasis supplied). As demonstrated above, the proposed terrace, while located within the view corridor, satisfies the ordinance because it does not obstruct or even diminish the view from Dover Street to the terminal end of North Mill Pond. Additionally, the proposed terrace is neither a building nor a structure and thus the ordinance is inapplicable. The terrace is clearly not a building, as it does not provide shelter (*see id*. 10.1530 (defining building)), and because the wall on its southeastern border is shorter than 4 feet, it does not qualify as a "structure" (*id*. (defining "structure" as including "fences" that are *over* 4 feet in height)).

Finally, the North Mill Pond Views Corridor Ordinance prohibits development that obstructs the "*existing"* public view only. Respectfully, the Dover Street view towards North Mill Pond is non-existent. As presently configured, the Dover Street view is occluded by overgrown foliage on property owned by B&M Railroad. There is no view to speak of from Dover Street and certainly not one that is within Iron Horse's control. The picture below depicts the Dover Street view, as shown on Bing maps, from the intersection of Islington Street:

The view worsens as one approaches the McDonough Street intersection. The proposed terrace could not violate the zoning ordinance because there is no *existing* view from Dover Street and given the overgrowth, there likely has not been a view for some time.

Additionally, the Dover Street view Corridor is already partially obstructed by the Roundhouse Building. *See* Site Plan Submission, plat C-101, Existing Conditions. That building will be demolished as part of the development, which if the foliage is cleared, will actually improve the view from Dover Street.

Based on the foregoing, the ZBA should deny count II of the appeal and affirm the decision of the Planning Board to permit the terrace between Building A and Building B in the Proposed Development.

C. Contrary to Appellants' claim in count III, Iron Horse Never Requested a Variance to "Block" to Dover Street View Corridor and the ZBA Never Presided Over That Issue.

In January 2020, Iron Horse sought a variance to "realign the Dover Street view corridor 90 degrees from McDonough Street from the existing oblique angle intersection, still maintaining a width equal to that of the Right of Way." January 2, 2020 Variance Request, p. 10. In other words, Iron Horse sought to shift the view corridor 90 degrees west from the terminal intersection of Dover Street and McDonough Street. The goal of the variance was to preserve the view corridor while easing restraints on development given the irregular configuration of the property and the desire to avoid encroaching on the wetlands buffer. The Zoning Board denied that request, and Iron Horse abided by the ZBA's decision. As depicted in the approved site plan, the Dover Street view corridor runs interrupted from the Dover Street, Islington Street intersection to the northwestern banks of North Mill Pond.

To say that Iron Horse sought to "block the Dover Street view corridor" through the requested variance or that the Planning Board's site plan approval was "contrary to this Zoning Board of Adjustment's own prior ruling"—as Appellants have alleged—is to display a worrisome capacity for disinformation. Count III of the appeal should be denied.

D. Appellants Misapply the Building Height Ordinance in Count VII of the Appeal.

Appellants open count VII by arguing that the Planning Board deviated from the ZBA's prior denial of a variance to Iron Horse regarding building height. They additionally accuse Iron Horse of "architectural sleight-of-hand" by raising the property grade as an end-run around the

ZBA's decision. Appeal, p. 9. Once again, Appellants have misconstrued what transpired at the January 22, 2020 ZBA meeting.

In January 2020, Iron Horse sought a variance to permit a 60-foot height on portions of Building B and Building C where only a 50-foot height is allowed by Section 10.5A.43.30 and Map 10.5A21.B. *See* January 2, 2020 Variance Request. The ZBA denied the request. However, those statements standing alone are misleading. Those statements fail to explain the critical distinction that, at that point in the planning process, Iron Horse already had committed to regrading the property to raise the ground floor of the proposed buildings to reduce surface parking by creating parking lots under the proposed buildings and to raise the proposed buildings above the floodplain for climate change planning.[7] Iron Horse made this plan clear to the ZBA in its January 2, 2020 submission: "Notably, Iron Horse has also graded the first floor of Buildings A, B, and C to raise the elevation of all occupied levels of the building to provide additional flood protection." Id., p. 8. Notwithstanding the proposed regrading, Iron Horse nevertheless sought a variance from the allowed building height in the CD4-W zone to gain an extra story and to achieve certain density objectives.

Many developments in the City, most recently the one at 145 Brewery Lane, involved regrading the property to raise the grade plane evaluation; it is a common practice. Contrary to Appellants' revisionist history in count VII, Iron Horse did not regrade the property as part of some "architectural sleight-of-hand" intended to end-run around the ZBA's denial of a variance. Iron Horse had committed to regrading the property *regardless* of whether the ZBA approved the variance to increase the allowable building height. Indeed, in December 2019, prior to the

[7] Portsmouth's Master Plan requires the City and developers to incorporate climate change impacts (including rising sea levels) into development planning efforts and to make infrastructure changes accordingly. *See* Portsmouth 2025 Master Plan, § 5.5.

variance request, Iron Horse had submitted a proposed site plan to the Planning Board showing that the grade of the property would be raised by approximately seven feet for the proposed development. *See* Exhibit A, Dec. 17, 2019 Grading, Drainage, and Erosion Control Plan and Grade Plane. Later, as part of its review, the Conservation Commission celebrated the fact that Iron Horse would be making the site resilient to climate change by regrading it and raising the grade plane elevation. *See* Memo from Conservation Commission Meeting, Feb. 10, 2021, p. 2. Looking at the record, it is evident that Iron Horse proposed regrading the site before it applied for a variance and for reasons completely unrelated to building height.

Iron Horse has abided by the January 22, 2020 decision of the ZBA, as none of the proposed buildings exceed a height of 50 feet. As applicable here, building height is measured from the grade plane to the top of the proposed building. *See* Portsmouth Zoning Ordinance, § 10.1530. The Grade Plane Exhibit demonstrates that Building A and Building B sit at a grade plane evaluation of 16.39 feet and Building C is at a grade plane elevation of 13.28 feet. *See* Exhibit B, Grade Plane Exhibit. Pursuant to the City's Ordinance, this means that Building A and Building B cannot exceed a building elevation of 66.39 feet and Building C cannot exceed a building elevation of 63.28 feet. As demonstrated in the Grade Plane Exhibit, none of the proposed buildings exceed the height limits. The Proposed Development therefore complies with the building height ordinance. Consequently, the ZBA should reject count VII and affirm the Planning Board's site plan approval.

WHEREFORE, Intervenor Iron Horse Properties, LLC respectfully requests that the Portsmouth Zoning Board of Adjustment:

A. Dismiss counts I, III, IV, V, VI, VII, and VIII of Appellants' appeal of the Planning Board decisions dated April 20, 2021;

B. Deny counts II and VII of Appellants' appeal of the Planning Board decisions dated April 20, 2021; and

C. Affirm the Planning Board's decisions dated April 20, 2021.

Respectfully submitted,

Iron Horse Properties, LLC

By its counsel,

Dated: June 4, 2021

By /s/ Michael D. Ramsdell
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CERTIFICATE OF SERVICE

On June 4, 2021, this Motion to Dismiss and Merits Response to Appellants' Appeal of Decision of the Portsmouth Planning Board was forwarded via email to City Attorney Robert P. Sullivan and Duncan J. MacCallum, Esq.

By: /s/ Michael D. Ramsdell
Michael D. Ramsdell