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July 28, 2021

Via Hand Delivery

Peter Stith, Principal Planner
Zoning Board of Adjustment of the City of Portsmouth
1 Junkins Ave., 3rd Floor
Portsmouth, NH 03801

Re: Iron Horse Properties, LLC v. City of Portsmouth, NH

Dear Mr. Stith:

Enclosed for filing in the above-referenced matter, please find 11 copies of Intervenor's Motion for Rehearing for the ZBA's Public Hearing on August 17, 2021.

Thank you for your attention to this matter.

Very truly yours,

/s/ Brian J. Bouchard

Brian J. Bouchard

BJB/smh
Enclosure

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 FOR REHEARING PURSUANT TO RSA 677:2

Iron Horse Properties, LLC¹ (“Iron Horse”), by and through its attorneys, Sheehan Phinney Bass & Green, moves for rehearing of the Portsmouth Zoning Board of Adjustment’s (“ZBA”) July 20, 2021 decision granting Appellants’² Appeal of Decision of the Portsmouth Planning Board pursuant to RSA 677:2.

Procedural History

At its regularly scheduled meeting that commenced on April 15, 2021, with written decision dated April 20, 2021, the Planning Board granted site plan approval for Iron Horse’s residential development of 105 Bartlett Street. Specifically, the Planning Board granted Iron Horse’s Wetlands Conditional Use Permit (“Wetlands CUP”) 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 ZBA, challenging all four Planning Board approvals. On June 4, 2021, Iron Horse filed a motion to dismiss and merits response to Appellants’ claims. On July 20, 2021, the ZBA granted Appellants’ appeal after, consistent with the advice of the City Attorney and the Planning Director, opting not to decide

¹ The Planning Board’s decision of April 20, 2021 was directed only to Iron Horse Properties, LLC, the site plan applicant. It is unclear why Appellants included Clipper Traders, LLC, and Portsmouth Lumber and Hardware, LLC in the caption to the instant appeal.

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.

Iron Horse's arguments in support of dismissal of many of Appellants' claims. Rather than deciding whether it had jurisdiction over many of Appellants' claims, including three counts seeking review of the Planning Board's decision on innovative land use controls, the ZBA simply assumed jurisdiction over Appellants' claims that it favored and refused to consider Iron Horse's arguments and defenses.

Having shaped the appeal in the context that certain ZBA members had predetermined best suited their goals, the ZBA elected to assume jurisdiction over only counts IV and VI of the appeal. In counts IV and VI, Appellants challenged the merits and procedural soundness of the Wetlands CUP granted to Iron Horse under the City's Wetlands Protection ordinance. Although the ZBA asked limited questions about other counts, the ZBA ultimately exercised jurisdiction over only counts IV and VI. However, the ZBA voted not to decide the threshold question regarding those counts; that is, whether it had subject matter jurisdiction to hear those claims because they involve the Planning Board's grant of a conditional use permit for innovative land use controls pursuant to RSA 674:21. Instead, the ZBA simply assumed jurisdiction over those counts without deciding whether its exercise of jurisdiction was lawful.

The ZBA granted Appellants' appeal, and thereby overturned the Planning Board's grant of the Wetlands CUP. The ZBA also granted the appeal because, as one ZBA member explained, Portsmouth already has enough housing for people who live in Portsmouth, and the City should not create additional housing for outsiders to move to Portsmouth.

Pursuant to RSA 677:2, Iron Horse now moves for rehearing on the ZBA's granting of the appeal. The ZBA's decision is unlawful and unreasonable. *See* RSA 677:2. The ZBA's assumption of subject matter jurisdiction over counts IV and VI was unlawful because the Wetlands CUP is an innovative land use control pursuant to RSA 674:21. *See* RSA 676:5, III.

The ZBA's decision was unreasonable and unlawful, and must be vacated because a ZBA member suffered from an undisclosed bias that rendered him incapable of participating in the ZBA's quasi-judicial appeal hearing. The ZBA's outright refusal to decide the issues raised in Iron Horse's motion to dismiss and merits response to the appeal violated Part I, Article 1 of the New Hampshire Constitution pursuant to which the ZBA is obligated to provide assistance to those that who appear before it. *See Savage v. Town of Rye*, 120 N.H. 409, 411 (1980); *Carbonneau v. Rye*, 120 N.H. 96, 99 (1980).

Finally, the ZBA followed the advice of the City Attorney, who did not appear at the hearing and provided a brief memorandum to the ZBA only hours before the hearing,³ which was reiterated by the City Planner during the hearing when it refused to decide issues, particularly related to its subject matter jurisdiction, raised in Iron Horse's motion to dismiss and merits response. As explained in more detail below, the memorandum was flawed because, at best it advised the ZBA to follow one part of RSA 676:5, III and ignored the remaining provisions of the statute. At worst, the memorandum encouraged the ZBA to eschew its responsibilities to Iron Horse and the citizens of Portsmouth essentially by punting the legal issues raised by Iron Horse to the superior court or the Housing Appeals Board.

The ZBA's refusal to decide the issues presented by Iron Horse led to a ZBA confused and fractured about the parameters of its lawful considerations. Consequently, multiple ZBA members admitted that they did not know how to evaluate the appeal from the Planning Board and had no understanding of how to proceed. Another ZBA member labored under the mistaken belief that Iron Horse had resubmitted a variance application and supported the appeal because not enough had changed since the original submission. The ZBA's inability to articulate a

³ A copy of the City Attorney's memorandum is submitted as Exhibit A to this motion.

cogent legal basis with supporting facts for its decision is exemplified by its one-paragraph written decision which states only that after considering the appeal, “the Board voted to grant the appeal.”

Argument

I. The ZBA’s Assumption of Jurisdiction Over Counts IV and VI of the Appeal, Without Deciding Whether It Had Subject Matter Jurisdiction, Was Unlawful Because Planning Board Decisions Regarding Innovative Land Use Controls Adopted Pursuant to RSA 674:21 Must Be Appealed to the Superior Court.

Counts IV and VI of Appellants’ appeal challenge the Planning Board’s approval of a Wetlands CUP. Pursuant to RSA 674:21, conditional use permits are innovative land use controls. The ZBA lacks subject matter jurisdiction over counts IV 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.

“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).

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.⁴ *Id.*

In counts IV & VI, Appellants challenge the merits and procedural soundness of the Wetlands CUP granted to Iron Horse under the City's Wetlands Protection ordinance. Section 10.1010 of the zoning 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."

The Wetlands Protection section of the zoning ordinance is an innovative land use control adopted pursuant to RSA 674:21, and its plain language 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 Loughlin, *New Hampshire Practice Series Land Use Planning and Zoning*, Vol. 15, § 15.07 (2020); RSA 674:21. The

⁴ Claims may also be filed with the recently created Housing Appeals Board panel pursuant to RSA 679.

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). Both ordinances involve adjudication of a conditional use permit by the Planning Board, which may occur only 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).

Prior to the ZBA hearing on the appeal, Iron Horse moved to dismiss counts IV and VI of the appeal because the ZBA does not have subject matter jurisdiction over Appellants' claims regarding the Wetlands CUP. Although at least two ZBA members were troubled by the advice

of the City Attorney and Planning Director to refrain from deciding Iron Horse's jurisdictional challenge, the ZBA ultimately assumed jurisdiction over counts IV and VI without deciding whether it lawfully possessed such jurisdiction. After assuming jurisdiction, the ZBA granted Appellants' appeal and reversed the Planning Board's decision on the Wetlands CUP.

The ZBA's reversal of the Planning Board's decision to grant the Wetlands CUP was unlawful and unreasonable. The ZBA lacked legal authority to assume subject matter jurisdiction over claims from which its jurisdiction is precluded by RSA 676:5, III. The proper venue for Appellants' challenge to the Planning Board's decision on the Wetlands CUP is the superior court or the Housing Appeals Board. *See* RSA 676:5, III; *see also* RSA 679. Iron Horse is entitled to rehearing on the ZBA's unlawful and unreasonable decision, and further, the ZBA must reverse its decision and dismiss counts IV and VI for lack of jurisdiction.

Even if the ZBA had jurisdiction over the Planning Board's decision to grant the Wetlands Cup, which it did not, the ZBA relied on factually incorrect information and arguments presented by Appellants and members of the public, and its own misinterpretation of zoning ordinance provisions to reach its decision. In doing so, the ZBA, in a few hours and without ever referring to the City Staff's report about the project's compliance with the zoning ordinance, the Conservation Commission's report that it had reviewed the appropriate criteria for a Wetlands CUP, or the substance of the Planning Board's decision that was the subject of the appeal,⁵ undid two years' worth of permitting, engineering, and architectural work, and the City's serious consideration of such work.

The ZBA gave no indication that it had reviewed or considered the expert report submitted to the Planning Board which shows that rather than harming North Mill Pond the

⁵ Copies of the City Staff report, the Conservation Commission report, and the Planning Board decision are submitted as Exhibits B-D to this motion.

project will improve it by substantially reducing the amount of impervious surface and implementing better storm water management.⁶ While ostensibly concerned about the 100-foot wetlands buffer, the ZBA never acknowledged that currently more buildings exist within the buffer than will be constructed during the project. The ZBA ignored undisputed facts and instead opted to entertain misrepresentations about building length and building height particularly in comparison to nearby railroad tracks,⁷ misleading statements about the zoning ordinance, and unfounded opinions about the wetlands. For example, many Board members relied on an unscaled sketch of a truncated development to support their conclusion that the proposed buildings could be developed without encroaching on the wetlands buffer, which would obviate the need for a Wetlands CUP. Yet, at no point did the ZBA hear testimony about how many units could be developed in the truncated design, its cost to build, or its engineering or architectural feasibility.

For the foregoing reasons and those stated in Iron Horse's motion to dismiss and merits response, its presentation and responses to questions from the ZBA, and its expert engineer's responses to the ZBA's questions, the ZBA's reversal of the Planning Board's decision was unlawful and unreasonable. The ZBA's assumption of jurisdiction over counts IV and VI was unlawful and its conclusions regarding the merits of the project, including that the project would hurt North Mill Pond, were erroneous and lacked an evidentiary basis.

⁶ A copy of the expert report is submitted as Exhibit E to this motion.

⁷ James Hewitt, Appellants' pseudo-expert whose qualifications were not explained to or explored by the ZBA, admitted that information he provided to the ZBA about the height of the railroad tracks was false.

II. The ZBA's Decision Was Unlawful and Unreasonable Because a ZBA Member Participated in the Quasi-Judicial Appeal Hearing Without Disclosing a Disqualifying Bias.

After Appellants, Iron Horse, and members of the public made presentations to the ZBA and were questioned by its members, the ZBA closed the public participation portion of the appeal and commenced deliberations. During the ZBA's deliberations, ZBA member David MacDonald explained his objection to the project. He declared that he would be voting against the project because Portsmouth already has enough housing for the people who live in the City, and the City should not create additional housing that would allow outsiders to move to Portsmouth.⁸ At no time during the public participation portion of the appeal hearing did Mr. MacDonald state or even allude to the fact that he was biased against Iron Horse's proposed development that includes three multi-family apartment buildings and a total of 152 dwelling units solely because he opposes the creation of additional housing that would allow outsiders to move to the City.⁹ Thereafter, Mr. MacDonald voted against the project and to grant Appellants' appeal.

Iron Horse is entitled to rehearing on the appeal and the ZBA's decision granting the appeal must be vacated because of the participation of an impermissibly biased ZBA member. The New Hampshire Constitution Part I, Article 35 standard that all judges be "as impartial as

⁸ After remarking about how previous developments have not "enhanced the City," Mr. MacDonald's specific statement was: "There are enough places to live for the people of the City to live here; it's people who don't live here, who aren't here, who wish they were who are sensing a shortage of housing. I don't think there's a shortage of housing." <https://www.cityofportsmouth.com/planportsmouth/zoning-board-adjustment> (approx. 3:00).

⁹ Mr. MacDonald further demonstrated his undisclosed bias against the project and his willingness to stop it through unlawful and unreasonable considerations instead of the appeal actually before the ZBA by stating: "The bottom line is, we don't need this development. It's not going to be good for the city; it's not going to be good for any of us. So, I am going to oppose the development and support the appeal. Thank you." <https://www.cityofportsmouth.com/planportsmouth/zoning-board-adjustment> (approx. 3:02).

the lot of humanity will admit[,]" applies to ZBA members. *Winslow v. Town of Holderness*, 125 N.H. 262, 267 (1984). In furtherance of that goal, RSA 673:14, I, states that:

No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, or historic district commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

The statutory standard for disqualification of a juror, RSA 500-A:12, requires disqualification where the person:

- (a) Expects to gain or lose upon the disposition of the case;
- (b) Is related to either party;
- (c) Has advised or assisted either party;
- (d) Has directly or indirectly given his opinion or has formed an opinion;
- (e) Is employed by or employs any party in the case;
- (f) Is prejudiced to any degree regarding the case; or
- (g) Employs any of the counsel appearing in the case in any action then pending in the court.

In sum, when the ZBA acts in a quasi-judicial capacity, a ZBA member, like a juror, is disqualified from participation if (s)he is "not indifferent" to the outcome of the proceeding. *Winslow*, 125 N.H. at 268. It is beyond question that a juror who disclosed that (s)he is against creating new housing units that would allow outsiders to move to Portsmouth would be disqualified from service on a trial of the issue of the appropriateness of the Planning Board's

approval of the Wetlands CUP for a project that would create 152 new housing units. *See* RSA 500-A:12(f). The same is true for a ZBA member.¹⁰ RSA 673:14, I.

It also is beyond dispute that the ZBA acts in its quasi-judicial capacity when it hears a planning board appeal. *See Hoffman v. Town of Gilford*, 147 N.H. 85, 88-80 (2001). It is equally well-established that “judicial action by a tribunal one of whose members is disqualified to act is voidable if the disqualified member participates therein, without reference to the fact whether the result is produced by his vote.” *Winslow*, 125 N.H. at 268 (quotation and citation omitted). Here, Mr. MacDonald’s statement about his opposition to projects that would enable outsiders to move to Portsmouth renders him far from indifferent on an appeal involving the creation of 152 new housing units. Mr. MacDonald should have disqualified himself from participation in the appeal of the Planning Board’s approval of Iron Horse’s project.

Moreover, Mr. MacDonald’s reason for voting against the project is repugnant. Importantly, when ZBA decisions are based on considerations outside of the scope of valid legal parameters, they “will be held invalid ... as an ultra vires enactment beyond the scope of the zoning authority delegated.” *Community Res. For Justice v. City of Manchester*, 154 N.H. 748, 754 (2007) (quotation and citation omitted). Mr. MacDonald rejected the New Hampshire Supreme Court’s recognition that “[m]unicipalities are not isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare,

¹⁰ In fact, one ZBA member recoiled at Mr. MacDonald’s statement: “While I certainly want the same world that Mr. MacDonald wants, I’m just not sure. . . is that a criteria we can use? *To say we don’t want people moving here and we want to save the world? Is that something we can use as reason to overturn the Planning Board?* I’m looking for parameters here. . . I don’t know how to look at this. I’m not looking at this as a variance; I’m looking at it completely new.” <https://www.cityofportsmouth.com/planportsmouth/zoning-board-adjustment> (approx. 3:08).

both within and without their boundaries.” *Id.* at 754-55 (quoting *Britton v. Town of Chester*, 134 N.H. 434, 441 (1991)).

Mr. MacDonald’s biased myopic view renders the ZBA’s decision granting the appeal ultra vires and voidable. *See Winslow*, 125 N.H. at 268. Iron Horse is entitled to rehearing on the appeal, to have Mr. MacDonald disqualified from participation in the matter, and to reversal of the ZBA’s decision to grant Appellants’ appeal.

III. The ZBA Violated Part I, Article I of the New Hampshire Constitution When It Intentionally Refused to Decide Issues Presented in Iron Horse’s Motion to Dismiss and Merits Response to Appellants’ Appeal.

More than forty years ago, the New Hampshire Supreme Court reminded the Town of Rye, and particularly its ZBA, that, pursuant to Part I, Article I of the New Hampshire Constitution, its function is to provide assistance to those who appear before it. *Carbonneau*, 120 N.H. at 99; *see also Savage*, 120 N.H. at 411. Part I, Article I has been held to require that a planning board inform site plan or subdivision applicants “not only whether their applications are substantively acceptable but also whether they are technically in order.” *Savage*, 120 N.H. at 411. In *Richmond v. City of Concord*, 149 N.H. 312 (2003), the New Hampshire Supreme Court addressed a municipality’s constitutional obligation to provide assistance in the context of a property owner seeking to develop property and stated that “[c]ases such as *Carbonneau* and *Savage* are aimed at preventing municipalities from ignoring an application or otherwise *engaging in dilatory tactics in order to delay a project.*” *Id.* at 315 (emphasis added). The Supreme Court also reiterated that during the public hearing process land use boards “must maintain a certain level of impartiality.” *Id.* (citing RSA 673:14).

Here, upon the advice of the City Attorney and the Planning Director, the ZBA intentionally elected to refrain from deciding the issues raised in Iron Horse’s motion to dismiss

and merits response to the appeal. Although certain ZBA members voiced their disquiet with the City Staff's advice, those voices were drowned out through a combination of Mr. MacDonald's unlawful and unreasonable comments and the City Staff's incorrect advice that any challenge to the ZBA's decision would be appealable immediately to the superior court instead of returning to the ZBA for its reconsideration.

Regardless of whether it acted upon the advice of the City Attorney or the Planning Director, the ZBA abdicated its responsibility to Iron Horse pursuant to Part I, Article I of the New Hampshire Constitution when it intentionally declined to decide issues raised in Iron Horse's motion to dismiss and merits response. In particular, the ZBA elected to ignore the second provision in RSA 676:5, III, which states: "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." As a result, the ZBA granted Appellants' appeal with some ZBA members applying unlawful and unreasonable standards, and others applying no standards, including:

MacDonald: I will support the appeal ... Will the City be in a better place to live or not because of what we've allowed to happen ... There are enough places to live for the people of the City to live here; it's people who don't live here, who aren't here, who wish they were who are sensing a shortage of housing. I don't think there's a shortage of housing.

The bottom line is, we don't need this development. It's not going to be good for the city; it's not going to be good for any of us. So, I am going to oppose the development and support the appeal. Thank you. *Hearing Video Recording*, approx. 3:00

Eldridge: While I certainly want the same world that Mr. MacDonald wants, I'm just not sure. . . is that a criteria we can use? To say we don't want people moving here and we want to save the world? Is that something we can use as

reason to overturn the Planning Board? I'm looking for parameters here. . . I don't know how to look at this. I'm not looking at this as a variance; I'm looking at it completely new. Id., approx. 3:08

McDonell: I'm at a loss; we could address it a few different ways; I just don't know the best way to deal with it is. Id., approx. 3:08

Lee: I just feel like it is the wrong thing to do ... that's my vote. Id., approx. 3:14

(Exchange between McDonell and Walker)

McDonell: It is a little tricky. If we vote on this as a whole, there's a chance that it comes back to us because we don't make it expressly clear why we are granting the appeal.

Walker: No, the appeal goes to the superior court; it doesn't come back to you.

McDonell: But let's say that we grant the appeal based entirely on the wetlands CUP because we're assuming that that is within our purview. We say all the other reasons are bunk; we're basing this on the wetlands CUP. It goes to the Court. The judge there says, "that wasn't properly before you. Come back and decide on the issues that are properly before you."

Walker: I don't think you can guess what's going to happen next. You just have to vote on what you have in front of you. Id., approx. 3:21-24.

The ZBA's refusal to decide issues, particularly jurisdictional challenges to certain of Appellants' claims, and its decision to decide the appeal without regard to a proper legal standard violated its obligation to provide assistance to Iron Horse pursuant to Part I, Article I of the New Hampshire Constitution. Moreover, the lack of decision-making about the issues presented by Iron Horse led to a confused ZBA that relied on impermissible and factually incorrect considerations. Multiple ZBA members admitted that they did not know how to evaluate an appeal from the Planning Board and had no understanding of how to proceed. ZBA member James Lee labored under the mistaken belief that Iron Horse had resubmitted a variance application and supported the appeal because not enough had changed since the original submission. He voted to grant the appeal specifically because the project was "the same horse

pulling a different buggy as was before [the ZBA] previously.” *Id.*, approx. 2:56. When another ZBA member attempted to explain the difference between a previous variance application and the current Planning Board appeal, Mr. Lee rebuffed the idea and trivialized the distinction as a “new and improved box of cereal” but the same stuff in a different package. *Id.* at approx. 2:58.

It was evident during deliberations that many ZBA members did not know how to proceed with an appeal, were ignorant of their role as appellate officials, and were woefully unprepared to discharge their constitutional obligations and provide assistance to Iron Horse. In fact, the ZBA’s election not to discharge its Part I, Article 1 responsibilities upon the advice of the City Attorney and the Planning Director and its arbitrary assumption of jurisdiction over only certain claims raised in the appeal also infringe upon Iron Horse’s Part I, Articles 2 and 12 rights to acquire, protect, and possess property because the conduct results in an unlawful deprivation of Iron Horse’s reasonable use of its land. *See Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727, 731 (2001).

Iron Horse is entitled to rehearing on the appeal because the ZBA violated Part I, Article I of the New Hampshire Constitution, and in doing so its members decided the appeal based on unlawful, unreasonable, and incorrect considerations. Such rehearing should include a decision on all issues presented in the motion to dismiss and merits response, and most particularly the challenges to the ZBA’s subject matter jurisdiction.

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

- A. Grant the instant Motion for Rehearing;
- B. Dismiss counts I, III, IV, V, VI, VII, and VIII of Appellants’ appeal of the Planning Board decisions dated April 20, 2021;

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

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

Respectfully submitted,

Iron Horse Properties, LLC

By its counsel,

Dated: July 28, 2021

By /s/ Michael D. Ramsdell

Michael D. Ramsdell (Bar No. 2096)
Brian J. Bouchard (Bar No. No. 20913)
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CERTIFICATE OF SERVICE

On July 28, 2021, this Motion for Rehearing Pursuant to RSA 677:2 was forwarded via email to City Attorney Robert P. Sullivan and Duncan J. MacCallum, Esq.

By: /s/ Michael D. Ramsdell

Michael D. Ramsdell

EXHIBIT A

CITY OF PORTSMOUTH

LEGAL DEPARTMENT

MEMORANDUM

DATE: July 20, 2021
TO: ZONING BOARD OF ADJUSTMENT
FROM: ROBERT P. SULLIVAN, CITY ATTORNEY *RPS*
RE: APPEAL OF DECISION OF PORTSMOUTH PLANNING BOARD
105 BARTLETT STREET

This memorandum is intended to supplement an earlier memorandum dated July 14, 2021 to the Board regarding the captioned matter. That earlier memorandum essentially concluded that as a matter of procedure the BOA should handle this appeal of a Planning Board decision as though it were an appeal from the decision of an administrative officer. Subsequent to the receipt of that memorandum, the Board has sought some additional guidance in implementing that recommendation. This memorandum is that guidance.

The problem which has generated the request of the Board for additional guidance is the extreme complexity and the technical nature of the documents which have been filed with the Board by both the appealing party in this case and the Intervenor. The Intervenor's pleading, for example, is 18 pages long with legal citations which must run into the hundreds. Legal writings of this nature are, frankly, beyond the reasonable expectation of a volunteer citizen administrative board to handle, especially during the course of an agenda containing numerous other items of business.

With the foregoing in mind, it is my suggestion that at the hearing of the case, the Board of Adjustment focus entirely on the authority granted to it by statute to hear the appeal. Specifically, RSA 676:5 III provides the Board in this case to hear an appeal from the Planning Board when that Board has made:

"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"

It is my recommendation that the Board focus entirely on the foregoing language and not attempt to address any issues raised by the filings in the case which exceed the scope of that language. Therefore, the Board should not attempt to determine such items as the validity of the conditional use permit provisions of the ordinance (appeal item IX); whether the project was the product of unlawful spot zoning (appeal item VIII); the jurisdiction of the Board (Intervenor's

item I), or whether the Board is the proper forum to seek an invalidation of an innovative land use control ordinance (Intervenor's item D). Rather, the Board should limit its consideration to items which specifically fall within the statutory language written above.

If the Board takes this recommended action, then it will lead to the automatic resolution of many of the complex legal questions raised in the filings of the parties. To the extent that any of those issues are not resolved by actions of the Board, the technical, legal issues will move to a more appropriate forum for their resolution, the court system.

cc: Juliet T.H. Walker, Planning Director
Duncan MacCallum, Esq.
Michael Ramsdell, Esq.

EXHIBIT B

Memo

TO: Conservation Commission Members
FROM: Peter Britz, Environmental Planner
DATE: February 5, 2021
SUBJ: February 10, 2021 Conservation Commission Meeting



105 Bartlett Street

This project includes the removal of existing impervious surfaces and buildings, construction of 3 stormwater outlets, repaving of an existing access drive and parking lot, construction of a linear waterfront trail and community space, and construction of three new multifamily building with a total of 152 dwelling units. This application has a more detailed landscape plan and includes a porous pavement pathway for pedestrian and fire access. The project as proposed will result in a net overall reduction in impervious surfaces of 28,792 square feet from the current site. This project was most recently before the Commission at the December 9, 2020 meeting. The Conservation Commission postponed the project after providing feedback and recommendations for the applicant.

According to *Article 10 Section 10.1017.50* the applicant must satisfy the following conditions for approval of this project.

- 1. The land is reasonably suited to the use activity or alteration.* This project is located in an area along the North Mill Pond that has not been maintained and has not been accessible to the public. While public access was not allowed by the former owner there were numerous camps a large amount of trash and other debris and a mix of invasive and opportunistic vegetation. Also there was an active business with a large gravel parking area, a number of abandoned buildings and a site access road paved to the bank of the pond with no stormwater treatment throughout the site. It is reasonable for this area to be redeveloped and the project is consistent with City Zoning for this location.
- 2. There is no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use, activity or alteration.* The location has been selected as it is an unused railroad area which has not been maintained. The applicant sees this area as ready for redevelopment and has provided a feasible approach for that development and has been able to demonstrate a reduction of impacts in the 100' wetland buffer.
- 3. There will be no adverse impact on the wetland functional values of the site or surrounding properties.* The buildings are no closer to the edge of wetland than existing buildings and the design has been modified to reduce the amount of building area in the wetland buffer. The amount of pavement and other impervious surfaces has been reduced by over ½ an acre in this proposal, stormwater treatment has been added to the design, the public is being brought onto the site with a proposed porous pavement trail and an extensive invasive species removal and native planting program has been proposed. The project provides community space that will allow people to walk along the pond on a safe accessible trail. Since the last meeting with the Conservation Commission building volume has been reduced in the 100 foot buffer parking has been pulled back from within the 100 foot buffer, and a more complete planting plan has been

provided. Overall this plan reduces the deteriorated buildings and site conditions as well as the quantity of invasive species, and the proposal will enhance the area generally given its current condition. This design is an improvement from the current site conditions as it reduces impervious surfaces, provides community access, treats stormwater, and reduces the amount of invasive species.

4. *Alteration of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals.* The proposed project will be impacting some natural vegetation on the site especially in the footprint of the new buildings. The applicant has provided an invasive species removal approach and extensive planting plan for the entire site that includes the removal of invasives provides the opportunity for re-establishment of existing native vegetation and planting of new native vegetation.
5. *The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this section.* The applicant has worked to enhance the site and overall impacts from the project. Impervious surfaces have been reduced with each subsequent revision of this project to a total reduction of 28,792 square feet from what exists on the site today. The applicant has made the site resilient to climate change by elevating the structures above the floodplain provided an extensive native planting plan and detailed and effective stormwater treatment plan and has provided community space to invite the public onto and through the site.
6. *Any area within the vegetated buffer strip will be returned to a natural state to the extent feasible.* The applicant provided a landscape plan which includes plantings around the proposed building and within the 100' tidal wetland buffer. The use of native trees and plantings within the 100 foot buffer and removal of invasive species on this site along with a protected 15' vegetated buffer will provide an enhancement to the buffer of the North Mill Pond.

Recommendation: Staff believes this application represents a reduction in impacts to the tidal buffer zone and provides public access through a location that has been left to deteriorate. The applicant has complied with section 10.1017.24 which requests the removal of impervious surface in the buffer to below what exists. Staff recommends approval of this application as presented.

375 Banfield Road

This project is to construct an industrial building outside of the 100' wetland buffer. This application has changed since the last meeting to include a stormwater treatment swale in the wetland buffer to address remediation concerns. As part of the project the applicant is removing an area of pavement for the proposed front parking area on the site which was presented at the January meeting.

1. *The land is reasonably suited to the use activity or alteration.* The prior application was proposed to remove pavement from the wetland buffer and revegetate the same area. While that is a suitable activity in the buffer the amended proposal is for 4000 square feet of new stormwater treatment swale to be constructed in the wetland buffer almost to the edge of the existing wetland area. It was stated by the applicant that this swale needed to be constructed here to stay away from waste. It needs to be demonstrated why no location outside of the buffer could be used for this.
2. *There is no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use, activity or alteration.* The proposed pavement to be removed from the buffer this is the appropriate location for this work. However, the proposed stormwater treatment swale and stone check dam are not appropriate for the buffer. While it does not make sense to route stormwater through contaminated soil as the applicant has said would occur with the previous location it is also not clear given the site is being completely demolished to construct the building why another location away from the waste and out of the buffer could not be used.
3. *There will be no adverse impact on the wetland functional values of the site or surrounding properties.*

This pavement removal will result in a reduction of impervious surface in the wetland buffer but the stormwater treatment swale and stone check dam are all new impacts to the buffer. The new swale will have impact to the wetland buffer that may be avoidable if a different location outside of the buffer could be used.

4. *Alteration of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals.* The removal of pavement from the buffer will result in an expansion of the natural vegetative state of the buffer. The addition of the new swale will remove some natural vegetation in the buffer as the swale while vegetated will still need to be maintained, thereby not providing the same buffer function as the natural vegetation in this location.

5. *The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this section.* The proposed pavement removal will reduce the amount of impervious surface in the wetland buffer but the new swale does not appear to be the least impacting alternative. While they cannot discharge stormwater through the fill if the site design were different it may be possible to avoid this area of impact.

6. *Any area within the vegetated buffer strip will be returned to a natural state to the extent feasible.* The plan provides for removal of pavement in the buffer to provide a planted area and the proposed swale will be vegetated so it will be vegetated over much of its area but the maintenance will now allow for as robust a planting as would be if this were undisturbed buffer.

Recommendation: There are still answered questions about this project regarding the swale location and the need to impact the buffer for this location. Given there is a site walk on Monday February 8 more questions may be answered at that time.

1 Clark Drive

This project is the subdivision of land where there is a single family home which will be replaced with a new cul-de-sac road and four new house lots to include the demolition of an existing home and swimming pool portions of which are in the 100 foot wetland buffer. As part of this project the applicant is proposing a vegetated rain garden and grass access road where lawn currently exists.

1. *The land is reasonably suited to the use activity or alteration.* The rear portion of the new house lots are partially within the 100' wetland buffer. The application is providing stormwater treatment in the lawn area at the rear of these houses. Given the area is currently lawn the proposed treatment will improve the quality of runoff from the site. An addition of plantings along the rear of the rain garden would help enhance the buffer quality of this site.

2. *There is no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use, activity or alteration.* Given the area is currently lawn this is the most feasible location for the treatment as it will intercept the flow before it reaches Cutts Cove.

3. *There will be no adverse impact on the wetland functional values of the site or surrounding properties.* Given that the proposed work is in a lawn area and will reduce the velocity of flow it should have a net improvement on stormwater quality. However, given the area will be disturbed erosion control measures will need to be maintained and buffer plantings would help to improve buffer function.

4. *Alteration of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals.* The existing lawn will be regraded and replaced with a vegetated rain garden.

5. *The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this section.* The proposed project should reduce velocity of stormwater from the site and with plantings could represent an enhancement.

6. *Any area within the vegetated buffer strip will be returned to a natural state to the extent feasible.* The plan does not show any landscape plans but staff recommends the applicant consider an area of new shoreland buffer planting be considered by the applicant waterward of the rain garden.

Recommendation: Staff recommends approval of this project with a stipulation that buffer plantings be added at the rear of the raingarden.

315 Banfield Road

This application is to install a 6 foot tall chain link fence in the wetland and wetland buffer on this property. The fence will have footings including 5 square feet in the wetland area and 10 square feet in the wetland buffer area.

1. *The land is reasonably suited to the use activity or alteration.* The applicant is putting up security fence for the school.

2. *There is no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use, activity or alteration.* Given that the fence is along the property line this is the appropriate location.

3. *There will be no adverse impact on the wetland functional values of the site or surrounding properties.* The proposed fence will have a minimal impact on the wetland functional values.

4. *Alteration of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals.* The project does not propose to impact vegetation.

5. *The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this section.* The proposal is only putting concrete where the fence needs added support as such this is the least impacting alternative.

6. *Any area within the vegetated buffer strip will be returned to a natural state to the extent feasible.* The applicant is not proposing any impacts to natural vegetation.

Recommendation: Staff recommends approval of this project as proposed.

EXHIBIT C



CITY OF PORTSMOUTH

Planning Department
1 Junkins Avenue
Portsmouth, New Hampshire
03801
(603) 610-7216

CONSERVATION COMMISSION

February 18, 2021

Ed Hayes, Manager
Iron Horse Properties, LLC
105 Bartlett Street
Portsmouth, New Hampshire 03801

RE: Wetland Conditional Use Permit for property located at 105 Bartlett Street (LU-20-4)

Dear Mr. Hayes:

The Conservation Commission, at its regularly scheduled meeting of Wednesday, February 10, 2021, considered your application for Wetland Conditional Use Permit Approval in accordance with Section 10.1017 of the Zoning Ordinance for work within the 25-foot, 50-foot, and 100-foot wetland buffers to North Mill Pond which includes the removal of existing impervious surfaces and buildings, construction of 3 storm-water outlets, repaving of an existing access drive and parking lot, construction of a linear waterfront trail and community space, and construction of three new buildings which will result in a net overall reduction in impervious surfaces of 28,792 square feet. Said property is shown on Assessor Map 157, Lots 1 & 2, Map 164, Lots 1 & 4-2 and lies within the Character District 4-W, Character District 4-L1. As a result of said consideration, the Commission voted to recommend **approval** of the Conditional Use Permit Application to the Planning Board with the following stipulations.

1. That the bike/ped path be porous pavement and include an operation and maintenance plan which includes no salting or sanding.
2. That the site use only dark sky friendly lighting.

This matter will be placed on the agenda for the Planning Board meeting scheduled for **Thursday, February 18, 2021**. One (1) hard copy of any revised plans and/or exhibits as well as an updated electronic file (in a PDF format) must be filed in the Planning Department and uploaded to the online permit system no later than Monday, February 15, 2021.

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,

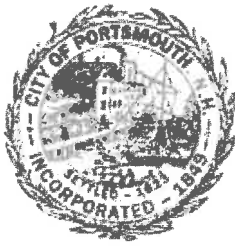
Barbara McMillan, Chair
Conservation Commission

cc:

2/18/2021

Clipper Traders, LLC
Portsmouth Lumber & Hardware, LLC
Patrick Crimmins, PE, Tighe & Bond

EXHIBIT D



CITY OF PORTSMOUTH

Planning Department
1 Junkins Avenue
Portsmouth, New
Hampshire 03801
(603) 610-7216

PLANNING BOARD

April 20, 2021

Ed Hayes, Manager
Iron Horse Properties, LLC
105 Bartlett Street
Portsmouth, New Hampshire 03801

RE: Site Plan Review, Lot Line Revision, and Wetland Conditional Use Permit for property located at 105 Bartlett Street

Dear Mr. Hayes:

The Planning Board, at its regularly scheduled meeting of **April 15, 2021**, considered your application for :

- 1) a Wetland Conditional Use Permit Approval in accordance with Section 10.1017 of the Zoning Ordinance for work within the 25-foot, 50-foot, and 100-foot wetland buffers to North Mill Pond which includes the removal of existing impervious surfaces and buildings, construction of 3 stormwater outlets, repaving of an existing access drive and parking lot, construction of a linear waterfront trail and community space, and construction of three new buildings which will result in a net overall reduction in impervious surfaces of 28,385 square feet [note square footage corrected to reflect application reviewed at meeting];
- 2) a Conditional Use Permit for shared parking on separate lots as permitted by Section 10.1112.62 of the Zoning Ordinance;
- 3) Site Plan Review approval for the demolition and relocation of existing structures for the construction of 152 dwelling units in three buildings, and associated community space, paving, lighting, utilities, landscaping and other site improvements.
- 4) Preliminary and Final Subdivision approval for a Lot Line Relocation as follows: Tax Map 157, Lot 1 increasing in area from 61,781 s.f. to 205,804 s.f.; Tax Map 157, Lot 2 decreasing in area from 102,003 s.f. to 81,645 s.f.; Tax Map 164, Lot 1 increasing in area from 51,952 s.f. to 52,289 s.f.; Tax Map 164, Lot 4-2 decreasing in area from 249,771 s.f. to 119,519 s.f. and the existing right-of-way increasing in area from 69,624 s.f. to 75,792 s.f.

Said property is shown on Assessor Map 157, Lots 1 & 2, Map 164, Lots 1 & 4-2 and lies within the Character District 4-W, Character District 4-L1. As a result of said consideration, the Board voted to **grant** the Wetland Conditional Use Permit as presented, the Conditional Use Permit for shared parking with stipulations, Site Plan Review approval with stipulations, and the Lot Line Revision with stipulations. The stipulations of approval are as follows:

Conditional Use Permit for Shared Parking

1. A shared parking arrangement shall be secured by a covenant in a form acceptable to the City's Legal and Planning Departments to be recorded at the Rockingham County Registry of Deeds.

Site Plan Review Approval

Conditions Precedent (to be complete prior to building permit issuance)

1. The applicant shall coordinate with the City's third party consultant to complete a Water Capacity Analysis using the City's capacity modeling and shall modify the water service design as required in coordination with the City's Water Division and subject to final review and approval by DPW and the Fire Department. The analysis of water demand shall include irrigation in addition to domestic use.
2. For the Bartlett Street water line replacement and paving project which shall be undertaken by the City, the applicant shall contribute \$65,000. The contribution shall be returned to the developer if the improvements are not constructed, under construction or designed and scheduled for construction by December 31, 2023.
3. The applicant shall update the recordable site plan to note that the property owner(s) responsible for the private road shall remove and maintain vegetation along the Bartlett Street frontage consistently to ensure that sight lines remain unobstructed at the site access intersection.
4. The landscaping plan shall be updated to replace the American Elms with Nyssa Sylvatica, shall reference the City's planting details (available on the City's web page -- <https://www.cityofportsmouth.com/publicworks/parksandgreenery/urban-forestry>) and shall note that a watering plan shall be provided for a minimum of one season.
5. The applicant shall prepare a Construction Management and Mitigation Plan (CMMP) for review and approval by the City's Legal and Planning Departments.
6. The applicant shall agree to pay for the services of an oversight engineer, to be selected by the City, to monitor the construction of improvements within the public rights-of-way and on site utilities including sewer, water, and drainage.
7. Owner shall provide an access easement to the City for water valve access and leak detection.
8. Any easement plans and deeds for which the City is a grantor or grantee shall be reviewed and approved by the Planning and Legal Departments prior to acceptance by City Council.
9. Wayfinding signage shall be added directing public access to the greenway trail and park subject to final approval by the Planning Department.
10. A note shall be added to the site plans to be recorded that no there shall be no performances or events involving amplification devices within the park and courtyard areas.
11. Plans shall be updated to remove any proposed trees located in the North Mill Pond Public View Corridor and otherwise confirm conformance with the requirements of Section 10.5A42.40 to provide a public view from Dover Street with a terminal vista of the North Mill Pond subject to final approval by the Planning Department.
12. Applicant shall agree to complete a feasibility study for restoration of the shoreline of the North Mill Pond along the frontage for this development project, to participate in a fair share based on owner's linear feet of wetlands impact along the shoreline, and grant access rights for any shoreline restoration efforts undertaken by the City in this area.

Conditions Subsequent

13. The Engineer of Record shall submit a written report (with photographs and engineer stamp) certifying that the stormwater infrastructure was constructed to the approved plans and specifications and will meet the design performance;
14. Subject to final review and approval by the DPW, the applicant shall add signage at the site driveway indicating that trucks may not turn right when exiting the site access road;
15. A stormwater inspection and maintenance report shall be completed annually and copies shall be submitted to the City's Planning and Public Works Departments.

Lot Line Revision

1. Applicant shall provide documentation of ownership rights and responsibilities for the private driveway to be improved and converted to a private road.
2. Property monuments shall be set as required by the Department of Public Works prior to the filing of the plat.
3. GIS data shall be provided to the Department of Public Works in the form as required by the City.
4. The final plat and any easement deeds shall be recorded concurrently at the Registry of Deeds by the City or as deemed appropriate by the Planning Department.

4/21/2021

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

This site plan approval shall not be effective until a site plan agreement has been signed satisfying the requirements of Section 2.12 of the City's Site Review Approval Regulations.

Unless otherwise indicated above, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

The Planning Director must certify that all stipulations of approval have been completed prior to issuance of a building permit unless otherwise indicated above.

This site plan approval shall expire unless a building permit is issued within a period of one (1) year from the date granted by the Planning Board unless an extension is granted by the Planning Board in accordance with Section 2.14 of the Site Review Regulations.

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dexter R. Legg". The signature is written in a cursive style with a large initial "D".

Dexter R. Legg, Chairman of the Planning Board

cc: Robert Marsilia, Chief Building Inspector
Rosann Maurice-Lentz, City Assessor

Peter H. Rice, Director of Public Works

Clipper Traders, LLC
Portsmouth Lumber & Hardware, LLC
Patrick Crimmins, PE, Tighe & Bond

EXHIBIT E

C0960-006
April 7, 2021

Mr. Dexter Legg, Chair
City of Portsmouth Planning Board
1 Junkins Avenue
Portsmouth, New Hampshire 03801

**Re: Request for Site Review, Conditional Use & Amended Subdivision Permits
Proposed Multi-Family Development, 105 Bartlett Street, Portsmouth, NH**

Dear Chairman Legg:

On behalf of Iron Horse Properties, LLC, we are pleased to submit one (1) set of hard copies and one electronic file (.pdf) of the following information to support a request for a Site Review Permit, Lot Line Revision Permit, Conditional Use Permit for Shared Parking, and a Wetland Conditional Use Permit for the above referenced project:

- Site Plan Set (full size) last revised March 10, 2021;
- TAC & CC Stipulation Response Report, dated March 10, 2021;
- Site Plan Application Checklist, dated March 10, 2021
- Subdivision Application Checklist, dated March 10, 2021
- Drainage Analysis, last revised March 10, 2021;
- Building Renderings, last revised April 7, 2021;
- Constraints Exhibit, last revised January 20, 2021;
- Buffer Impact Exhibit, last revised March 10, 2021;
- Public Open Space Exhibit, dated March 10, 2021;
- Site Plan Comparison Exhibit March 10, 2021;
- Grade Plane Exhibit, last revised March 10, 2021;
- Truck Turning Exhibits, last revised March 10, 2021;
- Subdivision Exhibit, last revised January 20, 2021;
- Bartlett Street Water Main Abandonment Plan, dated March 8, 2021;
- Trip Generation Memorandum last revised December 23, 2020;
- Wetland Delineation and Functions & Values Report last revised March 10, 2021;
- Photo Log of Existing Buffer Vegetation & Invasive Species dated January 19, 2021;
- Environmental Summary Memorandum, dated November 4, 2020;
- Estimated Water Demand Summary, dated January 20, 2021;
- Eversource Will Serve Letter, dated May 20, 2020;
- Until Will Serve Letter, dated April 17, 2020;
- Waste Management Letter, dated February 9, 2021;
- Green Building Statement, dated March 10, 2021;
- Site Lighting Fixture Cut Sheets

PROJECT SUMMARY

Existing Conditions

The project is located at 105 Bartlett Street consisting of properties identified as Map 157 Lots 1 & 2, Map 164 Lots 1 & 4-2, and a private roadway lot. The properties are bound by



Bartlett Street, the railroad and the North Mill Pond. The properties include 2,000+/- linear feet of tidal wetlands and buffers along the North Mill Pond. The limited functions and values of these areas are described in the enclosed Wetland Delineation Assessment and Functions and Values Report and the existing vegetation and invasive species of these areas are located in the enclosed Photograph Log.

The urban site has history of railroad and industrial use. The front portions of the site closest to Bartlett Street currently include the Ricci Supply buildings with paved parking areas and a private roadway that extend up the top of bank along the North Mill Pond. Currently, the stormwater for these paved areas either sheet flow directly into the North Mill Pond with no treatment or is collected in an old combined sewer overflow (CSO) system contributing burden to the City's sewer collection and treatment systems during rainfall events.

The rear portion of the site, which includes the proposed development area, consists of an industrial building converted to a brewery & a dog daycare. A vacant machine shop with paving, compacted gravel and building also are located in close proximity to the top of the North Mill Pond bank. The rear of the site includes derelict railroad structures that pose a safety hazard. The 100-foot tidal wetland buffer is almost entirely previously disturbed urban upland which has been neglected, fallen into disrepair, and overgrown with invasive species. The existing condition in the rear of the site has long been an attractive nuisance with a history of debris, homeless encampments, and crime.

The properties in question include a significant portion of the City of Portsmouth's long planned improvements to the shoreline of the North Mill Pond, the concept of which has been a focus of the City's planning for years. It was included in the Portsmouth Bicycle and Pedestrian Plan in 2014 and the North End Vision Plan in 2015. Many of the stated goals set forth in the City's Master Plan in 2016 called for its creation. The Final Report on the North Mill Pond Greenway and Community Park was issued in 2019.

The Final Plan calls for "a linear greenway and community park along the North Mill Pond which will create a new north-south pedestrian and bicycle connection from Bartlett Street to Market Street. This multi-use public path with civic amenities is envisioned to be constructed along the southeast shoreline of the pond, will include wetland restoration and pond edge stabilization and is anticipated and constructed through a series of public-private partnerships with private landowners."

The City's Zoning Ordinance was amended in 2016 to create an overlay district specifically allowing the construction of taller buildings in the area as incentive for real estate developers to join in these important public private partnerships.

Proposed Redevelopment

In 2018, a proposed subdivision was granted for the subject parcels and included a private road lot with cul-de-sac. The proposed project will revise the prior approved lot lines by relocating the cul-de-sac closer to Bartlett Street in a location that is currently an existing parking area for the brewery/dog daycare building. The amended subdivision will result in a 4.72-acre property where the existing brewery/dog day care building and vacant machine shop currently are located. This 4.72-acre property will be the location of the proposed multi-family development and, along the shore of North Mill Pond, will be the construction of the long planned public bicycle and pedestrian path as well as valuable new accessible open space along the water's edge.

Commercial Area

The front portion of the site will continue to be an existing commercial area that consists of the Ricci Supply buildings with associated parking improvements and a private road. This



portion of the site will be improved by pulling the private road further away from the top of North Mill Pond bank, implementing traffic and pedestrian improvements to the private road and adding landscape areas to reduce impervious surface. In addition, new stormwater management improvements will be constructed on this portion of the site. New stormwater collection systems will include deep sump catch basins with oil separator hoods and stormwater treatment units. The new systems will eliminate the existing CSO which has long been an initiative of the Department of Public Works across the City and will provide stormwater treatment where none is provided in the existing condition.

Multi-family Development Area

The proposed development area consists of three (3) multi-family apartment buildings depicted as Building A, B and C on the Site Plan. The three (3) buildings will include a total of 152 dwelling units with parking below Buildings A and B. The project includes associated site improvements that consist of the private road cul-de-sac adjacent to Building C, surface parking, pedestrian access, utilities, dark-sky friendly lighting, landscaping and stormwater management systems that provide treatment for runoff. The three (3) proposed buildings will provide additional housing stock to the City that is walkable to downtown, a theme that is consistent throughout the Master Plan.

The proposed development area has unique site conditions that include close proximity to the North Mill Pond; no build view corridors required by zoning that extend from perpendicular City streets located across the railroad; 15-foot side yard setback due to the adjacent railroad where none is typically required in the CD-4W district; and a 25-foot municipal sewer easement for a large sewer pipe that conveys wastewater flow for the City's west end to the Deer Street pump station. These unique conditions put constraints on the applicant's ability to locate buildings within the developable upland area. As shown in the enclosed Constraints Exhibit, the applicant has located the three (3) proposed buildings within the site constraints. The buildings are located in a manner that still pulls the building footprints further back from existing condition, locates surface parking away from the pond along the railroad and creates expansive public open space in an urban setting along the North Mill Pond.

The existing condition of the development property does not provide any stormwater treatment. The proposed development will provide stormwater management improvements which are described in further detail in the enclosed Drainage Analysis. The following is a summary:

- Proposed treatment to runoff from the new buildings and surface parking will be provided via stormwater treatment units. In addition, an underground detention system has been incorporated into the design to address concerns raised by the Conservation Commission regarding temperature of the runoff from the surface parking area. The underground detention system will detain and slowly release runoff for a 24-hour draw down time in order regulate temperature of runoff before discharging it to the North Mill Pond. An additional benefit of the underground detention system is that it will also reduce peak rates of runoff to the North Mill Pond even though peak rate reduction is not required for direct discharges to tidal waters.
- Stormwater treatment measures have been implemented in the rear of the buildings where the public park and trail will be located. Yard drains in the open space between building B & C and along portions of the trail will capture runoff and put them thru a treatment unit. Runoff from the public park area had been designed to flow to a rain garden. The rain garden will not only serve as stormwater treatment but also will be planted as an aesthetically pleasing central feature in the public park and will provide pollinator habitat.
- Porous asphalt has been incorporated into North Mill Pond trail design as requested by the Conservation Commission and City Staff.



As part of the original 2018 Subdivision Approval for these lots, a Traffic Study was prepared by Pernaw, Inc. and peer reviewed by the City's consultant who confirmed the results. This original study included projections for future multi-family development on this parcel. Enclosed with this package is an updated Trip Generation Memorandum prepared by Pernaw, Inc. dated December 23, 2020 for the latest 152-unit program. The memorandum provides a comparison of the trip generation for the program included in the 2018 Subdivision Approval and the current Site Plan. The memorandum demonstrates that the current development proposal will generate less vehicle-trips during the peak hour periods than the program studied as part of the 2018 Subdivision Approval. In addition, the traffic generation contemplated in the 2018 approval was used as background for the Traffic Analysis that was prepared for the West End Yards project. The West End Yards project resulted in traffic improvements to Bartlett Street and Cate Street that will direct traffic to the Route 1 By-Pass via the extension of Cate Street to the Borthwick Avenue intersection. Thus, off-site traffic improvements that would support this project have already been approved by the Planning Board and currently being constructed.

Open Space & Buffer Enhancement

The project is located in the West End Incentive Overlay District. The applicant will be providing 47,703 SF of Greenway Community Space which will be located from the North Mill Pond mean high water line to the 50-foot wetland buffer setback. Providing this community space will contribute towards the City realizing a goal of the Master Plan to create public access along the North Mill pond with a multi-use trail. This Greenway Community Space is 23.2% of the development parcel, exceeding the 20% required by the Zoning Ordinance. In addition to the community space, the applicant is also proposing a 23,552 SF public park adjacent the Greenway Community Space. The total public open space the project will create is 71,255 SF which is 35% of the development parcel area as shown in the enclosed Public Open Space Exhibit. Overall, the project will be providing 58.1% open space on the development lot where only 15% is required by zoning.

The project is providing buffer enhancement with the removal of invasive species and proposed plantings. The 100-foot tidal buffer zone currently consists of the existing buildings, paved roadway and parking areas, large compacted gravel areas, two small second growth wooded areas, and a 25-foot vegetated buffer zone. Much of the existing vegetation on the site consists of invasive species including Norway Maples, Buckthorn, Autumn Olive, Multiflora Rose and some Bittersweet. With the exception of the Norway Maples, which provide valuable canopy cover and screening, invasive species in the areas of construction and within the 25-foot vegetated buffer will be removed. Disturbed areas will be planted with either a native fescue grass mix (Areas shown as lawn on the Landscape Plan) or a New England Wildlife Conservation Seed Mix (Areas within the 25-foot vegetated buffer). The proposed development area will be planted with a mixed buffer of native trees, and drifts of a mix of native and ornamental (not native) shrubs and groundcovers. The majority of the proposed buffer plantings that are within the 100-foot buffer are native. In addition, a centrally located rain garden provides additional pollinator habitat with 90% of its plantings being native.

The project will provide an overall improvement in the 100-foot tidal wetland buffer by pulling parking and building further away from the North Mill Pond and by reducing overall impervious surface as summarized in Table 1 below. In addition to the summary in Table 1 below, detailed calculations of buffer impacts for the existing and proposed condition are depicted in the enclosed Buffer Impact Exhibit by both individual lot and overall project.



Table 1 - 100-Foot Tidal Buffer Impacts

Overall Buffer Impact Area		
Wetland Buffer Setback	Existing Impact	Proposed Impact
0 - 25 FT	12,788 SF	6,788 SF
25 - 50 FT	30,478 SF	22,394 SF
50 - 100 FT	66,844 SF	52,543 SF
Total Impact	110,110 SF	81,725 SF
NET BUFFER IMPROVEMENT		28,385 SF

Section 10.1017.24 of the Zoning Ordinance which indicates “Where feasible, the application shall include removal of impervious surfaces at least equal in area to the area of impervious surface impact. The intent of this provision is that the project will not result in a net loss of pervious surface within a jurisdictional wetland buffer.” As shown in Table 1, the proposed project far exceeds this requirement by providing a 0.65-acre reduction in impervious surface.

Land-Use Permit Applications

Permitting Timeline

The applicant is pleased to provide the enclosed information to support requests to the Planning Board to grant the following land-use permits:

- Site Plan Review
- Lot Line Revision
- Conditional Use Permit for Shared Parking
- Wetland Conditional Use Permit

The enclosed information has been prepared and/or revised in response to comments and feedback received over the past 19 months from the Planning Board, Technical Advisory Committee (TAC), Conservation Commission and public comment during the local land-use permitting process. The following is a summary of meetings with the various land use-boards and public:

1. September 4, 2019 – Meeting with the neighborhood
2. September 10, 2019 – TAC Work Session
3. September 11, 2019 – CC Work Session
4. September 19, 2019 – PB Conceptual Consultation
5. February 20, 2020 – PB Conceptual Consultation
6. March 19, 2020 – PB Design Review
7. May 5, 2020 – TAC Meeting
8. May 13, 2020 – CC Regular Meeting
9. June 2, 2020 – TAC Meeting
10. November 4, 2020 – CC Regular Meeting
11. December 1, 2020 – TAC Meeting
12. December 7, 2020 – CC Site Walk



13. February 2, 2021 – TAC Meeting

14. February 10, 2021 – CC Regular Meeting

In addition to the local land-use permits, the project will also require the following approvals from the New Hampshire Department of Environmental Services (NHDES):

- Alteration of Terrain Permit
- Shoreland Protection Permit
- Wetland Impact Permit

The applicant is in the process of working with NHDES to obtain these approvals. On April 15, 2020, the applicant had an initial Wetland Permit pre-application design meeting with NHDES to review the project. Given the number of plan revisions and improvements that have occurred in response to City and public feedback since the original meeting on April 15, 2020, the applicant recently had a second pre-application design meeting to review the project updates. The applicant has one more pre-application meeting scheduled for March 18, 2021 with NHDES to review the project's mitigation proposal. Following this last pre-application meeting, the applicant will formally file the NHDES permit applications.

Response to Land-Use Board & Public Comments

As noted above, the last time the project was before the Planning Board was on March 19, 2020 for Preliminary Design Review. The following is summary of improvements to design made in response to feedback from the various land-use boards and public since that time:

- Reduced density from 174 dwelling units to 152 dwelling units.
- Eliminated the two (2) story portion of Building A from the CD4-L1 district, further reducing buffer impact and shifting density away from the McDonough Street neighborhood. In doing so, a view corridor for Salem Street has essentially been created for the abutting neighbors and neighborhood, though not required by zoning.
- Revised the shape and reduced the footprint for Building C. The prior footprint mirrored the existing brewery/dog daycare building. This revision eliminates footprint in the buffer and creates an open space courtyard between Building B and C.
- Reduced surface parking on the development lot from 134 to 95 spaces. This further reduces buffer impact and avoids disturbance to the wooded area located in the vicinity of the Cabot Street view corridor.
- Re-aligned the path around the building by pulling it away from the North Mill Pond and into public park further reducing buffer impact. The path has been designed in a manner that minimizes asphalt to the extent feasible while addressing fire department comments to provide safe emergency access around the buildings. In addition, the path has been designed as porous asphalt to provide stormwater treatment to runoff on the path.
- Provided additional buffer enhancement measures with additional native plantings and groundcovers, incorporated invasive species removal measures and planted the 25-foot vegetated buffer along the North Mill Pond with a conservation seed mix that is only mowed periodically. The locations and types of invasive species have been identified in the plan set and bank stabilization measures have been incorporated where disturbance will occur for the invasive species removal and construction of the stormwater outfalls.
- An updated Trip Generation Memorandum prepared by Pernaw, Inc. dated December 23, 2020 was submitted to the City for peer review for the latest 152-unit program. The memorandum included a comparison of the trip generation for the program

included in the 2018 Subdivision Approval and the current Site Plan. The memorandum demonstrates that the current development proposal will generate approximately -39 (AM) and -52 (PM) fewer vehicle-trips during the peak hour periods than the program studied as part of the 2018 Subdivision Approval. The City's peer reviewer concurred with these results in a January 12, 2021 peer review letter.

Lot Line Revision Permit

The project is located at 105 Bartlett Street consisting of properties identified as Map 157 Lots 1 & 2, Map 164 Lots 1 & 4-2, and a private roadway lot. In 2018, a proposed subdivision was granted for the subject parcels and included a private road lot with cul-de-sac. The proposed project will modify the private road lot by relocating the cul-de-sac closer to Bartlett Street in a location that is currently the existing parking area for the brewery/dog daycare building. The front commercial parcels where the Ricci Supply buildings are located (Map 164 Lot 1 & Map 157 Lot 2) will be largely unchanged with only slight modifications resulting from the revisions to the private road lot. The lot line revisions will result in a 4.72-acre property where the existing brewery/dog day care building and vacant machine shop are currently located. This 4.72-acre parcel (Map 157 Lot 1) will be the location of the proposed multi-family development. A 2.75-acre parcel of land (Map 164 Lot 4-2) will remain undeveloped to the north of the multi-family development parcel.

Site Plan Review Permit

The project will require a Site Plan Review Permit for the site improvements described above in the project summary. The project has previously been before the Planning Board three (3) times for Conceptual Consultation and Preliminary Design Review. In addition, the project has been before the Technical Advisory Committee (TAC) five (5) times. On February 2, 2021, TAC recommended to the Planning Board that a Site Plan Review Permit be granted with stipulations. Enclosed with this package is a Stipulation Report addressing each of the TAC stipulations of approval.

Conditional Use Permit for Shared Parking

A Conditional Use Permit for parking on a separate lot is requested for the project. The project meets the parking requirements by sharing parking between the two (2) lots as shown on the enclosed Site Plans. A total of 210 parking spaces are required to meet the Zoning requirements.

190 of the proposed parking spaces are located on the development lot. 95 of those spaces are provided in the surface parking lot that will be located outside the 100-foot buffer between the proposed buildings and the railroad. In addition, the project will construct 95 spaces under Buildings A & B in effort to reduce impervious surface and reduce buffer impact.

The private road will be improved with traffic, pedestrian, and bicycle improvements. The road will include parking along the road and cul-de-sac. The cul-de-sac which is adjacent to Building C includes 8 parking spaces that will be designated as visitor spaces for the project. In addition, the portion road immediately south of the cul-de-sac will include 12 parallel parking spaces. These 20 proposed spaces on the private road that are in close proximity to the development parcel are included in the project's total parking count of 210 spaces provided. A Conditional Use Permit is required to include these spaces in the total count because the private road is a separate lot form the development parcel.

Conditional Use Permit of Wetland Buffer

Through the course of the land-use permitting process, the applicant has continued to be responsive to comments regarding buffer impact and concerns with density. The applicant



has submitted five (5) versions of the Site Plan to the Conservation Commission for review from the Conceptual Site Plan reviewed at the September 2019 Work Session through the last Conservation Commission meeting on February 9, 2021, in which the commission voted to recommend approval to the Planning Board for Wetland Conditional Use Permit.

The following includes a summary of four prior (4) iterations of the Site Plan previously submitted to the Conservation Commission and the latest enclosed package as it relates to improvement in the buffer and reduction in density.

Table 2 – Overall Project Buffer Impact Reduction

Submission Date	Existing Condition Buffer Impact (SF)	Overall Project Buffer Impact (SF)	Net Buffer Impact (SF)	Density (# of dwelling units)
09/11/2019	119,808	146,157	26,349	272
04/29/2020	110,110	95,121	(14,989)	174
05/27/2020	110,110	97,739	(12,371)	174
10/28/2020	110,110	89,170	(20,940)	170
03/10/2021	110,110	81,725	(28,385)	152

As depicted in Table 2, the applicant has continued to make a good faith effort to be responsive to comments from the local land-use boards and public by conceding allowed density and further improving buffer impact for the overall project that far exceeds the net zero requirements of Section 10.1017.24.

Based on the above described and enclosed materials, the following addresses how the proposed project warrants the granting of a Wetland Conditional Use Permit by satisfying the following six (6) criteria for approval in Section 10.1017.50 of the Zoning Ordinance:

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

The subject properties are within the CD4-W and CD4-L1 Zoning Districts (Character Districts). The proposed development parcel meets the requirements of the Zoning Ordinance and does not require any relief. The urban site is largely previously disturbed in the 100-foot tidal wetland buffer. The existing condition of the development includes large amounts of debris, a great deal of invasive species and derelict structures that pose a safety hazard. This area of the site has long been an attractive nuisance with a history of homeless encampments and crime. The proposed project will result in impervious surface reduction in the buffer, buffer enhancement, and will provide public access along North Mill Pond which is a goal of the City’s Master Plan.

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

The proposed development area has unique site conditions that include close proximity to the North Mill Pond; no build view corridors required by zoning that extend from perpendicular City streets located across the railroad; 15-foot side yard setback due to the adjacent railroad where none is required in the CD-4W district; and a 25-foot municipal sewer easement for large sewer pipe that conveys wastewater flow for the City’s west end to the Deer Street pump station. These unique conditions put constraints



on the applicant's ability to locate buildings within the developable upland area. The redevelopment is located within a feasible and reasonable manner that pulls the building footprints further back from existing condition, locates surface parking away from the pond along the railroad and creates expansive public open space in an urban setting along the North Mill Pond. As described above, the applicant has made a continued effort to reduce buffer impact and density in response to feedback from the local land-use boards and public during the local land-use permitting process.

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

There will be no adverse impact to surrounding properties as this property has long been an urban site with a history of railroad, industrial and commercial uses. The project has been designed in a manner that conforms with the requirements of the Zoning Ordinance. The project will reduce traffic from the original 2018 Subdivision approval. The project will provide public access to the North Mill Pond for the surrounding properties where none currently exists which is a goal of the City's Master Plan.

There will be no adverse impact on the wetland functional values of the site as the existing condition is largely previously disturbed upland riddled with debris and derelict structures that pose a safety hazard. The existing condition includes impervious surfaces near or at the top of North Mill Pond bank throughout much of the 100-foot tidal buffer. The proposed project will reduce buffer impact, remove invasive species in the 25-foot buffer and construction areas, and provide added value by creating public open space for recreation along the North Mill Pond.

(4) *Alteration of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals.*

The proposed project is only altering the natural vegetated state to the extent necessary. The project will be removing invasive species in the locations of construction and in the 25-foot vegetated except for the Norway Maple, which provide valuable canopy cover and screening. As described above, the enclosed supplemental information identifies the location of these invasive species and includes stabilization practices for their removal and for the construction of the stormwater outfalls.

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

The applicant has continuously worked to reduce 100-foot tidal wetland buffer impacts in response to feedback received throughout the permitting process. The project will reduce buffer impact by conceding allowed density and by pulling footprints away from the North Mill Pond to the extent feasible given the site constraints. The project includes underground parking and creates 1.63-acres of public open space area along the North Mill Pond which contribute toward a 0.65-acre net reduction in impervious surface within the buffer. Also, the applicant has conducted environmental studies on the property which are summarized in the enclosed Environmental Summary Memorandum previously submitted to and reviewed with the Conservation Commission. The applicant will remediate all identified recognized environmental conditions in accordance with applicable law.

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

The project is providing buffer enhancement with the removal of invasive species and installation of plantings around the buildings and within the 100-foot tidal wetland buffer.



The only other disturbance within the 0ft to 25ft buffer setback is for the construction of the three (3) stormwater outfalls. These outfalls will discharge treated stormwater to the North Mill Pond where no treatment currently exists. Stabilization practices have been included in the enclosed plans for of removal invasive species and construction of the outfalls.

Conclusion

We trust the above described and enclosed materials address the criteria and requirements for the Planning Board to grant a Site Plan Review Permit, Lot Line Revision Permit, Conditional Use Permit for Shared Parking and Wetland Conditional Use Permit for the proposed project. The proposed project meets requirements of the Zoning Ordinance. The proposed project achieves the goals of City's Master Plan to provide public access along the North Mill Pond with a Greenway Community Space and to provide buffer enhancement. In addition, the proposed buildings have been located in a manner within the unique site constraints to provide additional public benefit with an urban public park located along the Community Space Greenway in the rear of Building A and B.

In the past 19 months, the applicant has in good faith, continued to respond to feedback from the community and local land-use boards. As shown in the enclosed information, the latest proposal will provide additional housing stock for the City but will reduce density from earlier proposals, reduce traffic generation from the prior 2018 approvals, reduce buffer area impacts, improve stormwater management, enhance the North Mill Pond tidal wetland buffer and provide public benefit in the form of open space along the North Mill Pond. Based on this, the applicant respectfully requests approval for the various land-use permits noted above.

We respectfully request to be placed on the Planning Board agenda for March 18, 2021. If you have any questions or need any additional information, please contact Patrick Crimmins by phone at (603) 988-8066 or by email at pmcrimmins@tighebond.com.

Sincerely,
TIGHE & BOND, INC.



Patrick M. Crimmins, PE
Senior Project Manager

Enclosures

Copy: Clipper Traders, LLC (via E-mail)
Iron Horse Properties, LLC (via E-mail)
Portsmouth Lumber & Hardware, LLC (via E-mail)

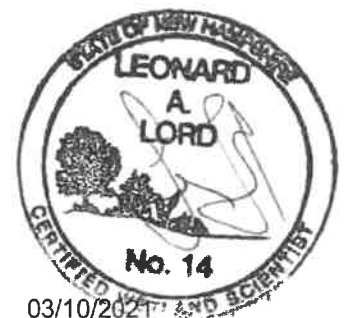




Cathartes
105 Bartlett Street Project
Portsmouth, NH

WETLAND DELINEATION AND ASSESSMENT OF FUNCTIONS AND VALUES

April 2020
Last Revised: March 2021



Tighe & Bond
Engineers | Environmental Specialists

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1.0 Introduction

The purpose of this report is to characterize wetlands and buffers in the vicinity of a proposed multi-family development at 105 Bartlett Street in Portsmouth, NH. The site is long and narrow and is located between an active railroad and North Mill Pond. It includes commercial buildings with paved and gravel parking areas, abandoned railroad structures, disturbed forest, and a dense shrub thicket. The area is highly disturbed, being originally filled by the railroad in the late 1800s.

2.0 Methods

On October 29 and December 2, 2019, Tighe & Bond reviewed and assessed 2,000+/- linear feet of tidal wetlands and buffers along the North Mill Pond. The review was limited to the vicinity of a proposed multi-family development, extending from Bartlett Street to an area opposite Cornwall Street, which runs roughly perpendicular to the parcel.

The wetland delineation review was based on criteria specified in the *Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1* (January 1987), and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region* (January 2012). The Highest Observable Tide Line was reviewed based on the definition found in NH Department of Environmental Services Wetland Rules, Env-Wt 101.49/Env-Wt 602.23. Wetlands were classified based on *Classification of Wetlands and Deepwater Habitats of the United States* (Cowardin et al., 1979).

The Highest Observable Tide Line (HOTL) had been previously delineated by another consulting firm in 2017. This line was reviewed by exporting the 2017 surveyed line into ArcGIS to overlay on an aerial photographic base map. This base map was then uploaded to an iPad and paired with a Trimble R1 submeter GPS for in-field verification. Using the iPad and GPS as a guide, the line was then evaluated in the field. The HOTL was deemed accurate and the previous 2017 delineation was accepted by Tighe & Bond. A previously unidentified freshwater wetland was also found within a six-foot +/- deep abandoned railroad turntable. Tighe & Bond delineated this area with sequentially numbered flagging and located the wetland boundary using the GPS technology described above.

Functions and values were assessed in the vicinity of the proposed project. Assessment methodologies were adapted from the *Maine Citizens Guide to Evaluating, Restoring, and Managing Tidal Marshes* (Bryan et al., 1997) and *The Highway Methodology Workbook Supplement—Wetland Functions and Values: A Descriptive Approach*, NAEEP-360-1-30a, US Army Corps of Engineers, New England Division, September 1999.

Photographs of the wetlands and buffers are provided in Appendix A.

3.0 North Mill Pond

North Mill Pond is a 79+/- acre tidal pond at the outlet of Hodgson Brook. It receives tidal flows under Maplewood Avenue at the northeast end of the pond. The pond consists predominantly of exposed mudflats at low tide, and is classified as Estuarine, Intertidal, Unconsolidated Shore, Mud, Regularly Flooded (E2US3N). A narrow band of salt marsh reaching up to 35+/- feet wide was identified between the mudflats and upland (Photo 1). The marsh is dominated by smooth cordgrass (*Spartina alterniflora*), with species such as

saltmeadow cordgrass (*Spartina patens*), sea lavender (*Limonium carolinianum*), and seaside goldenrod (*Solidago sempervirens*) more dominant toward the upland edge. This marsh area was classified as Estuarine, Intertidal, Emergent, Persistent, Regularly Flooded (E2EM1N).

North Mill Pond provides several important wetland functions and values, though many have been degraded by development and human activity. The following functions and values were assessed for the wetland in the vicinity of the proposed project.

3.1 Ecological Integrity

Ecological Integrity relates to how much the wetland has retained its native biotic and abiotic features and how these may have been degraded by human influences.

The Ecological Integrity of North Mill Pond has been compromised due to the presence of a tidal restriction, development of the upland buffer, water quality degradation, and filling along the project site. Efforts have been made in recent years to improve water quality entering the pond, improve tidal flushing, and restore some of the salt marshes. The peripheral salt marsh appears to be healthy and is comprised of native species along the project area.

3.2 Wildlife, Finfish, and Shellfish Habitat

The Wildlife, Finfish, and Shellfish Habitat function is the suitability of the habitat to support wildlife.

North Mill Pond contains extensive mudflats and a healthy but narrow peripheral salt marsh that contribute to wildlife habitat value. However, this value has been compromised by all the factors affecting Ecological Integrity described above. The area is likely to support a variety of wildlife, including migratory birds, finfish, and shellfish. Wildlife Action Plan mapping (Appendix B) depicts several small areas of the highest ranked wildlife value habitat around the pond. These high value habitats include two salt marsh areas in the vicinity of the proposed project; one directly across from the project and another just to the northeast of it.

3.3 Recreational and Commercial Potential

Recreational and Commercial Potential is the suitability of the wetland to support activities such as hiking, boating, hunting, bird watching, and shellfish harvesting.

North Mill Pond has the potential for use by small boats during high tide, though access appears to be limited to a boat launch on Marsh Lane, north of Maplewood Avenue. Shellfish harvesting is not allowed within the mudflats. Bird watching is a potential activity but public access is limited. There is an informal trail that runs through the proposed project area between Bartlett Street and Maplewood Avenue across private property that could be used for bird watching, but public access is not currently guaranteed. There is no visitor center, formally maintained trails, or access for disabled persons that would make this a more valuable area for recreation.

3.4 Aesthetic Quality

Aesthetic Quality refers to the ability of the wetland to provide interesting views and natural vistas.

The areas surrounding North Mill Pond are highly developed commercial and residential areas. There are few public viewing areas, but in locations where the pond can be seen it generally offers wide vistas and aesthetically pleasing views.

3.5 Educational Potential

Educational Potential consists of the ability of the wetland to serve as an outdoor classroom.

There is no safe public access to North Mill Pond near the project site. In addition to being private property, the project site has dangerous construction debris and steep banks to the pond, further diminishing the educational potential of this wetland.

3.6 Noteworthiness

Noteworthiness includes important qualities of the wetland not identified in previous functions, such as historic sites or unique natural features.

This area of North Mill Pond is noteworthy as it contains a salt marsh in a developed setting, which adds to its importance aesthetically and as part of the character of the area. In addition, the adjacent uplands have been proposed as part of the North Mill Pond Greenways project, which was presented to stakeholders in January 2019. (<https://www.cityofportsmouth.com/planportsmouth/north-mill-pond-trail-and-greenway>).

The wetland itself is not known for having any important historical features in the vicinity of the project area, though there have been historic structures and activities along its banks. The project area has some significance as the site of an old railroad yard with a turntable and roundhouse.

4.0 North Mill Pond Tidal Buffer

The North Mill Pond 100-foot tidal buffer can be divided into three zones within the project area: 1) a commercial area, including the Ricci Supply and Ace Hardware complex, the Great Rhythm Brewery building, a former railroad machine shop, and all the paved and unpaved impervious surfaces associated with those buildings; 2) the disturbed forest directly northeast and northwest of Great Rhythm Brewery, including the area around the old railroad turntable and roundhouse remains; and 3) the shrub thicket extending along the narrow portion of the parcel to the northeast. These areas all include historic filling 2-16 feet deep associated with railroad activities. The fill includes coal, coal ash, and possible slag.

4.1 Commercial Area Buffer

The commercial area (Photos 1-3) is comprised almost completely of impervious surfaces. These include buildings, paved and compact gravel parking lots, and a narrow strip of vegetation 10-20 feet wide extending down a steep bank to the tidal wetland. The vegetation includes lawn and species associated with disturbed sites such as staghorn sumac (*Rhus typhina*), autumn olive (*Elaeagnus umbellata*), black cherry (*Prunus serotina*), and Asiatic bittersweet (*Celastrus orbiculatus*). This area has little to offer in the way of functions and values other than contributing to stabilization of steep eroding

banks along the wetland. Runoff from this area likely contributes to the degraded water quality in North Mill Pond.

4.2 Disturbed Forest Buffer

The disturbed forested area northeast and southwest of Great Rhythm Brewery (Photos 4-6) is dominated by Norway Maple (*Acer platanoides*), black cherry, and staghorn sumac. The area includes significant rubble and debris as well as the railroad turntable and roundhouse remains. This area provides some screening for wildlife using the North Mill Pond and provides cover and food for small mammals and birds. However, it is dominated by invasive vegetation, and is highly disturbed by human activity.

4.3 Shrub Thicket Buffer

The shrub thicket northeast of the commercial area (Photos 7-8) is dominated by autumn olive with lesser amounts of staghorn sumac and other shrub species. This area provides wildlife habitat for small mammals and birds as well as screening for wildlife using North Mill Pond. Though invasive, the autumn olive provides prolific fruits utilized by birds and other frugivores. Bedding, clothing, campfire remains, trash, and other evidence suggests that this densely vegetated area has been used as camp sites by homeless individuals.

4.4 Buffer Impacts and Mitigation

The proposed project will not include any work within the 25-foot buffer to North Mill Pond. In addition, a 50-foot easement from the mean high water will be granted to the City of Portsmouth by the developer to build the North Mill Pond Trail and Greenway, which will provide improvements to the buffer, including invasive species management and revegetation with native species. Installation of the trail and greenway would result in improved functions and values of the wetland and buffer including: Ecological Integrity, Recreation Potential, Aesthetic Quality, and possibly Educational Potential. Existing impacts to the 100-foot buffer will be reduced from the trail and greenway improvements through the removal and restoration of impervious surfaces.

Table 4.1

105 Bartlett Street Multi-Family Development Buffer Impact Reductions

Overall Buffer Impact Area		
Wetland Buffer Setback	Existing Impact	Proposed Impact
0 - 25 FT	12,788 SF	6,788 SF
25 - 50 FT	30,478 SF	22,394 SF
50 - 100 FT	66,844 SF	52,543 SF
Total Impact	110,110 SF	81,725 SF
NET BUFFER IMPROVEMENT		28,385 SF

5.0 Excavated Palustrine Forested Wetland

A small wetland was delineated by Tighe & Bond within the base of the six-foot +/- deep, concrete walled railroad roundtable (Photos 9-10) within the disturbed forested area. The soils in this wetland are poorly drained marine silts and clays. The vegetation is dominated

by Norway maple and red osier dogwood (*Cornus sericea*). Nearby test pits identified approximately two to four feet of fill in the vicinity of the structure. Therefore, it is likely this wetland was at least partly excavated into native marine sediments during construction of the turntable. It is unclear if this area was originally a wetland or if the wetland was created by the excavation. This wetland was classified as Palustrine, Forested, Deciduous, Saturated (PFO1B). The small size of the wetland and its location within a man-made structure in a highly disturbed landscape has resulted in this system providing negligible wetland functions and values.

6.0 Summary

Two wetlands were delineated and evaluated on the site:

North Mill Pond is a 79+/- acre tidal wetland with expansive mud flats (E2US3N) and a narrow fringe of salt marsh (E2EM1N). Wetland functions and values are primarily Wildlife, Finfish, and Shellfish Habitat, as well as Aesthetic Quality and Noteworthiness. It is noteworthy as an important aesthetic component of the area and as an important potential site for a greenways trail project. It also has compromised but improving Ecological Integrity and some Recreation Potential. Upland buffers to the wetland have been compromised by development and invasive species, but limited vegetation does provide some screening for wildlife in the wetland.

A small excavated forested wetland (PFO1B) was identified within the old railroad turntable, approximately six feet below existing grade within a concrete wall. The small size of the wetland and its location within a man-made structure in a highly disturbed landscape has resulted in this system providing negligible wetland functions and values.

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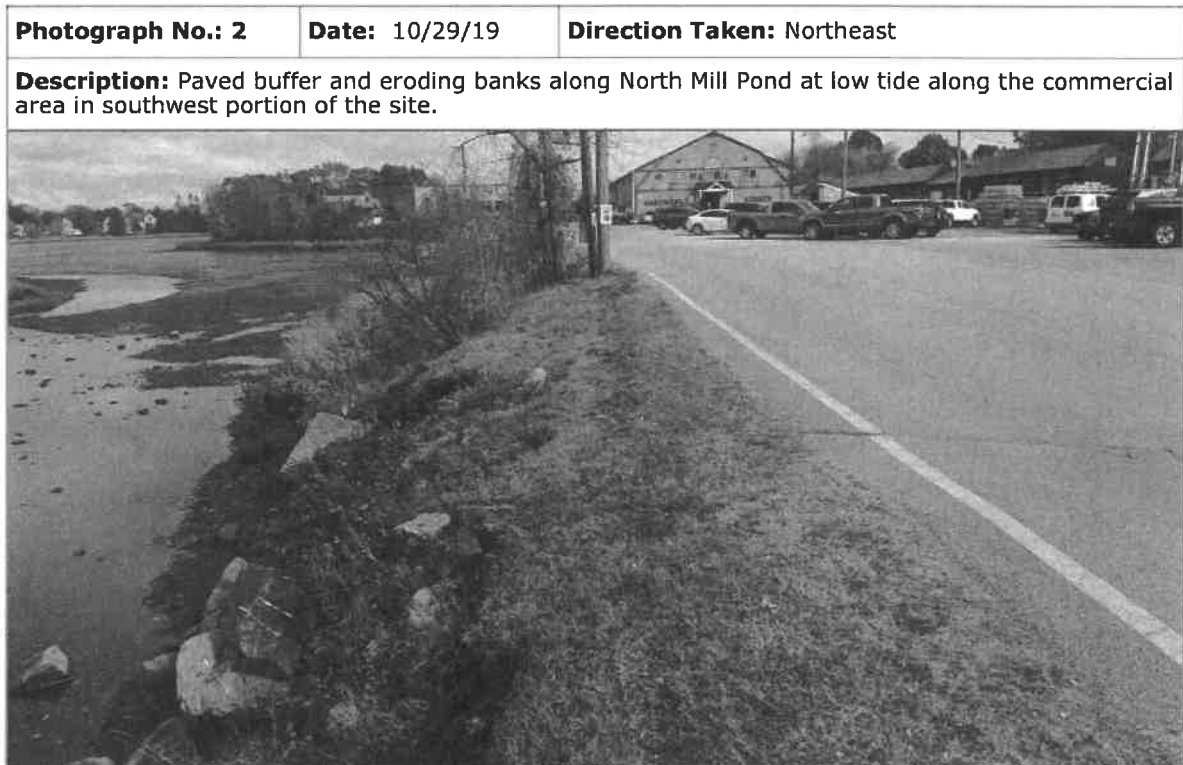
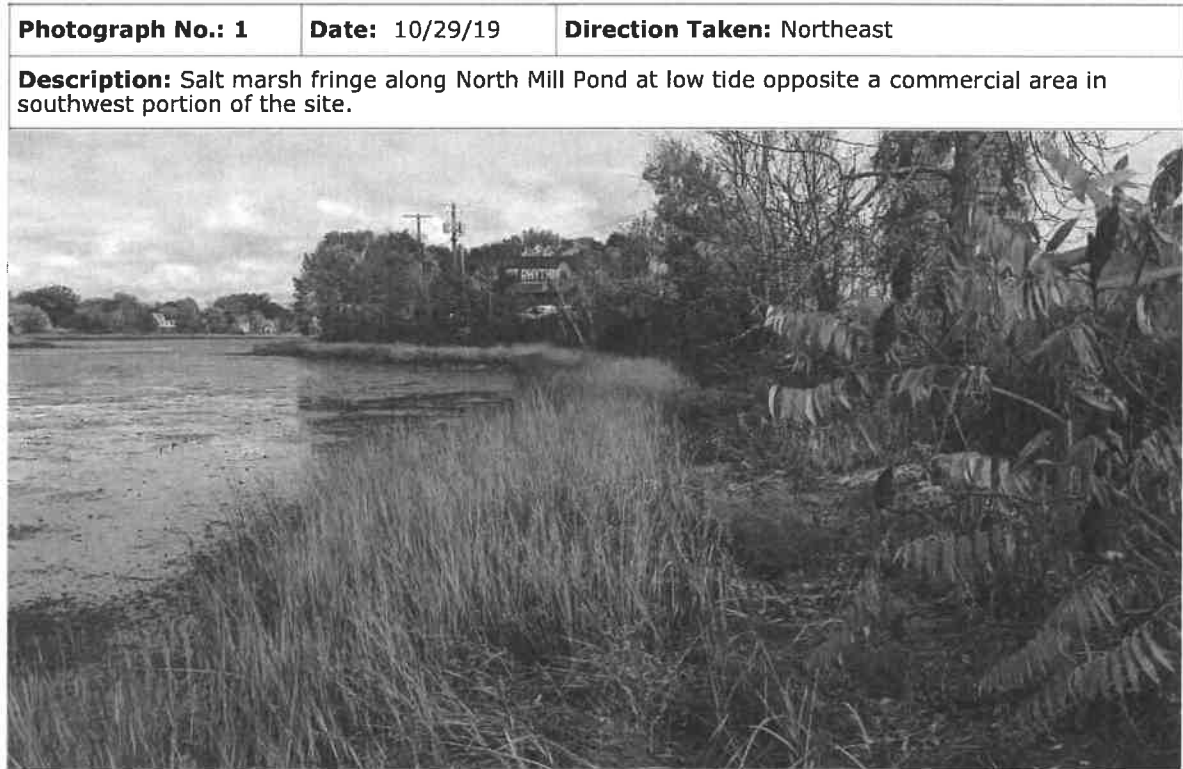
APPENDIX A

Appendix A- Photographic Log

Client: Cathartes

Job Number: C-0960006

Site: 105 Bartlett St., Portsmouth, NH

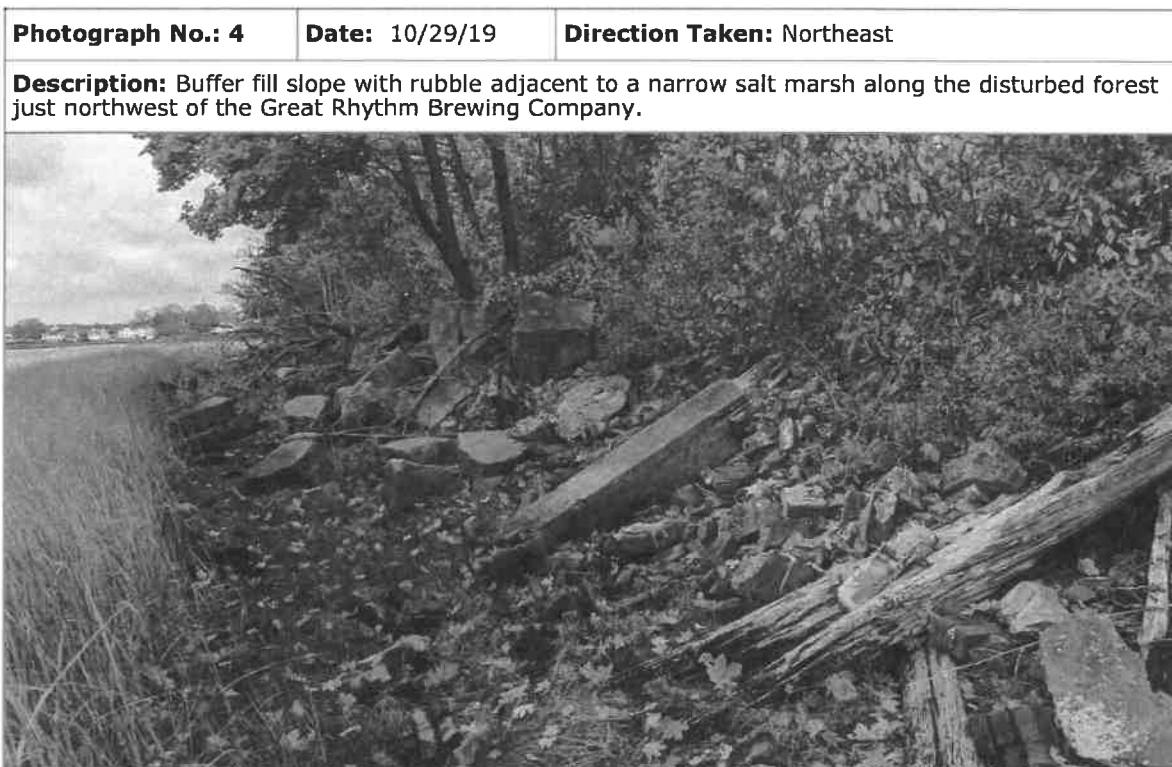
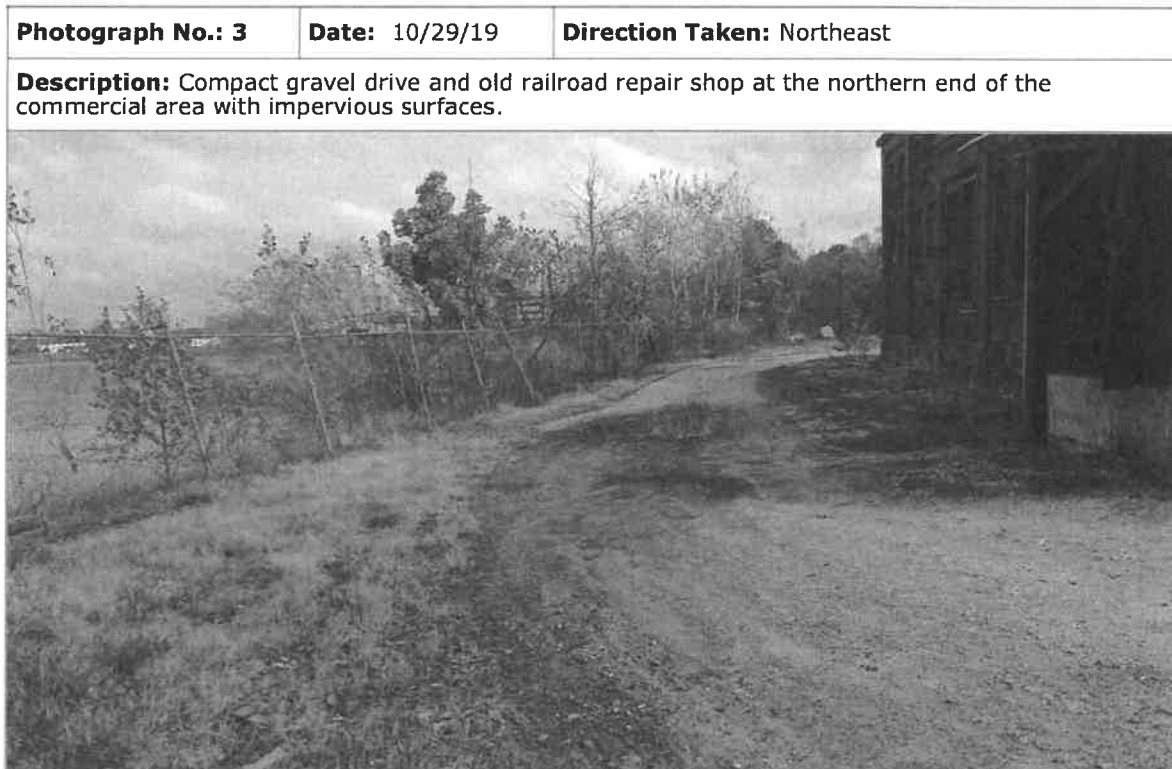


Appendix A- Photographic Log

Client: Cathartes

Job Number: C-0960006

Site: 105 Bartlett St., Portsmouth, NH

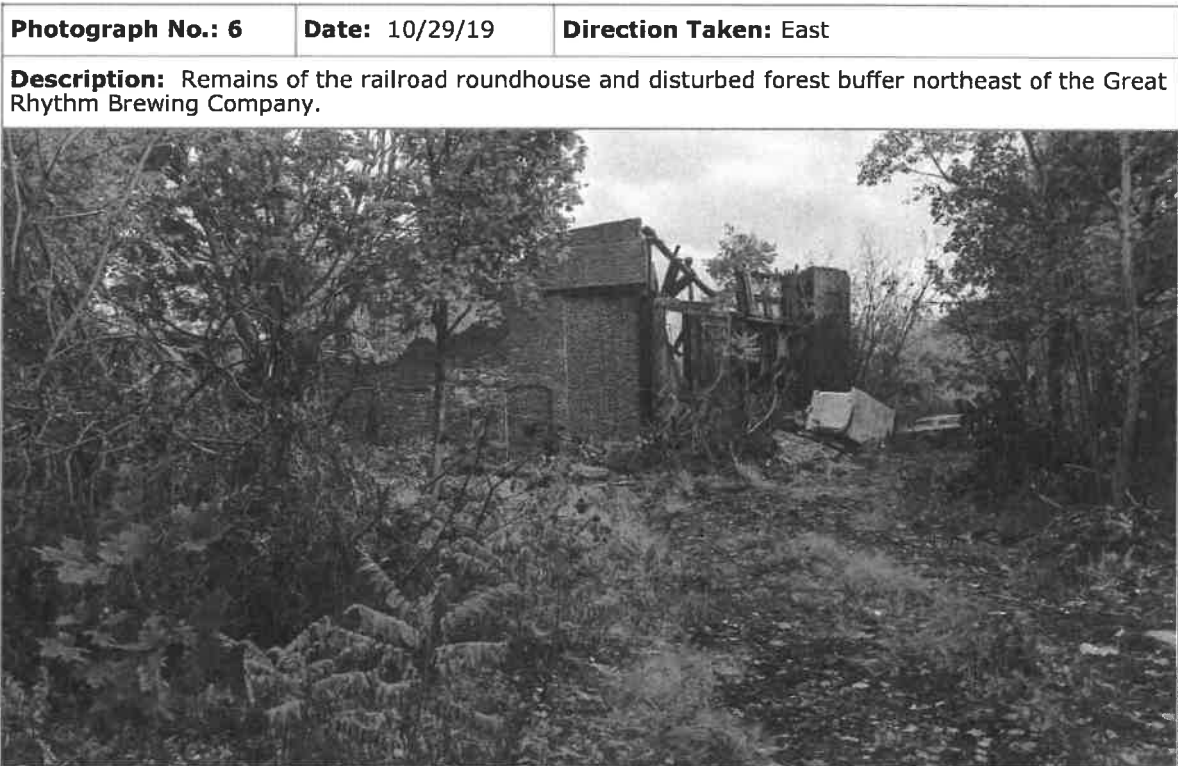
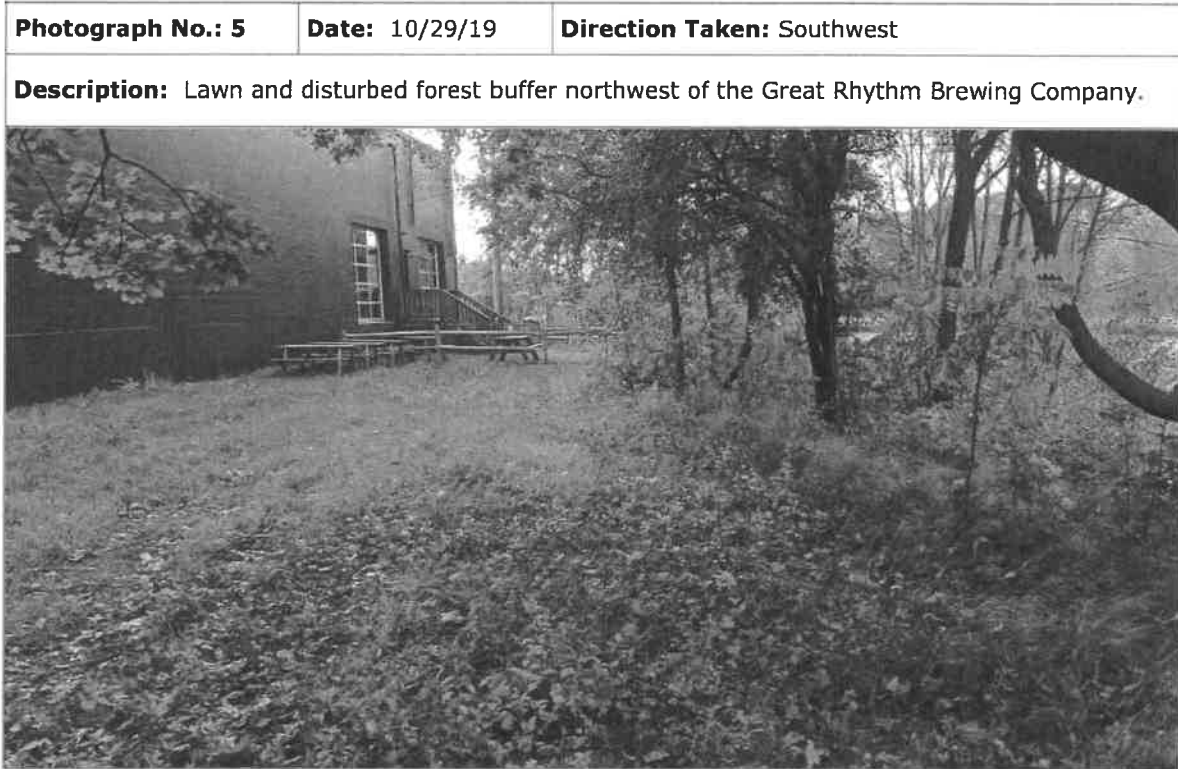


Appendix A- Photographic Log

Client: Cathartes

Job Number: C-0960006

Site: 105 Bartlett St., Portsmouth, NH

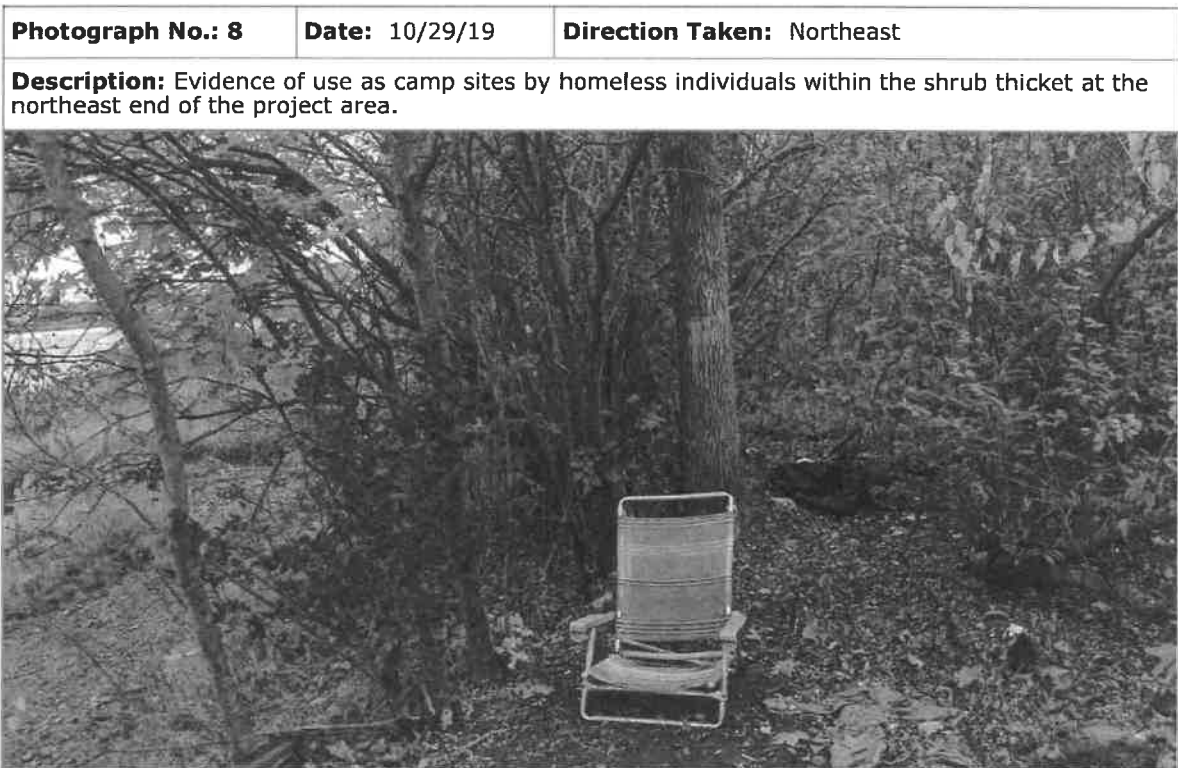
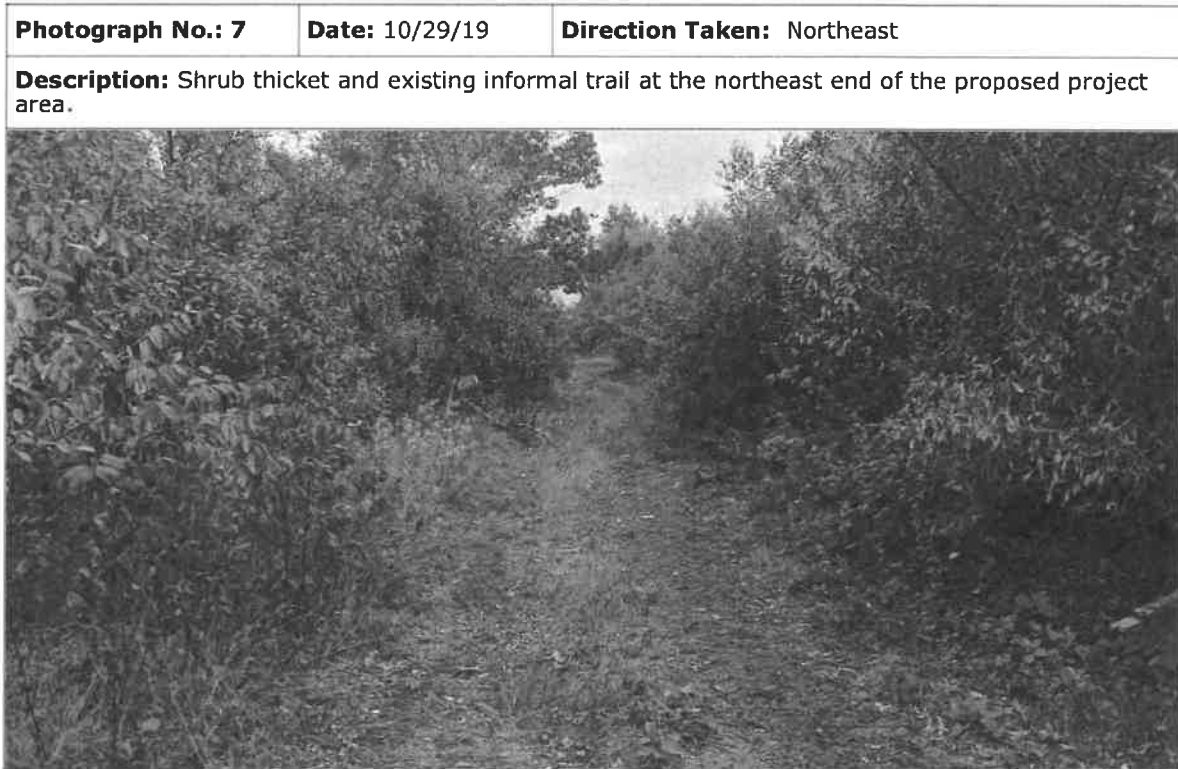


Appendix A- Photographic Log

Client: Cathartes

Job Number: C-0960006

Site: 105 Bartlett St., Portsmouth, NH





Appendix A- Photographic Log

Client: Cathartes

Job Number: C-0960006

Site: 105 Bartlett St., Portsmouth, NH



Photograph No.: 9	Date: 12/2/19	Direction Taken: South
Description: Wetland dominated by Norway maple and red osier dogwood within the old railroad turntable approximately six feet below grade.		
		

Photograph No.: 10	Date: 12/2/19	Direction Taken: n/a
Description: Poorly drained marine silts and clays observed in the bottom of the old railroad turntable.		
		

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APPENDIX B

2015 HIGHEST RANKED WILDLIFE HABITAT BY ECOLOGICAL CONDITION

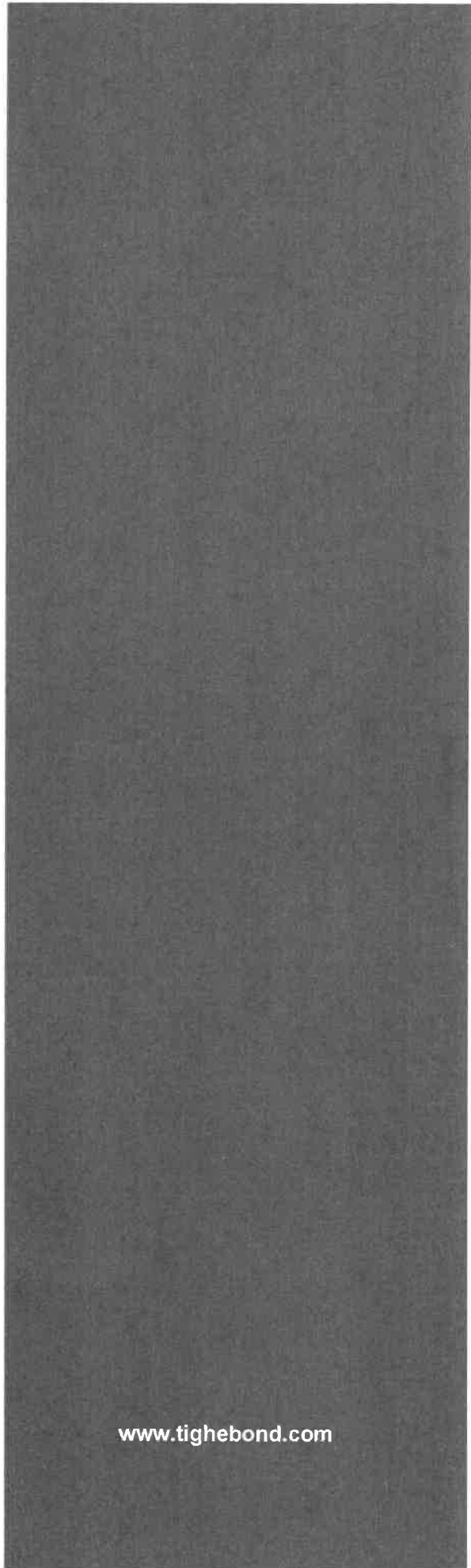
-  Highest Ranked Habitat in New Hampshire
-  Highest Ranked Habitat in the Biological Region
- Biological region = TNC ecoregional subsection for terrestrial habitats or Aquatic Resource
Mitigation region for wetlands and floodplain forest.
-  Supporting Landscapes
-  Conservation or public

Base map data provided by NH GRANIT at UNH
September 2019. Intended for planning use only.



**NEW HAMPSHIRE
Wildlife Action
Plan**
September 2015



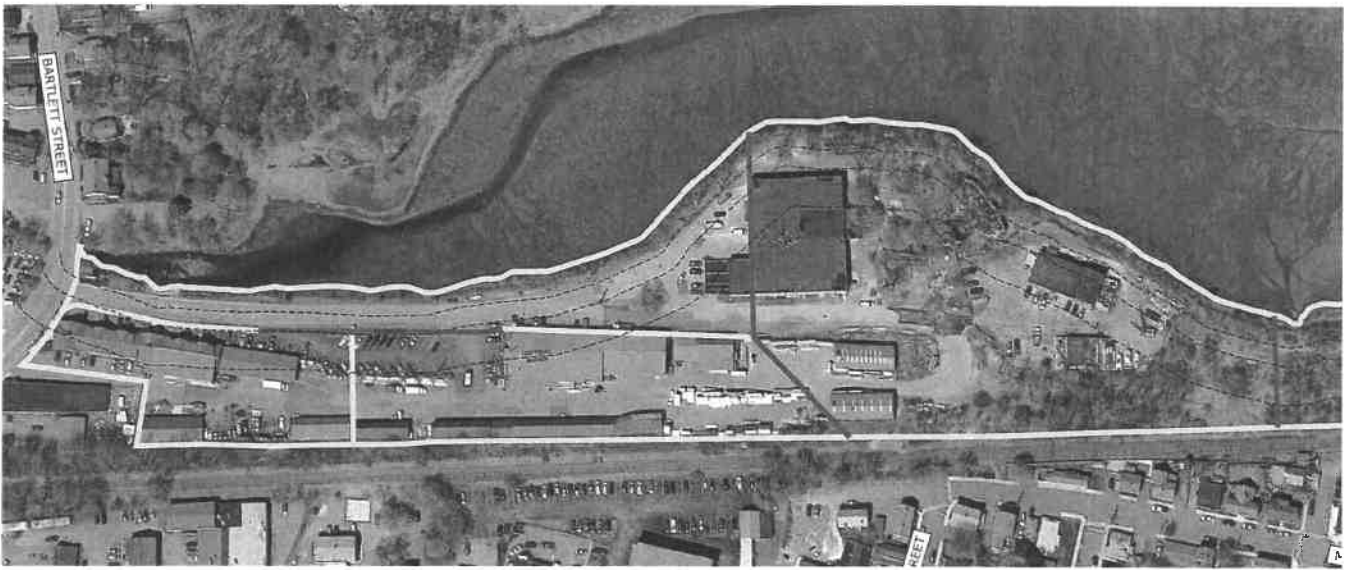


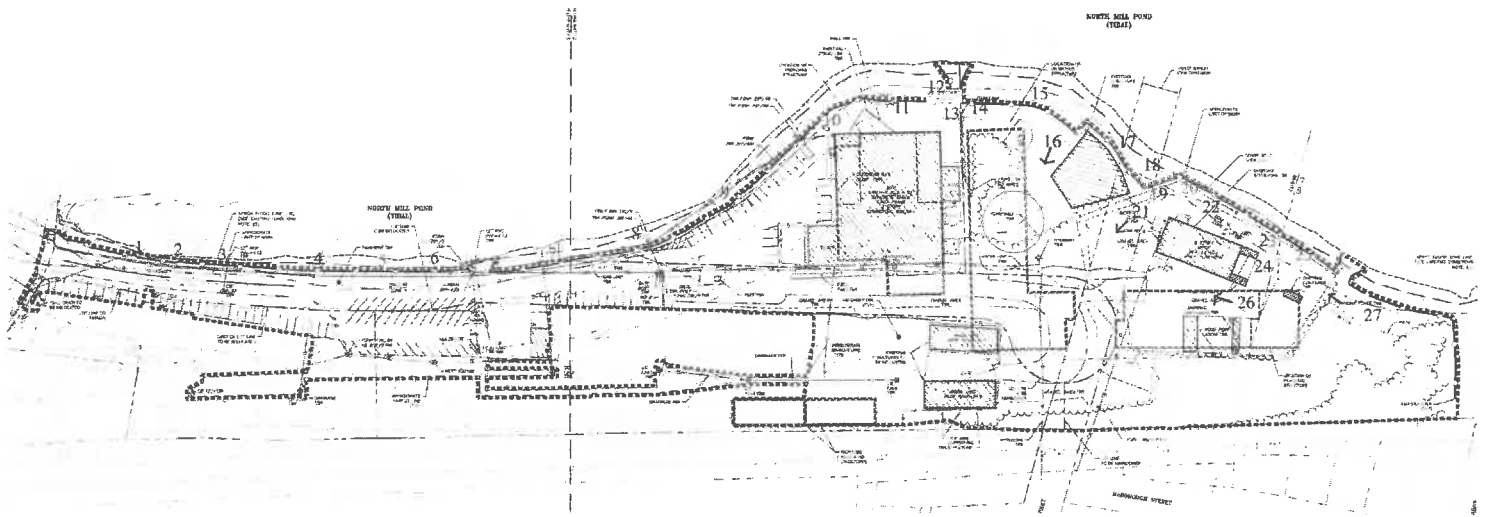
www.tighebond.com



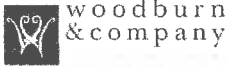
100% Recyclable







Existing vegetation within the 100' Buffer on the 105 Bartlett property consists of many invasive species along with native second growth trees and shrubs. Invasive species within the 100' buffer zone, include Buckthorn, Autumn Olive, Honeysuckle, Bittersweet, Norway Maple. With the exception of the Norway Maples in the 25' vegetated buffer, invasive species within the 100' shoreland setback will be removed. Invasive species within the 25' vegetated buffer will be flagged in field by the landscape architect or certified arborist to be removed. Invasive shrubs within the 25' vegetated buffer with caliper measuring greater than 3" such as Buckthorn and Autumn Olive will be flush cut repeatedly to kill the plant, leaving the stumps in place. Woody invasives smaller than 3" caliper shall be removed with hand tools. Areas of soil disturbance from such removals will be limited to the immediate root area surrounding each plant, dressed with loam, replanted with New England Wildlife and Conservation Seed Mix and stabilized with jute mesh staked in place. All other areas disturbed by headwalls and culverts shall be loamed, seeded with New England Wildlife and Conservation Seed Mix and stabilized with jute mesh.



*View Locations & Removal Process
105 Bartlett – Existing Vegetation &
Invasive Species in 100' Buffer - Photos 2*



1 Ash



2

Multiflora Rose



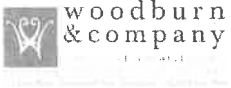
3

Bittersweet



4 Eastern Red Cedar

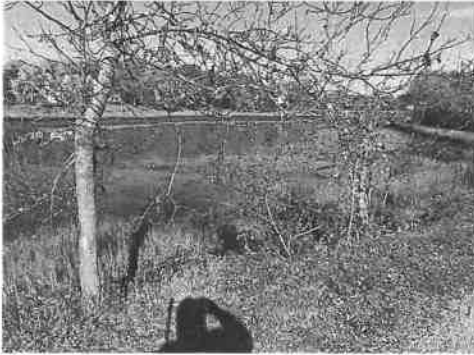
105 Bartlett – Existing Vegetation & Invasive Species in 100' Buffer - Photos



woodburn & company
LANDSCAPE ARCHITECTS
1000 Main Street, Suite 100, Bartlett, IL 60010
630.381.1111



Sumac & Ash
5



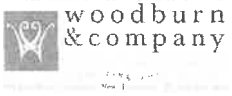
6

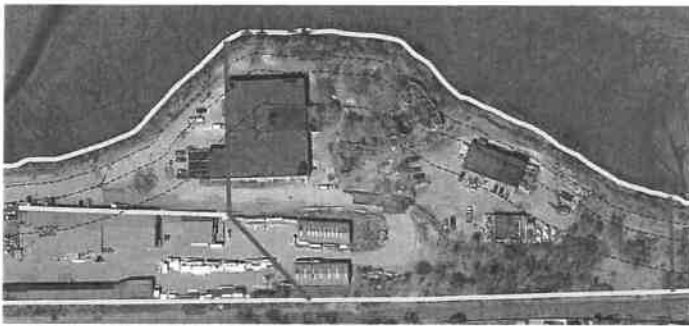


Ash and Buckthorn 7 Ash and Buckthorn



8 Buckthorn





Multiflora rose,
Crabapple,
Dogwood,
Buckthorn
9



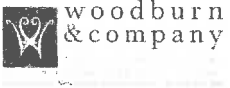
Norway Maple, Rhus aromatica 10



Norway Maple, Buckthorn,
Cottonwoods 11



Norway
Maple
12





Norway Maples
Red Oak
13



Buckthorn, Crabapple,
Norway Maples,
Cottonwoods, Autumn Olive

14



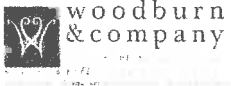
Cottonwoods



15

16

*105 Bartlett – Existing Vegetation &
Invasive Species in 100' Buffer - Photos*





Cherry, Norway
Maple, Buckthorn

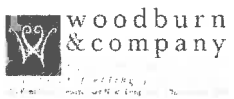
17

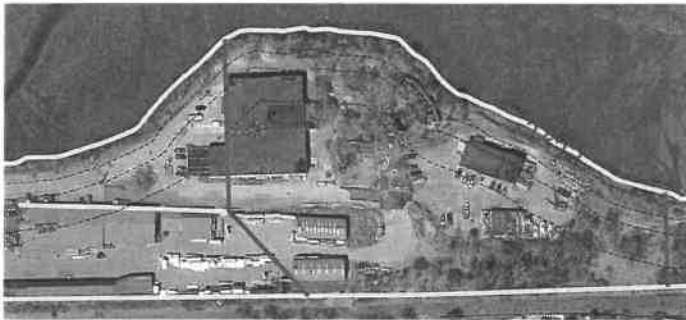


20

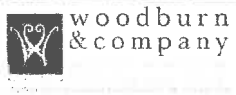
18 Cottonwood, Norway
Maple, Buckthorn

19





21



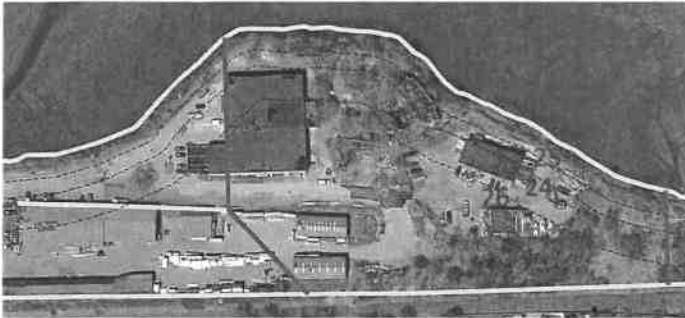
Norway Maple, Sumac
Red Oak 22



Ash, Cottonwood

23

105 Bartlett – Existing Vegetation & Invasive Species in 100' Buffer - Photos



Gravel, Scrub, Norway Maples, Cottonwood beyond 24



Cottonwood & Birch 25



Open Gravel 26

