THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

In re Application of Stone Creek Realty, LLC, CPI Management, LLC, and Boston & Maine Corporation regarding the property located at 53 Green Street

APPEAL OF DECISION OF
PORTSMOUTH PLANNING BOARD

Pursuant to RSA 676:5, III, James A. Hewitt, Elizabeth E. Hewitt, Richard Antal, Mark Brighton, William R. Castle, Lawrence J. Cataldo, Ramona Charland, Joseph R. Famularo, Jr., Philippe Favet, Abigail Gindele, Charlotte Gindele, Julia Gindele, Catherine L. ("Kate") Harris, John E. Howard, Nancy B. Howard, Elizabeth Jefferson, and April Weeks (collectively referred-to hereinafter as "the appellants"), all of whom are citizens, residents and/or property owners in the City of Portsmouth, hereby appeal the July 15, 2021 decision of the Portsmouth Planning Board, in which said Board (a) granted a wetlands conditional use permit to the owner-developers, Stone Creek Realty, LLC, CPI Management, LLC, and Boston & Maine Corporation, LLC, for the above-referenced lot of property located at 53 Green Street, purportedly granting such permit pursuant to Section 10.1017 of the Portsmouth Zoning Ordinance; (b) granted preliminary and

final subdivision approval to the developers' proposal; and (c) granted site plan approval.

As grounds for their appeal, the appellants state that the Planning Board misconstrued, misinterpreted and/or misapplied a number of provisions of the Portsmouth Zoning Ordinance and, in some cases, failed to observe those provisions altogether.

STANDARD OF REVIEW OF PLANNING BOARD DECISIONS

The legal standard for review of the Planning Board decisions by the Zoning Board of Adjustment is de novo. Ouellette v. Town of Kingston, 157 N.H. 604, 608-12, 956 A.2d 286, 290-93 (2008); 15 Peter J. Loughlin, New Hampshire Practice: Land Use Planning & Zoning § 33.02 n.10 (4th ed. 2010 & Supp. 2020). This Zoning Board of Adjustment is required to consider the applicants' petitions anew, and the ZBA is not required to give any deference to any of the findings and conclusions reached by the Planning Board. Id. In fact, this Board (viz., the ZBA) may substitute its own judgment in toto for that of the Planning Board, if it is so inclined. Id.

GROUNDS FOR APPEAL

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

I. The Planning Board erred in approving the applicants' proposed project without requiring them to meet the requirements for the issuance of a conditional use permit relating to the size of the building's footprint. The owner-developers were obligated to obtain a conditional use permit in order to allow them to erect a building having a footprint in excess of 20,000 square feet, as required by section 10.5A43.43 of the zoning ordinance for new buildings in the zoning district in question, and the Planning Board erred in approving the project without actually issuing a conditional use permit for that purpose. The building which the owner-applicants propose to erect has a footprint of 29,660 square feet, or almost 50% over the limit that is allowed without a conditional use permit. Apparently, the Planning Board members were misled by an erroneous citation to the wrong section of the zoning ordinance by the developers in their plans, leading the board members to believe that no conditional use permit was required in order for the developers to erect a building having a footprint exceeding 20,000 square feet.

More specifically, in Plan C-102.1 of their plans, the developers incorrectly cited to section 10.5A43.<u>42</u> of the ordinance, which pertains to "detached liner buildings" and does not require conditional use permits for the erection of such buildings. However, it is undisputed that the proposed building is <u>not</u> a detached liner building, and therefore section 10.5A43.42 does not apply. The correct section of the ordinance, covering

the proposed building in question, is section 10.5A43.43, which does require a conditional use permit in order to erect a building having a footprint exceeding 20,000 square feet in the zoning district in question.

This error was specifically brought to the attention of the City via a letter dated July 26, 2021 to City Attorney Robert Sullivan by one of the Planning Board members themselves, Rick Chellman, after the July 15, 2021 vote had taken place. (A copy of that letter is appended hereto as Attachment A.) That letter lucidly explains the distinction between § 10.5A43.42 and § 10.5A43.43, explains how the error probably came about, and explains what was required in order to correct it. The letter also leaves no doubt but that a conditional use permit is required in order for the building's footprint to exceed 20,000 square feet and that the Planning Board's approval of the project without such a permit was unlawful.

II. The Planning Board also erred in granting a wetlands conditional use permit, as the project does not meet the requirements set forth in the wetlands section of the Zoning Ordinance, section 10.1017.50. Where wetlands are at issue, section 10.-1017.50 requires that the development meet all of the following criteria:

> (1) The land is reasonably suited to the **use**, activity or **alteration.**
>
> (2) There is no alternative location outside the **wetland buffer** that is feasible

> and reasonable for the proposed **use**, activity or **alteration**.
>
> (3) There will be no adverse impact on the **wetland** functional values of the site or surrounding properties;
>
> (4) **Alteration** of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals; and
>
> (5) The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this Section.
>
> (6) Any area within the **vegetated buffer strip** will be returned to a natural state to the extent feasible.

(Emphasis in original.) Of these six criteria, it is only necessary to consider #2 and #5, for it is crystal clear that it is both possible and feasible to erect a building which suits the developers' purposes and is outside the wetland buffer, and it is clear that there were and are other alternatives which would have had less impact upon the site in question. Although in the appellants' view the developers' plan fails to meet several of the other criteria as well, the fact that it is possible to erect a building on the site which does not encroach upon the wetlands buffer is dispositive of the issue and ends the inquiry. It demonstrates conclusively that the Planning Board's decision was wrong. The developers' plan plainly violates the requirements of the above-quoted section of the ordinance, section 10.1017.50, for there is "[an] alternative location outside the wetland

buffer that is feasible and reasonable for the proposed use," § 10.1017.50(2), and it is clear that the developers' present plan is not the alternative "with the least adverse impact to areas and environments under the jurisdiction of this Section." Ordinance § 10.1017.50(5) (emphasis added).

A sketch of one such alternative, using the developers' own site plan as a template, is appended hereto as Attachment B as an example. This sketch shows how a building could be erected outside the 100' wetland buffer at a location that is both "feasible and reasonable for the proposed use," and moreover this alternative would plainly have "[less] adverse impact to areas and environments under the jurisdiction of" the wetlands ordinance, viz., the North Mill Pond. Portsmouth Zoning Ordinance § 10.-1017.50(2), -(5).

Further, Attachment B is merely one example. As another approach, it would also be feasible for the developers to simply make their buildings smaller, similarly avoiding encroachment into the 100' wetlands buffer.

The only explanation that the owner-developers have ever offered as to why they cannot adopt and implement a plan which would observe the 100' wetlands buffer and would be less intrusive to the environment is that any alternative plan which they might be able to devise would be less profitable to them than the one which they have proposed. However, relative lack of profitability, or the fact that a given alternative plan does not rep-

resent the "highest and best use" which might have been made of the property if no restrictions had existed, is no excuse for flouting the requirements of Portsmouth wetlands ordinance and the wetlands laws in general. The wetlands ordinance specifically provides that economic considerations alone are not sufficient reason for granting a conditional use permit. Zoning Ordinance § 10.1017.44. By approving the developers' plan on the basis of that rationale, the Planning Board committed clear error.

III. The plan that was approved by the Planning Board unlawfully provides for the placement of two 3-story buildings (or two 3-story wings of the same building, depending on how one chooses to view it) within 100' of the water line. This was plainly a violation of the zoning ordinance, for only two stories are allowed by the zoning ordinance under such circumstances. In the proceedings before the Planning Board, the owner-developers relied on section 10.5A46.10 of the ordinance, which provides that a developer is entitled to an extra story (in this instance, three stories instead of two) if he provides "community space" as part of his project. However, that section is trumped by sections 10.5A21.10 & -.20 of the zoning ordinance (and Map 10.5A21B, which is incorporated therein by reference), which flatly require that any structure or portion thereof erected within 100' of the mean high water line shall have no more than two stories, <u>period</u>.

Further, in cases where two provisions of the zoning ordinance are in conflict with one another, the zoning ordinance itself expressly states that the more restrictive of the two provisions shall control. Section 10.141 of the zoning ordinance states:

> The provisions of this Ordinance shall be held to be minimum requirements for the promotion of the public safety, health, convenience, comfort, prosperity and general welfare. Whenever a provision of this Ordinance is more restrictive or imposes a higher standard or requirement upon the **use** or dimensions of a **lot, building** or **structure** than is imposed or required by another ordinance, regulation, rule or permit, the provision of this Ordinance shall govern.

Similarly, section 10.511 of the ordinance provides:

> When this Article specifies two requirements for the same dimensions (for example, maximum **building height** stated both in feet and in stories, or minimum **side yard** stated both in feet and as a percentage of **building height**), the more restrictive requirement shall apply unless explicitly stated otherwise.

Because sections 10.5A21.10 & -.20 of the ordinance are more restrictive, and moreover because section 10.5A21.22(b) is specifically intended to address the situation in which a new structure is to erected within the wetlands buffer zone or where the height of an existing structure within that zone is to be increased, sections 10.5A21.10 and -.20 prevail over section 10.-5A46.10, and no building exceeding two stories in height is allowed. By virtue of the foregoing circumstances, the Planning

Board misconstrued, misinterpreted, and misapplied the provisions of the zoning ordinance, and it erred in granting site plan approval where two portions of the proposed building, three stories high, would fall within the 100' wetlands buffer zone.

The error was so egregious that one of the Planning Board members, Rick Chellman, wrote two letters to City Attorney Robert Sullivan pointing out the flaws in the Planning Board's reasoning and citing and quoting the above-quoted sections of the ordinance which state that when two provisions of the ordinance are in conflict, the more restrictive one prevails. The first letter has already been discussed at some length above, and a copy is appended hereto as Attachment A; the second, dated August 9, 2021, is appended hereto as Attachment C. Although Planning Board Member Chellman's discussion primarily targets the violation of the 20,000 square footage limit on the footprint, his reasoning applies to the two-story height limit as well, and his explanation is lucid. The Planning Board clearly erred in approving a plan which would allow two portions of a building falling within the 100' wetlands buffer zone to have three stories instead of two. It also erred in failing to require the developers to prove that their plan met the criteria for a conditional use permit for a footprint exceeding 20,000 square feet in area, and in approving the subdivision plan and the site plan without issuing such a permit. For the foregoing reasons, the Planning Board's decision must be overturned.

CONCLUSION

For all of the foregoing reasons, the Zoning Board of Adjustment should overrule the findings of the Planning Board, should vacate the latter's decision of July 15, 2021, and should direct that the applicants' site plan and subdivision plan be disapproved.

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madbarrister@aol.com
Attorney for Appellants

Dated: August 13, 2021

ATTACHMENT A

Rick Chellman

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Mr. Robert P. Sullivan, Esq.
City Attorney
1 Junkins Avenue
Portsmouth, NH 03801

July 26, 2021

Re: Potential Planning Board Error

Dear Bob:

On July 15, the Planning Board reviewed the application submitted by Tighe & Bond on behalf of the owner and applicant for a project known as 53 Green Street. The project as noticed and reviewed was approved.

There is an error on the plan and in this process that I believe are fatal to the subsequent Board actions on the application.

Specifically, I direct your attention to the attached which extracts a portion of Plan C-102.1 and the relevant page of the zoning ordinance.

The citation on the plan given as rationale for the building to be above the 20,000 sq. ft. permitted as a matter of right in this zone[1] is 10.5A43.**42** (lower portion of Plan C-102.1). That section of the ordinance pertains to "detached liner buildings" and does not require a conditional use permit.

It was confirmed with the applicant and the Planning Director during the meeting that the proposed building is not a detached liner building and that the correct section of the ordinance is 10.5A43.**43** which is the very next section in the ordinance (see video of meeting at approximately 53:43 regarding confirmation).

As you will readily note, section 10.5A43.43 requires several criteria to be met for a conditional use permit to be granted for a building's footprint to exceed 20,000 square feet; here, the proposed building's footprint, at 29,660 sq. ft., is for almost 50% above the building's footprint size that is permitted without a conditional use permit. Clearly this application requires a conditional use permit for a building of the proposed size.

I think the matter was downplayed and mischaracterized by the Planning Director and Chair as a typo, claiming that while the plan reference was incorrect, the terms of what the "incentive" (meaning justification for a larger building) are the same. I do not believe that is correct as I read the ordinance. In any case, the need for a conditional use permit for building footprint was not discussed or considered by the Board.

The net result of this is that:

- the plan for 53 Green Street shows a proposed building with a footprint well in

[1] Section 10.5A41.10D Specifies a maximum building footprint of 20,000 sq. ft. in the CD5 district "or as allowed by Section 10.5A43.40".

excess of the 20,000 sq. ft. permitted in that zone;
- the Planning Board never considered a conditional use permit to allow the larger building, as is required under the terms of the ordinance;
- the applicant apparently never requested a conditional use permit for the increased building size; and,
- obviously, the criteria for a conditional use permit were not reviewed by the Board.

Since the size of the building is a strategic and fundamental part of this proposed project, I think the proposal was not properly reviewed or noticed to the public as the conditional use permit for increased building size was not even considered much less approved as is required for a building of this size.

I believe this error ripples through the Board's actions as the site plan, for example, is entirely dependent on the size of the building it depicts and if the building depicted is not permitted due to excessive size, the site plan itself cannot be valid under the zoning.

If this is not resolved, how could a building permit, for example, later be approved for a building of this size without the required conditional use permit?

I know that there is no specific procedure for a "motion to reconsider" for a Planning Board and understand that someone could appeal this to the ZBA. However, this seems such an obvious error, I wonder if it might be more expedient to offer a rehearing to the applicant, or if the City needs to do something else as you may feel is appropriate under these circumstances.

I believe you and/or your department have had a similar experience with the Dziama v. City of Portsmouth case in 1995 where I understand the Court encouraged rehearings to allow a board to address potential errors as an expedient means of dealing with such matters.

In any case, I thank-you in advance for your counsel on this matter, and remain,

Respectfully Yours,

Rick Chellman

Email copies to:
Mayor Becksted
Councilor Whelan
Councilor Kennedy

From Zoning

10.5A43.40 Maximum Building Footprint

10.5A43.41 No **building** or **structure** footprint shall exceed the applicable maximum **building footprint** listed in Figures 10.5A41.10A-D (Development Standards) except as provided in Sections 10.5A43.42-44 below.

Cited on Plan → 10.5A43.42 In the CD5 district, a detached **liner building** may have a **building footprint** of up to 30,000 sq. ft. if it meets all other **development** standards and is integrated into a **parking structure** through the provision of **community space** or shared access.

Correct Section- In order for Building to exceed 20,000 sq. ft. Requires 30% Community Space AND a CUP AND full compliance with all other applicable standards → 10.5A43.43 For a **building** that contains **ground floor** parking, a **parking garage** or **underground parking levels**, and is not subject to Section 10.5A43.42, the Planning Board may grant a conditional use permit to allow a **building footprint** of up to 30,000 sq. ft. in the CD4 or CD4-W districts, and up to 40,000 sq. ft. in the CD5 district, if all of the following criteria are met:

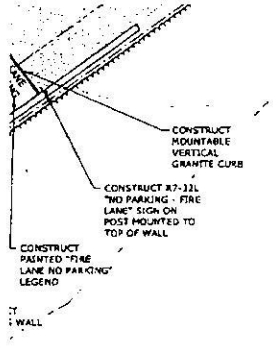
(a) No **story** above the **ground floor** parking shall be greater than 20,000 sq. ft. in the CD4 or CD4-W districts or 30,000 sq. ft. in the CD5 district.
(b) All **ground floor** parking areas shall be separated from any public or private **street** by a **liner building**.
(c) At least 50% of **the gross floor area** of the **ground floor** shall be dedicated to parking.
(d) At least 30% of the property shall be assigned and improved as **community space**. Such **community space** shall count toward the required **open space** listed under Figures 10.5A41.10A-D (Development Standards) and **community space** required under Section 10.5A46.20. The size, location and type of the **community space** shall be determined by the Planning Board based on the size and location of the **development**, and the proposed and **adjacent uses**.
(e) The **development** shall comply with all applicable standards of the ordinance and the City's land use regulations.

10.5A43.44 The **building footprint** of a **parking structure** shall be no greater than 40,000 sq. ft., and the **façade** length shall be no greater than 300 feet.

10.5A43.50 Streetscreens

Any **streetscreen** in a **front yard** shall be built on the same plane as the **façade** of the **principal building** and shall be between 3.5 and 4.0 feet in height

From Site Plan Submitted and Approved



22. ALL EXCESS SNOW SHALL BE HAULED OFF-SITE IN ACCORDANCE TO ALL LOCAL AND STATE LAWS. PROPOSED SNOW STAGING AREAS HAVE BEEN PROVIDED TO SHOW TEMPORARY SNOW STORAGE AREAS.
23. AREAS DESIGNATED FOR FIRE EMERGENCY ACCESS SHALL BE KEPT CLEAR OF SNOW.

SITE RECORDING NOTES:

1. THIS SITE PLAN SHALL BE RECORDED IN THE ROCKINGHAM COUNTY REGISTRY OF DEEDS.
2. ALL IMPROVEMENTS SHOWN ON THIS SITE PLAN SHALL BE CONSTRUCTED AND MAINTAINED IN ACCORDANCE WITH THE PLAN BY THE PROPERTY OWNER AND ALL FUTURE PROPERTY OWNERS. NO CHANGES SHALL BE MADE TO THIS SITE PLAN WITHOUT THE EXPRESS APPROVAL OF THE PORTSMOUTH PLANNING DIRECTOR.
3. THIS IS NOT A BOUNDARY SURVEY AND SHALL NOT BE USED AS SUCH.

LEGEND

PROPERTY LINE			PROPOSED POROUS PAVEMENT
PROPOSED PROPERTY LINE			
ABUTTER PROPERTY LINE			PROPOSED PAVEMENT
PROPOSED EASEMENT			PROPOSED GRASS PAVER FIRE LANE
PROPOSED EDGE OF PAVEMENT			
PROPOSED CURB	TYP		TYPICAL
PROPOSED BUILDING	30'R		PROPOSED CURB RADIUS
PROPOSED BRICK SIDEWALK	VGC		PROPOSED VERTICAL GRANITE CURB
	SGC		PROPOSED SLOPED GRANITE CURB
PROPOSED CONCRETE SIDEWALK	SWL		SOLID WHITE LINE
	CAP		CAPACITY
PROPOSED STAMPED CONCRETE			

SITE DATA:
LOCATION: TAX MAP 119, LOT 2
OWNER: STONE CREEK REALTY LLC C/O DOUGLAS PINCIARO PO BOX 121 NEW CASTLE, NH 03854

ZONING DISTRICT: CHARACTER DISTRICT 5 (CD5)
DOWNTOWN OVERLAY DISTRICT
NORTH END INCENTIVE OVERLAY DISTRICT
HISTORIC DISTRICT
FLOOD PLAIN DISTRICT

PROPOSED USE: MULTI-FAMILY RESIDENTIAL/COMMERCIAL
PROPOSED LOT SIZE: ±1.78 ACRES (±77,579 SF)

DEVELOPMENT STANDARDS

BUILDING PLACEMENT (PRINCIPAL BUILDING):	REQUIRED	PROPOSED
MAXIMUM PRINCIPAL FRONT YARD:	5 FT	48 FT[1]
SIDE YARD:	NR	
MINIMUM REAR YARD:	5 FT	52 FT
FRONT LOT LINE LENGTH:	NR	101.66 FT
MINIMUM FRONT LOT LINE BUILDOUT:	80% (82.9 FT)	80.1% (83.0 FT)[2]

BUILDING AND LOT OCCUPATION:	REQUIRED	PROPOSED
MAXIMUM BUILDING BLOCK LENGTH:	225 FT	205 FT
MAXIMUM FACADE MODULATION LENGTH:	100 FT	<100 FT
MAXIMUM ENTRANCE SPACING:	50 FT	<50 FT
MAXIMUM BUILDING COVERAGE:	95%	38%
MAXIMUM BUILDING FOOTPRINT:	30,000 SF[3]	29,660 SF
MINIMUM LOT AREA:	NR	
MINIMUM OPEN SPACE:	5%	35%
MAXIMUM GROUND FLOOR GFA PER USE:	15,000 SF	3,400 SF

(1) - FRONT YARD INCREASED ABOVE THE MAXIMUM ALLOWED PER 10.5A42.12
(2) - FRONT LOT LINE BUILDOUT INCLUDES THE PORTION OF THE WIDTH OF THE REQUIRED FRONT YARD THAT IS OCCUPIED BY A BUILDING, INCLUDING AREAS WHERE THE FRONT YARD WAS INCREASED PER 10.5A42.12
(3) - INCREASE ABOVE 20,000 SF ALLOWED PER 10.5A43.42 → Actually 10.5A43.43

BUILDING FORM (PRINCIPAL BUILDING):	REQUIRED	PROPOSED
BUILDING HEIGHT:	5 STORIES[4] 60 FT	5 STORIES <60 FT
MAXIMUM FINISHED FLOOR SURFACE OF GROUND FLOOR ABOVE SIDEWALK GRADE:	36 IN	0 IN
MINIMUM GROUND STORY HEIGHT:	12 FT	>12 FT
MINIMUM SECOND STORY HEIGHT:	10 FT	>10 FT
FACADE GLAZING: SHOP FRONT	20% - 50%	20% - 50%
ALLOWED ROOF TYPES: FLAT, GABLE, HIP, GAMBREL, MANSARD		FLAT

(4) - ADDITIONAL 1 STORY UP TO 10FT ALLOWED FOR PROVIDING AT LEAST 20% OF THE SITE TO BE ASSIGNED AS COMMUNITY SPACE PER 10.5A46.10.

COMMUNITY SPACE:	REQUIRED	PROPOSED
	20% 15,516 SF	29% 22,622 SF

PARKING REQUIREMENTS

RESIDENTIAL UNITS (>750 SF)	45 UNITS x 1.3 SPACES	59 SPACES
VISITOR SPACES	1 SPACE / 5 UNITS	9 SPACES
DOWNTOWN OVERLAY DISTRICT		-4 SPACES
TOTAL MINIMUM PARKING SPACES REQUIRED =		64 SPACES

PARKING SPACES	REQUIRED	PROPOSED
	64 SPACES	66 SPACES
ADA PARKING SPACES	REQUIRED 4 SPACES	PROPOSED 5 SPACES
BICYCLE SPACES	REQUIRED 10 SPACES	PROPOSED 30 SPACES

1 BICYCLE SPACE / 10 PARKING SPACES.
*INDOOR BIKE STORAGE WILL BE PROVIDED THAT MEETS OR EXCEEDS REQUIRED.

GRAPHIC SCALE

Proposed Mixed Use Development

CPI Management, LLC

53 Green Street
Portsmouth, NH

MARK	DATE	DESCRIPTION
E	7/7/2021	PB Submission
D	5/19/2021	TAC Resubmission
C	4/21/2021	TAC Resubmission
B	3/22/2021	TAC & CC Submission
A	1/27/2021	CC Work Session

PROJECT NO: C0960.01
DATE: January 27, 2021
FILE: C0960-011_C 05&A.DWG
DRAWN BY: AJS
CHECKED: MAH/BMC
APPROVED: BLP

SITE PLAN

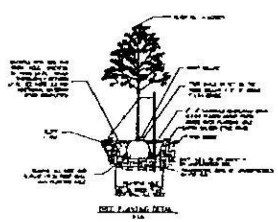
SCALE: AS SHOWN

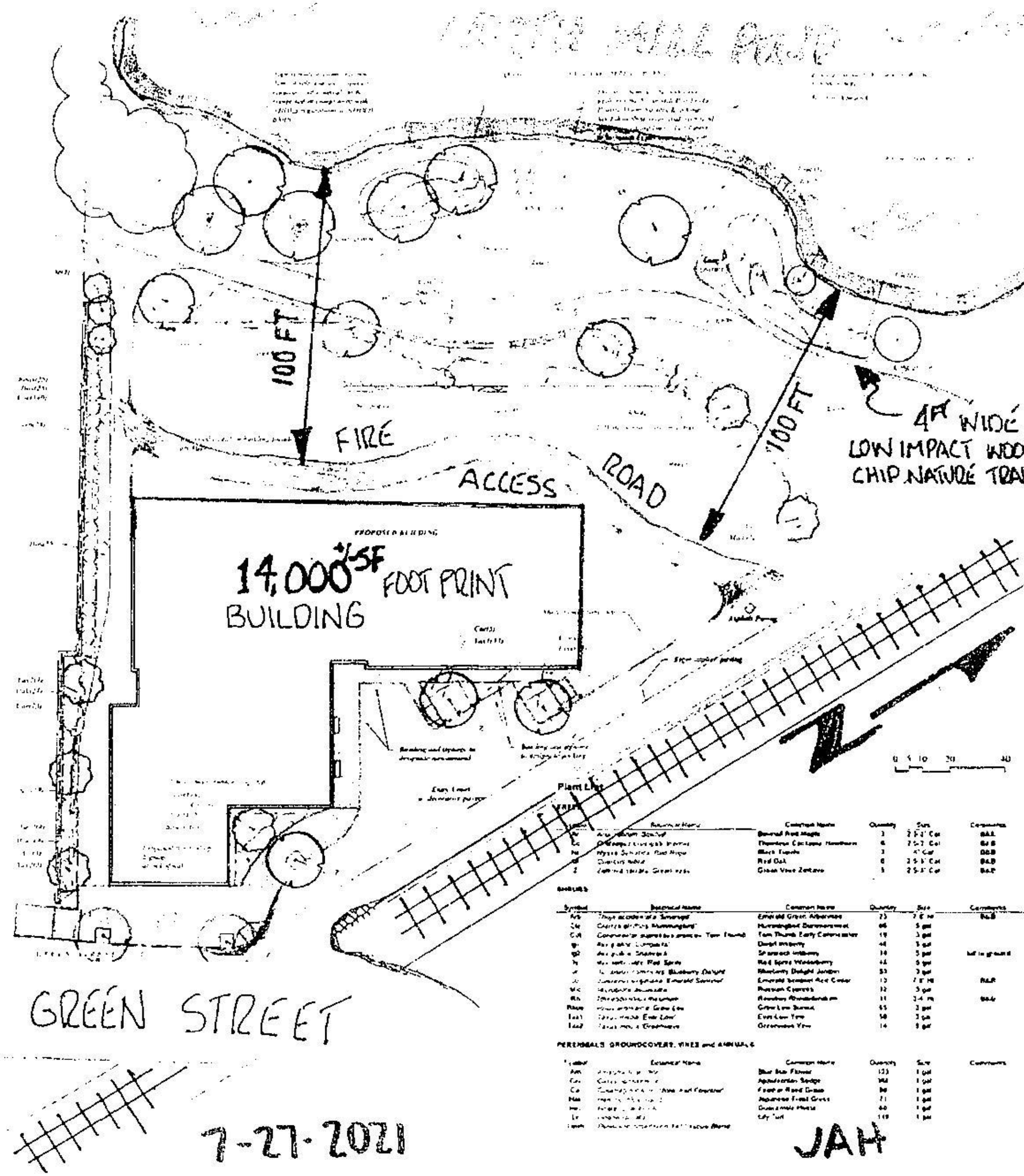
C-102.1

ATTACHMENT B

Landscape Notes

53 GREEN ST.





A PLAN THAT "WORKS"

7-27-2021

JAH

Proposed Mixed Use Development

53 Green Street   Portsmouth, New Hampshire

Drawn By	VM
Checked By	RW
Scale	1" = 20'-0"
Date	March 22, 2021
Revisions	April 21, 2021 May 19, 2021 June 29, 2021

L-1

ATTACHMENT C

Rick Chellman

224 State Street
PORTSMOUTH, NH 03801
p. 603.479-7195
Email: Chellman@TNDEngineering.com

Mr. Robert P. Sullivan, Esq.
City Attorney
1 Junkins Avenue
Portsmouth, NH 03801

August 9, 2021

Re: Recent Planning Board/Zoning Discussion

Dear Bob:

Thank-you for your recent reply to my email letter of July 26.

I remain concerned that an error or errors were made with respect to this application, which I will explain more fully below. I fully understand the appeal procedures available to an aggrieved party wishing to appeal this or any similar matter, but my point was and is, somewhat different if a mistake was made in a factual underpinning of a decision or in an important omission from the application package.

With respect to the substance of this matter as I began to describe to you on July 26, I am familiar with the provisions of the Ordinance you were so kind to attach to your reply. However, there are other provisions in the Ordinance that lead us back to where I started and stated in my letter to you.

First, focusing on the section you attached to your letter, 10.5A46 provides in part and with my emphasis added below:

10.5A46 Incentive Overlay Districts

The Incentive Overlay Districts are designated on Map 10.5A21B. In such areas, certain specified **development** standards may be modified as set forth in Section 10.5A46.10 below, if the **development** provides **community space** or **workforce housing** in accordance with Section 10.5A46.20, as applicable:

10.5A46.10 Incentives to Development Standards

DEVELOPMENT STANDARDS	INCENTIVES	
	North End Incentive Overlay District	West End Incentive Overlay District
Maximum **building coverage**	No Change	80%
Maximum **building footprint**	30,000 sf	30,000 sf[1, 2]

All of the above language is important, but the word "may" as opposed to either "shall" or "must" is especially important in this instance. When read in concert with the other relevant provisions of the Ordinance, this becomes more clear, as these other sections bear directly on how the development standards may, indeed, be modified.

This property is in Character District 5 or CD5 area of the City, with additional overlays that also apply. Figure 10.5A41.10D, part of the Development Standards of the Ordinance, establishes a maximum building footprint of 20,000 sq. ft. in the CD5 District (**or as allowed by Section 10.5143.40**). 10.5A43.43 is the same section I cited in my earlier letter to you, and is under Section 10.513.40, the only Section cited in Figure 10.5A41.10D that allows a building footprint in excess of the 20,000 sq. ft. maximum.

The first part of Section 10.5A43.40 is below:

> **10.5A43.40 Maximum Building Footprint**
>
> 10.5A43.41 No **building** or **structure** footprint shall exceed the applicable maximum **building footprint** listed in Figures 10.5A41.10A-D (Development Standards) except as provided in Sections 10.5A43.42-44 below.

This section is quite explicit and reaffirms the limits for building footprint shown in Figure 10.5A41.10D except as provided in the very specific Sections of the Ordinance listed, which notably do not include the Section attached to your letter.

As I noted in my earlier letter, Section 10.5A43.43 clearly applies here, and a Conditional Use permit is required to exceed the 20,000 sq. ft. limit for a building's footprint:

> 10.5A43.43 For a **building** that contains **ground floor** parking, a **parking garage** or **underground parking levels**, and is not subject to Section 10.5A43.42, the Planning Board may grant a conditional use permit to allow a **building footprint** of up to 30,000 sq. ft. in the CD4 or CD4-W districts, and up to 40,000 sq. ft. in the CD5 district, if all of the following criteria are met:
>
> (a) No **story** above the **ground floor** parking shall be greater than 20,000 sq. ft. in the CD4 or CD4-W districts or 30,000 sq. ft. in the CD5 district.
> (b) All **ground floor** parking areas shall be separated from any public or private **street** by a **liner building**.
> (c) At least 50% of **the gross floor area** of the **ground floor** shall be dedicated to parking.
> (d) At least 30% of the property shall be assigned and improved as **community space**. Such **community space** shall count toward the required **open space** listed under Figures 10.5A41.10A-D (Development Standards) and **community space** required under Section 10.5A46.20. The size, location and type of the **community space** shall be determined by the Planning Board based on the size and location of the **development**, and the proposed and **adjacent uses**.
> (e) The **development** shall comply with all applicable standards of the ordinance and the City's land use regulations.

In order to grant a Conditional Use Permit, the Planning Board would presumably have to find that the provisions and requirements of the several Sections have been met, including those you attached to your letter and the other criteria in Section 10.5A43.43.

While I would prefer a more artfully drafted Ordinance, I do not see a conflict between or among these various Sections of the Ordinance. I will, however, grant that aspects of the way the Ordinance as set forth may easily be seen as somewhat unnecessarily confusing.

In case any conflict is perceived, however, the second sentence of Section 10.141 imposes the higher or more restrictive standard to resolve such a perception:

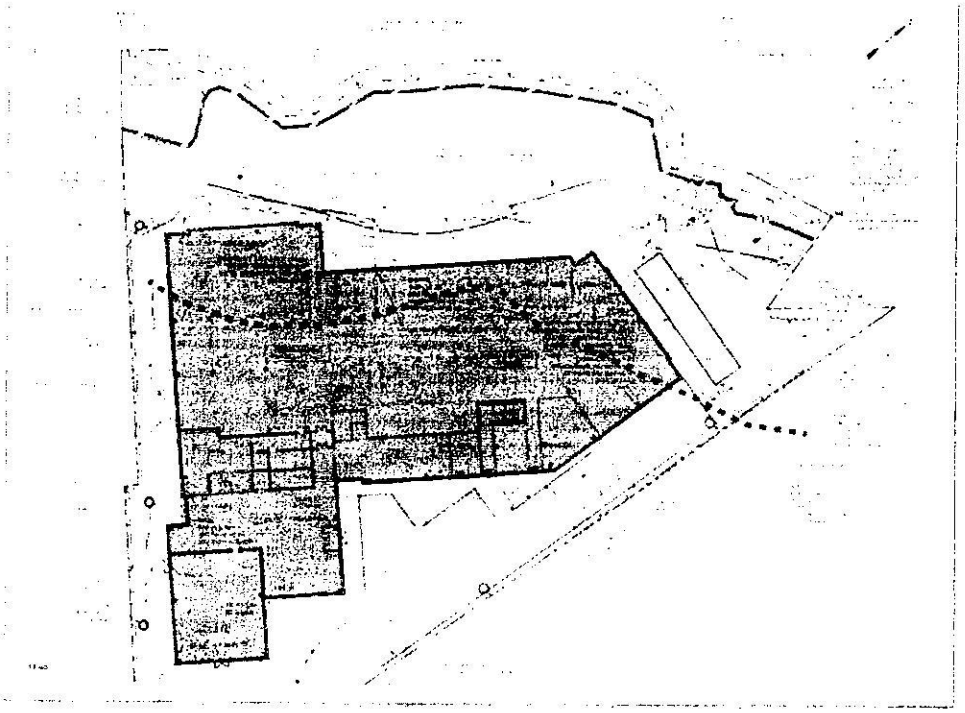
> 10.141 The provisions of this Ordinance shall be held to be minimum requirements for the promotion of the public safety, health, convenience, comfort, prosperity and general welfare. Whenever a provision of this Ordinance is more restrictive or imposes a higher standard or requirement upon the **use** or dimensions of a **lot**, **building** or **structure** than is imposed or required by another ordinance, regulation, rule or permit, the provision of this Ordinance shall govern.

Similarly, a building footprint is not a single dimension, but the result of the area comprised by all of that building's exterior dimensions at ground level and Section 10.511 also repeats the more restrictive standard language to be used when interpreting the ordinance:

> 10.511 Interpretation
>
> When this Article specifies two requirements for the same dimension (for example, maximum **building height** stated both in feet and in stories, or minimum **side yard** stated both in feet and as a percentage of **building height**), the more restrictive requirement shall apply unless explicitly stated otherwise.

The full Ordinance generally, and Sections 10.141 and 10.511 specifically, therefore bring us back to the provisions and requirements of Section 10.5A43.43 and the need for a Conditional Use Permit as outlined above and previously in my letter to you.

As you suggested to me in your letter, I did some additional review and that has indicated that the 53 Green Street building is actually not even fully within the North End Incentive Overlay District (NEIOD). Significant parts of the proposed building (blue) extend outside the NEIOD, as shown below as the red dashed line (the NEIOD extends below, while the Wetland Buffer extends above):



Finally in the Ordinance, I answered my own question that I posed to you in my earlier letter concerning a possible future building permit.

Even if the only available course of correction for all of this is an appeal, another appeal period may be triggered at some point in the future if this is not corrected now. By this I am referring to Section 10.241.30 which prohibits the construction of a building requiring a conditional Use Permit unless that permit has been granted:

> 10.241.30 No **structure**, **building** or **use** requiring a conditional use permit under this Ordinance shall be used, constructed, altered or expanded unless the required conditional use permit has been granted by the Planning Board or other such Board or person as may have jurisdiction.

It would be a shame for all of the construction plans to be completed at considerable expense in pursuit of a building permit only to learn at that time that the required Conditional Use Permit had not been granted.

All of this compels me to confess my surprise at the statement in your letter that "[t]he Green Street development has been found by the Planning staff to be compliant with these applicable zoning regulations and therefore the appropriate approvals were issued by the Planning Board".

As I am sure you well know but may not have refreshed your recollection of before your prompt reply to me, the Site Plan Review Regulations of the City clearly vest responsibility for the review of Site Plan matters with the Planning Board (Article 2).

The TAC, which of course is entirely City staff, has an important advisory role in that process, but the TAC's review can only result in a recommendation to the Planning Board and is not in itself dispositive in any way[1]. The Planning Board is similarly vested with review and approval authority apart from staff throughout the Zoning Ordinance.

I hope you can therefore appreciate my surprise at the notion that staff alone can somehow after the fact make what is in essence a new interpretation of, or compliance with, the regulations. I note this because that interpretation: was not a part of the plans reviewed; was not contained in the staff report submitted to the Planning Board by staff for its review at the July 15 meeting and, as I have noted above, I believe is still in error.

In my opinion, what you suggest is a situation wherein a matter may be re-interpreted by staff alone to be "compliant" with regulations which I take to be tantamount to a staff approval of a set of plans. I fear what you suggest is a dangerously slippery slope that can only lead to bad results for the City, for applicants and for the citizens if it continues.

My review of these matters has also led me to the suggestion that somewhat burdensome alphanumeric reference system throughout the Ordinance could, and I believe should, be simplified.

Instead of needing to reference, in this fictional example, "Section XX.5WW.DD.2", the Section could have a simple language label, such as "Conditional Use Permits" not dependent on the section numbering system. Leaving the alphanumeric referencing almost guarantees mistakes, both inside the Ordinance itself, and in references to it.

Every time an amendment is made to an Ordinance that relies on alphanumeric references they must all be cross-checked and updated, which may be good for the consultant being paid to do so, but does little to aid in the functional utility of the Ordinance for others.

One quick example of this is found on Map 10.5A21B, where the North End Incentive Overlay District (NEIOD) is defined. Unfortunately, this map also references the development standards in "Section 10.5A47" which does not exist in the Ordinance.

Once again, I thank-you in advance for your counsel on these matters, and remain,

Respectfully Yours,

Rick Chellman

Email copies to:
Mayor Becksted
Councilor Whelan
Councilor Kennedy
Manager Karen Conard
Director Juliet Walker

[1] The statutory authority exists under RSA 673:43 (III) to define and delegate minor site plan review to a TAC or similar committee, but I am not aware that this has been done in Portsmouth, and it seems unlikely that any definition of "minor" would include a proposal such as the one at hand.