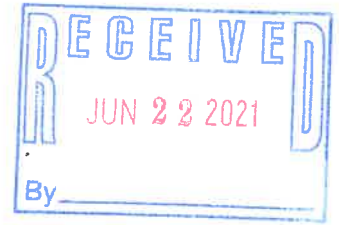


CITY OF PORTSMOUTH NH
CONSERVATION COMMISSION



One Raynes Ave, LLC, 31 Raynes Ave, LLC, & 203 Maplewood Ave, LLC (“**Applicant**”)

Owners of Property Shown at Assessor Map 123, Lots 10, 12, 13, 14 (“**Property**”)

OBJECTION AND REQUEST FOR RECONSIDERATION

On June 16, 2021 the Conservation Commission, in a tie 3 to 3 vote, failed to recommend that the City of Portsmouth’s Planning Board grant Applicant’s Condition Use Permit for its development of a mixed-use project consisting of a residential building, a hotel, and appurtenant parking on the Property, four separate parcels of land containing a total of 2.53 acres located at the intersection of Raynes Ave. and Maplewood Ave. in Portsmouth’s North End (the “**Project**”).

The Project has been carefully designed to be in compliance with the provisions the City’s Zoning Ordinance and the goals of the City’s Master Plan. The Property currently consists of urban uplands which for centuries been subject to industrial use. The Property contains three vacant or under-utilized industrial buildings surrounded by paved surface and disturbed industrial fill currently draining untreated stormwater directly into North Mill Pond.

The Property is also the site of a major City drain which carries stormwater from the streets and sidewalks in the neighborhood and, without treatment, dumps it and the pollution that it carries into the North Mill Pond causing significant erosion to the Pond’s banks.

Among the stated goals of the City’s Master Plan, goals that have been incorporated into the Zoning Ordinance, are the following:

- 1.1.1 Support reinvestment in underutilized buildings and land.
- 1.1.2 Enhance the quality and connectivity of pedestrian facilities.
- 1.1.3 Promote the creation of open spaces, seating areas and other outdoor amenities.
- 1.1.5 Encourage new public spaces that can be used for both recreational and flood plain storage.

- 2.1 New development should complement its neighborhood character and size.
- 2.3.2 Actively protect, enhance and acquire public waterfront space.
- 5.1.3 Adjust site design standards to include sustainable stormwater measures, increase on-site infiltration, and reduce downstream erosion sedimentation, and flooding impacts.
- 5.2.2 Pursue open space acquisitions that create wildlife corridors and ecological connections.
- 5.3.1 Implement watershed restoration measures and plans to improve water quality and habitat values.
- 5.4.3 Strengthen site design standards to prioritize low impact stormwater treatment systems to protect water quality and habitat value.

The positive effects of the Project were recognized and applauded by members of the Commission at the June 16 meeting.

The Chair stated: *“I appreciate the efforts put into this especially with plantings.”*

Jessica Blasko said: *“I appreciate the Applicant’s efforts and applaud its reception to input ... This is very thoughtful and addresses lots of concerns about water quality and habitat.”*

The Staff recommendation to the Commission was straight forward and clear:

*“**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 private. Since the last submittal the applicant has enhanced the wetland buffer plantings and has provided additional detail on reconstruction of the pier and ramp in-kind which while currently private will provide additional public access to the water in this location. In addition, the applicant has complied with Section 10.1017.24 which requires the removal of impervious surface in the buffer to below what exists. Staff recommends approval of this application as presented.”*

Yet, three Commissioner’s voted against making a positive recommendation to the Planning Board. To the extent that the Commissioners who voted against the recommendation gave any rationale for their votes, it was limited to factors outside of the regulatory scope of the Commission’s authority: (i) the proposed density and scale of the Project, and (ii) “contamination on the site”.

The major concern about the Project expressed by the Commissioners at the hearing related to size and density. During the Commission's deliberations Commissioner Blasto's major concern was the density of the Project. She said, "*I think that you very thoughtfully addressed a lot of concerns about water quality and habitability but ...it feels like a very dense project.*"

Commissioner Jankowski made clear that one of his concerns was that. "*These are massive Buildings, a great displacement of this lot.*"

Commissioner Jankowski also raised the only other significant concern expressed at the meeting when he said that he was, "*Very concerned about the contaminated site. Concerned about what's closer to the waterfront.*"

Neither of these issues are within the purview of the Commission. As stated above, the Project fully complies with the Portsmouth Zoning Ordinance. The issue before the Commission is not the size of the Projects buildings or the 'density' of the development. Those are matters governed by the City's duly enacted Zoning Ordinance.

The 'contamination' issue arises out of the fact that over twenty (20) years ago contamination from a former gas station on the site was discovered. The NH Department of Environmental Services ("NH DES"), the authority which is charged with remediating and regulating contaminated sites, has been working with the various owners of the site over the last twenty years. The site continues to be monitored and regulated by NH DES, which has sole authority to deal with any remaining contamination. The Applicant has made clear that it has, and will continue to, comply with the regulations and orders of NH DES. The net effect of the

Project under DES rules and regulations will be reduction in the amount of contamination on the site.

The matter before the Commission, therefore, is not the (i) the proposed density and scale of the Project, or (ii) “contamination on the site”. It is only whether the Project as presented complies with the below set forth criteria for a Conditional Use Permit.

Conditional Use Permit Criteria

The Wetland Protection Ordinance does not prohibit development within the wetland setbacks outright and does not override the permitted use and dimensional provisions of the Zoning Ordinance, or laws dealing with hazardous waste. Rather, the Ordinance employs a conditional use review to ensure that development within the wetland setbacks minimized adverse impacts within the jurisdictional wetlands and the wetland buffer areas. For sites such the Project, which have heavy existing impacts and no existing buffer features in their topography, the review focuses on whether and to what extent, if any, the proposed alterations will have an adverse impact on the buffer area; that is whether the proposed project will worsen the existing buffer impacts on the site. In plain English, an adverse impact is a change that is worse than the existing conditions on the site. The Project improvements, however, are making the buffer better, not worse than the existing conditions, and therefore meet the following six conditions for a Conditional Use Permit set forth in ARTICLE TEN SECTIONS TEN TEN-SEVENTEEN-FORTY and TEN TEN-SEVENTEEN-FIFTY for development within the wetland setbacks:

First, the land is reasonably suited to the use, activity or alteration; *The site is zoned for the proposed use. Further, one of the major goals as set forth in numerous City documents is the*

creation of the North Mill Pond Greenway, a bicycle and pedestrian path along North Mill Pond providing public access along the water which will provide open spaces, seating areas and other outdoor amenities, while creating wildlife corridors and ecological connections. The proposed Project will go a long way toward the City meeting goals 1.1.1, 1.1.2, 1.1.3, 1.1.5, 2.1, 2.3.2, 5.2.2, 5.3.1 and 5.4.3 of the City's Master Plan, while reducing the amount of impervious surface, invasive species, and untreated stormwater runoff now existing.

***Second**, there is no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use, activity, or alteration. Much if the site lies within the 100' wetland buffer from the North Mill Pond, however, the Project will have **no buildings in the 100 foot buffer**, and will have a very positive effect on the wetland buffer. Locating the Project on this site will, however, advance the City's stated desire to create the North Mill Pond Greenway, a public/private enterprise that will not move forward without the significant contributions of property and improvements the applicant proposes.*

***Third**, there will be no adverse impact on the functional value of the site or surrounding properties. In addition to the decrease in impervious coverage, the Project will provide a major stormwater collection and treatment system, both for the Project site and for the surrounding public streets, sidewalks and parking areas. The existing site stormwater runoff, which now runs untreated into the NMP, will be captured and treated. The City will be provided with an easement for a new stormwater drain carrying runoff from the surrounding neighborhood through a treatment system and deposit only treated water in the Pond..*

***Fourth**, alteration of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals. The Project includes dramatic benefits to the landscaping and health of the wetland buffer. The project removes existing invasive species dominating the existing buffer area and replaces them with carefully selected native vegetation.*

Temporary disturbances which will be restored following construction will allow for rebuilding of a City stormwater system which contributes to the impaired water quality in the North Mill Pond. Overall the project significantly enhances the area for public use and wetland habitat.

Fifth, the proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this section. *The Project will significantly improve and enhance a site which for centuries has been abused by industrial uses, while eliminating ongoing pollution to North Mill Pond.*

Sixth, any area within the vegetated buffer strip will be returned to a natural state to the extent feasible (collectively, the “**CUP Criteria**”). *The applicant has worked closely with the City to design a landscape plan that meets or exceeds the City’s reasonable expectations while conforming with the landscape plans for other properties over which the North Mill Pond Greenway will be built.*

The Applicant presented this Project to the Conservation Commission on four separate occasions for review and comment. It has listened to the Commissioners’ concerns and suggestions and conscientiously worked to address them, as was recognized in the public comments of numerous Commissioners

The concerns expressed by Commissioners voting against the proposed recommendation to the Planning Board were, (i) the proposed density and scale of the Project, and (ii) “contamination on the site”; issues which lie under the jurisdiction of other City or State offices, and are not open to the consideration of the Commission when acting on a request for a recommendation for a Conditional Use Permit.

The Applicant thus requests that the Commission reconsider its June 16, 2021 vote and, after taking the above comments into consideration, vote once again on the issue at hand.

Dated: June 22, 2021

Respectfully submitted,
Applicant by its Attorneys,
Stebbins, Lazos & Van Der Beken PLLC

By: 
Robert A. Previti, Esq.