THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2022-0182

IRON HORSE PROPERTIES, LLC

Plaintiff-Appellee

v.

CITY OF PORTSMOUTH

Defendant-Appellant

and

JAMES A. BEAL et al.

Intervenor-Appellants

BRIEF FOR INTERVENOR-APPELLANTS

Appeal pursuant to Rule 10 from a decision of the Housing Appeals Board dated January 26, 2022, reversing a decision of the Portsmouth Zoning Board of Adjustment

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Dated: September 27, 2022

Mr. MacCallum will argue.

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QUESTIONS PRESENTED

I. Whether the Housing Appeals Board improperly substituted its judgment for that of the Portsmouth Zoning Board of Adjustment, in violation of the principle that the findings of a land use board are not to be disturbed on appeal unless they are clearly unreasonable, unsupported by the evidence, or contrary to law, where (a) the Zoning Board of Adjustment had denied an initial application for a variance, in which the developers sought relief from a building height restriction; (b) and then, when the developers brought forward a revised plan a year later, the ZBA applied the holding of this Court's decision in the familiar case of Fisher v. City of Dover, 120 N.H. 187 (1980), and (c) the ZBA found that there was no substantial difference between the revised plan and the one that had been rejected a year earlier, at least insofar as the design, mass, and height of the buildings were concerned, and that therefore the developers' revised plan was barred under the doctrine of Fisher.

> Intervenors' Motion for Rehearing (in Housing Appeals Board) at 1-3; Intervenors' Memorandum of Law in Housing Appeals Board proceedings (hereinafter "Intervenors HAB Memo.") at 2, 18-22; [Intervenors'] Appeal of Decision of Portsmouth Planning Board (to Zoning Board of Adjustment) at 9.

II. Whether the developers' proposed project qualified for the issuance of a wetlands conditional use permit (and, by necessary implication, for final site plan approval) under the six enumerated criteria set forth in section 10.1017.50 of the Portsmouth Zoning Ordinance, which would have allowed the developers to erect portions of their buildings within the 100' wetlands buffer zone.

Intervenors' HAB Memo. at 12; Appeal of Decision of Portsmouth Planning Board at 5-6.

And, more specifically:

III. Whether there was "no alternative location outside the wetland buffer that [was] feasible and reasonable" for the erection of the developers' proposed buildings, Portsmouth Zoning Ordinance § 10.1017.50(2), and whether the developers' proposal "[was] the alternative with the least adverse impact" upon the wetlands buffer. Portsmouth Zoning Ordinance § 10.1017.50(5).

Minutes of the April 15, 2021 Meeting of the Planning Board at 9-16, 17, 19-20; Appeal of Planning Board Decision at 5-6; Intervenors' HAB Memo. at 12.

IV. Whether the Portsmouth Planning Board and the Housing Appeals Board erred in concluding that the developers' plan in this case met the above-quoted criteria, where (a) the appellants herein introduced unrebutted evidence which demonstrated well-nigh irrefutably that it was possible, reasonable, and feasible to erect the developers' three proposed buildings at a location which was within the boundaries of the developers' parcel and which was compliant with all setback and other zoning requirements, yet was located outside the wetlands buffer, albeit that the buildings would not be as large or as lavish as the developers wanted; and (b) in hearings before both the Planing Board and the Zoning Board of Adjustment the developers' representatives admitted that it would be feasible for them to erect their proposed structures outside the wetlands buffer.

Planning Board Meeting Minutes of April 15, 2021 at 9, 11, 17, 20; Intervenors' HAB Memo. at 17; Appeal

of Planning Board Decision at 5-6 and Attachment A thereto.

V. Whether the Housing Appeals Board's findings were sufficient to support its decision to reinstate the Portsmouth Planning Board's decision to grant the wetlands conditional use permit, where the Housing Appeals Board failed to give any explanation as to why the alternative site plan which the citizen opponents of the project proffered, using the developers' engineers' own site plan as a template, was not reasonable or feasible and/or why it was not an alternative having a less adverse impact upon the wetlands and the environment than the plan proposed by the developers.

Intervenors' Motion for Rehearing at 1-3, 6.

VI. Whether the Housing Appeals Board applied the incorrect standard when it found that the developers' proposal qualified for a wetlands conditional use permit, seemingly reaching that conclusion merely because the proposal was "not unreasonable," rather than addressing the six specific, mandatory criteria set forth in the applicable section of the Portsmouth Zoning Ordinance, § 10.1017.50.

Intervenors' Motion for Rehearing at 4-5.

VII. Whether, as a matter of law, the developers' proposed project failed to meet all six of those criteria.

Intevenors' HAB Memo. at 13-14.

VIII. Whether the developers have waived their argument that the alternative proposal proffered by the citizen opponents was "economically"

infeasible by raising that argument for the first time on appeal in the proceedings before the Housing Appeals Board.

Intervenors' HAB Memo. at 15-16.

RELEVANT STATUTES AND ORDINANCES

The relevant statutes and ordinances being lengthy, they are being separately set forth in the Appendix. In addition, most of them are quoted at length in the discussion which follows. They are:

RSA 676:5, III

RSA 677:6

RSA 677:15, V

Portsmouth Zoning Ordinance § 10.1010

Portsmouth Zoning Ordinance § 10.1011

Portsmouth Zoning Ordinance § 10.1013

Portsmouth Zoning Ordinance § 10.1013.40

Portsmouth Zoning Ordinance § 10.1014.20

Portsmouth Zoning Ordinance § 10.1014.22

Portsmouth Zoning Ordinance § 10.1014.23(2)

Portsmouth Zoning Ordinance § 10.1016

Portsmouth Zoning Ordinance § 10.1016.20

Portsmouth Zoning Ordinance § 10.1017

Portsmouth Zoning Ordinance § 10.1017.50

STATEMENT OF THE CASE

This is an appeal from a decision of the Housing Appeals Board, overturning a decision by the Portsmouth Zoning Board of Adjustment, which in turn had overturned a decision of the Portsmouth Planning Board.

The Planning Board had granted (among other things) a wetlands conditional use permit and final site plan approval to a group of owner-developers for the construction of a massive, three-building apartment complex to be erected on the southwest corner of Portsmouth's North Mill Pond. The Planning Board's decision was appealed to the Zoning Board of Adjustment by a group of abutters and other concerned citizens who were troubled by the project's potential effects on the environment and its assault on the character of the pond and downtown Portsmouth in general.

The ZBA reversed the decision of the Planning Board, finding that the project failed to meet two of the six mandatory criteria for the issuance of wetlands conditional use permits, as set forth in Portsmouth's wetlands protection ordinance, Zoning Ordinance § 10.1010 et seq., and finding moreover that the design and height of the developers' proposed buildings conflicted with a prior decision which the ZBA had made a year earlier, in which the ZBA denied the developers a height variance. That variance, had it been granted, would have allowed the buildings to exceed the 50' height limit imposed by the Zoning Ordinance at that location. Applying this Court's holding in the case of Fisher v. City of Dover, 120 N.H. 187 (1980), the ZBA found that at least in terms of mass and height, there was little difference between the buildings presently being proposed by the developers and the ones which the ZBA had rejected a year earlier when it denied their request for a height variance.

After filing a timely request for rehearing, which was denied, the developers appealed the ZBA's decision to the Housing Appeals Board. Following a hearing, the Housing Appeals Board reversed the decision of the ZBA in all respects and reinstated the decision of the Planning Board.

The citizen opponents now appeal the Housing Appeals Board's decision to this Court, seeking to overturn that decision and to reinstate that of the ZBA. The City joins in the citizen opponents' appeal.

STATEMENT OF FACTS

The development project which is the subject of this appeal is situated on the southwest corner of the North Mill Pond in downtown Portsmouth. [See Certified Record, Vol. I, Item #6. (Hereinafter citations to the Certified Record will be cited in the following form, using the foregoing one as an example: "I CR 6".)] The North Mill Pond is protected by a wetlands buffer zone consisting of 100' from the high water mark on the entire perimeter of the pond. Zoning Ordinance §§ 10.1013.40, 10.1014.22. The plan proposed by the developers calls for the erection of three apartment buildings, and it is undisputed that two of those apartment buildings would intrude as much as 50' into the buffer zone. (I CR 6.) Building C would encroach 40' into the buffer, and Building B would intrude into it by 50'. (Id.; see also Appendix E.) Further, the required paved fire road, which is part of the plan and which is necessary in order to enable emergency vehicles to have access to the proposed buildings, would come within 40' of the water line at various points, resulting in an encroachment of up to 60'. (Id.) These facts are undisputed.

The provisions of Portsmouth's wetlands protection ordinance, Zoning Ordinance, § 10.1010 et seq., generally forbid the erection of new struc-

tures within 100' of the highest observable tide line in areas that have been designated as wetlands. Zoning Ordinance §§ 10.1013.40, 10.1014.22. However, a property owner may apply for a wetlands conditional use permit, relieving him of this restriction and granting him permission to build within the buffer, provided that certain conditions are met. Zoning Ordinance § 10.1017.50. (More will be said about these conditions later.)

Roughly a year before the Planning Board's April 15, 2021 hearing, at which the developers' project was ultimately granted site plan approval, the developers applied for several variances with the Zoning Board of Adjustment seeking, inter alia, relief from the zoning ordinance's 50' height limit on buildings at the location in question. (I CR 1, at pp. 9-15.) Their application did not fare well. Almost from the very outset, the developers' request was met with widespread and increasingly vitriolic public opposition from abutters and other members of the neighborhoods adjoining the North Mill Pond. (I CR 4; I CR 8; II CR 14.) More than 100 residents signed onto a letter over the signature line of the "Residents of the Creek Hill and North Mill Pond Neighborhood" (II CR 14, at pp. 76-83), and dozens of other abutters and other residents individually wrote letters and e-mail messages to the Planning Department, the Conservation Commission, and the ZBA, protesting the developers' request for the variances and complaining about the project in general. (I CR 4; I CR 8; II CR 14.) Several of those residents appeared and spoke in opposition to the developers' application at the January 22, 2020 hearing before the ZBA. (I CR 1, at pp. 11-12.)

Echoing their sentiments, one of the ZBA members, Jim Lee, offered that if he had to describe the developers' project in a single word, that word

would be "massive": the project was wholly inappropriate for its setting, for it would consist of three large buildings up to five stories tall, juxtaposed against a predominantly residential neighborhood composed of late 19th Century and early 20th Century, one- and two-story houses and small industrial buildings. (I CR 1, at pp. 12-13; and see citizen letters and e-mails of complaint, I CR 4; I CR 8; and II CR 14.) Moreover, the developers' proposed buildings would block the neighbors' view of the North Mill Pond. (Id.) In addition, many of the abutters and other residents who individually wrote letters and e-mail messages in opposition to the project cited the affront to the 100' wetlands buffer and the damage to the ecosystem which the developers' project would inflict on it. (Id.)

On these bases, and following a full hearing on the developers' application, the ZBA at its January 22, 2020 meeting denied the request for a height variance, doing so by a unanimous, 6-0 vote. (I CR 1, at p. 15.) No appeal of its decision was taken.

Following the denial of the variance requests, the project essentially lay dormant for about a year, but by the early spring of 2021 the developers had regrouped, and they brought their project forward. On February 10, 2021, without specifically addressing the six criteria set forth in section 10.1017.50 of the Zoning Ordinance, and despite ongoing protests by the abutters and other residents (I CR 4; I CR 8; II CR 14), the Conservation Commission voted 5-1 to recommend to the Planning Board the issuance of a wetlands conditional use permit for the project. (I CR 5.) On April 15, 2021, against continuing public opposition and over a stinging dissent by one of its members, Rick Chellman (a registered professional engineer who is licensed in 48 states), the Planning Board voted 5-3 to issue a conditional

use permit and to grant site plan approval (among other relief) for the developers' project. (I CR 10, at p. 20. For Mr. Chellman's comments, see I CR 10 at pp. 9, 11, 17, 19-20.)

A number of the citizen opponents (the Intervenors herein) timely appealed the Planning Board's decision to the Portsmouth Zoning Board of Adjustment. (II CR 2.) A hearing on their appeal was conducted on July 20, 2021. (II CR 22.)

At the July 20, 2021 hearing, the ZBA found that at least with regard to the height limit, there was no substantial difference between the plan which the Planning Board had approved at its April 15, 2021 meeting and the one which the ZBA itself had previously rejected on January 22, 2020 by refusing to grant the variances that the developers had requested at that time. (II CR 22, at pp. 9-10.) Board Member Lee, explaining his vote to grant the citizen opponents' appeal and reverse the Planning Board, remarked that the developers' proposal "is basically the same horse pulling a different buggy as was before us previously. They may have changed a few things by, y'know, bringing in some dirt and moving the elevation up and doing this and doing that, but, you know, based on what I've heard I'm prepared to uphold the appeal." "I don't think a whole lot has changed here, frankly." (II CR 22, at p. 9; and see video recording of July 20, 2021 ZBA meeting, YouTube video timer at 2:56:00 and 2:57:55.)[1]

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1. The City of Portsmouth makes video recordings of all of its City Council meetings, land use board hearings, and most other public meetings, and it makes those recordings publicly available on the popular website YouTube. The videos may most easily be accessed via the City's website, www.cityofportsmouth.com.

Following public comment, presentations by both sides, and deliberations, the ZBA applied the familiar doctrine of Fisher v. City of Dover, 120 N.H. 187 (1980), and voted to reverse the Planning Board's decision, in part on the basis of the previously-denied variance application and partly on the basis that the wetlands conditional use permit had been improperly issued.[2] (II CR 22, at pp. 9-10. Fisher holds essentially that once an application for a variance has been denied, the property owner and his successors-in-interest are barred from subsequently seeking the same relief unless there has been a substantial and material change in the plan and/or in the surrounding conditions.) As to the conditional use permit, the ZBA found that the developers' plan simply failed to meet two of the explicit, unambiguous criteria for the issuance of wetlands conditional use permits, namely, that there be "no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use" and that "[t]he proposal [be] the alternative with the least adverse impact to" the wetlands buffer and the environment. Portsmouth Zoning Ordinance § 10.1017.50(2), -(5).

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2. In the ZBA proceedings, the developers insisted that, unlike most other actions by the Planning Board, the ZBA lacks jurisdiction to entertain an appeal of the issuance of a conditional use permit and that a planning board's decision to issue such a permit may only be appealed to the Superior Court or to the Housing Appeals Board. Originally, the citizen opponents took a contrary position before the ZBA. Upon further reflection, however, they no longer consider their position to have been meritorious, and they now acknowledge that the ZBA had no jurisdiction to entertain that part of their appeal. However, they consider it to be significant that the ZBA's members, most of whom are quite experienced in their roles, analyzed the issue rigorously and reached a conclusion that was directly opposite to that of the Planning Board, notwithstanding the lack of jurisdiction.

Both in the Planning Board and in the ZBA proceedings, the citizen opponents presented well-nigh irrefutable proof that it was both possible and feasible for the developers to erect their buildings at a location that was within the site and the setback boundaries but outside the wetlands buffer zone. That proof took the form of, inter alia, an alternative site plan that was prepared by a citizen opponent who happened to be a registered professional engineer, James Hewitt, and he used the developers' engineers' own site plan as a template. [See Attachment A to Appeal of Decision of Portsmouth Planning Board. (II CR 2.) A copy of his diagram also appears as Appendix E hereto.] The diagram showed that it was possible to erect three buildings on the site that were compliant with all setback requirements and all other zoning restrictions, yet were outside the 100' wetlands buffer. (Id.) Further, upon pointed questioning by Planning Board Member Chellman, the developers' representatives admitted--or, at least, failed to deny--that it would be feasible for them to erect structures within the boundaries of the site but outside the wetlands buffer zone. (I CR 10, at pp. 9, 11.) The only explanation which the developers' representatives ever tendered during any of the land use board proceedings, both in the Planning Board and in the ZBA, was that a reduced-size apartment complex erected outside the wetlands buffer zone would be less profitable to them. (Id. at pp. 9, 11, 17, 20.)

Other relevant facts will be addressed as they arise in the discussion which follows.

SUMMARY OF ARGUMENT

The Housing Appeals Board improperly substituted its judgment for that of the Portsmouth Zoning Board of Adjustment. It is fundamental that an appellate tribunal is bound by a land use board's findings and may not

overturn the latter's decision unless it was unreasonable, unsupported by the evidence, or contrary to law. In this case, the ZBA initially denied an application by the developers for a height variance which would have excused them from complying with a 50' height limit imposed by Portsmouth's zoning ordinance at the location of their proposed new buildings. A year later, the developers submitted a revised plan and claimed, through architectural sleight of hand, that the redesigned buildings did not exceed 50' in height and that therefore no variance was required. However, it is undeniable that the newly-designed buildings were to be very nearly as tall as the ones whose design the ZBA had rejected a year earlier and that in any event they exceeded 50' in height above ground level. Applying this Court's holding in the familiar case of Fisher v. Dover, the ZBA found as fact that there was no substantial difference between the revised building plan and the one that had been rejected a year earlier.

Without any meaningful explanation, the Housing Appeals Board set aside this finding and improperly substituted its judgment for that of the ZBA. In do doing, the Housing Appeals Board exceeded its authority.

The Portsmouth Planning Board improperly approved the issuance of a wetlands conditional use permit for the developers' project, and the Housing Appeals Board wrongly upheld its decision. As a matter of law, the developers' proposed project failed to meet the criteria for the issuance of a wetlands conditional use permit, without which the developers' plan could not properly have been approved. The Portsmouth Zoning Ordinance sets forth six mandatory criteria for the issuance of wetlands conditional use permits, and the developers' project failed to meet at least two of those criteria. In the land use board proceedings, the citizen opponents showed

by irrefutable proof that it was both possible and feasible to erect a series of buildings at a "location outside the wetland buffer that [was] feasible and reasonable for the proposed use" and that the developers' proposal was not "the alternative with the least adverse impact to" the wetlands buffer;[3] and further, in the land use board proceedings the developers admitted that the alternative proposed by the citizen opponents was feasible. As a matter of law, therefore, the developers' plan failed to qualify for a conditional use permit, and the Housing Appeals Board erred in upholding the Planning Board's decision.

ARGUMENT

I. The Developers' Plan Fails to Meet the Requirements for the Issuance of a Wetlands Conditional Use Permit, as Set Forth in the Wetlands Protection Ordinance.

The developers' project failed to meet the requirements for the issuance of a wetlands conditional use permit, for it failed to comply with at least two of the six mandatory criteria set forth in Zoning Ordinance § 10.1017.50 for the issuance of such permits. In violation of the scheme of the ordinance, a majority of the members of the Planning Board treated those mandatory criteria as mere "factors" and improperly adopted a "benefits vs. detriments" analysis, wrongly concluding that a wetlands conditional use permit may be issued if there is a "net" overall benefit to the environment after weighing the benefits of the proposal against its draw-backs. Section 10.1017.50 of the Wetlands Protection Ordinance provides that the criteria are mandatory, and the Planning Board acted improperly in

3. Portsmouth Zoning Ordinance §§ 10.1017.50(2), -(5).

refusing to insist that all six criteria be satisfied. The Planning Board was wrong in issuing a conditional use permit, and the Housing Appeals Board was wrong in upholding it.

A. The City of Portsmouth has a strong policy in favor of wetlands protection.

The Portsmouth Zoning Ordinance manifests a strong policy in favor of wetlands protection. The prefatory sections of the wetlands protection provisions of the ordinance, § 10.1010, set forth the following aspirational goals:

> Section 10.1010 Wetlands Protection
>
> 10.1011 Purpose
>
> The purposes of this Section are:
>
> (1) To maintain, and where possible improve, the quality of surface waters and ground water by controlling the rate and volume of stormwater runoff and preserving the ability of **wetland**s to filter pollution, trap sediment, retain and absorb chemicals and nutrients, and produce oxygen.
>
> (2) To prevent the destruction of, or significant changes to, **wetland**s, related water bodies and adjoining land which provide **flood** protection, and to protect **person**s and property against the hazards of **flood** inundation by assuring the continuation of the natural or existing flow patterns of streams and other water courses within the City.
>
> (3) To protect, and where possible improve, potential water supplies and aquifers and aquifer recharge areas.
>
> (4) To protect, and where possible improve, wildlife habitats and maintain ecological balance.

(5) To protect, and where possible improve, unique or unusual natural areas and rare and endangered plant and animal species.

(6) To protect, and where possible improve, shellfish and fisheries.

(7) To prevent the expenditure of municipal funds for the purpose of providing and/or maintaining essential services and utilities which might be required as a result of misuse or abuse of **wetland**s.

(8) To require the use of **best management practices** and **low impact development** in and **adjacent** to **wetland** areas.

(Boldfacing in original. The boldfaced words and phrases are ones which have been given definitions in the "general definitions" section of the Zoning Ordinance, § 10.1530.)

To help implement this policy, sections 10.1013.40, 10.1014.20, and 10.1016 of the zoning ordinance create a 100' "no build" wetlands buffer zone around Portsmouth's North Mill Pond, generally prohibiting the construction of any new structures within 100' of the highest observable tide line. Section 10.1014.20 provides:

10.1014.20 Wetland Buffers

10.1014.21 The purpose of a **wetland buffer** is to reduce erosion and sedimentation into the **adjacent wetland, vernal pool** or water body, to aid in the control of nonpoint source pollution, to provide a vegetative cover for filtration of runoff, to protect wild-life habitat, and to help preserve ecological balance.

10.1014.22 The required **wetland buffer** for a jurisdictional **wetland** or water body shall be defined as all land within 100 feet of the jurisdictional area.

10.1014.23 **Wetland buffer**s, including **vegetated buffer strip**s and limited cut areas, shall be parallel to and measured from the **reference line** for the applicable jurisdictional area on a horizontal plane.

(1) **Inland wetland buffer**s shall be measured from the edges of **inland wetland**s and surface water bodies.

(2) **Tidal wetland buffer**s shall be measured from the edges of **tidal wetland**s and **highest observable tide line**s.

(Boldfacing in original.)

Section 10.1013 is the provision that designates the perimeter of the North Mill Pond as one of the areas that is protected by the 100' wetlands buffer zone. That section provides in pertinent part:

The provisions of this Section 10.1010 apply to the following jurisdictional areas:

* * * *

10.1013.40 The **tidal wetland**s of Sagamore Creek, Little Harbour, North Mill Pond, South Mill Pond and part of the Piscataqua River, defined as follows:

* * * *

(c) North Mill Pond: Extending along the entire shoreline of North Mill Pond between Bartlett Street and Market Street.

(Boldfacing in original.)

Section 10.1016 of the zoning ordinance lists the specific uses which are permitted within the wetlands buffer--and, by necessary implication, forbids all uses which are not listed. In fact, section 10.1016 itself says as much. It states:

> 10.1016 Permitted Uses
>
> 10.1016.10 The following **use**s, activities and **alteration**s are permitted in **wetland**s and **wetland buffer**s:
>
> (1) Any **use** that does not involve the erection or construction of any **structure** or **impervious surface**, will not alter the natural surface configuration by the addition of fill or by dredging, will not result in site **alteration**s, and is otherwise permitted by the Zoning Ordinance. Examples of such **use**s include forestry and tree farming, wildlife refuges, parks and recreational **use**s, conservation and nature trails, and **open space**s as permitted or required by the Zoning Ordinance or Subdivision Regulations.
>
> (2) Improvements to existing public rights-of-way and **sidewalk**s.
>
> (3) The construction of piers or docks, provided that all required local, state and federal approvals have been granted.
>
> (4) The construction of an addition or extension to a **one-family** or **two-family dwelling** that lawfully existed prior to the effective date of this Ordinance or was constructed subject to a validly issued conditional use permit, provided that:
>
> (a) The **footprint** area of the addition or extension, together with the area of all prior such additions and extensions, shall not exceed 25 percent of the area of the **footprint** of the principal heated **structure** existing prior to the effective date of this Ordinance or constructed pursuant to

a validly issued conditional use permit (this 25 percent limit shall not be based on preexisting attached or detached garages, sheds, decks, porches, breezeways, or similar **building**s or **structure**s);

(b) The addition or extension shall be no closer to a **wetland** or water body than the existing principal **structure**; and

(c) The addition or extension shall conform with all other provisions of the Zoning Ordinance and with all other applicable ordinances and regulations of the City of Portsmouth.

(5) The use of motor vehicles, except for all-terrain vehicles, when necessary for any purpose permitted by this Ordinance.

(6) Emergency power generator outside the **wetland** and **vegetated buffer strip**, provided that the total **coverage** by equip-ment and any mounting pad shall not exceed 10 square feet.

(7) **Use**s, activities and **alteration**s that are consistent with a Wetland Protection Plan that has been approved by the Planning Board through the grant of a conditional use permit.

(8) Construction of fences outside the **vegetated buffer strip**, provided that any posts are no wider than 3" in any dimension, and that there are no footings and no ground disturbance beyond the installation of the posts.

(Boldfacing in original.)

Section 10.1016.20 is the provision of the ordinance which explicitly provides that any use or alteration which does not appear on the above list of permitted uses is specifically prohibited (unless allowed by a conditional

use permit properly issued pursuant to other provisions of the ordinance). It states:

> Any **use**, activity or **alteration** not specifically permitted by Section 10.1016.10 above is prohibited unless authorized by the Planning Board through the grant of a conditional use permit.

(Boldfacing in original; underlining added.)

The bottom line is this: No new buildings or impervious surfaces are to be erected or installed within 100' of the water line of the North Mill Pond (more specifically, within 100' of the "highest observable tide line," Zoning Ordinance § 10.1014.23(2)); and anything to the contrary is to be viewed as an exception to that general rule. It is to be emphasized that this prohibition against construction within the 100' buffer zone is not merely a casual suggestion, a general guideline, or friendly advice, even though in practice it is often treated as such by developers. Rather, the provisions of the zoning ordinance have the force of law. They are not to be treated cavalierly or to be blithely disregarded, particularly in view of, in this case, the strong policy in favor of wetlands protection evinced by the Portsmouth Zoning Ordinance. In Portsmouth, the only way around that prohibition is through a properly issued wetlands conditional use permit granted pursuant to section 10.1017.50.

B. There are six criteria which must be met for the issuance of wetlands conditional use permits.

Both sides to this appeal agree that the only provision authorizing the issuance of a wetlands conditional use permit allowing the erection of a new building or portion thereof within the 100' wetlands buffer zone is

section 10.1017.50, and in any event the appellee Iron Horse and its co-venturers have never relied on any other provision of the zoning ordinance either in the Conservation Commission, the Planning Board, or the Zoning Board of Adjustment as the basis for their request for the issuance of such a permit. Section 10.1017.50 sets forth six criteria, all six of which must be met in order for a wetlands conditional use permit to be issued. They are:

> (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** func-tional 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 con-struction 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.

(Boldfacing in original.)

The zoning ordinance makes clear that these criteria are not merely "factors" to be taken into consideration and to be weighed against one another in deciding whether to issue a permit, nor that an exceptionally strong showing of compliance with one of these criteria may be used to offset or excuse noncompliance with another. Rather, these criteria are

mandatory requirements. Section 10.1017.41 of the zoning ordinance makes clear that all six criteria must be satisfied in order for a wetlands conditional use permit to be issued. That section states:

> The Planning Board shall grant a conditional use permit provided that it finds that all other restrictions of 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.

(Boldfacing in original; other emphasis added. Section 10.1017.60, mentioned in the quoted section above, is inapplicable here, inasmuch as it pertains to public and private utilities and rights-of-way in wetlands and wetlands buffers. No utilities or rights-of-way are at issue in this case.)

In case there were any doubt concerning the matter, the opening sentence of section 10.1017.50 itself states:

> Any proposed **development**, other than installation of utilities within a right-of-way, shall comply with all of the following criteria:

(Emphasis added.) Thus, the six criteria quoted above are mandatory. All six must be complied-with.

C. The Developers' Plan Fails to Comply with the Six Criteria.

The developers' plan undeniably fails to meet at least two of the six of the criteria specified in section 10.1017.50 of the zoning ordinance and quoted above, and therefore the wetlands conditional use permit granted by the Planning Board was improperly issued. There is some doubt as to whether the developers' proposal fully met any of these six criteria; however, it is unnecessary to consider the other four of them, for it is beyond reasonable dispute that the plan failed to comply with subsections (2) and

(5) of that section, and its failure to comply with either one of them is dispositive of its application for the permit (and of this appeal). On the undisputed facts of this case, the developers' proposal was not "the alternative with the least adverse impact" upon the wetlands buffer and the surrounding environs, Zoning Ordinance § 10.1017.50(5), and there was "[an] alternative location outside the wetland buffer that [was] feasible and reasonable for the proposed use" to which the developers intended to put it. Zoning Ordinance § 10.1017.50(2).

In the Conservation Commission, in the Planning Board, and in the Zoning Board of Adjustment, one of the citizen opponents of the project, James A. Hewitt, himself a registered professional engineer, submitted a diagram which he entitled "A Plan That Works," using one of the developers' engineers' own site plans as a template, and it showed irrefutably that it was and is feasible to erect three apartment buildings on the site at a location that is outside the 100' wetlands buffer. (See Appendix E.) True, the three buildings depicted on Mr. Hewitt's diagram were smaller than the ones shown on the developers' own plan, and the buildings drawn by Mr. Hewitt would probably have been less profitable to the developers than the ones shown on their own site plan. However, this is not a case in which the developers couldn't construct an apartment complex which was reasonable and feasible and which would generate a reasonable profit. It is a case in which they didn't want to.

The developers' representatives were given repeated opportunities to explain why the plan depicted in Mr. Hewitt's rendering "A Plan That Works" was not feasible, and they never did so. In the Planning Board hearing of April 15, 2021, the developers' representatives were was asked

repeatedly by one of the Planning Board members, Rick Chellman, whether it was not feasible to erect a set of apartment buildings within the site but outside the wetlands buffer, and the only explanation which they ever offered was that it would not be as profitable for them to pursue their project if it were confined to the area outside the wetlands buffer than it would if they were permitted to stick to their original plan. (II CR 10, at pp. 9, 11; and see YouTube video of the Planning Board's April 15, 2021 meeting, beginning at approximately 1:49:00 and 2:08:00 on the video timer.) Subsequently, in their written appeal and in the hearing before the ZBA, the citizen opponents highlighted Mr. Hewitt's rendering and repeatedly pointed out that it was perfectly feasible for the developers to build three apartment buildings outside the 100' wetlands buffer zone. The developers never offered any explanation as to why this could not have been done, other than the fact that it would not have been as financially rewarding for them to do so.

Never offered any explanation until they offered it on appeal, that is. In their appeal before the Housing Appeals Board the developers argued, for the first time, that it would have been economically infeasible for them to have erected their three buildings at a location outside the wetlands buffer. Having raised this argument for the first time on appeal, however, it is waived. Robinson v. Town of Hudson, 154 N.H. 563, 567-68 (2006); Blagbrough Family Realty Trust v. Town of Wilton, 153 N.H. 234, 238-39 (2006); Cherry v. Town of Hampton Falls, 150 N.H. 720, 725 (2004); Dziama v. City of Portsmouth, 140 N.H. 542 (1995). It was never advanced in any of the land use board proceedings.

On these facts, and given the developers' lack of any timely or satisfactory explanation--in fact, no explanation at all--as to why it would have been infeasible for them to erect their buildings within the boundaries of the site but outside the wetlands buffer zone, it is clear that both the Planning Board and the Housing Appeals Board were wrong. As a matter of law, the developers' plan failed to meet the requirement that their proposal be "the alternative with the least adverse impact" upon the wetlands buffer, Zoning Ordinance § 10.1017,50(5), and the requirement that there be "no alternative location outside the wetland buffer that [was] feasible and reasonable for [its] proposed use". Zoning Ordinance § 10.1017.50(2).

D. The six criteria are mandatory, and there is to be no "balancing" of detriments versus benefits.

The developers' consistent argument before the Conservation Commission, the Planning Board, and the Zoning Board of Adjustment was that although their proposed project would encroach upon the wetlands buffer in the ways mentioned above (i.e., as much as 50' into the buffer zone with its buildings, plus the paved fire road), there would be a "net" overall benefit to the site and to the wetlands buffer because of the various "improvements" which the developers claimed that they would be implementing as part of their plan. The developers advocated a "balancing" approach, whereby the damage to the environment caused by its buildings should be weighed against the benefits that would be brought about by the project, such as open space, a public greenway, removal of some dilapidated railway buildings, and the storm water runoff plan which it planned to implement and which it claimed would improve the North Mill Pond. (It should be noted, of course, that the construction activity itself would inflict significant

damage upon the buffer zone, the environment, and the pond, even if the finished product would arguably be less detrimental once it was installed.)

It is debatable whether any of these alleged improvements would really improve the wetlands buffer or its surroundings. But in any event, as already noted above, the wetlands protection ordinance, Zoning Ordinance § 10.1017.50, sets forth six criteria which must be met in order for a wetlands conditional use permit to be issued, and section 10.1017.41 of the ordinance further makes clear that those criteria are mandatory. The applicant must comply with all six of them. "The Planning Board shall grant a conditional use permit provided that it finds that all other restrictions of 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."[4] Zoning Ordinance § 10.1017.41 (emphasis added).

Similarly, in its written decision the Housing Appeals Board concluded that the developers' plan was "not unreasonable" and used that conclusion as the main basis for its decision for reversing the ZBA and reinstating the Planning Board's decision. (Indeed, the Housing Appeals Board gave little other explanation for its decision.) However, that a proposal is "not unreasonable" is not the test. The test for issuing a wetlands conditional use permit is whether the plan complies with the six criteria that are set forth in section 10.1017.50. The Housing Appeals Board's reasoning was clearly erroneous, as was its ultimate decision.

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4. As noted above, section 10.1017.60 is not applicable, for it pertains only to public and private utilities and rights-of-way in the buffer zone.

Thus, there is not to be any "balancing" of benefits versus detriments, nor any trade-offs of harm to the wetlands buffer in exchange for perceived improvements. Section 10.1017.50 of the ordinance does all of the balancing that needs to be done, and it says what it says. It provides that the developers' proposal must be the alternative with the least adverse impact upon the wetlands buffer, and that in order for a conditional use permit to be granted there must be no alternative location outside that buffer which is feasible and reasonable for the developer's proposed project. Zoning Ordinance § 10.1017.50(5), -(2). The developers' plan simply does not meet either of those two criteria. For these reasons, the Planning Board's decision was erroneous as a matter of law, as was the Housing Appeals Board's decision to uphold it. Their decisions must be reversed.

II. The Housing Appeals Board Improperly Substituted Its Judgment for That of the Zoning Board of Adjustment, in Contravention of the Fundamental Principle that the Appellate Tribunal is Bound by a Land Use Board's Findings Unless They are Clearly Unreasonable or Contrary to Law.

The Housing Appeals Board improperly substituted its judgment for that of the Portsmouth Zoning Board of Adjustment. It is fundamental that an appellate tribunal is bound by a land use board's findings and may not overturn the latter's decision unless those finding were unreasonable, unsupported by the evidence, or contrary to law. Dietz v. Town of Tuftonboro, 171 N.H. 614, 618 (2019). In this case, the ZBA initially denied an application by the developers for a height variance which would have excused them from complying with the 50' height limit imposed by Portsmouth's zoning ordinance at the location of their proposed new buildings. A year later, the developers submitted a revised plan and claimed, through

what the citizen opponents have aptly characterized as "architectural sleight of hand," that the redesigned buildings did not exceed 50' in height and that therefore no variance was required. However, it is undeniable that the newly-designed buildings were to be very nearly as tall as the ones whose design the ZBA had rejected a year earlier and that in any event they exceeded 50' in height above ground level.

Applying this Court's holding in the familiar case of Fisher v. City of Dover, 120 N.H. 187 (1980), the ZBA found as fact that there was no substantial difference between the revised building plan and the one that had been rejected a year earlier. The Housing Board of Appeals had no business setting aside this finding.

A. The Background

At its January 22, 2020 meeting, the Zoning Board of Adjustment entertained an application by the developers for a couple of variances for the subject property. One of these was a request for a variance relieving them from the 50' height limit imposed by the zoning ordinance on buildings at that location. (The developers envisioned an apartment building or buildings up to 60' high.)

Their variance request was coolly received by both the public and the ZBA, to say the least. Citing the massive size of the building depicted in their proposal and its inconsistency with the character of the neighborhood, the ZBA denied the developers' request for a variance from the building height limit, denying same by a unanimous, 6-0 vote.

A year later, on April 15, 2021, the developers came before the Planning Board seeking, among other things, site plan approval for their revised plan. In at least one important respect, however, there was little

difference between that plan and the one which the ZBA had rejected a year earlier. The revised plan called for buildings exceeding the 50' height limit and reaching almost 60' in height. The developers' solution to the dilemma created by the ZBA's previous denial of their variance request was simple: The new plan called for the developers to transport fill into the site from outside and to pack it around the first story/ground floor garage of their new building. They would then call the first level "the underground garage"[5] and would use the imported fill to raise by several feet the level of the ground surrounding it. They would then call the raised ground level "the new grade," from which the building's height was supposedly to be measured. By rearranging the numbers, the developers claimed that their new building would not violate the 50' height limit and that therefore no variance was required.

No matter how much the developers gerrymandered the calculations used to measure the grade level, however, the practical effect of all of this was that the elevation of the top of the roof of the new buildings was to be just as high, or very nearly so, as that of the proposed buildings whose design the ZBA had rejected the year before, and the height would be well over 50' from the original ground level.

The ZBA was not fooled. It reversed the Planning Board, disapproved the developers' final site plan, and found that there was no sub-

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5. In reality, it would have been impossible and/or prohibitively expensive for them to have constructed a true underground garage, for the ground on which the project was to sit was only a few feet above sea level. They would have had to excavate below the water table, and much of their "underground garage" would have been submerged in water.

stantial difference between the redesigned buildings and the ones that the ZBA had rejected a year earlier.

Naturally, the developers take a much different view of the matter, and the subject was one of sharp disagreement and conflicting testimony, both lay and expert, at the July 20, 2021 hearing on the citizen opponents' appeal to the ZBA. One of the citizen opponents, Mr. Hewitt, a registered civil engineer, explained how the new version of the developers' building would violate the 50' height restriction, just as the original version would have. The developers' engineer, of course, argued to the contrary and claimed that when properly measured from grade level the proposed new building did not exceed 50'. Likewise, there was sharply conflicting testimony in other respects.

The ZBA resolved these conflicts in favor of the citizen opponents and found that there was no substantial difference between the developers' present proposal and the one which the ZBA had rejected a year earlier via its vote to deny the developers' request for a height variance. (See remarks of ZBA Member Jim Lee, quoted ante at 14.) Following a lengthy hearing, the ZBA voted to overturn the Planning Board's decision granting site plan approval, based in large part on the fact that that site plan was contrary to the ZBA's prior ruling.

B. The Standard of Review

The standard of review of zoning board decisions by the Superior Court (and, presumably, by the Housing Appeals Board) is settled and familiar. The factual findings of the zoning board of adjustment are prima facie lawful and reasonable. Dietz v. Town of Tuftonboro, 171 N.H. 614, 618 (2019); Rochester City Council v. Rochester Zoning Bd. of Adjust-

ment, 171 N.H. 271, 275 (2018); Trs. of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 504 (2018); RSA 677:6, -:15, V. The burden is on the party bringing the appeal to show that those findings are contrary to law or unreasonable.[6] Id. The question before the court when reviewing a zoning board's decision is not whether the court agrees with the findings of the ZBA or whether it would have reached a different conclusion itself, but whether there is evidence upon which those findings could reasonably have been based. Id. Where the testimony or evidence before the board is in conflict, it is the ZBA's function to resolve the conflict. Id. It is up to the ZBA "to resolve conflicts in evidence and assess the credibility of offers of proof." Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 519 (2011). The Superior Court or other appellate tribunal does not act as a "super zoning board." Dietz, 171 N.H. at 618.

Here, there was conflicting testimony and other evidence as to whether the developers artificially raised the ground level of their proposed new building in order to circumvent the ZBA's prior decision denying their application for a height variance, or whether they redesigned their building for legitimate reasons. There was also an issue as to whether the developers

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5. It should be noted, parenthetically, that the ZBA's standard of review of Planning Board decisions is different. Unlike the Housing Appeals Board's scope of review of ZBA findings, the ZBA's review of Planning Board decisions is de novo. Ouellette v. Town of Kingston, 157 N.H. 604, 608-12 (2008). The ZBA, unlike the Housing Appeals Board, is free to substitute its own judgment for that of the Planning Board and to reach completely different conclusions from those of the latter. Id. Therefore, the ZBA had the authority to enforce its own prior decision and reverse the Planning Board's approval of a site plan if that plan included an unlawful component, namely, a building whose height exceeded 50 feet. Id.

had taken contradictory positions by applying for a height variance in 2020 but professing that none was needed in 2021. And, of course, the question of how the building height was to be measured, and from what point, was hotly disputed.

C. ZBA's Findings Binding When Evidence is Conflicting

The ZBA members had before them both the building plan that had been submitted to the Planning Board on the spring of 2021 and the one that had presented to the ZBA itself a year earlier, and most of the ZBA members remembered having entertained the prior variance application at that time. Being residents of Portsmouth themselves, in addition to being members of the Zoning Board, they were also well familiar with the site. They were in as good a position as any to determine whether the plan that was presented to the Planning Board was substantially different from the one that they had rejected a year earlier, and, applying the doctrine of Fisher v. City of Dover, 120 N.H. 187 (1980), they resolved that question in favor of the citizen opponents. Where the evidence is in conflict, it is for the ZBA to resolve the conflict and assess the credibility of the witnesses. Haborside Associates, 162 N.H. at 519. On the evidence presented, it cannot be said that the Portsmouth ZBA's findings were unlawful or unreasonable, and therefore those findings were binding on the Housing Appeals Board. Dietz; Rochester City Council; Trustees of Dartmouth College; Harborside Associates. The Housing Appeals Board acted improperly and exceeded its authority in setting those findings aside. Id.

The ZBA's findings having provided a lawful, legally sufficient, independent basis for overturning the Planning Board's decision to grant site plan approval, the ZBA's ruling must be affirmed, regardless of this

Court's disposition of the issue of the wetlands conditional use permit. The Housing Appeals Board's decision must be reversed, the Portsmouth ZBA's decision must be reinstated (at least insofar as the building height and design are concerned), and the Planning Board's decision to grant site plan approval must be vacated.

CONCLUSION

For all of the foregoing reasons, the decision of the Housing Appeals Board should be reversed; the decision of the Portsmouth Zoning Board of Appeals should be reinstated; and the decision of the Portsmouth Planning Board, granting approval of the issuance of a wetlands conditional use permit and granting final site plan approval, should be vacated.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested. Because of the intricate and fact-intensive nature of this controversy, the Intervenors believe that oral argument will simplify the issues and enable the Court to ask any questions that it may have. They also believe that 15 minutes is inadequate for these purposes, and so they request an additional 15 minutes per side, although they are hopeful that they can conclude their presentation within only 20 or 25 minutes.

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that this brief, excluding the cover page, table of contents, table of citations, and the appendix, contains less

than 9,500 words. According to the "word count" feature in the undersigned counsel's word processing program, the number of words is 8,974.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, Duncan J. MacCallum, Attorney for Intervenor-Appellants in the within appeal, hereby certifies that on this 28th day of September, 2022, the foregoing Brief for Intervenor-Appellants was served upon all parties by serving counsel for the appellee, Michael D. Ramsdell, Esquire and Brian J. Bouchard, Esquire, and counsel for the City of Portsmouth, Robert P. Sullivan, Esquire and Trevor P. McCourt, Esquire, via the Court's electronic case filing system.

/s/ Duncan J. MacCallum
Duncan J. MacCallum

APPENDIX

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APPENDIX A

THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD
Governor Hugh J. Gallen State Office Park

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CASE NAME: Iron Horse Properties, LLC v. City of Portsmouth
CASE No.: ZBA-2021-21

ORDER

The matter under review by the Housing Appeals Board is an appeal by Iron Horse Properties, LLC (the "Applicant") of a decision by the City of Portsmouth (the "City") Zoning Board of Adjustment ("ZBA") reversing the Applicant's Planning Board approval of its development plan for Bartlett Street in Portsmouth, New Hampshire.

FACTS:

The Applicant owns a parcel of real property known as Map 164, Lot 4-2, located at 105 Bartlett Street in Portsmouth, New Hampshire. On 15 April 2021, the City of Portsmouth Planning Board granted the Applicant approvals for:

1) A wetland Conditional Use Permit ("CUP");
2) A CUP for shared parking on separate lots;
3) Site plan approval for the demolition and relocation of existing structures for the construction of 152 units in three (3) buildings; and
4) Subdivision approval for a lot line relocation.

On 14 May 2021, the Intervenors filed an administrative appeal with the ZBA requesting review of the following Planning Board decisions in conjunction with the Applicant's site plan approval:

1) The site plan approval was not in compliance with the City Zoning Ordinance, Section 10.5A41.10B which limits the maximum allowable building length to 200 feet;
2) The Planning Board improperly granted a CUP that allows the Applicant to block the Dover Street view corridor;
3) The Planning Board's site plan approval contradicts a prior decision of the ZBA issued at a meeting on 22 January 2020;
4) The Planning Board erred in granting a wetlands CUP because the application did not meet the second and fifth criteria in the City Zoning Ordinance, Section 10.1017.50;
5) The Planning Board erred in granting the CUP for shared parking, claiming "There were less intrusive designs…which could have avoided encroachment into the 100' wetland buffer;"
6) The Conservation Commission never "considered or made specific findings concerning the six criteria delineated in 10.1017.50…;"
7) The approved site plan violates the 50-foot height limit in Sections 10.5A43.31 and 10.5A46.10 of the City Zoning Ordinance;
8) The site was unlawfully spot-zoned for the purpose of approving the Applicant's project;
9) The CUPs granted by the Planning Board were not related to innovative land use controls and therefore were not authorized by the enabling statute RSA 674:21.

At the 20 July 2021 meeting, the ZBA voted to grant the appeal of the Intervenors. On 28 July 2021, the Applicants filed a motion for rehearing with the ZBA. On 17 August 2021, the ZBA denied the Applicant's motion. On 15 September 2021, the Applicant filed this appeal with the Housing Appeals Board.

LEGAL STANDARDS:

The Housing Appeals Board review of any Zoning Board of Adjustment decision is limited. It will consider the Zoning Board's factual findings prima facie, lawful, and reasonable. Those findings will not be set aside unless, by a balance of the probabilities upon the evidence

before it, the Housing Appeals Board finds that the Zoning Board decision was unlawful or unreasonable. *See,* RSA 679:9. *See also, Lone Pine Hunters Club v. Town of Hollis*, 149 N.H. 668 (2003) and *Saturley v. Town of Hollis Zoning Board of Adjustment*, 129 N.H. 757 (1987). The party seeking to set aside a Zoning Board decision bears the burden of proof to show that the order or decision was unlawful or unreasonable. RSA 677:6.

DISCUSSION:

As the "Facts" reveal, on 15 April 2021, the City of Portsmouth Planning Board granted site plan approval for the Applicant's residential development located at 105 Bartlett Street. As part of that approval, two (2) CUPs were granted by the Planning Board in conjunction with the Applicant's proposal. Specifically, one was a wetlands CUP (Count 4 of the Intervenors' appeal) and the second was a shared parking CUP (Count 5 of the Intervenors' appeal).

The Housing Appeals Board will first address the issue of the validity of an appeal of a Planning Board's CUP decisions to the City of Portsmouth Zoning Board of Adjustment, since any appeal of an innovative land use control decision made by the Planning Board must be filed directly with the Superior Court or the Housing Appeals Board under RSA 676:5, III.[1]

Specifically, if the RSA 676:5, III, procedure had been followed, both CUPs would have been appealed directly to the Superior Court or the Housing Appeals Board, and, in that instance, the burden of proof would have rested with the Intervenors. Including the CUP issues within the Intervenors' 9-count zoning board administrative appeal, thus placing the burden of proof upon the Applicant on all nine (9) counts, may not be reasonable nor consistent with the statutory framework previously referenced.

Depending on the state of the evidence, this may be important since RSA 677:6 entitled "Burden of Proof" places the burden "…upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show

[1] The language is specific in RSA 676:5, III. It states: "…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." That statute contains the procedure for appeal to the Superior Court or the Housing Appeals Board.

that the order or decision is unlawful or unreasonable."[2] Because the Applicant believes the burden of proof on Counts 4 and 5 would be unfairly shifted by including those in the Intervenors' appeal, the Applicant has requested the Housing Appeals Board place the burden of proof on the Intervenors as to the CUP determinations.[3]

The underpinning of the CUP burden of proof issue (Intervenors' zoning appeal, Counts 4 & 5) has its genesis under RSA 674:21, the "Innovative Land Use Controls" statute.[4] Under Section I, a list of these "controls" is provided, but the list is not inclusive; it clearly states:

> I. Innovative land use controls may include, but are not limited to:
> (a) Timing incentives.
> (b) Phased development.
> (c) Intensity and use incentive.
> (d) Transfer of density and development rights.
> (e) Planned unit development.
> (f) Cluster development.
> (g) Impact zoning.
> (h) Performance standards.
> (i) Flexible and discretionary zoning.
> (j) Environmental characteristics zoning.
> (k) Inclusionary zoning.
> (l) Impact fees.
> (m) Village plan alternative subdivision.
> (n) Integrated land development permit option. *Id.*

[2] Both parties acknowledge that the CUP dispute could have ended up before either the Superior Court or the Housing Appeals Board by: 1) a direct appeal filed after the Planning Board's grant of either or both CUPs; or 2) an indirect appeal of the Planning Board's grant of either or both CUPs by filing a petition with the ZBA and an appeal to the Superior Court or Housing Appeals Board at the conclusion of any ZBA action. As noted, in either case it could have ended up before the Housing Appeals Board.

[3] To shift the burden of proof to the Applicant after a finding that proper procedure was not followed by the Intervenors is inconsistent with the statutory framework. The Housing Appeals Board notes that neither party has requested that the matter be dismissed without prejudice so that a direct appeal can be filed with either the Housing Appeals Board or the Superior Court.

[4] The second request for relief in the Intervenors' administrative appeal (Count 2) states that the Planning Board improperly granted a CUP allowing the Applicant to "block the Dover Street view corridor." This is factually incorrect. As a condition of site plan approval, the Planning Board imposed a condition requiring the Applicant to conform to Section 10.5A42.40 of the Zoning Ordinance, in order to: "…provide a public view from Dover Street with a terminal vista of the North Mill Pond…." (CR at Vol. 1, Tab 9, Condition 11). Based on the foregoing, Count 2 is dismissed. Likewise, Count 3 of the appeal is not supported. The purpose of the prior variance request was not to interfere or block the Dover Street view corridor. After variance denial, (CR at Tab 22), the Applicant complied with the decision. A review of the site plan shows no realignment of the referenced view corridor. Because of the foregoing, Count 3 of the appeal is dismissed.

When RSA 674:21 controls are adopted and placed in the zoning ordinance (*see,* RSA 675:1, II) they are administered as provided in the ordinance. In this case, Section 10.1017, wetlands CUP, and Section 10.1112.14, shared parking CUP, can be waived by the Planning Board if the stated CUP requirements are met. This allowance was approved by the local legislative body and became part of the Portsmouth zoning scheme.[5] *See,* RSA 675:2.

The Intervenors argue that both the wetlands and shared parking CUPs are not "innovative land use controls," thus, they do not require a direct appeal from the Planning Board's decisions. Because RSA 674:21, I is not limited, and since innovative land use controls are Planning related, the wetlands and shared parking CUPs fall squarely within the statutory guidance of RSA 674:21, I, as evidenced by the allowed Planning Board waiver procedure contained in the Zoning Ordinance.[6] Planning Board intrusion into zoning provisions is not to be taken lightly, since, apart from this limited power, only the ZBA is granted that right.[7]

Turning to the specific complaints made by the Intervenors, the Housing Appeals Board turns first to the wetlands CUP. The Certified Record contains the specific factors evaluated by the Planning Board in making its wetland buffer CUP decision. It also gained input from the

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[5] The Zoning Ordinance in Section 10.242.10 clearly grants the Planning Board the power to issue CUPs for the two granted CUPs. It states:

> The Planning Board…may grant a conditional use permit if the application is found to be in compliance with the general approval criteria in Section 10.243 or, if applicable, the specific standards or criteria as set forth in this Ordinance for the particular use or activity. The Planning Board…shall make findings of fact, based on the evidence presented by the applicant, City staff, and the public, respecting whether conditional use is or is not in compliance with the approval criteria of Section 10.243.

[6] The Housing Appeals Board agrees with the Applicant that there is no clear statutory provision in New Hampshire Law allowing a Planning Board to waive zoning provisions by granting CUPs except as an "innovative land use control." This concept is encapsulated in advice provided by the New Hampshire Municipal Association. It advises its members that a CUP is a device to implement "innovative land use controls." Continuing with that advice, the New Hampshire Municipal Association published *Look Before You Leap: Understanding Conditional Use Permits*, which expressly cites: "Conditional use permits might be used appropriately in connection with: construction or filling in wetlands, wetland buffers, or aquifer protection district…." C. Christine Fillmore, Esq., *Look Before You Leap: Understanding Conditional Use Permits* (Jan. 2006).

[7] Review of the Planning Board's CUP decisions by the City of Portsmouth Zoning Board of Adjustment will be decided by the Housing Appeals Board "as if it were a direct appeal of the Planning Board's grant of the conditional use permits."

City's environmental planner, Peter Britz, as well as the City's Conservation Commission.[8] All recommended approval of the CUP. While the Intervenors suggest that there was an alternative location for the proposed development with less adverse impact, based upon the final design of the project including underground parking and relocating the footprint of any structures away from North Mill Pond, the final design is not unreasonable based on the facts considered by the Planning Board.

The Intervenors would like the Housing Appeals Board to focus on the idea that a smaller project could be built as a basis for reversal of the Planning Board's approval of the wetlands buffer and shared parking CUPs. The Certified Record reflects adjustments made by the Applicant to the plan, but, more importantly, this "desire" by the ZBA does not mandate a wholesale reduction in project size. *See, Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007). The Housing Appeals Board does not believe that the Planning Board acted illegally or unreasonably in making its wetlands CUP decision, thus, the ZBA decision reversing the Planning Board's grant of the wetland buffer CUP was unreasonable.[9]

The other CUP referenced in Count 5 of the Intervenors' appeal is approval of shared parking. Again, the Intervenors allege that there could have been less intrusive designs or other changes to the plan. In this instance, the Housing Appeals Board believes that the Planning Board properly and fairly reviewed the CUP criteria in granting the shared parking CUP in this location. As a result, the ZBA's reversal of the Planning Board's granting of the shared parking CUP was unreasonable.[10]

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[8] The sixth item of the Intervenors' ZBA appeal (Count 6) suggests that the Conservation Commission never "…considered or made specific findings concerning the six CUP criteria referenced in Section 10.1017.59…" of the ordinance. The Conservation Commission provides review and/or comment and, in this case, did so. There is no ordinance provision requiring a review of the six wetland buffer CUP criteria by the Conservation Commission. The Certified Record demonstrates a full review by the Conservation Commission with an approval recommendation to the Planning Board. (CR at Vol. II, Tab 5).

[9] To the extent further comment is needed regarding the City of Portsmouth Zoning Board of Adjustment decision regarding the CUP determinations made by that board, the Housing Appeals Board finds that the Zoning Board of Adjustment was confused by the advice given to it by planning staff. (CR at Vol. I, Tabs 17 and 18). Essentially, the ZBA expected a court appeal and acted as if their decisions were inconsequential since the matter would be decided by a court or the Housing Appeals Board.

[10] Review of the Certified Record discloses that the City Zoning Board of Adjustment spent little time reviewing this particular matter. Like Count 4 of the Intervenors' appeal, the ZBA felt other designs could have been considered. (CR at Vol. I, Tab 22).

Count 1 of the Intervenors' administrative appeal of the referenced Planning Board decision states that the Applicant's site plan included a structure more than 200 feet in length which is in violation of Section 10.5A41.10B of the ordinance.

At the outset, the Certified Record does not show that the Intervenors' presented this argument to the Planning Board allowing the Planning Board to consider the possible zoning violation.[11] That said, a review of the Certified Record shows that the longest building façade is 185 feet—well short of the 200-foot maximum. (*See,* Building B on the site plan C-102.2 and Section 10.1530A, Figure 10.5A41.10B of the Zoning Ordinance.) (CR at Vol. II, Tab 2). Based upon the facts before the Planning Board, the reversal of the Planning Board's decision by the ZBA regarding "building length" was unreasonable.[12]

We next turn to Count 7 of the Intervenors' appeal. It alleges that the Planning Board acted illegally in interpreting the ordinance height restriction in the CD-W Zoning District. Specifically, Map 10.5A21B, Section 10.5A43.30, defines building height as: "…the height measured from the grade plane to the top of the proposed building." While the actual height of the building is not in significant dispute, the Intervenor claims that the Applicant should have used the original grade plane that existed when taking the measurement.

If that had been the case, there may have been a building height violation. However, the measurement used by the Applicant and the Planning Board was measured from the regraded

[11] A party must raise any issue to be litigated before a tribunal in order to have the issue heard on appeal. *See, Blagbrough Family Realty Trust v. Town of Wilton*, 153 N.H. 234 (2006). However, it is always presumed the tribunal will follow the law—in this case, the duly enacted City of Portsmouth Zoning Ordinance. Therefore, the issue will be considered by the Housing Appeals Board.

[12] The Planning Board and its staff reviewed the Applicant's plans in detail. It is clear from the record that each side conducted their own review of the ordinance. What is revealing is the comment of ZBA member Ms. Beth Margeson:

> …she remarked that there were two ways of calculating building length in the ordinance, the regular zoning ordinance and the character-based zoning, and that was the maximum building block length. Because the way the definition was worked in the character-based zoning, she thought it would seem to be the appropriate calculation for the building. (CR at Vol. I, Tab 22).

There was little other ZBA discussion regarding Count 1 of the Intervenors' appeal. *See,* Zoning Ordinance Section 10.1530A and Figure 10.5A41.10B.

surface, bringing it within the 50-foot limitation.[13] The Certified Record and information provided by the Parties shows that this appears to be the methodology previously used by the City of Portsmouth in determining building height. The Applicant points out in its materials that the property at 145 Brewery Lane and another at 77 Hanover Street included regrading the property to raise the grade plane elevation.[14] Apparently, no abutters or interested parties raised concerns over that methodology in regard to these properties. The Housing Appeals Board finds that, to the extent that there is any confusion, "administrative gloss" will be applied to this particular issue. Specifically in interpreting the building height ordinance, the City has used the average grade plane and not the original grade. This will be the standard applied to the Applicant's application.[15]

Based upon the foregoing, the Housing Appeal Board finds that the City of Portsmouth Zoning Board of Adjustment was unreasonable in reversing the Planning Board's height decision in conjunction with the Applicant's planning approval.

In Count 8 of the Intervenors' appeal, a challenge is being made to alleged "spot zoning" of the Applicant's property. (CR at Vol. I, Tab 2, Page 10). The Housing Appeals Board notes that on 20 August 2018, the City Council of the City of Portsmouth rezoned the subject property and made additional changes to the CD4-W District. Under RSA 677:2, the

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[13] The CD4-W zoning district imposes a 50-foot building height limit. Map 10.5A21.B, Section 10.5A43.30. This is measured from the "grade plane" to the top of the building. *See,* Zoning Ordinance at Section 10.1530. While the Applicant proposed some regrading to accommodate parking under the structure, the "grade plane" exhibit (*see,* Applicant's Ex. D, Page 6), shows the building within the height limits. *See,* Ex. I. Importantly, building height is measured from the "average grade plane"—not from the original grade. *See,* Section 10.1530 of the Zoning Ordinance.

[14] *See,* ¶ 116 of Applicant's *Appeal from Decision of the Portsmouth Zoning Board of Adjustment Pursuant to RSA 679:5*.

[15] To the extent there is any vagueness in interpreting this ordinance provision, "administrative gloss" controls. In *Harborside Assoc., L.P. v. City of Portsmouth*, 163 N.H. 439 (2012), the Supreme Court stated:

> As a rule of statutory construction, an administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference.

The Supreme Court in *Hansel v. City of Keene*, 138 N.H. 99, 104 (1993) further stated on this matter: "…the municipality may not change such a de facto policy, in the absence of legislative action, because to do so would presumably violate legislative intent."

Intervenors had 30 days from the City Council's 2018 decision to request a rehearing on this issue. RSA 677:2 states:

> Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion.[16]

Based upon the time that has passed since the zoning decision was made, the Housing Appeals Board does not find that this issue has merit. Thus, Count 8 is dismissed.

Turning to Count 9 of the Intervenors' appeal; it suggests that the City's CUPs are facially invalid because they are not authorized by RSA 674:21. As previously discussed, the City's Zoning Ordinance provides for CUPs regarding wetlands and the shared parking. However, the appropriate agency to administer and provide the actual permit is the Planning Board. The only mechanism under current New Hampshire law to allow the waiver of a zoning ordinance by the Planning Board is when the subject of the ordinance falls under the Innovative Land Use Controls authorized under RSA 674:21.[17]

[16] RSA 672:8 states: "'Local legislative body' means one of the following basic forms of government utilized by a municipality: I. Council, whether city or town…." *See also, Portsmouth Advocates, Inc. v. City of Portsmouth*, 133 N.H. 876 (1991), which outlines the process for challenging a decision of a city council.

[17] A CUP review by a Planning Board can only occur if the area in question is under an Innovative Land Use Control. This procedure was adopted and confirmed by the local legislative body when the Portsmouth City Zoning Ordinance was approved. Ordinarily, the only body authorized to waive the provisions of the Zoning Ordinance is the Zoning Board of Adjustment; however, as noted, if the provision is part of an Innovative Land Use Control, then the local legislative body can authorize the Planning Board to act as the waiver authority. This is the case with the two CUPs issued in the matter before the Housing Appeals Board. *See,* Peter Loughlin, *New Hampshire Practice Series: Land Use Planning and Zoning*, Vol. 15, Section 15.07 (2020).

Based upon the foregoing, the findings of the City of Portsmouth ZBA as to Counts 1, 4, 5, 6, 7, and 9 are REVERSED; Counts 2, 3, and 8 are DISMISSED.[18,19]

HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:

Elizabeth Menard

Date: January 26, 2022

Elizabeth Menard, Clerk

[18] In reviewing the Certified Record, in particular: Tab 22, the ZBA summarily reversed the Planning Board's decisions (Counts 1-9) without significant discussion. Likely, this resulted, in part, from some bias toward the Applicant's project unrelated to the appeal requests. At the 20 July 2021 ZBA hearing, Mr. David MacDonald opined:

> …he would support the appeal, noting that the City in the last decade had gone through a surge of developing buildings that the City didn't really need and that consumed services and generated costs for the citizens. He asked how much better off Portsmouth would be if the proposal was approved. He said there were enough places to live for residents that people who didn't live in Portsmouth but wanted to saw [sic] a shortage of housing. He said there was a shortage of natural waterfront and wild species and that the City didn't have to approve giant residential buildings or corrupt shorelines and estuaries to make the planet a better place to live." (CR at Vol., I, Tab 22).

In addition, Mr. James Lee said: "…the Board should just consider the totality of the appeal and say yes or no." (CR at Vol. I, Tab 22). The Housing Appeals Board finds this method of deciding the numerous appeal counts to be suspect, since the focus of the ZBA was on the project itself and not each individual appeal request.

[19] After a full review of the Certified Record, the Housing Appeals Board has found, by a balance of the probabilities, that the ZBA erred in its findings and that the Planning Board's decisions, including the CUPs, were appropriate. (*See,* RSA 679:9). This is so regardless of which side had the "burden of proof" on Counts 4 and 5 of the zoning petition discussed at Pages 5-8, *supra.* Thus, though the "burden of proof" issue was raised at the request of the Applicant, the Housing Appeals Board finds, in this case, that issue to be moot.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

HOUSING APPEALS BOARD

DOCKET NO. ZBA-2021-21

Iron Horse Properties, LLC

v.

City of Portsmouth

INTERVENORS' MOTION FOR REHEARING

The Intervenors in the above-captioned matter, pursuant to RSA 541:3, respectfully move this Board for a rehearing on the Appellant's appeal. As grounds in support of their motion, the Intervenors state the following:

1. This Board improperly substituted its judgment for that of the Portsmouth Zoning Board of Adjustment when it refused to apply the holding of the familiar case of Fisher v. Dover, 120 N.H. 187, 412 A.2d 1024 (1980), and when it overruled the ZBA's finding that there had been no substantial difference between the developers' original proposal, as to which the ZBA had denied a height variance a year earlier, and the revised proposal that the Portsmouth Planning Board ultimately voted to approve in the spring of 2021. When measured from sea level or the original ground level (or any other fixed point whose elevation does not move or fluctuate), the height of each of the proposed buildings under the new, revised plan was only a few feet lower than that of the old, original plan, and they in any event exceeded the 50' height limit imposed by the Portsmouth Zoning Ordinance, as to which the ZBA had denied a variance a year earlier. It is fundamental that this Board is bound by the findings of the ZBA or other land use board from

whom an appeal is taken, and this Board may not set aside those findings unless they are unsupported by the evidence, unlawful, or unreasonable. The controlling question is not whether this Board would have decided the matter differently if it had seen and heard the same evidence that the land use board did. Rather, the issue is whether the ZBA's findings were unsupported by the evidence, unlawful, or unreasonable, and this Board is not permitted to simply substitute its own judgment for that of the ZBA. Essentially, that is exactly what this Board did when it reversed the decision of the Portsmouth ZBA.

2. In this case, the ZBA had before it both the developers' current plan, which the Planning Board had voted to approve, and the previous plan as to which a height variance had been denied a year earlier (from which denial no appeal was taken). The ZBA members were in as good a position as any to judge whether the change in size and height between the two plans was substantial enough to take the new design out from under the holding of Fisher v. Dover. Most of the ZBA members who entertained the Intervenors' appeal of the Portsmouth Planning Board's decision in 2021 were also sitting on the ZBA at the time that the prior request for a height variance was denied a year earlier, and they were well familiar with the prior plan.

3. Having compared the old, rejected plan with the new, revised one, the ZBA explicitly found that there was very little difference between the two, and in any event not enough difference to justify a departure from the ruling which the ZBA had made a year earlier. Under the settled holding of Fisher v. Dover, consideration of the new plan was barred. The Intervenors in this appeal aptly characterized the developers' new plan as the product of "architectural sleight-of-hand." When all was said and done, the top of each of the new buildings would be only a few feet lower in height (measured from sea level or some other fixed, immovable point) than the top of the ones that had been rejected a year earlier, and they would still be well over 50' above the

original ground level. The ZBA rightly found that at least in terms of height and mass, the new design was substantially the same as the one which had been rejected a year earlier, with only a few cosmetic changes.

4. Moreover, unlike the question of whether a wetlands conditional use permit should have been granted, the ZBA's decision in this regard was not tainted by any issue of whether the ZBA had jurisdiction to entertain it. The issue of whether a height variance should have been issued in the first instance and the issue of what point the building height of the buildings should be measured from are questions having nothing to do with conditional use permits. They involve applications of other terms and provisions of the Zoning Ordinance, and at the local level the ZBA is the final arbiter of the interpretation of those terms. The ZBA plainly had jurisdiction to entertain an appeal of the Planning Board's decision on the latter two issues and, adhering to the holding of Fisher v. Dover, had the authority to enforce the decision that it had made a year earlier, when it denied the height variance. The developers' so-called redesign was merely an attempt on their part to evade that decision, and this Housing Appeals Board erred when it second-guessed the ZBA's judgment.

5. Perhaps there may be room for reasonable difference of opinion on the matter, and perhaps reasonable minds could reach different conclusions. Whatever else may be said about the ZBA's decision, however, it cannot be said that it was unreasonable, based on the evidence before it. In ruling to the contrary, this Board simply substituted its judgment for that of the ZBA, which it is not permitted to do.

6. This Board improperly used technical jargon and shifting definitions of "grade plane," "regraded surface," "grade plane elevation, "average grade plane" and the like to thwart the will of the Zoning Board of Adjustment. The ZBA made its intention clear in 2020, when it denied

the developers' application for a height variance, and made it clear again in 2021, when it applied to holding of Fisher v. Dover and voted to reverse the Planning Board's decision and deny site plan approval to the developers' revised plan, expressly commenting that the project was too massive and that there was little difference between the proposal currently under discussion and the one that had been rejected the year before. It was plainly the judgment of the ZBA that the proposed buildings were too tall, that they were undeserving of a variance, and that they should not exceed 50' feet in height, measured from the original ground level that had been the basis of that board's earlier decision. By juggling the provisions and terminology of the zoning ordinance and measuring the height of the buildings from a different point, this Board invaded the province of the ZBA and thwarted its express intention. This Board's reliance on the doctrine of "administrative gloss" is unsupportable, as the developers and this Board cited only two buildings in the entire City of Portsmouth, a city with 22,000 residents and thousands of buildings, as examples to serve as the basis for this Board's conclusion that "this appears to be the methodology previously used by the City of Portsmouth in determining building height," Order at 8; and in their memorandum in opposition to the Appellant's appeal the Intervenors pointed out that the lone, two examples cited--145 Brewery Lane and 77 Hanover Street--were vastly different in character and presented vastly different circumstances than the subject project at 105 Bartlett Street. Two examples do not a methodology make. This Board committed clear error in relying on the "administrative gloss" doctrine.

7. This Board used the wrong test in concluding that "the final design is not unreasonable" and in using that conclusion as a basis for approving the developers' proposal. (Order at 4.) The test is not whether the developers' final design was "not unreasonable," but whether it complied with the six specific criteria set forth in the Portsmouth Zoning Ordinance for the

granting of a wetlands conditional use permit. (In this case, without the wetlands conditional use permit the entire project collapses, for the entire project is based upon the developers' ability to erect substantial portions of their buildings within the 100' wetlands buffer. Site plan approval could not properly be granted without that permit.) Section 10.1017.50 of the Zoning Ordinance sets forth those six criteria, and section 10.1017.41 of the Ordinance makes clear that they are mandatory. An applicant seeking a wetlands conditional use permit must comply with all six criteria in order for such a permit to be issued. If he fails to satisfy even one of them, then his application for a wetlands conditional use permit must be denied.

8. This Board misapplied those criteria by finding that they were satisfied merely because "the final design [wa]s not unreasonable." Both in the Planning Board, in the ZBA, and before this Housing Appeals Board itself, the Intervenors demonstrated irrefutably that the developers' plan failed to meet at least two of those criteria: the developers' plan was not "the alternative with the least adverse impact" upon the wetlands buffer, Zoning Ordinance § 10.1017,50(5); and there was "[an] alternative location outside the wetland buffer that [was] feasible and reasonable for the proposed use". Zoning Ordinance § 10.1017.50(2). Inasmuch as the developers and their representatives had admitted in proceedings before the land use boards that a less expansive design which did not intrude into the wetlands buffer was feasible, their proposal plainly did not comply with subsections (2) and (5), and that concession on their part should have ended the inquiry. This Board could not properly disregard the six enumerated criteria or determine that those criteria had been satisfied merely because the final design was "not unreasonable".

9. In its decision, this Board devoted an inordinate amount of discussion to the question of which party had the burden of proof on the question of whether the Planning Board erred in granting a wetlands conditional use permit and whether the ZBA erred in denying it. The fact of

the matter is that in this case it didn't make any difference. Using an engineering drawing prepared by the developers' own engineers as a template, the Intervenors demonstrated irrefutably that it was possible, reasonable, and feasible to erect three apartment buildings on the site at a location that was outside the 100' wetlands buffer, and the developers' representatives admitted as much during the land use board hearings. Those buildings may not have been as big as the developers had wanted, but they were not entitled to erect buildings as big as they wanted, nor otherwise to simply do whatever they pleased. Their proposal was still required to meet the six criteria of Zoning Ordinance § 10.1017.50, and it was not enough that the proposal was "not unreasonable." As a matter of law, the project failed to comply with Zoning Ordinance § 10.1017.50(2) and -(5), and accordingly disapproval of the site plan was required. It didn't matter who had the burden of proof.

10. It is also notable that in its decision this Board itself did not engage in any analysis of the six criteria nor explain why it felt that the alternative plan proposed by the Intervenors would not be the alternative with the least adverse impact on the North Mill Pond and the rest of the environment--or in any event, why it would not have less adverse impact than the developers' plan. Nor did it explain why the plan proffered by the Intervenors was not a reasonable, feasible alternative lying outside the wetlands buffer. This in and of itself was error.

11. For all of these reasons, this Board erred in reversing the decision of the Portsmouth Zoning Board of Adjustment, in dismissing the Intervenors' claims, and in reinstating the decision of the Portsmouth Planning Board. A rehearing on the appeal should be conducted.

WHEREFORE, the Intervenors respectfully pray that a rehearing be conducted on the Appellant's appeal..

/s/ Duncan J. MacCallum

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CERTIFICATE OF SERVICE

The undersigned, Duncan J. MacCallum, Attorney for Intervenors in the within proceeding, hereby certifies that on this 25th day of February, 2022, the foregoing Intervenors' Motion for Rehearing were served upon all other interested parties both via e-mail and by forwarding true and correct copies of same by first class mail, postage prepaid, to each of the following counsel of record:

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/s/ Duncan J. MacCallum
Duncan J. MacCallum

APPENDIX C

THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD
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CASE NAME: Iron Horse Properties, LLC v. City of Portsmouth
CASE No.: ZBA-2021-21

ORDER

After review of the Intervenors' Motion for Rehearing and the Applicant's response to same, the Housing Appeals Board ("Board") Rules as follows:

The Board will only grant a rehearing motion "upon a showing that the [B]oard overlooked or misapprehended the facts or the law and such error affected the [B]oard's decision." Hab 201.32(e). Nothing in the Intervenors' rehearing motion identifies any facts or law that the Board overlooked or misapprehended that affected the decision in the instant matter.

Based upon the foregoing, the Intervenors' Motion for Rehearing is DENIED, and the Housing Appeals Board Decision Order dated January 26, 2022 (Order Number 2022-005) suspended by its Interim Order dated March 1, 2022 is "UNSUSPENDED" and REINSTATED forthwith.

HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:

Elizabeth Menard

Date: March 9, 2022

Elizabeth Menard, Clerk

APPENDIX D

RELEVANT STATUTES & ORDINANCES

RSA 676:5, III

I. Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA674:33 may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

II. For the purposes of this section:

(a) The "administrative officer" means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.

(b) A "decision of the administrative officer" includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.

III. 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 RSA674:21 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 RSA677:15.

IV. The board of adjustment may impose reasonable fees to cover its administrative expenses and costs of special investigative studies, review of documents, and other matters which may be required by particular appeals or applications.

V(a). A board of adjustment reviewing a land use application may require the applicant to reimburse the board for expenses reasonably incurred by obtaining third party review and consultation during the review process, provided that the review and consultation does not substantially replicate a review and consultation obtained by the planning board.

(b) A board of adjustment retaining services under subparagraph (a) shall require detailed invoices with reasonable task descriptions for services rendered. Upon request of the applicant, the board of adjustment shall promptly provide a reasonably detailed accounting of expenses, or corresponding escrow deductions, with copies of supporting documentation.

RSA 677:6

In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

RSA 677:15

I. Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in

whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable. Such petition shall be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. This paragraph shall not apply to planning board decisions appealable to the board of adjustment pursuant to RSA 676:5, III. The 30-day time period shall be counted in calendar days beginning with the date following the date upon which the planning board voted to approve or disapprove the application, in accordance with RSA21:35.

I-a.

(a) If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section. If any party appeals any part of the planning board's decision to the superior court before all matters appealed to the board of adjustment have been resolved, the court shall stay the appeal until resolution of such matters. After the final resolution of all such matters appealed to the board of adjustment, any aggrieved party may appeal to the superior court, by petition, any or all matters concerning the subdivision or site plan decided by the planning board or the board of adjustment. The petition shall be presented to the superior court within 30 days after the board of adjustment's denial of a motion for rehearing under RSA 677:3, subject to the provisions of paragraph I.

(b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who

brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III.

II. Upon presentation of such petition, the court may allow a certiorari order directed to the planning board to review such decision and shall prescribe therein the time within which return thereto shall be made and served upon the petitioner's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the order shall stay proceedings upon the decision appealed from. The planning board shall not be required to return the original papers acted upon by it; but it shall be sufficient to return certified or sworn copies thereof, or of such portions thereof as may be called for by such order. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

III. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with the referee's findings of fact and conclusion of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made.

IV. The court shall give any hearing under this section priority on the court calendar.

V. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable. Costs shall not be allowed against the municipality unless it shall appear to the court that the planning board acted in bad faith or with malice in making the decision appealed from.

Portsmouth Zoning Ordinance §§ 10.1010 & 10.1011

Section 10.1010 Wetlands Protection

10.1011 Purpose

The purposes of this Section are:

(1) To maintain, and where possible improve, the quality of surface waters and ground water by controlling the rate and volume of stormwater runoff and preserving the ability of **wetland**s to filter pollution, trap sediment, retain and absorb chemicals and nutrients, and produce oxygen.

(2) To prevent the destruction of, or significant changes to, **wetland**s, related water bodies and adjoining land which provide **flood** protection, and to protect **person**s and property against the hazards of **flood** inundation by assuring the continuation of the natural or existing flow patterns of streams and other water courses within the City.

(3) To protect, and where possible improve, potential water supplies and aquifers and aquifer recharge areas.

(4) To protect, and where possible improve, wildlife habitats and maintain ecological balance.

(5) To protect, and where possible improve, unique or unusual natural areas and rare and endangered plant and animal species.

(6) To protect, and where possible improve, shellfish and fisheries.

(7) To prevent the expenditure of municipal funds for the purpose of providing and/or maintaining essential services and utilities which might be required as a result of misuse or abuse of **wetland**s.

(8) To require the use of **best management practices** and **low impact development** in and **adjacent** to **wetland** areas.

Portsmouth Zoning Ordinance § 10.1013.40

The provisions of this Section 10.1010 apply to the following jurisdictional areas:

. . . .

10.1013.40 The **tidal wetland**s of Sagamore Creek, Little Harbour, North Mill Pond, South Mill Pond and part of the Piscataqua River, defined as follows:

. . . .

(c) North Mill Pond: Extending along the entire shoreline of North Mill Pond between Bartlett Street and Market Street.

Portsmouth Zoning Ordinance § 10.1014.20

10.1014.20 Wetland Buffers

10.1014.21 The purpose of a **wetland buffer** is to reduce erosion and sedimentation into the **adjacent wetland, vernal pool** or water body, to aid in the control of nonpoint source pollution, to provide a vegetative cover for filtration of runoff, to protect wild-life habitat, and to help preserve ecological balance.

10.1014.22 The required **wetland buffer** for a jurisdictional **wetland** or water body shall be defined as all land within 100 feet of the jurisdictional area.

10.1014.23 **Wetland buffer**s, including **vegetated buffer strip**s and limited cut areas, shall be parallel to and measured from the **reference line** for the applicable jurisdictional area on a hori-zontal plane.

(1) **Inland wetland buffer**s shall be measured from the edges of **inland wetland**s and surface water bodies.

(2) **Tidal wetland buffer**s shall be measured from the edges of **tidal wetland**s and **highest observable tide line**s.

Portsmouth Zoning Ordinance § 10.1016

10.1016 Permitted Uses

10.1016.10 The following **use**s, activities and **alteration**s are permitted in **wetland**s and **wetland buffer**s:

(1) Any **use** that does not involve the erection or construction of any **structure** or **impervious surface**, will not alter the natural surface configuration by the addition of fill or by dredging, will not result in site **alteration**s, and is otherwise permitted by the Zoning Ordinance. Examples of such **use**s include forestry and tree farming, wildlife refuges, parks and recreational **use**s, conservation and nature trails, and **open space**s as permitted or required by the Zoning Ordinance or Subdivision Regulations.

(2) Improvements to existing public rights-of-way and **sidewalk**s.

(3) The construction of piers or docks, provided that all required local, state and federal approvals have been granted.

(4) The construction of an addition or extension to a **one-family** or **two-family dwelling** that lawfully existed prior to the effective date of this Ordinance or was constructed subject to a validly issued conditional use permit, provided that:

(a) The **footprint** area of the addition or extension, together with the area of all prior such additions and extensions, shall not exceed 25 percent of the area of the **footprint** of the principal heated **structure** existing prior to the effective date of this Ordinance or constructed pursuant to a validly issued conditional use permit (this 25 percent limit shall not be based on preexisting attached or detached garages, sheds, decks, porches, breezeways, or similar **building**s or **structure**s);

(b) The addition or extension shall be no closer to a **wetland** or water body than the existing principal **structure**; and

(c) The addition or extension shall conform with all other provisions of the Zoning Ordinance and with all other applicable ordinances and regulations of the City of Portsmouth.

(5) The use of motor vehicles, except for all-terrain vehicles, when necessary for any purpose permitted by this Ordinance.

(6) Emergency power generator outside the **wetland** and **vegetated buffer strip**, provided that the total **coverage** by equipment and any mounting pad shall not exceed 10 square feet.

(7) **Use**s, activities and **alteration**s that are consistent with a Wetland Protection Plan that has been approved by the Planning Board through the grant of a conditional use permit.

(8) Construction of fences outside the **vegetated buffer strip**, provided that any posts are no wider than 3" in any dimension, and that there are no footings and no ground disturbance beyond the installation of the posts.

10.1016.20 Any **use**, activity or **alteration** not specifically permitted by Section 10.1016.10 above is prohibited unless authorized by the Planning Board through the grant of a conditional use permit.

10.1016.30 When the Planning Director reasonably believes that an existing or proposed **use**, activity or **alteration** that is not specifically permitted by Section 10.1016.10 is located in a **wetland** or **wetland buffer**, and a conditional use permit has not been granted for such **use**, activity or **alteration**, the Planning Director may require a **wetland** delineation complying with Section 10.1014 in order to verify the location or absence of **wetland**s and determine whether the **use**, activity or **alteration** requires a conditional use permit.

Portsmouth Zoning Ordinance § 10.1017.10

10.1017.10 General

The 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.

Portsmouth Zoning Ordinance § 10.1017.41

The Planning Board shall grant a conditional use permit provided that it finds that all other restrictions of 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.

Portsmouth Zoning Ordinance § 10.1017.50

10.1017.50 Criteria for Approval

Any proposed **development**, other than installation of utilities within a right-of-way, shall comply with 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**.

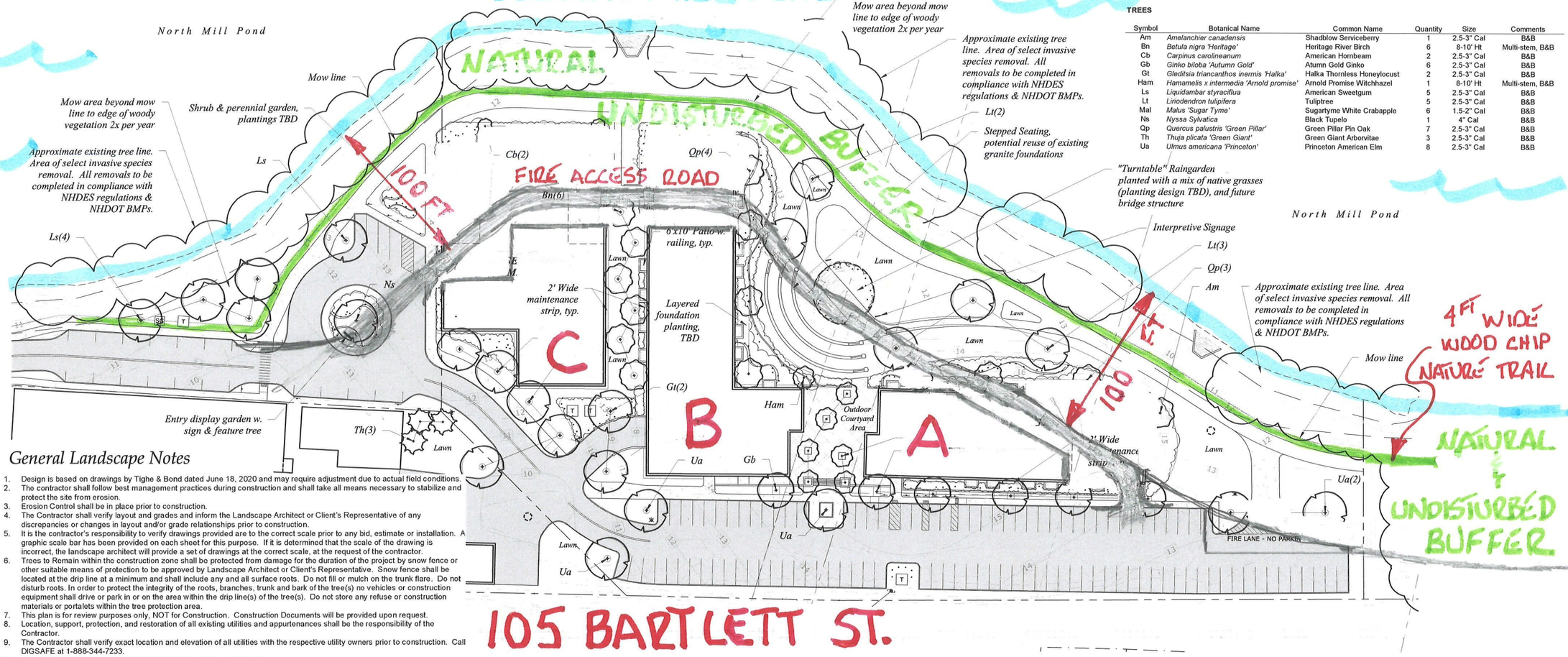
(3) There will be no adverse impact on the **wetland** functional values of the site or surrounding properties;

(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.

APPENDIX E



General Landscape Notes

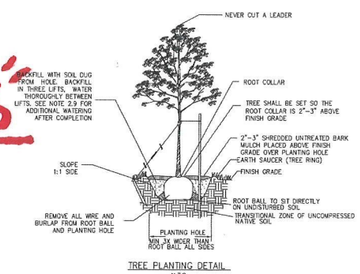
1. Design is based on drawings by Tighe & Bond dated June 18, 2020 and may require adjustment due to actual field conditions.
2. The contractor shall follow best management practices during construction and shall take all means necessary to stabilize and protect the site from erosion.
3. Erosion Control shall be in place prior to construction.
4. The Contractor shall verify layout and grades and inform the Landscape Architect or Client's Representative of any discrepancies or changes in layout and/or grade relationships prior to construction.
5. It is the contractor's responsibility to verify drawings provided are to the correct scale prior to any bid, estimate or installation. A graphic scale bar has been provided on each sheet for this purpose. If it is determined that the scale of the drawing is incorrect, the landscape architect will provide a set of drawings at the correct scale, at the request of the contractor.
6. Trees to Remain within the construction zone shall be protected from damage for the duration of the project by snow fence or other suitable means of protection to be approved by Landscape Architect or Client's Representative. Snow fence shall be located at the drip line at a minimum and shall include any and all surface roots. Do not fill or mulch on the trunk flare. Do not disturb roots. In order to protect the integrity of the roots, branches, trunk and bark of the tree(s) no vehicles or construction equipment shall drive or park in or on the area within the drip line(s) of the tree(s). Do not store any refuse or construction materials or portalets within the tree protection area.
7. This plan is for review purposes only, NOT for Construction. Construction Documents will be provided upon request.
8. Location, support, protection, and restoration of all existing utilities and appurtenances shall be the responsibility of the Contractor.
9. The Contractor shall verify exact location and elevation of all utilities with the respective utility owners prior to construction. Call DIGSAFE at 1-888-344-7233.
10. The Contractor shall procure any required permits prior to construction.
11. Prior to any landscape construction activities Contractor shall test all existing loam and loam from off-site intended to be used for lawns and plant beds using a thorough sampling throughout the supply. Soil testing shall indicate levels of pH, nitrates, macro and micro nutrients, texture, soluble salts, and organic matter. Contractor shall provide Landscape Architect with test results and recommendations from the testing facility along with soil amendment plans as necessary for the proposed plantings to thrive. All loam to be used on site shall be amended as approved by the Landscape Architect prior to placement.
12. Contractor shall notify landscape architect or owner's representative immediately if at any point during demolition or construction a site condition is discovered which may negatively impact the completed project. This includes, but is not limited to, unforeseen drainage problems, unknown subsurface conditions, and discrepancies between the plan and the site. If a contractor is aware of a potential issue, and does not bring it to the attention of the landscape architect or owner's representative immediately, they may be responsible for the labor and materials associated with correcting the problem.
13. The Contractor shall furnish and plant all plants shown on the drawings and listed thereon. All plants shall be nursery-grown under climatic conditions similar to those in the locality of the project. Plants shall conform to the botanical names and standards of size, culture, and quality for the highest grades and standards as adopted by the American Association of Nurserymen, Inc. in the American Standard of Nursery Stock, American Standards Institute, Inc. 230 Southern Building, Washington, D.C. 20005.
14. A complete list of plants, including a schedule of sizes, quantities, and other requirements is shown on the drawings. In the event that quantity discrepancies or material omissions occur in the plant materials list, the planting plans shall govern.
15. All plants shall be legibly tagged with proper botanical name.
16. The Contractor shall guarantee all plants for not less than one year from time of acceptance.
17. Owner or Owner's Representative will inspect plants upon delivery for conformity to Specification requirements. Such approval shall not affect the right of inspection and rejection during or after the progress of the work. The Owner reserves the right to inspect and/or select all trees at the place of growth and reserves the right to approve a representative sample of each type of shrub, herbaceous perennial, annual, and ground cover at the place of growth. Such sample will serve as a minimum standard for all plants of the same species used in this work.
18. No substitutions of plants may be made without prior approval of the Owner or the Owner's Representative for any reason.
19. All landscaping shall be provided with the following:
    a. Outside hose attachments spaced a maximum of 150 feet apart, and
    b. An underground irrigation system, or
    c. A temporary irrigation system designed for a two-year period of plant establishment.
20. If an automatic irrigation system is installed, all irrigation valve boxes shall be located within planting bed areas.
21. The contractor is responsible for all plant material from the time their work commences until final acceptance. This includes but is not limited to maintaining all plants in good condition, the security of the plant material once delivered to the site, and watering of plants. Plants shall be appropriately watered prior to, during and after planting. It is the contractor's responsibility to provide clean water suitable for plant health from off site, should it not be available on site.
22. All disturbed areas wil be dressed with 6" of topsoil and planted as noted on the plans or seeded except plant beds. Plant beds shall be prepared to a depth of 12" with 75% loam and 25% compost.
23. Trees, ground cover, and shrub beds shall be mulched to a depth of 2" with one-year-old, well-composted, shredded native bark not longer than 4" in length and ½" in width, free of woodchips and sawdust. Mulch for ferns and herbaceous perennials shall be no longer than 1" in length. Trees in lawn areas shall be mulched in a 5' diameter min. saucer. Color of mulch shall be black.
24. In no case shall mulch touch the stem of a plant nor shall mulch ever be more than 3" thick total (including previously applied mulch) over the root ball of any plant.
25. Secondary lateral branches of deciduous trees overhanging vehicular and pedestrian travel ways shall be pruned up to a height of 6' to allow clear and safe passage of vehicles and pedestrians under tree canopy. Within the sight distance triangles at vehicle intersections the canopies shall be raised to 8' min.
26. Snow shall be stored a minimum of 5' from shrubs and trunks of trees.
27. Landscape Architect is not responsible for the means and methods of the contractor.

105 BARTLETT ST.

City of Portsmouth Landscape Notes

1. The property owner and all future property owners shall be responsible for the maintenance, repair and replacement of all required screening and landscape materials.
2. All required plant materials shall be tended and maintained in a healthy growing condition, replaced when necessary, and kept free of refuse and debris. All required fences and walls shall be maintained in good repair.
3. The property owner shall be responsible to remove and replace dead or diseased plant materials immediately with the same type, size and quantity of plant materials as originally installed, unless alternative plantings are requested, justified and approved by the Planning Board or Planning Director.

A PLAN THAT "WORKS"



TREE PLANTING DETAIL
N.T.S.

12-5-2020 JAH

City of Portsmouth Tree Planting Detail

PART 1 – GENERAL:

1.1 THE BASE OF THE CITY OF PORTSMOUTH TREE PLANTING REQUIREMENTS IS THE ANSI A300 PART 6 STANDARD PRACTICES FOR PLANTING AND TRANSPLANTING. ANSI A300 PART 6 LAYS OUT TERMS AND BASIC STANDARDS AS SET FORTH BY INDUSTRY BUT IT IS NOT THE "END ALL" FOR THE CITY OF PORTSMOUTH. THE FOLLOWING ARE THE CITY OF PORTSMOUTH, NH TREE PLANTING REQUIREMENTS THAT ARE IN ADDITION TO OR THAT GO BEYOND THE ANSI A300 PART 6.

PART 2 – EXECUTION:

2.1 ALL PLANTING HOLES SHALL BE DUG BY HAND – NO MACHINES. THE ONLY EXCEPTIONS ARE NEW CONSTRUCTION WHERE NEW PLANTING PITS, PLANTING BEDS WITH GRANITE CURBING, AND PLANTING SITES WITH SILVA CELLS ARE BEING CREATED. IF A MACHINE IS USED TO DIG IN ANY OF THESE SITUATIONS AND PLANTING TO DEPTH NEEDS TO BE RAISED THE MATERIAL IN THE BOTTOM OF THE PLANTING HOLE MUST BE FIRMED WITH MACHINE TO PREVENT SINKING OF THE ROOT BALL.

2.2 ALL WIRE AND BURLAP SHALL BE REMOVED FROM THE ROOT BALL AND PLANTING HOLE.

2.3 THE ROOT BALL OF THE TREE SHALL BE WORKED SO THAT THE ROOT COLLAR OF THE TREE IS VISIBLE AND NO GIRDLING ROOTS ARE PRESENT.

2.4 THE ROOT COLLAR OF THE TREE SHALL BE 2"–3" ABOVE GRADE OF PLANTING HOLE FOR FINISHING DEPTH.

2.5 ALL PLANTINGS SHALL BE BACKFILLED WITH SOIL FROM THE SITE AND AMENDED NO MORE THAN 20% WITH ORGANIC COMPOST. THE ONLY EXCEPTIONS ARE NEW CONSTRUCTION WHERE ENGINEERED SOIL IS BEING USED IN CONJUNCTION WITH SILVA CELLS AND WHERE NEW PLANTING BEDS ARE BEING CREATED.

2.6 ALL PLANTINGS SHALL BE BACKFILLED IN THREE LIFTS AND ALL LIFTS SHALL BE WATERED SO THE PLANTING WILL BE SET AND FREE OF AIR POCKETS – NO EXCEPTIONS.

2.7 AN EARTH BERM SHALL BE PLACED AROUND THE PERIMETER OF THE PLANTING HOLE EXCEPT WHERE CURBED PLANTING BEDS OR PITS ARE BEING USED.

2.8 2"–3" OF MULCH SHALL BE PLACED OVER THE PLANTING AREA.

2.9 AT THE TIME OF PLANTING IS COMPLETE THE PLANTING SHALL RECEIVE ADDITIONAL WATER TO ENSURE COMPLETE HYDRATION OF THE ROOTS, BACKFILL MATERIAL AND MULCH LAYER.

2.10 STAKES AND GUYS SHALL BE USED WHERE APPROPRIATE AND/OR NECESSARY. GUY MATERIAL SHALL BE NON–DAMAGING TO THE TREE.

2.11 ALL PLANTING STOCK SHALL BE SPECIMEN QUALITY, FREE OF DEFECTS, AND DISEASE OR INJURY. THE CITY OF PORTSMOUTH, NH RESERVES THE RIGHT TO REFUSE/REJECT ANY PLANT MATERIAL OR PLANTING ACTION THAT FAILS TO MEET THE STANDARDS SET FORTH IN THE ANSI A300 PART 6 STANDARD PRACTICES FOR PLANTING AND TRANSPORTATION AND/OR THE CITY OF PORTSMOUTH, NH PLANTING REQUIREMENTS.

Plant List

TREES

Symbol	Botanical Name	Common Name	Quantity	Size	Comments
Am	*Amelanchier canadensis*	Shadblow Serviceberry	1	2.5-3" Cal	B&B
Bn	*Betula nigra 'Heritage'*	Heritage River Birch	6	8-10' Ht	Multi-stem, B&B
Cb	*Carpinus carolineanum*	American Hornbeam	2	2.5-3" Cal	B&B
Gb	*Ginko biloba 'Autumn Gold'*	Atumn Gold Ginko	6	2.5-3" Cal	B&B
Gt	*Gleditsia triancanthos inermis 'Halka'*	Halka Thornless Honeylocust	2	2.5-3" Cal	B&B
Ham	*Hamamelis x intermedia 'Arnold promise'*	Arnold Promise Witchhazel	1	8-10' Ht	Multi-stem, B&B
Ls	*Liquidambar styraciflua*	American Sweetgum	5	2.5-3" Cal	B&B
Lt	*Liriodendron tulipifera*	Tuliptree	5	2.5-3" Cal	B&B
Mal	*Malus 'Sugar Tyme'*	Sugartyme White Crabapple	6	1.5-2" Cal	B&B
Ns	*Nyssa Sylvatica*	Black Tupelo	1	4" Cal	B&B
Qp	*Quercus palustris 'Green Pillar'*	Green Pillar Pin Oak	7	2.5-3" Cal	B&B
Th	*Thuja plicata 'Green Giant'*	Green Giant Arborvitae	3	2.5-3" Cal	B&B
Ua	*Ulmus americana 'Princeton'*	Princeton American Elm	8	2.5-3" Cal	B&B

0 10 20 40 80

NDSCAPE ARCHITECTURE

Proposed Multi-Family Development

LANDSCAPE PLAN

105 Bartlett Street Portsmouth, New Hampshire

Drawn By:	VM
Checked By:	RW
Scale:	1" = 40' - 0"
Date:	May 20, 2020
Revisions:	October 28, 2020

L-1

Sheet 1 of 1