

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

THE CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON PLANNING BOARD ET AL.

Docket Nos: 218-2014-CV-00654 and 218-2014-CV-01287

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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

THE CITY OF PORTSMOUTH
1 Junkins Avenue
Portsmouth, New Hampshire 03801

v.

NEWINGTON PLANNING BOARD
205 Nimble Hill Road
Newington, New Hampshire 03801

PETITION FOR APPEAL OF THE TOWN ON NEWINGTON PLANNING BOARD'S DECISION PURSUANT TO RSA 677:15, I AND 677:15, I-a (a)

NOW COMES the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue and appeals a decision by the Town of Newington Planning Board pursuant to RSA 677:15, I and RSA 677:15 I-a (a) as follows:

PARTIES

1. The Petitioner/Appellant is the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue, Portsmouth, New Hampshire 03801 ("City").
2. The Newington Planning Board is a local land use board established by the Town of Newington pursuant to RSA 673 ("Planning Board").

JURISDICTION AND VENUE

3. The Zoning Ordinance of the Town of Newington requires that the Planning Board review site plans pursuant to its Site Plan Review Regulations. (RSA 674.43, RSA 674.44, Town of Newington Site Plan Review Regulations, Section 1).
4. This Court has jurisdiction pursuant to RSA 677:15, I and RSA 677:15, I-a (a). Venue is proper pursuant to RSA 507:9.

BACKGROUND

5. Sea-3 Inc. ("Sea-3") owns two parcels of property located off Shattuck Way in Newington, New Hampshire. These two lots are divided and separated by the rail way owned and operated by Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am Railways ("Pan Am").

6. Sea-3 presently uses both parcels to import foreign Liquefied Petroleum Gas (“LPG”) by ship to distribute domestically by rail and truck.

7. The first parcel is depicted on the Town of Newington’s Tax Map at Map 20, Lot 13 (“Lot 13”). This parcel is 7.02 acres located within both the General Industrial District (“I”) and the Waterfront Industrial and Commercial District (“W”). The Zoning District boundary bisects the western most LPG storage tank. Lot 13 is located west of the rail line and contains a main building, truck loading racks, two large storage tanks for the storage of Liquefied Petroleum Gas (LPG), a smaller distribution tank and associated pipelines.

8. The second parcel is depicted on the Town of Newington’s Tax Map at Map 20, Lot 2 (“Lot 2”). This parcel is 3.92 acres located within the Waterfront Industrial and Commercial District (“W”). Lot 2 contains a small building, 3 rail berths with pipelines to transport LPG between the waterfront loading docks through pipes located in Lot 2 to the storage tanks located in Lot 13.

9. Sea-3 has submitted an application (“Application”) for the Newington Planning Board’s review and approval to reconfigure its property and construct improvements to convert its operation from one that imports foreign LPG for domestic distribution by rail and truck to one that primarily exports domestic LPG received by rail and truck to foreign markets by ship.

10. This change in use requires construction of new facilities on the site to accommodate a substantial increase in volume of LPG that will be received, stored, chilled and distributed from the site for distribution to primarily foreign markets.

11. The improvements proposed by Sea-3 are located on three separate parcels, on Lots 13 and 2 as described above and on land owned by Pan Am that includes the railway and surrounding property that divides Lots 13 and 2. The proposed improvements are as follows:

1. Lot 13: The installation of new piping to transport LPG to tanks located on Lot 13;
2. Lot 2: The construction of three 90,000 gallon storage tanks, unloading compressors, pumps, condensers, dryers and heaters along with a machinery building for refrigeration equipment and the relocation of the flare tower; and
3. Property owned by Pan Am: The construction of five rail unloading berths new rail sidings and new pipes to transport LPG from Lot 2 to the storage tanks on Lot 13.

12. Pan Am is not the Applicant and only after (7) seven public hearings was the site plan revised to list Pan Am as the owner of the property described above.

13. There is no lease between Pan Am and Sea-3 for the use of Pan Am's property described above.

PROCEDURAL HISTORY

14. In August of 2013, Sea-3 submitted preliminary site plans of the project to the Newington Town Planner.

15. By letter dated October 28, 2013, the Town of Greenland requested that the Sea-3 project be deemed a development of regional impact pursuant to RSA 36:54-58.

16. By letter dated October 30, 2013, Sea-3 challenged the determination by the Newington Town Planner that both Lots required variances from Article VI and Article XIII of the Newington Zoning Ordinance because the Lots did not have sufficient frontage on a public right of way and did not comply with minimum set backs.

17. On November 5, 2013, Sea-3 filed an Application for site plan review with the Newington Planning Board.

18. On November 6, 2013, Sea-3 filed an Administrative Appeal of the Town Planner's decision that variances were required and also filed for a variance requests for the frontage and set back issues raised by the Town Planner.

19. On November 25, 2013, the Zoning Board of Adjustment held a public hearing on Sea-3's administrative appeal and variance requests. The Zoning Board of Adjustment denied the administrative appeal but granted Sea-3's request for variances.

20. On December 9, 2014, the Town of Newington deemed the project a "development of regional impact" pursuant to RSA 36:55.

21. A "developments of regional impact" is a project that will impact neighboring communities for various reasons, including but not limited to the project's proximity to another communities border, the project's effect on the transportation network and its effect on anticipated emissions such as light, noise, smoke, odor or particles or proximity to aquifers or surface water that transcends municipal borders. See RSA 36:55, II-V.

22. Notice was sent to the Rockingham Planning Commission and four affected communities, including the City of Portsmouth, the Town of Greenland, the Town of Statham and the Town of Newfields in order for the Commission and these affected communities to have appropriate notice in order to provide comment on the project to the Planning Board for its consideration. See RSA 36:54-58.

23. Public hearings were held on the Sea-3 project on December 9, 2014, February 10, 2014, March 10, 2014, March 24, 2014, April 14, 2014 and May 5, 2014.

24. The City of Portsmouth actively participated in these public hearings, including but not limited to the attendance, submission of written testimony, submission of letters and public comment by the following: Senator Martha Fuller Clark, Mayor, Robert Lister, Assistant Mayor, Jim Splaine, City Councilors Ester Kennedy, City Councilor Stephany Shaheen, City Councilor Jack Thorsen, City Officials, including City Manager John P. Bohenko, Deputy City Manager Dave Allen, Environmental and Sustainability Director Peter Britz, and numerous concerned citizens from Portsmouth, including but not limited to Rich DiPentima, Catherine DiPentima, Lewis Brown, Joe Calderola, Abdullah Alhamdan, Pat Ford, Beth Moreau, Bob Gibbons, Jean Heino, Richard Langan, John Sutherland, Jane Sutherland, David Rheäume, and Lou Salomi. The City Council also voted unanimously not to support the project.

25. The City of Portsmouth, through those participants listed above, initially raised concerns about rail safety because Sea-3's proposal would increase the volume and speed of railcars transporting hazardous materials through its residential neighborhoods and through its downtown. This concern prompted United States Senators Jeanne Shaheen and Kelly Ayotte and Congresswoman Carol Shea-Porter to request the Federal Railroad Administration to inspect the tracks, and later to request a comprehensive safety study of the rails. In addition, the City met with Department of Transportation and officials from Pan Am on the issue of rail safety and created a website with pertinent documents regarding Sea-3's Application.

26. Through the public hearing process the City, through various participants, repeatedly raised its concerns about rail safety and requested that the Planning Board require rail safety reports and hire an expert to assess rail safety. However the Planning Board denied these requests due to its belief that federal preemption, pursuant to the Interstate Commerce Commission Termination Act, prohibited the Planning Board from addressing any site-related or site-specific issues that touched on the rails or "railway operations."

27. However, in addition to rail safety, the City, through those participants mentioned above, repeatedly and vociferously requested that the Planning Board require a comprehensive safety and/or security review of the full scope of Sea-3 proposal, including but not limited to a hazard identification and vulnerability assessment, an environmental risk assessment and an analysis of emergency response for the impacted communities, physical security assessments and incident /hazards response analysis. ("safety/hazard assessment").

28. Site Plan Review Regulations authorize the Planning Board to require "any other exhibits or data that the Planning Board may require in order to adequately evaluate the proposed development for site review." Section 8, (q), Town of Newington Site Plan Review Regulations.

29. The Planning Board uniformly denied all requests from the City for a safety/hazard assessments and granted Sea-3's site plan Application at its May 19, 2014 meeting, conditioning approval on receipt of an updated "safety plan" from its site plan approved in 1996 before a building permit will issue.

31. The City appeals the Planning Board's decision as unlawful and unreasonably for the reasons set forth below, but primarily because the Planning Board's failed and refused to require a safety/hazard assessment after repeated requests from the City before approving Sea-3's site plan.

STANDING

32. A non-abutter has standing to appeal a decision of a Planning Board if the Court finds, after a review of the facts, that the party has sufficient interest in the outcome. See Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541 (1979).

33. The Weeks Court lists certain factors that must be considered when evaluating whether a non-abutter has standing:

... Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case. The trial court may consider factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings.

119 N.H. at 544-45.

34. The Court in Weeks also opined that the list of factors was not exhaustive and that Courts should consider "any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding." Weeks at 544-45.

35. In several recent cases, the Supreme Court has further discussed these factors established by Weeks in evaluating whether a non-abutter has standing to appeal, and has further defined what it means to be "directly affected". Golf Course Investors of New Hampshire v. Town of Jaffrey, 161 N.H. 675 (2011); Hannaford Brothers Co. v. Town of Bedford, 164 N.H. 764 (2013).

36. Participation in administrative hearings before land use boards, although not the only factor, is a major factor the Court will consider in determining whether a non-abutter has a direct, definite interest in the outcome and is a person directly affected. See Golf Course Investments at 684.

37. Standing will not be extended to all persons in the community who feel they are injured by a local administrator's decision (Goldstein v. Town of Bedford, 154 N.H. 393, 395 (2006)); or those who only have a generalized interest in the outcome of a decision of land use board (Nautilus of Exeter v. Town of Exeter, 139 N.H. 450, 451-52 (1995)); or those who allege a speculative injury (Joyce v. Town of Weare, 156 N.H. 526 (2007)); or to those whose only injury is potential economic loss due to business competition. See also Hannaford at 769.

38. Proximity:

The City of Portsmouth is a community that abuts Newington. Although it does not own property immediately adjacent to the site itself, the City and Newington share common transportation systems of rivers, roads and rails. In terms of proximity, any catastrophic event at the site would likely require the evacuation of City's residents and the loss of property and damage. Any significant logistical issues relating to bringing materials into the Sea-3 facility by rail would have a substantial effect on the logistics and operations of ordinary traffic and concourse in and for the City of Portsmouth.

39. Type of Change of Use:

The type of change of use requested by Sea-3 is an expansion and intensification of use of not only its property, but the shared transportation systems of river, road and rail through the City due to the increase in volume of LPG being delivered, stored, chilled and distributed from the site. Although the Planning Board is not able to unduly restrict the railroad from conduction operations or unreasonably burden interstate commerce, its decision to allow Sea-3's expansion has caused an impact and increased burden on the City by increasing traffic of hazardous material and their associated risks by river, roads and rail throughout the City.

40. Immediate Impact:

The impact of Sea-3's expansion will be immediate because Pan Am has represented that it would be improving the tracks to accommodate a larger volume of LPG transported by rail cars that can travel at higher speeds. The City would be required to improve several rail crossings at an estimated cost of \$2,400,000.00 million dollars. Although part of the cost may be deferred by working with NH DOT, some 20% of these costs will be borne by City taxpayers. Citizens of Portsmouth will not only be obligated to pay for improved roadways at rail crossings, but will be supplementing Newington's Fire Department, given their limited number of fire fighters and equipment, in the event of an incident at the site. The City's taxpayers will pay for this burden and will not receive any of the tax benefit Newington receives from Sea-3. The City also supplies water to Newington at the site and to the Newington Fire Department and the City's water resources would be impacted in the event of an incident at the site. In addition, on information and belief, there will be a diminution in value of property in the City, specifically those residential neighborhoods that abut the railway, reducing the City's tax base.

41. Participation in administrative hearings:

As previously stated, the City submitted written testimony, letters and provided thoughtful, well researched and pointed public comment during the seven public hearings. There were more citizens, elected officials and staff from the City than any other stakeholder or representatives of any other towns at most of these hearings.

42. Towns are not “isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries.” Britton V. Chester, 133 NH 434, 441 (1991).

43. Newington is not an isolated enclave. It must promote, and at least give meaningful consideration to, the general welfare of the City. Its failure to do so, and its unwillingness to order or provide for a safety/hazard assessment was a decision that clearly does not promote, but hinders – or at least largely and unreasonably ignores- the general welfare of the City. At the same time, Newington will receive a financial benefit from the tax revenue it receives from Sea-3, Newington is imposing a financial burden on the City to improve roads and to provide services of its first responders, all while it denies the City its request for a safety/hazard assessment of the project.

44. The City anticipates that its standing to bring suit will be challenged. This challenge will likely be based on the fact that the City became an abutter when it was given notice by the Town of Newington that the project of was development of regional impact because RSA 36:57 defined abutters “for the limited purpose of notice and providing comment”.

45. However, the Court must look at the statutory scheme as a whole, in that RSA 36 is the enabling legislation for the creation of the Regional Planning Commissions, which are “political subdivision of the state” as established in RSA 36:49-a and have only the authority expressly provided for in the statute, providing that “nothing in this subdivision shall be deemed to reduce or limit any of the powers, duties or obligations of planning boards in individual municipalities.” RSA 36:47.

46. The statutory scheme of RSA 36 was carefully drafted to create and empower these Commissions without granting them the ability to rest control from local land use boards. Thus, the limitation as an abutter for the limited purpose of notice and comment may apply to the Rockingham Regional Planning Commission, but not to the City of Portsmouth, as it has demonstrated above that it is a “person aggrieved” and a “person directly affected”.

47. The City of Portsmouth is a “person aggrieved” and “person directly affected” for the aforementioned reasons and it has a direct define interest in the outcome of the Planning Board’s decision to grant Sea-3’s Application and appeals the decision of the Newington Planning Board because it was unlawful and unreasonable.

PROCEDURAL ERRORS AND IRREGULARITIES

A. FAILURE TO COMPLY WITH REQUIRMENTS OF RSA 36

49. The only mention by the Planning Board regarding a safety/hazard assessment is in one of its conditions of approval dated May 19, 2014. The fifth condition provides as follows:

5. Several safety plans were adopted in conjunction with the original Sea-3 site plan approval. They shall be reviewed by Sea-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.”

50. The City, as an abutter, through its Mayor, Assistant Mayor, City Manager, City Councilors, City Manager, City Staff and citizens, as evidenced in the record, repeatedly and vociferously requested that the Planning Department require a safety study/hazard assessment of the site and of this particular expansion and use intensification prior to approval of the site plan.

51. The Planning Board’s condition of approval requires that Sea -3 update “safety plans” and submitted to “public officials (including the Newington Fire Chief) for its review and approval prior to the issuance of a building permit.”

52. The requirement that this safety plan be submitted directly to “public officials”, after site plan approval and outside the scope of any public hearing process violates the intent and purpose of (the site plan regulations themselves and) RSA 36, which requires Newington land use boards to give prompt, advance and effective notice to affected communities that the pending development proposal will have “regional impact,” in order to facilitate comment on the project before it is approved by the Newington Planning Board.

53. Review of updated “safety plans” – outside the public hearing process and the scrutiny of residents of the Town and abutters from other affected municipalities – denies the affected communities a meaningful opportunity to review, understand and comment on how these “updated safety plans” affect their communities. The Planning Board’s post-approval “update” condition denies the City and others the opportunity to comment on these “safety plans,” in violation of RSA 36 and constitutes a procedural error. As such, the Planning Board’s decision to approve the Application should be overturned.

54. Nothing in the record indicates that the current Planning Board or any of its members reviewed these original “safety plans” referenced in condition five. Sea-3’s last site plan was in 1996 when they expanded their facilities. The Planning Board does not have the same members it did almost 20 years ago. And even if they did, federal

regulations regarding the transportation, handling and storage of LPG has changed as well as surrounding populations, abutters and transportation routes which would render the original safety plans outdated. It is also unclear from the condition what “plans” the Planning Board is referring to as, on information and belief, there are six different “plans” or reports in the 1996 site review file.

55. The Planning Board’s approval of the site will increase truck and rail traffic throughout more than just the four affected communities that received notice. The scope of this project’s impact was too narrowly defined and as such, other affected communities did not receive adequate notice in violation of RSA 36, and as such, the Planning Board’s decision to approve the site plan was unlawful and unreasonable and should be overturned.

56. In addition to the Planning Board’s violates the intent and purpose of RSA 36, the Planning Board’s approval of a site plan without first reviewing a site/hazard assessment is in violation of Newington’s Site Plan Regulations.

B. DELAY IN DECLARING PROJECT OF DEVELOPMENT OF REGIONAL IMPACT

57. The City was prejudiced and other abutters were prejudiced in the Planning Board’s delay in declaring this a “development of regional impact.”

58. A request that this project be deemed a “development of regional impact” was received by the Town on October 28, 2013 but the Town delayed until December 9, 2013 to declare the project a “development of regional impact”

59. RSA 36:56 provides that a “local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. **Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact.**” Emphasis added.

60. The appeal and request for variances were filed on November 6, 2013 and noticed for Zoning Board of Adjustment hearing on November 25, 2013, at which time the appeal was denied and the request for variances was granted.

61. Abutters were not given notice of the hearing and were denied the ability to comment on the project.

62. Failure of the Town to give abutters notice of application for variance, after request received almost one month prior, was procedural error and as such, unreasonable and unlawful.

C. FAILURE TO ABIDE BY SITE PLAN REVIEW REGULATIONS

1. Public Health, Safety and Welfare

63. Planning Boards must abide by and properly apply their own site plan regulations. The Newington Site Plan Regulations explicitly require compliance “in all respects [with] any and all pertinent ordinances and regulations.” Town of Newington Site Plan Regulations, Section 2. The Site Plan Regulations expressly indicate that the purpose of site plan review “is to protect the public health, safety and welfare; ...[and] to avoid development which may result in negative environmental impacts.” Town of Newington Site Plan Regulations, Section 2. In fact, Section 19 of the Site Plan Regulations provides the Board with the ability to require the applicant to reimburse it and the Town for “administrative expenses and costs of special investigation and other matters,” including review by consulting engineers or other consultants to assess the environmental impact, hydrological impact ground water quality impact, traffic impact, or any other study deemed necessary by the Planning Board in order to make an informed decision. Town of Newington Site Plan Regulations, Section 19. As previously stated, the City, through its citizens, Mayor, Assistant Mayor and City Councilors, City Manager, City Staff and numerous citizens repeatedly requested that the Planning Board require and review safety study/hazard assessment. The Planning Board repeatedly denied all requests by the City (and individual citizens of the City of Portsmouth) to perform a meaningful and professional assessment of the safety and health consequences of the proposed expansion and intensification of the use of the property.

64. The Planning Board’s refusal to conduct, or direct the applicant to conduct or pay for a proper, meaningful, professional and up to date safety, health, welfare and environmental assessment of the potential impacts of the proposed expansion and intensification of the use of the property was unreasonable and unlawful. The Planning Board’s failure to require a proper safety, health, welfare and environmental impact assessment was a gross and unreasonable abuse of its discretion. Under the circumstances, the Planning Board was required to evaluate the site, and given the nature of the use of land requested, the increased distribution, storing and chilling of LPG, a hazardous material, it should have required and reviewed a safety plan/ hazard assessment before approving the site plan.

65. Specifically, the Town of Newington Site Plan Review Regulations provides:

Sites for non-residential development shall be reviewed so as to minimize traffic congestion, traffic hazards, unsightliness, annoyance to other nearby land uses, erosion and other effects detrimental to the abutter, the neighborhood, the environment of the Town. In order to attain these goals, the Planning Board shall determine that:

- e) loading
- h) light, glare, odor, noise
- i) street (access)

l) The public health, safety and welfare will be otherwise protected

66. The Planning Board could not determine that the public's health, safety and welfare would be protected if it never reviewed a safety study/hazard assessment before granting site plan approval. Any "update" to "safety reports" received after approval of the site plan could not support the Planning Board's finding prior to their receipt that the project would promote the health, welfare and safety of the public without first reviewing any such assessment.

67. In addition to the City, a safety/hazard assessment was recommended by the Newington Town Planner, who acknowledged abutters concerns on safety and recommended the name of firm to Planning Board. This recommendation was ignored.

68. The only safety/hazard report reviewed by the Planning Board was a "Study of the Safety Impacts of Ethanol Transportation by Rail through Boston, Cambridge, Chelsea, Everett, Somerville, & Revere" dated March 29, 2013, which was brought to the Board's attention by a private citizen in order to demonstrate that safety and health assessments were understood to be appropriate in these sorts of circumstances. The Planning Board ignored the study and the purpose for which it was offered, finding "the circumstances of this study are not related to this application". Minutes of Town of Newington, NH, Planning Board, May 19, 2014.

69. In addition to its authority under Section 19 of the Site Plan Regulations, the Planning Board had the power to require additional exhibits or data to assist in adequately evaluating the proposed development for site review. Town of Newington Site Plan Regulations, Section 8(q). The Board's failure to seek further data, and to require a professional assessment of this proposal was unlawful and unreasonable, and its decision should be overturned, and the matter remanded to the Planning Board with directions to conduct the study and seek relevant current data on the project with public comment.

70. "Municipalities do not exist solely to serve their own residents and thus their regulations should promote the general welfare, both inside and outside their boundaries." Britton, 134 N.H. at 441.

71. The failure to address safety, hazards and environmental concerns and concluding the project promoted the health safety and welfare of the public was unlawful and unreasonable. The decision of the Planning Board should be overturned, and the matter should be remanded back to the Planning Board with instructions from the Court to conduct or cause the Applicant to conduct a proper, professional and current assessment of the impacts of the proposed development, in accordance with the Newington Site Plan Regulations.

2. Loading, Street Access, Traffic

72. The Planning Board approved the site plan without receiving a traffic study. The Planning Board received a memorandum, not a traffic impact study, from the Applicant

that was reviewed by the Town's own expert, Dirk J. Grotenhuis, PE, LEED, AP. In a peer review memorandum dated April 10, 2014, the Planning Board's own expert concluded that Sea-3's memorandum was incomplete and affirmed this opinion during his comments at the April 14, 2014 Planning Board Meeting. See Minutes of Town of Newington, NH Planning Board, April 14, 2014. The Planning Board's finding in paragraph 24, inaccurately summarized Mr. Grotenhuis' opinion on the incompleteness of the memorandum and failed to address his concerns about the lack of information provided in the traffic memorandum submitted by the Sea-3.

73. A representative of Sea-3 at the public hearings represented that there would be no change in the number of trucks because it would only process 10 trucks per hour. The Town's own retained expert, however, drafted a memorandum to the Newington Town Planner, raising 11 unanswered questions and issues that were Mr. Grotenhuis indicated had not been adequately addressed by Sea-3, including, but not limited to: (i) the inability to assess effects on the adjacent highway because there was no information on peak hour trips; (ii) the potential for queuing or congestion at the entrance or adjacent intersections and queuing on site; (iii) the fact that there was no information regarding the difference between off loading from ships versus rails and that no data was provided relating to public highway safety records (vehicle crashes) or the occurrence and location of vehicle crashes on nearby roads and intersections. The Board's failure to address these questions and shortcomings, or require the applicant to address them, was unreasonable and unlawful.

74. The proposed expansion would transform the facility from a seasonal facility to a year round operation, impacting traffic during the summer months and there was no analysis provided by Sea-3 regarding how this change in use would affect traffic.

75. Planning board decisions must be based on more than mere opinions. Smith v. Town of Wolfeboro, 136 N.H. 337, 344 (1992).

76. While a municipal body "is entitled to rely, in part, upon its own judgment and experience when reviewing applications for various land uses, its decision... must be based upon more than the mere personal opinion of its members." Richmond Co. v. City of Concord, 149 N.H. 312, 316 (2003).

77. The Planning Board may not base its decision solely on its opinion, ignoring its own expert recommendations, relevant questions, and concerns. Failing to address their own expert's concerns regarding incomplete information regarding the potential impact of the project on traffic was unreasonable and unlawful. On this basis, the decision of the Planning Board should be overturned and the matter should be remanded back to the Planning Board with instructions from the Court to address the traffic issues raised by Mr. Grotenhuis, as required by the Site Plan Regulations.

3. Failure to Address the Issue of Odor of Hazardous Materials/Substances

78. Federal safety regulations differ when transporting, handling and storing nonodorized rather than odorized LPG. LPG is odorized in order for a leak to be detected. Unodorized LPG is impossible to detect without special sensors.

79. In discussing the issue of odorant in LPG, the Town of Newington's own expert engineer recommended that a condition of approval be that LPG was odorized.

80. The Planning Board ignored its own expert's recommendation and made no such condition of approval.

81. The Planning Board has authority to impose conditions reasonably related to the purpose set forth in the site regulations to promote safe and attractive development, even if those conditions not specifically mentioned in ordinance. Summa Humma Enterprises, LLC d/b/a MB Tractor v. Town of Tilton. 151 N.H. 75, 78-79 (2004).

82. No discussion of federal regulations regarding requirements of odorizing LPG was presented by Sea-3 to the Planning Board. Sea-3 indicated that it would be an odorless facility, thereby making LPG gas undetectable if it leaked. Failure of the Planning Board to inquire regarding federal regulations on required odorization of LPG was unreasonable and unlawful.

83. There was an assessment of the site performed by SFC Engineering Partners, Inc. for the benefit of the Town. In both its January, 2014 and April, 2014 report it required "details of any non-odorized LPG to be stored at the site" before a permit could be issued. These report indicate that the Planning Board's own expert and the Planning Board did not have adequate information regarding whether LPG would be unodorized at the site, and that information is critical to determine and assess the safety of the site and its impact on the public's health, welfare and safety and the Planning Board's approval of the site plan without adequate information regarding whether LPG would be odorized or non-odorized was unlawful and unreasonable and as such, the Planning Board's decision should be overturned.

84. No information regarding the properties of LPG gas was provided to the City after several requests, other than a reply from Planning Board members that "it evaporates". There was evidence submitted to the Planning Board that LPG is not lighter than air and goes to ground when it leaks, presenting a completely different risk to the public health and safety. Failure of the Planning Board to ascertain the properties of LPG and its potential risk to the public's health and safety prior to granting site plan approval was unlawful and unreasonable.

85. Condition 4 states that final design plans shall meet the requirements of the NH Fire Code and NFPA Code. Perhaps in other types of site review final plans are not required before a site plan is approved but when the Planning Board is charged with evaluating the project of this nature with inherent risk to public's health, safety and welfare, approving the site plan without critical information necessary to determine compliance with state and federal fire codes as required by the Newington Zoning

Ordinance, Article V, Section 6, D (3) a-c, was unlawful and unreasonable and the Planning Board's decision should be overturned,.

4. **The Failure to Address Issues Relating to Light, Noise, Air and Water Quality**

86. The Planning Board did not evaluate whether the site would have an effect on air quality due to idling trucks and increase rail traffic. Sea-3 will operate 24 hours a day, 365 days a year, 7 days a week. Truck traffic will queue, start and stop, idle, increase rail traffic will increase and no evaluation regarding the cumulative impact from fumes from diesel engines, increase ship stack emissions, any emissions from flares was reviewed by the Planning Board's. The Planning Board's lack of review of impact on air quality was in violation of its site review regulations and was unlawful and unreasonable, and therefore the decision of the Planning Board should be overturned.

87. In addition to the impact on air quality, there was no information presented or any assessment of the noise due to idling trucks and increase rail traffic and noise from idling railcars, noise from flare on tanks, noise from ships or any noise from emergency generators. The Planning Board is required to assess noise in evaluating a site plan and its failure to do so was unreasonable and unlawful and therefore its decision should be overturned.

88. Because no information on peak hours of trucks was given and no assessment on the impact on light and glare was assessed in contravention of the site plan review regulations. Also, SFC Engineering Partners, Inc. never reviewed a site lighting plan. Approving a site plan without assessing the sites lighting plan and its impact is in violation of site plan review regulations and as such, the decision of the Planning Board was unlawful and unreasonable and should be overturned.

89. If public water is being used, and there is a catastrophic event at the site, no analysis was done regarding the adequacy of the water supply and how it would affect abutting communities. Failing to assess the site's impact on the water supply was unlawful and unreasonable and the decision of the Planning Board should be overturned.

5. **The Applicant's Failure to Demonstrate Its Right, Title and Interest in and to the Subject Property**

90. Throughout the review of the Application at seven (7) public hearings, the Applicant maintained that Pan Am was not an applicant, perhaps as part of a plan to ensure that Pan Am did not itself submit to local land use authority and retain the full leverage of its constant assertion of "federal preemption" of all such local regulation. Late in the hearing process, however, it was finally revealed that a portion of the proposed improvements to the site are located on land owned by Pan Am, not on land owned by the Applicant. The Applicant represented that it would have a lease with Pan Am in the future for the use of its land, but never represented that it had a lease for the

use of the property at the time of the Application and at the time of the decision of the Planning Board. Pan Am represented that the lease was being negotiated.

91. Newington Site Plan Review Regulations provide that Applications must be properly complete; site plans must show entire property and all facilities and name and address of owners of record. See Newington Site Plan Review Regulations, Section 7(a), (b) and (d).

92. Paragraph 19 of the Planning Board's findings indicate that the Applicant would add a second means of emergency access to the site over the property of Pan Am Railways. However, the Applicant may not add any additional access to the site over property it does not own, have an easement or have a lease.

93. Because the Applicant did not have right, title and interest to part of the land upon which site improvements and a second means of emergency access are to be located, the decision of the Planning Board to grant the Application was unlawful and unreasonable and should be overturned.

WHEREFORE, the City respectfully prays that this Court grant it the following relief:

A. That the decision of the Planning Board be overturned and the Application should be denied; or

B. In the alternative, that the Court remand this matter back to the Planning Board to comply with site plan review regulations which include, but are not limited to requiring a traffic study and a safety/hazard assessment be performed and reviewed by the Planning Board and by abutting communities after proper notice pursuant to RSA 36 for further public hearings on the Application; and

C. For such other and further relief as the Court may deem appropriate.

The City of Portsmouth
By and through its Attorney

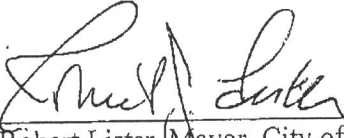


Jane Ferrini, Staff Attorney
NHBM # 6528
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7256

VERIFICATION

I, Robert Lister, Mayor of the City of Portsmouth, being first duly sworn according to law, depose and say that all of the facts and allegations set forth in this document, to the extent based on my personal knowledge, are true and correct to the best of my knowledge, information and belief.

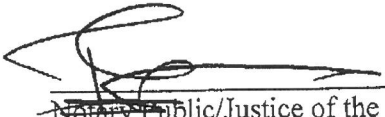
Dated: June 16, 2014



Robert Lister, Mayor, City of Portsmouth

STATE OF NEW HAMPSHIRE
COUTNY OF ROCKINGHAM

Personally appeared the aforementioned and affirmed to me that the facts and recitals set forth in the foregoing document are true and correct to the best of his knowledge, information, and belief.



Notary Public/Justice of the Peace
Commission Expires 9/18/14

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

SUPERIOR COURT

Docket No. 218-2014-CV-654

THE CITY OF PORTSMOUTH

v.

NEWINGTON PLANNING BOARD

MOTION TO INTERVENE BY PORTSMOUTH RESIDENTS RICHARD AND CATHERINE DIPENTIMA, JOHN AND JANE SUTHERLAND, MARGARET AND LOUIS SALOME, ROBERT GIBBONS, PATRICIA FORD, MATTHEW AND ERICA NANIA, THOMAS AND CORRINE SZOPA, STEVE AND CAROLE EDWARDS

NOW COME the proposed Intervenors, by and through their counsel, Sheehan Phinney Bass + Green, P.A., and respectfully request leave of the Court to intervene in this appeal filed by the City of Portsmouth pursuant to RSA 677:15, I and RSA 677:15, I-a (a), for the reasons set forth below. In support of their Motion to Intervene, the Intervenors state as follows:

1. The proposed Intervenors are residents of the City of Portsmouth, as follows:
 - a. Richard and Catherine DiPentima, 16 Dunlin Way, Portsmouth NH 03801;
 - b. John and Jane Sutherland, 8 Dunlin Way, Portsmouth NH 03801;
 - c. Margaret (Peg) and Louis Salome, 142 Spinnaker Way, Portsmouth NH 03801;
 - d. Robert Gibbons and Patricia Ford, 145 Spinnaker Way, Portsmouth NH 03801;
 - e. Matthew and Erica Nania, 18 Dunlin Way, Portsmouth NH 03801;
 - f. Thomas and Corrine Szopa, 132 Spinnaker Way, Portsmouth NH 03801; and
 - g. Steve and Carole Edwards, 144 Spinnaker Way, Portsmouth NH 03801.

2. As set forth in the City of Portsmouth's Petition for Appeal, on May 19, 2014, the Town of Newington Planning Board conditionally approved a site plan application submitted by Sea-3 Inc. ("Sea-3") to reconfigure its property and construct improvements to expand and significantly intensify its business operations for the import and export of liquefied petroleum gas ("LPG"). Sea-3 currently imports foreign LPG by ship to distribute domestically by rail and truck, and Sea-3 proposes to expand substantially its operations to export domestic LPG to foreign markets by ship. The proposed expansion and reconfiguration of Sea-3's site in Newington will result in a significant increase in rail traffic carrying LPG and running through the City of Portsmouth, on rail lines that directly abut the Intervenor's residential properties. As such, the Intervenor is impacted directly by the proposed expansion and site plan, both in terms of potential economic harm due to impacts on their property values, and environmental and potential safety impacts from the increase in LPG rail traffic.

3. The Town of Newington Planning Board designated Sea-3's proposed project as a "development of regional impact" pursuant to RSA 36:55, and as such, invited and permitted both the City of Portsmouth (and other municipalities) and residents of Portsmouth (and other municipalities) to participate, testify and submit exhibits and evidentiary materials in public hearings on Sea-3's application. The Intervenor participated in the site plan approval process by attending public hearings, commenting on Sea-3's application and submitting written comments and requests for information to the Newington Planning Board, Sea-3 and Pan Am Railways.

4. The Intervenor has significant interests in the outcome of Sea-3's proposed site plan and the instant appeal. A primary issue in the appeal is whether the Newington Planning Board violated its own site plan regulations and RSA ch. 36 by failing to require a

comprehensive safety study and hazard assessment of the site and the railways that would be used to transport LPG (including the rail lines running through the City of Portsmouth), and instead condition site plan approval only upon after-the-fact submission of updated safety plans “to the appropriate public officials” for review and approval, without requiring – or indeed, allowing – further public hearing. This conditional approval of Sea-3’s site plan deprives the Intervenors and other abutting residents a voice in the process, contrary to the requirements and intentions of RSA ch. 36.

5. In addition, the appeal raises due process concerns over the timing and notice concerning designation of the project as a development of regional impact pursuant to RSA 36:55. In particular, if allowed under RSA ch. 36, the Intervenors and others likely would have participated in strident opposition to Sea-3’s variance applications, which were approved by the Newington Zoning Board of Adjustment in November 2013 and allowed the proposed expansion of the Sea-3 site to move forward. Again, this issue directly impacts the Intervenors, who were deprived of notice and the opportunity to comment upon Sea-3’s applications.

6. Superior Court Civil Rule 15 provides that “[a]ny person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause...” The Intervenors have a direct, substantial and continuing interest in the outcome of this appeal brought by the City of Portsmouth and the issues raised by the City, and they respectfully request the Court’s permission to intervene in this matter.

WHEREFORE, the Intervenors respectfully requests that this Court:

- A. Permit the proposed Intervenor to intervene in the above-captioned matter for the purpose of submitting legal memoranda and oral argument in this appeal pursuant to RSA 677:15; and
- B. Grant such other and further relief as the Court deems necessary and just.

Respectfully submitted,

**RICHARD AND CATHERINE DIPENTIMA,
JOHN AND JANE SUTHERLAND,
MARGARET AND LOUIS SALOME,
ROBERT GIBBONS AND PATRICIA FORD,
MATTHEW AND ERICA NANIA,
THOMAS AND CORRINE SZOPA,
STEVE AND CAROLE EDWARDS**

By Their Attorneys,

**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**

Dated: June 18, 2014

By:  for

Christopher Cole, Esquire (Bar No. 8725)
Karyl R. Martin, Esquire (Bar No. 16468)
1000 Elm Street
P. O. Box 3701
Manchester, NH 03105-3701
(603) 627-8223
ccole@sheehan.com
kmartin@sheehan.com

Certification of Service

I hereby certify that on June 18, 2014 the foregoing Motion to Intervene was sent, first class mail, postage prepaid to Jane Ferrini, Esq., counsel for the City of Portsmouth; John Ratigan, Esq., and Denis Hebert, Chair of the Town of Newington Planning Board.

 for

Christopher Cole

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

City of Portsmouth

v.

Town of Newington Planning Board

Docket No. 218-2014-CV-00654

**TOWN OF NEWINGTON PLANNING BOARD'S
OBJECTION TO MOTION TO INTERVENE**

NOW COMES the Respondent, Town of Newington Planning Board (the "Planning Board"), by and through its attorneys, Donahue, Tucker & Ciandella, PLLC, and files this Objection to the proposed Intervenor's Motion to Intervene due to the proposed Intervenor's lack of standing. In support of its motion, the Town states as follows:

Introduction

1. At issue in this case is the Planning Board's conditional site plan approval of a site plan application by SEA-3, Inc. ("SEA-3"). The conditional site approval was granted after seven public hearings over the course of seven months which encompassed hours of expert testimony and comment from federal and state authorities and the public alike. Because the proposed Intervenor's do not meet the standard for non-abutter standing articulated in Weeks Restaurant Corp. v. Dover, 119 N.H. 541 (1979), they do not have grounds to participate in the appeal and their Motion to Intervene should be denied.

Relevant Facts

2. By way of brief background, the SEA-3 property in question is located at 190 Shattuck Way in Newington (the "Property"). It has been the site of SEA-3's business operations in Newington for approximately 38 years. That business operation has historically included a liquefied petroleum gas ("LPG") energy terminal and storage use. In the past LPG has been delivered to the terminal by ships. The LPG would be off-loaded and piped to the storage tanks on-site, where the LPG would be stored for later distribution to commercial and residential customers by truck. The site has also received on a daily basis up to five liquefied petroleum gas ("LPG") shipments via railroad tank cars. Under SEA-3's conditionally approved site plan, it is authorized to modify its operations to permit the export of LPG via ship. As conditionally approved, SEA-3 is authorized to receive up to 16 shipments of LPG by rail tank cars per day.

3. At the commencement of its review of the SEA-3 application, the Planning Board deemed the project as having the potential for regional impact pursuant to RSA 36:54-55 on November 18, 2013. See, Exh. B, 11/18/13 Meeting Minutes at pg. 3.

4. The declaration of the project as a development having the potential for regional impact had the effect of extending to the Rockingham County Regional Planning Commission, the City of Portsmouth, and the Towns of Greenland, Stratham, and Newfields, the status of "abutters" per RSA 672:3 for the limited purpose of providing notice and giving testimony to the Planning Board. See, RSA 36:57, I.

5. The proposed Intervenor are not actual RSA 672:3 "abutters" to the site. They reside approximately 2 miles away in the City of Portsmouth. See, Affidavit of Stephanie Guy, attached as Exh. A.

6. Public hearings on the site plan application were held on November 18, 2013, December 9, 2013, January 13, 2014; February 10, 2014, March 10, 2014, March 24, 2014, and April 14, 2014. These meetings included hours of public comment, testimony from political figures, and expert testimony from federal and state authorities, traffic engineers, fire safety experts and site engineers. (See, Planning Board Meeting Minutes, attached as Exh. B).

7. Spoken participation by the proposed Intervenor at the seven public hearings varied: some spoke often, some did not speak or spoke hardly at all.

8. None of the proposed Intervenor about the Property in question. Below is a list of the proposed Intervenor and their approximate road distances from the Property:

- Richard and Catherine DiPentima: 2.56 miles from Property;
- John and Jane Sutherland: 2.50 miles from Property;
- Margaret and Louis Salome: 2.56 miles from Property;
- Robert Gibbons and Patricia Ford: 2.56 miles from Property;
- Matthew and Erica Nania: 2.69 miles from Property;
- Thomas and Corrine Szopa: 2.58 miles from Property;
- Steven and Carole Edwards: 2.56 miles from Property;

See, Exh. A.

9. Moreover, and as evidenced in the Guy Affidavit and documents attached hereto as Exhibit A, each of proposed Intervenors' residences are at least two miles from the Property as the crow flies.

I. Standard of Review for Motion to Dismiss for Lack of Standing

10. When a party's motion to dismiss "challenges the plaintiff's standing to sue, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief." Joyce v. Town of Weare, 156 N.H. 526, 529 (2007).

11. When the Court determines that a petitioner does not have a "sufficient, definite direct interest in the outcome of the proceedings," it will conclude that standing does not exist. *Id. citing* Weeks Restaurant, 119 N.H. at 545.

II. Legal Standard for Determining Standing to Appeal

12. "Aggrieved parties" may appeal decisions of a planning board. RSA 677:15, I-a(a).

13. However, standing will not be extended to "all persons in the community who might feel that they are hurt by" the land use board's decision. Golf Course Investors of NH, LLC v. Town of Jaffrey, 161 N.H. 675, 680 (2011).

14. To have standing to appeal to the Zoning Board of Adjustment, a petitioner must be "directly affected" which requires that they have "some direct, definite interest in the outcome of the action or proceeding." *Id.*

15. Further, "[t]o determine whether a non-abutter has sufficient direct, definite interest to confer standing, the trier of fact may consider factors such as the proximity of the challenging party's property to the site for which approval is sought, the

type of change proposed, the immediacy of the injury claimed, and the challenging party's participation in the administrative hearings." *Id. citing Weeks Restaurant*, 119 N.H. at 545 (hereinafter referred to as the "Weeks factors").

16. Though a petitioner does not have to meet each factor to demonstrate standing, the Supreme Court of New Hampshire has held that a lack of proximity and a failure to allege any concrete injury is fatal to a petitioner's claim of standing. Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 767 (2013).

17. "Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis." Golf Course Investors, 161 N.H. at 680.

18. The petitioner bears the burden when standing is challenged and "cannot rest on unsubstantiated allegations, but must sufficiently demonstrate his or her right to claim relief." *Id.*

III. The Proposed Intervenor Do Not Meet the Legal Standard for Standing

19. The proposed Intervenor have failed to allege sufficient proximity to the Property or concrete injury necessary to confer standing as non-abutters under Weeks Restaurant. Accordingly, and despite the proposed Intervenor's participation in the Planning Board meetings, they lack standing in this matter and their Motion to Intervene should be denied.

20. As depicted in Exhibit A, all of the proposed Intervenor live at least two and a half miles away from the Property via the roadways and at least two miles away as the crow flies. The proposed Intervenor do not even mention the Weeks factors or suggest that they have established proximity in their Motion to Intervene. Under the facts

presented, they have not met their burden on the proximity element of the Weeks test. See, Golf Course Investors (fact that respective property owners properties were located between 450 and 2,400 feet from the site did not confer standing); Hannaford Bros. Co. (petitioner conceded that it lacked proximity because it was located 3.8 miles from proposed site).

21. The proposed Intervenor also fail the “immediacy of the injury” analysis under the Weeks factors because they do not allege a concrete injury. The proposed Intervenor reference an ambiguous “impact” caused by “a significant increase in rail traffic carrying LPG and running through the City of Portsmouth, on rail lines that directly abut the proposed Intervenor’s residential properties.” If mere proximity to the rail line was the measure of the “immediacy of injury claimed, then all rail line abutters in New Hampshire and Massachusetts would be able to satisfy this element of the standing test. Motion to Intervene, ¶ 2. The proposed Intervenor also reference a speculative “potential economic harm” and a speculative “environmental and potential safety impact” from the increase in rail traffic. *Id.*

22. The thrust of the proposed Intervenor’s objections and comments at the public hearings are linked not to activities that are proposed to occur on the Property and arise from SEA-3’s site plan application, but rather from anticipated increased rail activity within the City of Portsmouth. (See, Exh. B, 12/9/13 Meeting Minutes at pgs. 2, 4 DiPentima, comments; 1/13/14 Meeting Minutes at pgs. 3, 4, Sutherland comments; 2/10/14 Meeting Minutes at pg. 3, comments of Rich and Catherine DiPentima; 3/10/14 Meeting Minutes, comments of DiPentima at pgs. 2, 4, 8, comments of Sutherland at pg. 9 and pg. 10; 3/24/14 Meeting Minutes, comments of Gibbons and

DiPentima at pg. 2, DiPentima and Ford at pg. 3, Sutherland and DiPentima at pg. 10; and 4/14/14 Meeting Minutes at pg. 2, comments of DiPentima and Gibbons.

23. Rail operations are outside the province and jurisdiction of the Planning Board when it reviews a site plan application. These issues are preempted by federal law. 49 U.S.C. §10501(b); see, also, 49 U.S.C. §10102(9)(A) defining “transportation.” “[T]o have standing, a party is required to identify an injury that its particular property would incur as the result of” the decision. Hannaford Bros. Co., 164 N.H. at 769 (citations and quotations omitted). The Planning Board is not the decision maker on rail safety or rail operation issues.

24. Under the circumstances, the proposed Intervenor’s lack of proximity to the subject property and have merely stated objections to operations of the railway within the City of Portsmouth and related, speculative rail traffic impacts. Such rail operations are outside the jurisdiction of the Planning Board in its review of the SEA-3 site plan application.

25. As the Intervenor’s lack of proximity and have failed to allege any concrete injury to their particular property, the Weeks factors, on balance, are not satisfied. *Id.* at 770. The proposed Intervenor’s have not satisfied their burden.

26. The proposed Intervenor’s Motion to Intervene should be denied.

Conclusion

27. The proposed Intervenor’s lack of proximity and a concrete injury under the Weeks factors. Accordingly, they lack a “direct, definite interest in the outcome of the action or proceeding” in question under Weeks Restaurant. As a result, the proposed Intervenor’s Motion to Intervene should be denied.

WHEREFORE, the Planning Board requests that this Honorable Court:

- A. Deny the proposed Intervenor's Motion to Intervene; and
- B. Grant such other relief as may be fair and just.

Respectfully submitted,

TOWN OF NEWINGTON PLANNING BOARD
By its attorneys:

DONAHUE, TUCKER & CIANDELLA, PLLC

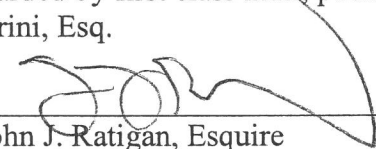
Date: 6/27/14

By: 

John J. Ratigan, Esquire
NHB #4849
225 Water Street
Exeter, NH 03833
(603) 778-0686
jratigan@dtclawyers.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection to Motion to Intervene was this 27th day of June, 2014 forwarded by first class mail, postage prepaid to Christopher Cole, Esquire and Jane Ferrini, Esq.


John J. Ratigan, Esquire

S:\NA-NE\Newington\SEA-3 Rail Safety Issues\2014 06 24 Objection to Motion to Intervene.docx

EXHIBIT A

AFFIDAVIT

I, Stephanie A. Guy, am a paralegal employed by the law firm of Donahue, Tucker & Ciandella, PLLC, having a business address of 225 Water Street, Exeter, New Hampshire, after being duly sworn, state as follows:

1. I was asked by Attorney John Ratigan to determine the distance, driving and "as the crow flies", from the 190 Shattuck Way in Newington, New Hampshire to Dunlin Way and Spinnaker Way in Portsmouth, New Hampshire (the "Properties").

2. I completed research on the following websites:

Town of Newington (www.newington.nh.us)
City of Portsmouth (www.cityofportsmouth.com)
Google Maps (www.google.com/maps)
Mapquest (www.mapquest.com)
TJ Peiffer, Geospatial Data Analyst
(www.tjpeiffer.com/crowflies)

3. While each website varies slightly in the distances between the properties, in no event was the driving distances less than 2.5 miles and the "as the crow flies" distance was no less than 2.0 miles (see attached Exhibit A-1).

4. Attached as Exhibit A-2 is the Town of Newington Tax Maps # 14 and 20 showing the proximity of the SEA-3 property to the railroad.

5. Attached as Exhibit A-3 is the City of Portsmouth Tax Map # 213 showing the proximity of the proposed Interveners' property to the railroad.

Further affiant sayeth not.

Witness my hand this 26th day of June, 2014.

Gretchen S. Hyn
Witness

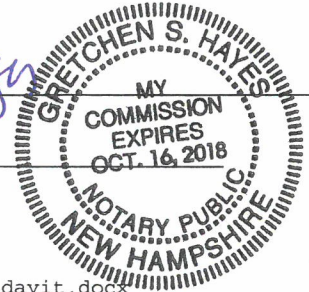
Stephanie A. Guy
Stephanie A. Guy

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM, SS.

June 26, 2014

Personally appeared Stephanie A. Guy, known to me, or satisfactorily proven, to be the person whose name is subscribed to the foregoing instrument, and acknowledged that she executed the same for the purposes therein contained.

Before me, Gretchen S. Hayes
Notary Public
My Commission Expires: _____



"As The Crow Flies" Distance Calculator

Calculates the "As the Crow Flies" distance between any two places on earth.

190 Shattuck Way, Newington, NH, United States

8 Dunlin Way, Portsmouth, NH, United States

Calculate

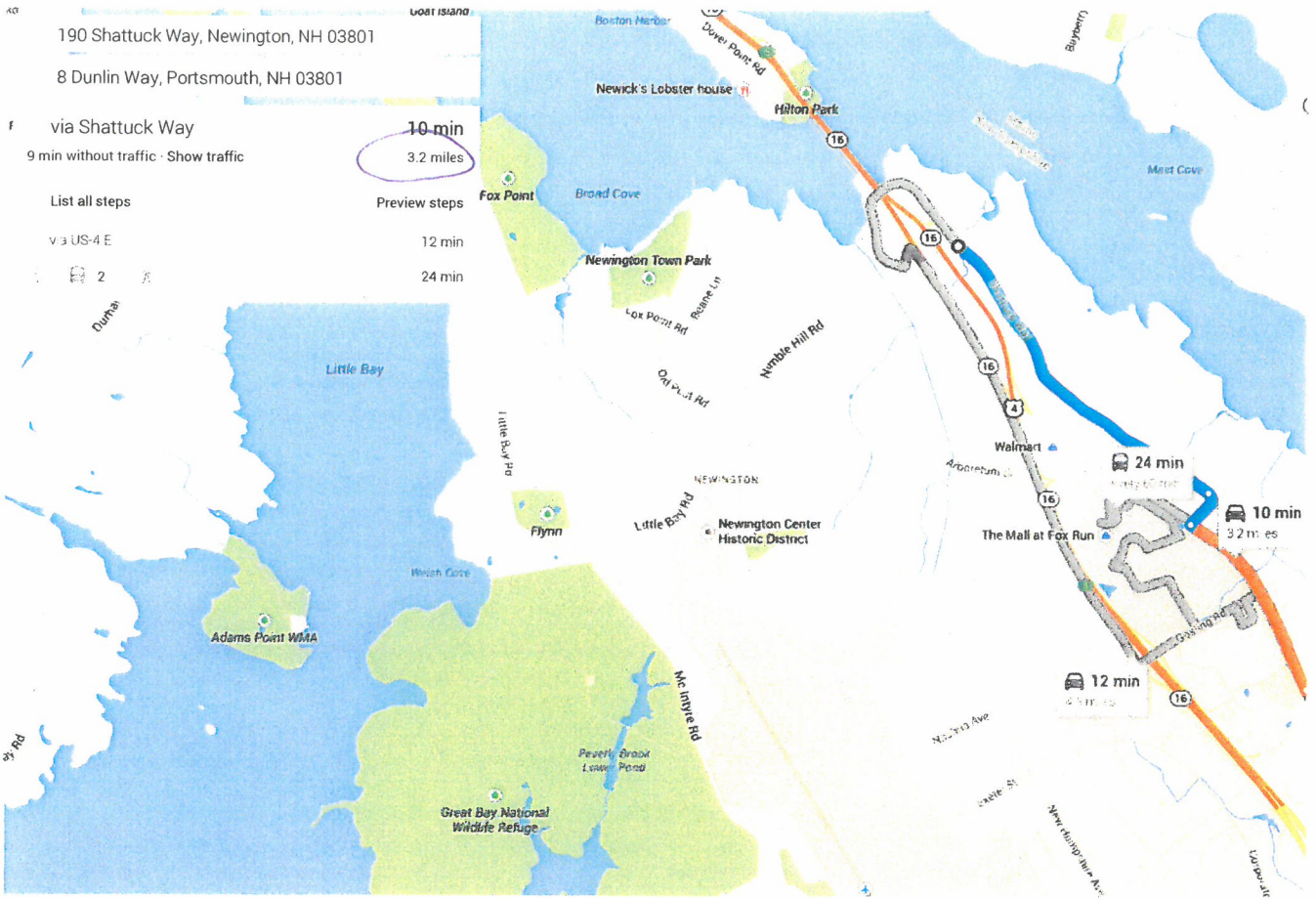
Clear Map

The distance is 2 Miles



Google

Report a map error
tjpeiffer.com





Trip to:

8 Dunlin Way

Portsmouth, NH 03801-7308

2.60 miles / 6 minutes

Notes

**Which "Carb" Kills
your Blood Sugar?**

Click To Reveal #1 Worst Carb EVER
(Don't Eat This!)

FixYourBloodSugar.com



190 Shattuck Way, Newington, NH 03801-7869

Download
Free App



1. Start out going **southeast** on **Shattuck Way** toward **Avery Rd.** [Map](#)

0.7 Mi

0.7 Mi Total



2. Take the 2nd **right** onto **Piscataqua Dr.** [Map](#)

0.1 Mi

Piscataqua Dr is 0.3 miles past Avery Rd

If you reach the end of Piscataqua Dr you've gone about 0.1 miles too far

0.8 Mi Total



3. Take the 2nd **left** onto **Woodbury Ave.** [Map](#)

1.0 Mi

If you are on Newington Park and reach Fox Run Mall you've gone a little too far

1.8 Mi Total



4. **Woodbury Ave** becomes **Market St.** [Map](#)

0.1 Mi

2.0 Mi Total



5. Turn **left** onto **Portsmouth Blvd.** [Map](#)

0.2 Mi

If you reach McGee Dr you've gone about 0.2 miles too far

2.2 Mi Total



6. Turn **right** onto **Osprey Dr.** [Map](#)

0.4 Mi

Osprey Dr is 0.1 miles past Shearwater Dr

If you reach the end of Portsmouth Blvd you've gone about 0.2 miles too far

2.5 Mi Total



7. Turn **right** onto **Dunlin Way.** [Map](#)

0.06 Mi

2.6 Mi Total



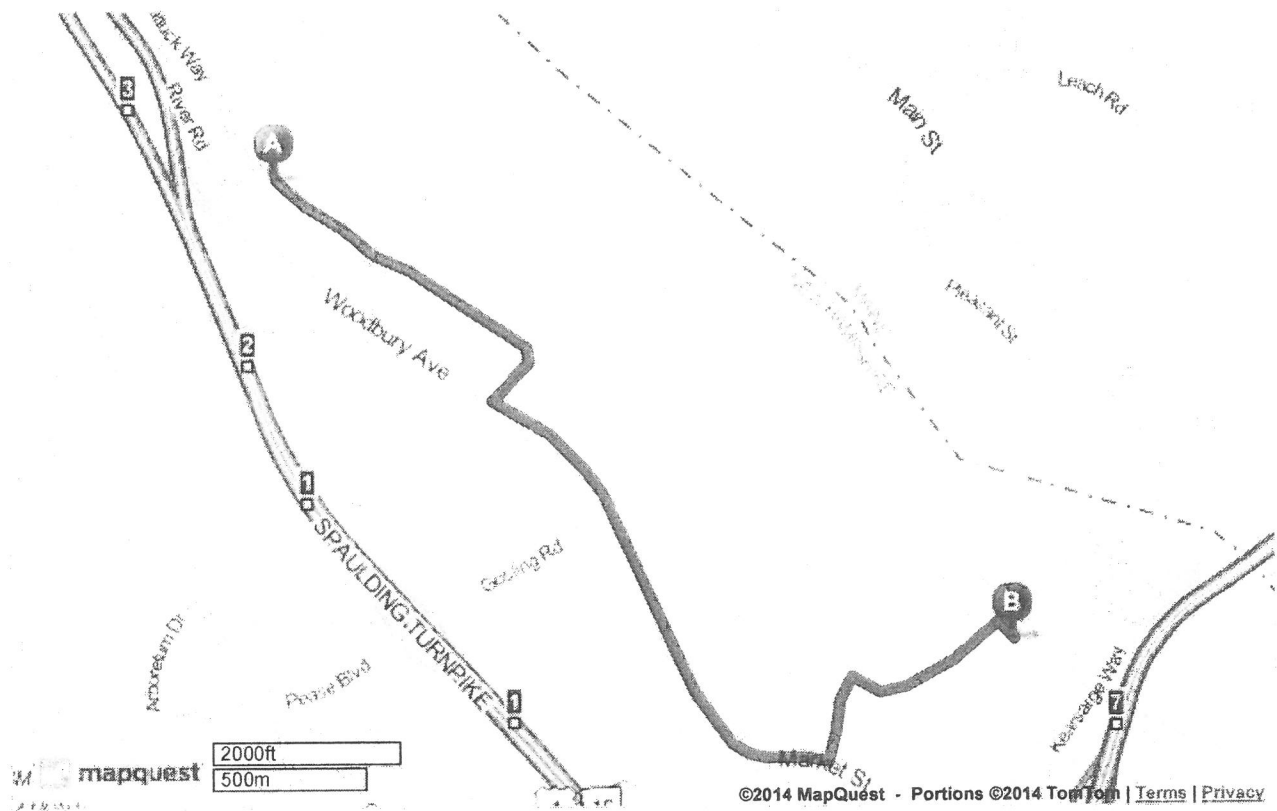
8. **8 DUNLIN WAY** is on the **left.** [Map](#)

If you reach Blue Heron Dr you've gone a little too far



8 Dunlin Way, Portsmouth, NH 03801-7308

Total Travel Estimate: 2.60 miles - about 6 minutes



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Trip to:

142 Spinnaker Way

Portsmouth, NH 03801-3370

2.54 miles / 6 minutes

Notes

4 Ways to Avoid Running Out of Money During Retirement

If you have a \$500,000 portfolio, download the guide by *Forbes* columnist Ken Fisher's firm. Even if you have something else in place, this must-read guide includes research and analysis you can use right now. Don't miss it!

[Click Here to Download Your Guide!](#)

FISHER INVESTMENTS*



190 Shattuck Way, Newington, NH 03801-7869

Download Free App



1. Start out going **southeast** on **Shattuck Way** toward **Avery Rd.** [Map](#)

0.7 Mi

0.7 Mi Total



2. Take the **2nd right** onto **Piscataqua Dr.** [Map](#)

Piscataqua Dr is 0.3 miles past Avery Rd

If you reach the end of Piscataqua Dr you've gone about 0.1 miles too far

0.1 Mi

0.8 Mi Total



3. Take the **2nd left** onto **Woodbury Ave.** [Map](#)

If you are on Newington Park and reach Fox Run Mall you've gone a little too far

1.0 Mi

1.8 Mi Total



4. **Woodbury Ave** becomes **Market St.** [Map](#)

0.4 Mi

2.3 Mi Total



5. Turn **left** onto **Spinnaker Way.** [Map](#)

Spinnaker Way is 0.2 miles past Portsmouth Blvd

If you reach Kearsarge Way you've gone about 0.2 miles too far

0.3 Mi

2.5 Mi Total



6. **142 SPINNAKER WAY** is on the **right.** [Map](#)

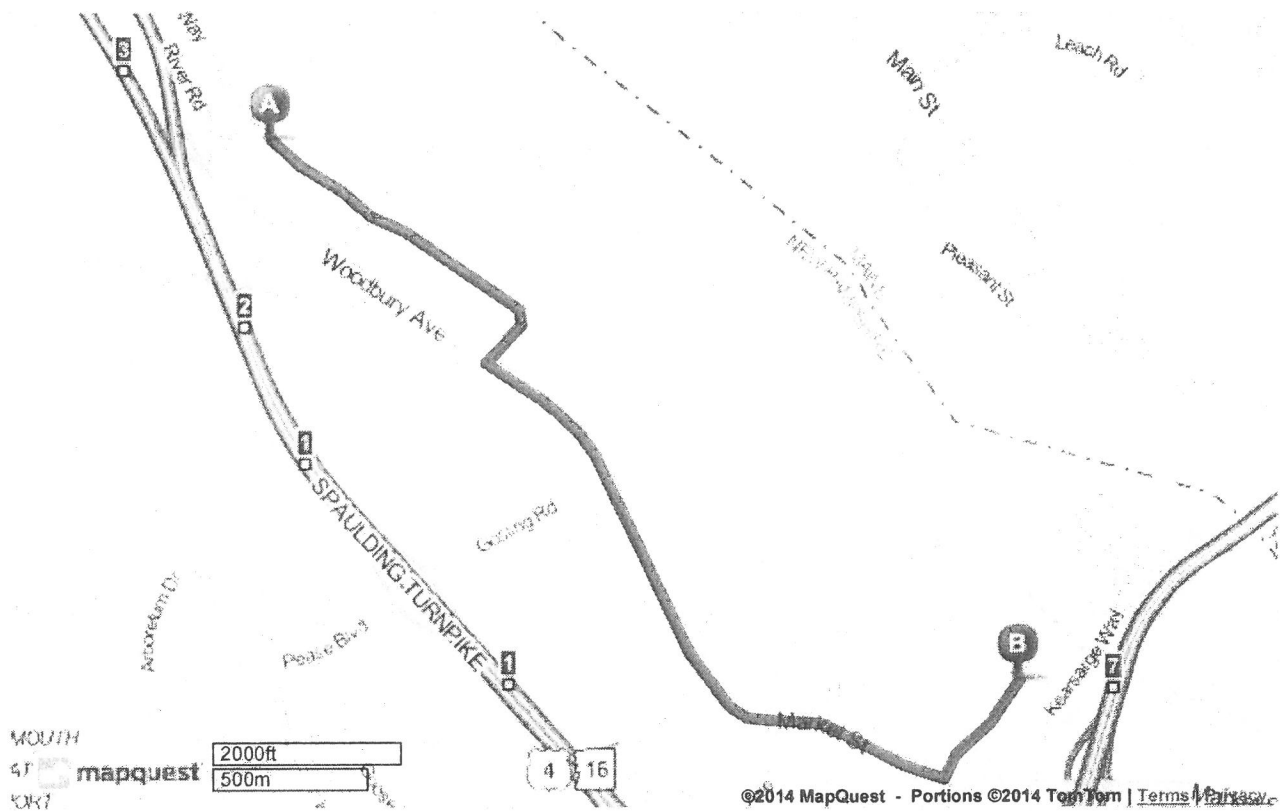
Your destination is just past Mangrove St

If you reach Blue Heron Dr you've gone about 0.1 miles too far



142 Spinnaker Way, Portsmouth, NH 03801-3370

Total Travel Estimate: **2.54 miles - about 6 minutes**

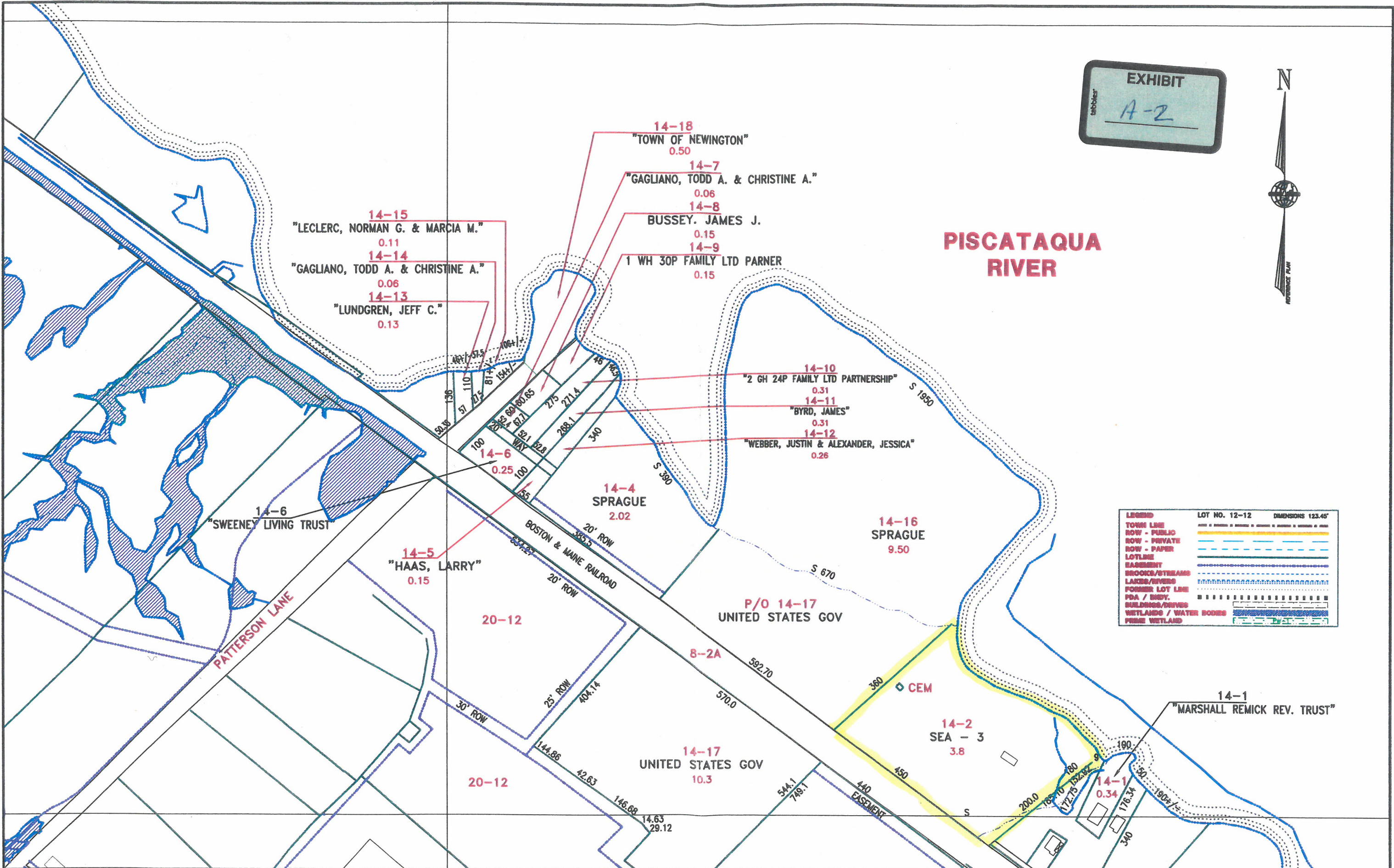


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EXHIBIT
A-2



PISCATAQUA RIVER



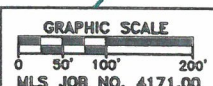
LEGEND	LOT NO. 12-12	DIMENSIONS 123.45'
TOWN LINE	---	---
ROW - PUBLIC	---	---
ROW - PRIVATE	---	---
ROW - PAPER	---	---
LOTLINE	---	---
EASEMENT	---	---
BROOKS/STREAMS	---	---
LAKES/RIVERS	---	---
FORMER LOT LINE	---	---
PDA / BUDY.	---	---
BUILDINGS/DRIVES	---	---
WETLANDS / WATER BODIES	---	---
PRIME WETLAND	---	---

MERIDIAN LAND SERVICES, INC.
 51 OLD HASBIA ROAD, ANDOVER, N.H. 03816
 TEL. 603-973-6441 FAX 603-978-1884
 ENGINEERS - LAND SURVEYORS - SCIENTISTS - LAND PLANNERS

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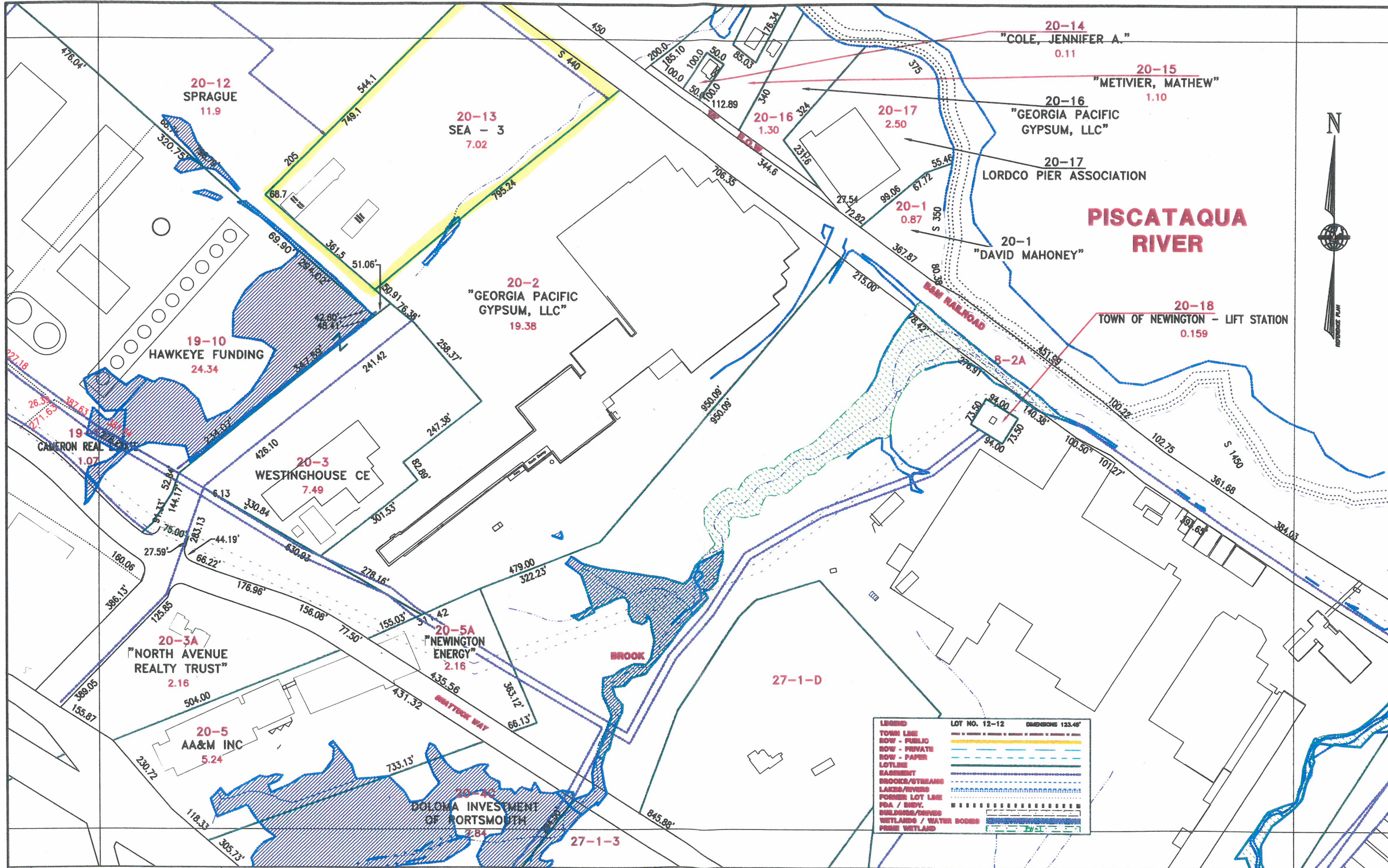
NEWINGTON, N.H.

TAX MAP SCALE
 24"x36" PLOT - 1"=100'
 11"x17" PLOT - 1"=220'+/-
 JANUARY 17, 2011
 DATE OF LATEST REVISION



8	13	19	20	21
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14



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NEWINGTON, N.H.

TAX MAP SCALE
 24"x36" PLOT - 1"=100'
 11"x17" PLOT - 1"=220'+/-
 APRIL 2011
 DATE OF LATEST REVISION

GRAPHIC SCALE
 0 50' 100' 200'
 MLS JOB NO. 4171.00

13	14
19	21
26	28

20

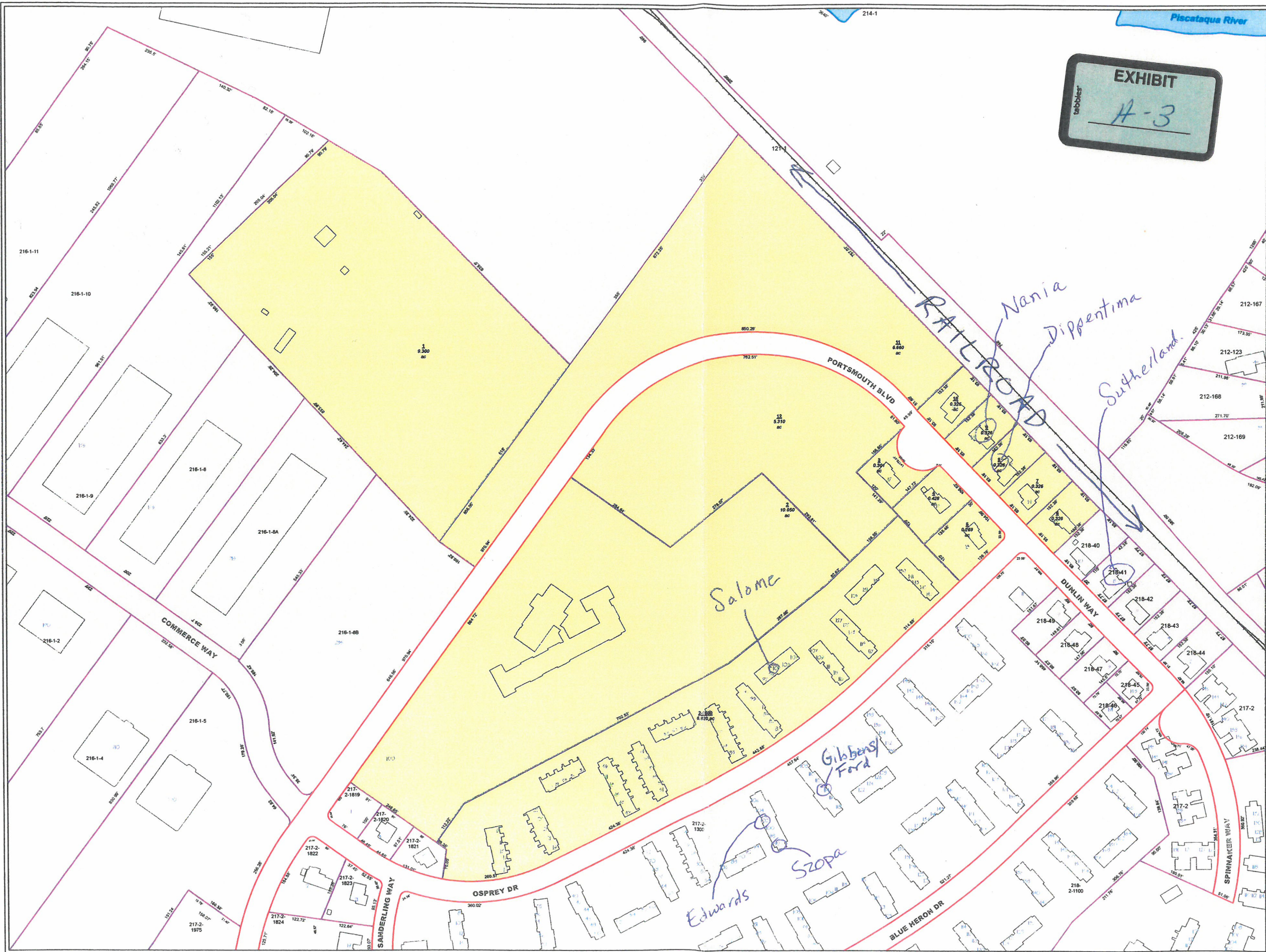
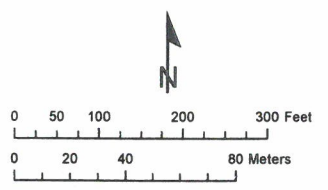
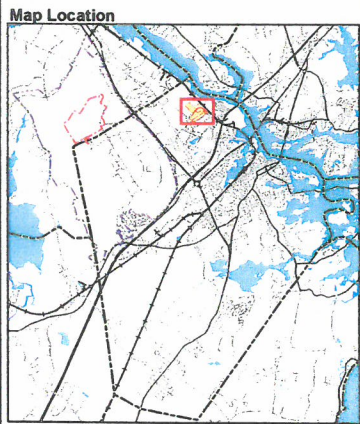
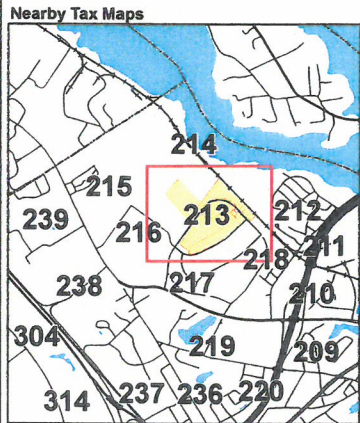


EXHIBIT
tabbles
A-3

- Partial Legend**
See the cover sheet for the complete legend.
- 7-5A Lot or lot-unit number
 - 2.56 ac Parcel area in acres (ac) or square feet (sf)
 - Address number
 - 233-137 Parcel number from a neighboring map
 - 66' Parcel line dimension
 - SIMS AVE Street name
 - Parcel/Parcel boundary
 - Parcel/ROW boundary
 - Water boundary
 - Structure (1994 data)
 - Parcel covered by this map
 - Parcel from a neighboring map (see other map for current status)



This map is for assessment purposes only. It is not intended for legal description or conveyance. Parcels are mapped as of April 1. Building footprints are 2006 data and may not represent current structures. Streets appearing on this map may be paper (unbuilt) streets. Lot numbers take precedence over address numbers. Address numbers shown on this map may not represent posted or legal addresses.



Portsmouth, New Hampshire
2013
Tax Map 213

EXHIBIT B

Town of Newington, NH

PLANNING BOARD

Meeting Minutes, Monday, November 18, 2013

- Call to Order:** Chair Denis Hebert called the November 18, 2013 meeting at 6:35 PM.
- Present:** Vice Chair, Mike Marconi; Jack Pare; Justin Richardson; Alternate Member, Peggy Lamson; Board of Selectmen Rep, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner
- Absent:** Bernie Christopher
- Public Guests:** Paul Bogan, VP Operations, Sea-3; Stephen Haight, P.E., Haight Engineering; Cynthia Scarano, Executive VP & Robert Culliford, Senior VP & General Counsel of Pan Am Railways; Attorney Paul Sanderson; Craig Daigle; Matt Metiber; Michael Mathers; Edna Mosher; Keith Boyle, Boyle Studios; Ken Anderson, Riverside Pickering Marine; Linn Lebel, Appledore marine Engineering; Gregg Mikolaities, Tighe and Bond Engineering; Attorney Richard Uchida; Attorney Lee Witham; Troy Leeburg; Brenda Belonigan; Attorney Bernie Pelech; Joey Cresta; Dorene Stern; Eric Weinreib; Altus Engineering

1) Public Hearings:

A) Proposal by **Sea-3** to reconfigure its terminal at **90 Shattuck Way** (Tax Map 14, Lot 2; and Map 20, Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, the export of same via ocean-going ships.

Mr. Paul Bogan, VP of Operations for Sea-3 said they were no longer able to make a profit from importing foreign propane since their costs had gone up after lower cost propane and natural gas had glutted the domestic market. Mr. Bogan said they were proposing to convert the majority of their operation from importing foreign propane to exporting domestic propane, with a small percentage to the local market in New England. The propane would be brought in from Pennsylvania and West Virginia on rail, and processed at their plant for shipping out. An expansion of their facility would be required for the process. Steve Haight, of Haight Engineering said they would be applying for Shoreline Protection and Alteration of Terrain permits in the next week.

Justin Richardson asked if it would be possible to reverse the process to accept imports if the market changed, and Mr. Bogan said it would only be designed to unload by rail, chill and ship out, whereas the facility previously received chilled product by ship.

Alternate Board member, Peggy Lamson asked how many trucks would be coming in and out of the plant, and Mr. Bogan said there would be twelve a week. Craig

Town of Newington, NH

PLANNING BOARD

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Daigle of Nimble Hill Road asked if there was any possibility that there would be more than twelve trucks, and Mr. Bogan said they didn't expect any more than twelve any time soon, but the maximum they could have would be sixteen trucks. Edna Mosher of Nimble Hill Road asked if the change would increase truck traffic on Shattuck Way and Mr. Bogan said the number of shipments and trucks would be reduced.

Vice-Chair Mike Marconi asked where the railroad cars would be stored, and Cynthia Scarano, Executive VP of Pan Am Railways 12 cars would come in from Rockingham Junction and be unloaded with no cars stored at the facility. Vice-Chair Marconi asked if any would be stored at Patterson Lane, and Ms. Scarano said they would not.

Ms. Lamson said Greenland Town Administrator, Karen Anderson sent a request to Town Planner, Tom Morgan that the SEA-3 proposal be declared a development with regional impact under NH RSA 36:54.

Attorney Paul Sanderson, Greenland Planning Board Chair said the Town of Greenland is concerned over the transportation of propane through their town ten crossings and only two active, not protected at all, and an antiquated trestle. Attorney Sanderson said they were particularly concerned for the residents of Bayside Drive that would have no means of escaping their neighborhood if there was a rail accident at the crossing. He said he understood that town boards have no jurisdiction over the railways, which are under U.S. Federal jurisdiction, but the NH Department of Transportation does, so they may need to work with them.

Matt Metiber, an abutter asked if they'd done a safety assessment, and Mr. Bogan said improvements had to be done under the FDA's National Fire Protection, and the NFPA would work with the local fire chief when the project moved forward.

Chair Denis Hebert said people were concerned with the risks of propane hazards and asked Mr. Bogan to explain what the worst-case scenario would be like. Mr. Bogan said their main concern would be to prevent boiling liquid vapor explosions resulting from a lack of cooling water should the liquid propane become hot and weaken the steel causing an explosion. Mr. Bogan said that was the reason they were proposing a sprinkler system for cooling and prevention. Mr. Bogan said DOT has required rail cars to be insulated and equipped with head shields at the front and ends to prevent explosions as well as safety couplers that cannot come apart.

Chairman Hebert asked where the water would come from, and Mr. Bogan said they would be able to pump 3,500 gallons per minute where they were only required to pump 2,000 per minute from their sprinkler system on the tanks. Chairman Hebert said he would be concerned if they lost pressure. Mr. Morgan asked how the fire suppression system would work if they lost electricity, and Mr. Bogan said they had a diesel water pump that supplied two sprinklers. Mr. Bogan said they could get water from their Sprague's next door has a water storage tank that fire fighters could tap into, and there were two dry fire hydrants available, and fire fighters could draught water from the river. Chairman Hebert said fire prevention would be critical in the first few seconds, and the fire department could be more concerned with evacuation in an emergency. Mr. Bogan said he hadn't recalled losing water from the City of Portsmouth in 38 years.

Town of Newington, NH
PLANNING BOARD

Meeting Minutes, Monday, November 18, 2013

Mr. Richardson said he was impressed and confident with the safety systems he saw during the site walk, but wondered if they should have a review for their FDA 50 compliance. Mr. Bogan said they were hesitant to expend \$100,000 during the preliminary stages without a better sense that they might receive approval for their proposal. Ms. Scarano said the Class I tracks were used twice a week, the trains were all under 260 tons, and limited to 10 mph. Chairman Hebert asked why they couldn't go faster, and Ms. Scarano said it was not necessary for the trains to go any faster. She said Federal inspectors inspected the tracks, cars, and systems regularly. Chairman Hebert asked if the inspection records were available, and Ms. Scarano said some were and some information was not available to the public because of Homeland Security.

Mr. Richardson said he would like Mr. Morgan to get a professional engineer rather than debating the idea. Mr. Morgan said they would need to follow certain procedures first. He said they would need to notify abutters and publish a legal notice for a public hearing to determine if the plan was substantially complete, then they would need to decide if the proposal made a regional impact, and send notice to the surrounding communities. Mr. Morgan said he had been talking with the former fire chief about working with the fire marshal.

Mike Marconi moved that the proposal by Sea-3 to reconfigure its terminal at 90 Shattuck Way (Tax Map 14, Lot 2; and Map 20, Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, the export of same via ocean-going ships was substantially complete. Jack Pare seconded, and all were in favor.

Jack Pare said there would be significant regional impact in providing propane at a lower price for the region.

Mike Marconi moved to request a regional impact notice to be sent out to the surrounding towns of Greenland, Portsmouth, Newfield and Stratham regarding the Sea-3 proposal to reconfigure its terminal at 90 Shattuck Way (Tax Map 14, Lot 2; and Map 20, Lot 13) in order to accommodate Liquefied Petroleum Gas shipments via rail, the export of same via ocean-going ships. Jack Pare seconded, and all were in favor.

Mike Marconi moved to request a regional impact notice to be sent out to the surrounding towns of Greenland, Portsmouth, Newfield and Stratham regarding the Sea-3 proposal to reconfigure its terminal at 90 Shattuck Way (Tax Map 14, Lot 2; and Map 20, Lot 13) in order to accommodate Liquefied Petroleum Gas shipments via rail, the export of same via ocean-going ships. Jack Pare seconded, and all were in favor.

Town of Newington, NH
PLANNING BOARD

Meeting Minutes, Monday, November 18, 2013

Justin Richardson moved to authorize the Planning Board Chair in consultation with the Town Planner to hire fire safety and rail safety experts, and to pass the associated costs on to the applicant Sea-3 of 90 Shattuck Way (Tax Map 14, Lot 2; and Map 20, Lot 13). Jack Pare seconded, and all were in favor.

Chairman Hebert continued the hearing to Monday, December 9, 2013.

2) Planning: Bicycle infrastructure improvements

Eric Weinrieb with Altus Engineering said in 2012 the Town of Newington had asked him to do a bike lane or bike path feasibility from the Spaulding Turnpike to the town center. Mr. Weinrieb said environmental consultant Mark West and Dave Hislop from Knight Hill Surveying did a wetlands study and survey of the area. He said a year ago the Board of Selectmen worked with DOT to allow a bike path on the southbound lane of the Spaulding to Arboretum Drive, which would reduce the number of commuters coming through town and up Fox Point to get to Arboretum Drive and Pease, but biking enthusiasts and local bikers would still go through town. Ms. Lamson said there was concern for bikers' safety on the roundabout connecting to Pease. Board of Selectman Chair, Rick Stern said the PDA said they wouldn't allow a bike path on that section of Arboretum Drive because they saw that area as having prime development potential. Ms. Lamson said people tend to take the shortest path from one place to another.

Mr. Weinrieb said they needed to determine what they were trying to accomplish, whether a built up bike path on one side of the road for locals, or a bike lane on both sides of the road for enthusiasts. He said one of the issues was that a bike path probably wouldn't be used with biking enthusiasts, and widening the road for a bike lane would involve more land acquisition and could give the impression that vehicles could travel faster through town. Mr. Weinrieb said they also needed to consider whether they wanted to limit doing something on Nimble Hill Road, or elsewhere in town.

Mr. Morgan said there was a serious concern for safety due to the narrow shoulder and poor visibility for bikers and pedestrians along Nimble Hill Road across from Coleman Drive and near the school. Mr. Richardson said most towns have designated school zones and there could be safety concerns with a bike path going through a school zone.

Chairman Hebert said there was a variety of travel from locals and people going through town to get to Pease or Greenland. He said he saw a need to come up with a plan for the entire town. Mr. Daigle said he thought there was a need to reduce the speed through town, but he didn't want to see the look of the town change. Mr. Richardson said bicyclists and pedestrians blame cars and drivers blame bicyclists and pedestrians, but the issue still needed to be addressed. He said they also needed to be concerned with traffic slowing down traffic speed. He said curb bump outs were shown to slow traffic down as well as signs placed in the center lane. He said a four-way stop at Fox Point Road and Nimble Hill Road has also been suggested.

Ms. Mosher said she the lack of adherence and enforcement of the speed limits was part of the problem, but she said poor visibility and no place to get out of the way

Town of Newington, NH

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Meeting Minutes, Monday, November 18, 2013

was also a problem. Brenda Belonigan of Hannah Lane agreed that enforcement of the speed limit was more of a problem than the speed limit. Vice-Chair Marconi said he thought speed was the first problem, and room for bike travel was the second problem.

Chairman Hebert said they should identify the issues further before asking Mr. Weinrieb to make a preliminary recommendation. He set a date for a work session on Disremember 9, 2013.

3) Preliminary Discussions

A) Proposal for a lot line adjustment between **Dorothy Watson's** property at **133 Fox Point Road** and the **Mathes** lot on the corner of Fox Point Road and Nimble Hill Road, Tax Map 17, Lots 11 & 11-12.

Mr. Michael Mathes came before the Board to discuss his lot line adjustment. Mr. Mathes said any trees required to open up the line of site from the curb cut would have to be taken down by the new owner.

Chairman Hebert said he it would be important to understand that the remaining lot couldn't be subdivided further due to wetlands and limited frontage. Mr. Richardson said they could put that on the plan.

Edna Mosher of Nimble Hill Road said she had known the applicant's family for many years, and Mr. Mathes had made many improvements to Dorothy Watson's place, and selling the property would help provide for her household care and healthcare as she goes into her 95th year.

Mike Marconi moved to going into a public hearing on December 9. Justin Richardson seconded, and all were in favor.

B) Proposal by the **Fox Run Mall** to modernize exterior signs throughout its shopping center property at **45 Fox Run Road**, Tax Map 20, Lot 1.

Keith Boyle with Boyle Studios said they submitted a lumens study for their new sign proposal. Chairman Hebert asked if they would be able to dim the lights if it was determined that they were too bright, and Mr. Boyle said they were fixed, but the lumens of the current sign was 30,000 lumens and the new sign would be 11,000 lumens. Mr. Pare asked if they had a diffuser in front of the LED and Mr. Boyle said the LED was behind acrylic lettering. Mr. Richardson said they could approve the sign subject to conditions that the light not be unreasonably bright in comparison. Mr. Pare said the pixels of the LED light would be diminished behind the acrylic.

Mike Marconi moved to go to a public hearing on December 9. Justin Richardson seconded and all were in favor.

C) Proposal by **Pickering Marine** to construct a pier and laydown area near the eastern end of **Shaftmaster Drive**, Tax Map 20, Lot 1.

Ken Anderson with Riverside and Pickering Marine said they were finalizing their plans with minor changes to Phase I of the floating dock system to support their operation. Mr. Anderson said they would extend another pier parallel in the next 3-5

Town of Newington, NH PLANNING BOARD

Meeting Minutes, Monday, November 18, 2013

years. He said they had applied for an Expedited Review Permit, which usually takes 75 days. He said once it was accepted as complete, it would be bumped up as a commercial project that would be beneficial to the economy. Mr. Anderson said they had me with DES, and the EPA National Fisheries Division.

Mr. Pare asked if they were applying for Phase I or Phase II and Mr. Anderson said they were applying for both. Mr. Morgan said site plan regulations say approval would expire in two years so they would need to reapply if they didn't complete the second phase before that time.

Vice-Chair Marconi asked when they anticipated beginning the project, and Mr. Anderson said their lease in Eliot, Maine they planned on starting in 2½-3 months.

Mr. Stern asked if they owned land, and Mr. Anderson said they owned approximately one acre for the gravel laydown area. He said they were hoping to purchase more land, and were also looking for another area for office space. Chairman Hebert said he was concerned with their limited space, and traffic hazards with the narrow access roadway, and said he would propose putting a condition of shut down if safety hazards occurred.

Mr. Anderson said Riverside Marine they started as a small marine contractor in 2007, and then acquired Pickering Marine in 2009. He said they have operated with tugboats, two box vans, and two pickup trucks. He said they would delivery trucks would come into the site, and load construction materials onto the boats.

Peggy Lamson moved to move to a public hearing on December 9. Mike Marconi seconded, and all were in favor.

D) Proposal by **Lam Brothers Partnership** for residential, office, sales or service use at **21 River Road**, Tax Map 19, Lot 4.

Attorney Don Witham came before the Board on behalf of his client who purchased the foreclosed property. He said Mr. Gilman the former owner of Superior Towing came before the Zoning Board of Adjustment for a special exception as to allow him and his family to continue residing in the commercial 30' x 50' building. He said the Board approved the exception with the stipulation that it would revert to commercial use after sale of the property. Attorney Witham said the current owner was having difficulty finding a buyer for the property that was at the back between two office buildings with only thirty feet of frontage. He said they haven't been able to advertise the property as part residential and part commercial to rent it, and asked if the Board would consider lifting the mixed use. Mr. Morgan said they would have to go before the ZBA. Chairman Hebert said he wasn't sure if that would be a good use of the property. Mr. Richardson said they may be able to make a case that there was a hardship, and Chairman Hebert said the history was available for the owners and they still purchased the property.

4) Driveway Permit Application: Request by **Troy Leeberg** for land off of **Hannah Lane**, Tax Map 18, Lot 3A.

Mr. Troy Leeberg said he purchased 20 acres off Hannah Land with just 59 feet of frontage on Hannah Lane and a right of way easement on the deed for access

Town of Newington, NH

PLANNING BOARD

Meeting Minutes, Monday, November 18, 2013

through the end lot accessing Fox Point Extension cul-de-sac. Mr. Leeburg came before the Board asking for their determination on road frontage.

Abutter Brenda Belonigan of Hannah Lane said she attended the public hearing for the subdivision in the 90's, and she recalled being assured that the access point would be off Fox Point Road, but she would also accept the driveway off Nimble Hill Road. Mr. Leeburg said there would be four driveways in succession on Nimble Hill Road and his preference was for Hannah Lane. Mr. Morgan said there were six meetings on the subject and it was not as clear from the meeting minutes for those meetings that was approved, but said the ordinance requires 200' of continuous road frontage, and neither Fox Point or Nimble Hill Road would meet that requirement.

Mr. Richardson said the ordinance came about in 2008/2009 after the land was subdivided. Chairman Hebert said the tax card listed the property as buildable, but referred to the Fox Point access. Mr. Morgan said the Fox Point access was listed as a right of way so the Watson family could gain access to their orchards. Mr. Morgan said a corner lot has to be 40' from both corners. He said he would like to look into the matter further with the tax assessor. The Board decided that they would continue the discussion at the December 9 meeting.

5) Site Plan Approval Extension: Request by Doloma Investment of Portsmouth, Inc. for property between Woodbury Avenue and Shattuck Way, Tax Map 20, Lot 4C

Attorney Bernie Pelech said the applicant's original site plan had been approved in 2007 and 2008 before the project was postponed due to a down turn in the economy and nothing had been changed in their plan. Attorney Pelech said they had a potential buyer that was proposing the same hotel plan as the original.

Vice-Chair Marconi suggested making a motion to approve the original proposal. Chairman Hebert asked if State permits would be approved on projects that had been delayed from the 2008 economic down turn, and for how long. Mr. Richardson said the permits would only extend five years after approval if site development had begun, but it had not. Chairman Hebert said he thought they would need to go through site plan review and a public hearing again, but it would probably be quicker since they'd already gone through the process and little had changed.

The Board agreed to continue the site plan review of Doloma Investment of Portsmouth, Inc. for property between Woodbury Avenue and Shattuck Way, Tax Map 20, Lot 4C until the January meeting.

Adjournment: Mike Marconi motioned to adjourn, and Jack Pare seconded. All were in favor and meeting adjourned at 10:15 pm

Next Meeting: Monday, December 9, 2013

Respectfully Submitted by: Jane K. Kendall, Recording Secretary

Town of Newington, NH
PLANNING BOARD

Meeting Minutes, Monday, December 9, 2013

- Call to Order:** Chair Denis Hebert called the December 9, 2013 meeting at 6:30 PM.
- Present:** Vice Chair, Mike Marconi; Bernie Christopher; Alternate Member, Peggy Lamson; Board of Selectmen Rep, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner
- Absent:** Jack Pare and Justin Richardson
- Public Guests:** Karen Anderson, Administrator for the Town of Greenland; Ken Anderson, Pickering Marine; Brenda Belonigan; Paul Bogan, VP Operations, Sea-3; Jeff Buxton, Town of Newfields Fire Department; Maggie Cook; Rich DiPentima; Stephen Haight, P.E., Haight Engineering; Bob Keating, Shaftmaster; Dan Latievierre; Troy Leedburg; Attorney, Alec McEachren; Greg Mikolaites, Tighe & Bond Engineering; Michael Mathes; Nicholas Middle, Fox Run Mall Representative; Edna Mosher; Paul Reardon; Attorney Paul Sanderson; Cynthia Scarano, Executive VP & Robert Culliford, Senior VP & General Counsel of Pan Am Railways; John Sullivan; Steven Sawyer; Bill and Sandy Sweeney; Attorney Richard Uchida; David Vincent, Surveyor; Randy Watson; Attorney Patricia Weathersbee; Joey Cresta with "Portsmouth Herald"

1) Public Hearings:

A) Proposal by **Sea-3** to reconfigure its terminal at **190 Shattuck Way** (Tax Map 14 Lot 2; and Map 20 Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and the export of same via ocean-going ships.

Paul Bogan, VP Operations, Sea-3 returned to the Board to continue the public hearing for their proposal after a regional impact notice had gone out to the towns of Greenland, Portsmouth, Newfield and Stratham. Ms. Cynthia Scarano, Executive VP & Robert Culliford, Senior VP & General Counsel of Pan Am Railways were also in attendance to answer questions regarding the rail line.

Mr. Paul Reardon of Patterson Lane, Newington asked Mr. Bogan how many rail trucks would be coming in and out for propane pickup and deliveries a day, and Mr. Bogan said no more than twelve a day. When asked how many homes or business were direct abutters, Mr. Bogan replied that there were a couple of cottages and the Sprague Energy Terminal.

Ms. Karen Anderson, Administrator for the Town of Greenland said they were concerned with railcars carrying LPG going over railroad crossings on their public roads on a daily basis at increased speeds. She asked if there were any plans on training school children on railway safety. Ms. Cynthia Scarano, Executive VP for Pan Am Railways said railcars were using the tracks already, and the number of railcars had always varied depending on the amount of business they were seeing. Ms. Scarano

Town of Newington, NH

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Meeting Minutes, Monday, December 9, 2013

said inspection of the railway crossings came under the Department of Transportation (DOT), and the rest of the railroad came under the Federal Railway Administration (FRA). She said they were under Federal jurisdiction because they were passing through several states and numerous cities and towns so there was no requirement for local approval on the number of cars that passed through. Ms. Scarano said the rails were inspected regularly and were currently approved for 10 mph travel with no plans to increase rail speed at this time. She also said Pan Am Railways is a member of Operation Life Saver made up of employees that volunteer to go into schools to educate students on rail safety, and they could be called to set up a presentation.

Mr. Rich DiPentima, a member of the Portsmouth Conservation Commission expressed concern with LPG railcars passing within 20 feet of the Harbor House Hotel and condominiums, the upcoming Wholefoods Market on Maplewood Avenue, and within 5-20 feet of Atlantic Heights, Spinnaker Point, and other residences and businesses in Portsmouth. Ms. Scarano said it was already an active railroad operating three times a week, and that freight rails operated at slower speeds and not on the same schedule as passenger rails. Mr. Bogan said they had transported propane in various volumes over the tracks since 1995.

Ms. Peggy Lamson, alternate Board member said she understood economic importance of the product, but it was the town's duty to look at safety for their citizens.

Chairman Denis Hebert said the Town had hired an independent railway-engineering consultant, Mr. Steven Sawyer, P.E. with Sebago Transportation Services. Chairman Hebert asked Mr. Sawyer to explain the railroad safety inspection process. Mr. Sawyer said the FRA is responsible for monitoring railway track safety and standards in the region, and the DOT is responsible for railway crossings. Mr. Sawyer suggested they proceed with due diligence and write a letter to the FRA informing them of the proposal and requesting they investigate the condition of the railroad tracks and product carrier, and also contact Mr. John Robinson in railroad inspection with DOT to access and inspect the railways crossings. Chairman Hebert asked how the towns within the regional impact should get involved, and Mr. Sawyer said it would have a greater impact to write the letter as a community effort. Chairman Hebert asked Ms. Anderson if the Town of Greenland would be interested in being included in the letter, and she said they would.

Chairman Hebert asked Mr. Sawyer if the DOT and the FRA would have a forum open for public comment. Mr. Sawyer said he doubted if they would conduct an open process.

Mr. Reardon said he spoke with the Speary inspection crew from Portsmouth and they told him there were multiple deficiencies on the rail line, that there were still materials from the late 1800's to early 1900's. He said he observed bowing of the railroad ties in some areas and gravel laid under them to shore them up. Mr. Reardon said they should be fixed because safety should come before all else. Vice-Chair Marconi asked Ms. Scarano how far the cars would go up toward Patterson Lane, and she said the cars would only go as far as the Sea-3 facility.

Town of Newington, NH

PLANNING BOARD

Meeting Minutes, Monday, December 9, 2013

Mr. Bill Sweeney of Patterson Lane asked if there would be an increase in the number of rail cars and times they passed, and Mr. Bogan said the capacity of the chillers and drying towers prevented more than twelve cars a day.

Mr. Reardon asked where the ships would come in and Mr. Bogan said they would come into the same pier they had used for the past 34 years.

Attorney Patty Weathersbee, representing Matt Mateva who owns two rentals between Shaftmaster and the proposal said her client was concerned about any potential for explosions or acts of terrorism. Attorney Weathersby said they would like to see the construction of passive protection like a berm with a blast wall, fire suppression and improved security to seal off the area. She said she was pleased that the Town had hired Mr. Sawyer as a consultant. Mr. Bogan said they were required by the U.S. Coast Guard to have security plans, monitoring cameras 24 hours a day, adequate lighting, fire safety analysis and meet fire protection standards. He also said they had discussed a berm along the property line.

Mr. Reardon asked where the railroad cars would rest over night, and Mr. Bogan said they would hold six cars overnight on their lot near the chillers. Ms. Scarano said the business owner does all the loading and unloading and they do all the switching of cars.

Mr. Don Lalevierre, who lives at one of his brother's properties on Patterson Lane, said it was already noisy and he was concerned with light and noise. Mr. Bogan said there might be noise from other industry nearby, but there was very little noise from their operation, and they didn't anticipate any added noise impact from the insulated chillers. Chairman Hebert said steel on steel does make noise, but he hoped they would try to minimize it. He said they used berms at Pease and it worked quite well to reduce noise. Attorney Weathersbee asked if the tanks could be moved further north from the residents, and Mr. Bogan said they could only be moved 10-12 feet at best and their location proposal was to give emergency responders space.

Ms. Anderson said recognizing a list of deficiencies would not resolve issues and Greenland would like to make it a stipulation for approval that Pan Am Railroad work with the communities on safety improvements. Chairman Hebert said Pan Am had offered to work with them, but he didn't think the Town could take on any liability by making safety improvements by Pan Am a stipulation for approval as they were under Federal jurisdiction, and it was up to the FRA to do their job.

Mr. Reardon asked if the railroad cars had alarms and fire suppression systems and Mr. Bogan said the operation was manned 24/7, 365 days a year and were trained in emergency safety response. Mr. Reardon asked if water was the only means of fire suppression, and Mr. Bogan said it was the primary source to cool metal to keep it from rupturing and to stop the flow of fuel, keeping in mind that they would want fire to burn the fuel out at the source in some cases rather than allow gas to spread.

Vice-Chair Mike Marconi asked Mr. Bogan what his qualifications in fire safety were, and Mr. Bogan said he was a principal member of the NFPA50 committee and also a fire safety instructor of propane fire emergencies at the Massachusetts and New Hampshire Fire Academy twice a year.

Town of Newington, NH

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Mr. DiPentima asked who owned the tank cars and who was responsible for their maintenance. Ms. Scarano said some customers own their own cars and some lease them, but the Association of American Railroads was responsible for inspecting them. She said GATX was a major leaser of boxcars and tankers. Chairman Hebert asked if they would refuse a car in poor condition, and Ms. Scarano said they only inspected the exterior. Chairman Hebert asked Mr. Bogan what safety measures there were on the cars and Mr. Bogan said after a review of cars bumping into one another, improvements were made in the couplings and insulating front and back with header shields. Vice-Chair Marconi asked if they had cameras to monitor the engineers driving behaviors to avoid derailment as had happened in the Bronx recently, and Ms. Scarano said they did not. He said that was an improvement they might consider.

Mr. John Sullivan of Dunlavy Way in Portsmouth said he lived in a house 50' from the tracks and was concerned that the 10 mph speed might increase to 25 mph. Ms. Scarano said the speed was determined by track classification which was set by the FRA, and was based on the track condition. She said Amtrak passenger rails go at higher speeds and have a higher track classification. Mr. Sullivan asked if the speed was based on the residential areas they go through and Ms. Scarano said it was not.

Mr. Jeff Buxton from Newfields Fire Department said they shared safety concerns because they went through their town as well, and he believed they went through at higher speeds. Chairman Hebert asked why they only went 10 mph through the towns of Greenland, Newington, and Portsmouth, and Ms. Scarano said it had to do with the condition of the tracks.

Town Planner, Tom Morgan said the Planning Board had asked him to locate a LPG fire safety consultant, and the State fire marshal recommended Mr. Nicholas Criscenti, President of SFC Engineering Partnership. Chairman Hebert said he would like legal counsel to review the terms of the contract first. Mr. Bogan said he would like to know the fee, and Chairman Hebert said he could check with Mr. Morgan.

Vice-Chair Marconi asked if there was anyone representing the City of Portsmouth, and no one spoke up, but Chairman Hebert said they had received a letter from Portsmouth Planning Director, Rick Taintor. Vice-Chair Marconi said they should ask the City of Portsmouth to take part in the process. Chairman Hebert asked Mr. Morgan to invite the other towns to participate within the next ten days, and draft a letter to the FRA to investigate the condition of the tracks and the DOT to investigate the railroad crossings.

Chairman Hebert continued the public hearing to Monday, January 13, 2014.

B) Proposal for a lot line adjustment between Dorothy **Watson's** property at **133 Fox Point Road** and the **Mathes'** lot on the corner of Fox Point Road and Nimble Hill Road, Tax Map 17, Lot 11 & 11-2.

Chairman Hebert asked Mr. Morgan to update the Board on what he found out regarding a lot line adjustment stipulations for a single house. Mr. Morgan said Mr. Mathes' potential buyer did not want a stipulation to be referenced on the deed that would restrict future subdivision of the lot, despite limited buildable area due to wetlands

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buffers. Chairman Hebert said they contacted Town counsel, Attorney Rattigan who said the owner could come back to the Board if they wanted to subdivide and they would need a wetlands scientist report, and request a curb cut be added to the plan. Ms. Dorothy Watson's nephew, Randy Watson asked where the adjustment was being made and Mr. David Vincent, the surveyor showed him.

Chairman Hebert asked Mr. Mathes if he had legal authority to represent Ms. Watson, and Mr. Mathes said he had power of attorney through Attorney Bill Boshe

Chairman Hebert said he would like a concrete or granite marker, not just a pin, and Mr. Vincent agreed.

Peggy Lamson moved to accept the proposal for a lot line adjustment between Dorothy Watson's property at 133 Fox Point Road and the Mathes lot on the corner of Fox Point Road and Nimble Hill Road, Tax Map 17, Lots 11 & 11-2. Mike Marconi seconded, and all were in favor.

(Chairman Hebert left at this point in the meeting and Vice-Chair Marconi chaired the rest of the meeting from this point on)

C) Proposal by **Fox Run Mall** to modernize exterior signs throughout its shopping center property at **45 Fox Run Road**, Tax Map 27 Lot 11.

Mr. Nicholas Middle, representing the Fox Run Mall came in response to questions posed to Mr. Keith Boyle with Boyle Studies at the November 18, 2013 meeting regarding the intensity of sign lighting. Mr. Middle presented the same drawings that Mr. Boyle presented. Mr. Middle reiterated that the incandescent lights illuminating the signs on the pylons would have the same 30,000 lumens that they had before and the LED signs on the buildings would only be shining through the lettering, not the entire backboard.

Mr. Morgan said mall management would need to follow the ordinances regarding the size of the wayfinding signs or come before the Board of Adjustment.

Bernie Christopher moved to accept the proposal by Fox Run Mall to modernize exterior signs throughout its shopping center property at 45 Fox Run Road, Tax Map 27 Lot 11. Peggy Lamson seconded, and all were in favor.

D) Proposal by **Pickering Marine** to construct a pier and laydown area near the eastern end of **Shaftmaster Drive**, Tax Map 20 Lot 1.

Mr. Gregg Mikolaites with Tighe and Bond Engineering reviewed the site plan showing how delivery trucks would enter and exit. He said they met with the Conservation Commission and received a recommendation for their DES permits.

Mr. Bob Keating abutter from Shaftmaster said they had no problem with the proposal.

Board of Selectmen representative, Rick Stern asked what they were going to use for the laydown area, and Mr. Ken Anderson with Pickering Marine said they would use gravel. Mr. Stern asked if there were any plans to pave, and Mr. Anderson said there were not.

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Vice-Chair Marconi asked where the run off would go, and Mr. Mikolaites aid it would go into the wetlands buffer.

Peggy Lamson moved to approve the proposal by Pickering Marine to construct a pier and laydown area near the eastern end of Shaftmaster Drive, Tax Map 20 Lot 1. Bernie Christopher seconded, and all were in favor.

2) Driveway Permit Application: Request by Troy Leedberg for land off Hannah Lane, Tax Map 18 Lot 3A.

Mr. Troy Leedburg said he submitted a detailed plan to the Board at the previous meeting and had since checked Google maps regarding question of frontage. He said he also consulted with Attorney Bernie Pelech who informed him that the zoning ordinance reference to road frontage could mean more than one side facing a public roadway.

Mr. Leedburg said the property was listed and sold as a buildable lot since it was subdivided 17 years ago. Mr. Stern asked how much of the property was buildable, and Mr. Leedburg said much of the 20 acres was wetlands with only five to six acres buildable.

Brenda Blonigan of Hannah Lane said she and several others attended the subdivision 17 years before, and recalled the access as being through an easement through private property at the end of Fox Point Road, however she could not find any record of the minutes from that time. Ms. Lamson said Fred Smith was on the Board of Selectmen at that time.

Ms. Maggie Cook of Hannah Lane said all the residents of Hannah Lane were required to have 200 feet of frontage and this lot did not have 200 feet so an attorney would have to determine whether the frontage was on Hannah Lane or Nimble Hill Road.

Mr. Morgan said the application before the Board was for a curb cut, but Town counsel, Attorney Rattigan agreed that Mr. Leedberg would need a variance to build and the Planning Board would have to decide which side is the frontage. Mr. Morgan said the Town changed the ordinance on frontage in 2012.

Mr. Stern said he didn't feel they could approve the curb cut if the lot was no longer considered buildable because of a lack of road frontage, however Mr. Leedburg could have temporary access to cut trees. Mr. Leedburg expressed financial distress at not being able to start building, saying it would cost him an additional \$10,000 for the delay. Mr. Morgan said the ZBA scheduled meetings as soon as they received applications.

Rick Stern moved to table the request by Troy Leedburg for a driveway permit off Hannah Lane, Tax Map 18 Lot 3A. Bernie Christopher seconded, and all were in favor.

3) Land Regulation: Proposal for Shared Driveway Regulations

Mr. Morgan said town counsel, Attorney Rattigan recommended the Board establish criteria for shared driveway permits. Discussion ensued regarding concerns

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for property owners with shared driveways and conflicts that could arise from lack of cooperation with current or future owners. Mr. Stern said he didn't feel shared driveways should be permitted, and Mr. Morgan said that had been the general consensus of the Board.

Bernie Christopher moved to amend the Driveway Regulations so as to prohibit shared driveways and Peggy Lamson seconded. All were in favor with Vice-Chair Marconi voting as well.

4) Additional Discussions:

Mr. Stern said he was not comfortable accepting \$10,000 from Cumberland Farms that was originally intended for a COAST bus stop shelter on Gosling Road near their new building site, but had since been scrapped and was offered to go toward the Town's contribution to COAST bus service. Vice-Chair Marconi agreed and said the Town would also be returning bus stop funds to Tyco since there would be no bus stop shelter near their site either, and it would not be right to keep the money for a different use.

Mr. Morgan said abutters would have to be notified if a condition of approval was changed.

On another matter, Mr. Stern asked if a lot wouldn't be grandfathered as buildable, and Mr. Morgan said the Town used to have the authority to make that decision, but in 2012 the Planning Board presented a warrant article before Town Meeting that frontage could not be included around corners. Vice-Chair Marconi said he thought the applicant had a hardship because the lot was considered buildable at the time it was subdivided, and it was listed as buildable. Mr. Stern asked how the Planning Board could fix the ordinance so it wouldn't happen again, and Mr. Morgan said the Board could rescind the amendment, but it wouldn't help the current applicant who would still have to go through the process of requesting a variance.

Minutes: ***Peggy Lamson moved to approve the Minutes for the October 28, 2013 meeting. Bernie Christopher seconded, and all were in favor.***

Peggy Lamson moved to approve the Minutes for the 2013 meeting and Rick Stern seconded. Bernie Christopher was absent and abstained, all others voted in favor.

Adjournment: ***Rick Stern motioned to adjourn, and Bernie Christopher seconded. All were in favor and meeting adjourned at 9 pm.***

Next Meeting: Monday, December 18, 2013

**Respectfully
Submitted by:** Jane K. Kendall, Recording Secretary

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Meeting Minutes, Monday, January 13, 2014

- Call to Order:** Chair Denis Hebert called the January 13, 2014 meeting at 6:31 PM.
- Present:** Vice Chair, Mike Marconi; Bernie Christopher; Jack Pare; Justin Richardson; Alternate Member, Peggy Lamson; Board of Selectmen Rep, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner
- Public Guests:** Jane and Michael Mazeau; Paul Bogan, VP Operations, Sea-3; Stephen Haight, P.E., Haight Engineering; Cynthia Scarano, Executive VP of Pan Am Railways; Mary Andrews; Jeff Barnum; Brenda Belonigan; Sherry Brandsema; Laura Bygero; Rich DiPentima; Robert Gibbons; Christopher Hayden; John Klanchesser; Paul Reardon;; Don Seeger; Jane and John Sutherland; Pat White; Attorney F.X. Bruton; Attorney Bernie Pelech; Troy Leedberg; Ken and Cathy Latchlaw; Joey Cresta, Portsmouth Herald

1) Public Hearings:

A) Proposal by **Planning Board** to add the following to the **Driveway Regulations**: "No driveway shall serve more than one residential building."

Mr. Michael Mazeau of Fox Point Road said he visited Town Planner, Tom Morgan with his first set of subdivision plans and was told the Planning Board frowned upon shared driveways so he changed his plans, but when he filed his DES application, the Conservation Commission did not make a recommendation for the plan and it was because they said there were other alternatives that would limit the wetlands crossings. Mr. Mazeau asked the Board why they would now want to amend the regulations, which would cause more wetlands crossings.

Board member, Justin Richardson said Mr. Mazeau was correct that the Conservation Commission had not made a recommendation to DES for the original plan, and he still believed avoiding wetland impacts with shared driveways could work if done properly. Mr. Richardson said some towns create condo associations for responsible maintenance, and have statutory authority to lean fees if members do not follow the bylaws. He said Newington has some old land crossings from the original Kings' grant properties and it is challenging to prove ownership and responsibility each time someone purchases a new lot.

Alternate Board member, Ms. Peggy Lamson said she liked the way Mr. Mazeau's shared driveway turned out, but could see how some shared driveways could cause problems

Attorney Bernie Pelech passed out an article from the Office of State Planning regarding shared driveway incentives. He said DES discouraged excessive impervious

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surfaces because of storm water runoff that increases harm to the environment and wildlife. Attorney Pelech said the Newington Master Plan also encouraged the reduction of impervious surfaces and curb cuts for the same reason, as well as the importance of saving pastures and trees to preserve the rural nature of town. Attorney Pelech said fewer curb cuts were also encouraged by the DOT to reduce traffic flow.

Attorney Pelech said there was a meeting in June of 2012 where Mr. Morgan said he didn't have a preference for shared driveways over Town roads, both of which limited wetlands crossings, but the Board voted in favor of a shared driveway over a Town road to keep infrastructure costs down.

Attorney John Bosen representing Mr. Bruce Belanger said there were numerous commercial and residential shared driveways in Newington and an amendment could result in "taking". He said a shared driveway agreement could be drawn up that would run with the property to protect owners.

Ms. Lamson agreed, but said Planning Board members took an oath of responsibility to look out for all citizens, present and future. She said it was good that they went to a public hearing to allow the public to speak before making any decisions.

Chairman Hebert asked Attorney Bosen if he had spoken with Town Counsel, Attorney John Rattigan, and Attorney Bosen said he had, and said he would withdraw his administrative appeal to the ZBA on a December 2013 Planning Board decision that had never been made. Mr. Morgan asked him to send him an email confirming his withdrawal.

Chairman Hebert said Attorney Rattigan said there was a wide range of approaches in towns. He said everyone knew he was not in favor of shared driveways because it could be hard to enforce and capture costs if people were in violation of agreements.

Ms. Lamson said one of the advantages of shared driveways was that they could reduce driveway cuts on subdivisions and improve safety. Chairman Hebert agreed that there could be environmental impacts to individual driveways, but he wasn't sure they were any worse than what runs into Great Bay when people used chemical fertilizers and pesticides on their lawns. Mr. Richardson said there is evidence that stormwater runoff from impervious surfaces also factor in to pollution to waterways.

Vice-Chair Marconi said as a real estate appraiser, he didn't see any change in surrounding property values as a result of shared driveways, and he thought there were environmental benefits. He said he didn't see a problem with shared driveways so long as homeowners agreed with responsible maintenance.

Ms. Lamson said she liked Mr. Richardson's suggestion about referencing agreements in deeds. Mr. Richardson said a deed conveyance was the worst way to specify who made decisions on maintenance costs, and it would work better if created along with a subdivision agreement. Mr. Marconi said the Town allows two property owners on one lot, however. Mr. Morgan said they could have condominium regulations on the site plan. Board member, Bernie Christopher said as a board member and citizen he agreed with Mr. Richardson that shared driveways could be the way to go, but he said as a developer he found they didn't work. Mr. Mazeau said the Town could have an agreement just as they had a culvert agreement. He said the guy at the end of the

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shared driveway would always be willing to pay for plow service or he wouldn't be able to get home during a storm. Chairman Hebert said a town would have to step in to maintain a road for its residents if they were neglected, and it could be a problem if they weren't up to specifications. Board of Selectmen Chair, Rick Stern said they would need to be up to emergency vehicle access standards.

Chairman Hebert said a former Board member had told him that there was something in the regulations that restricted shared driveways, but he couldn't find it until recently. He read from page 124 on the Driveway Regulations that said there could be "...no drive within 15' of abutters' property line," which he said would make a shared driveway impossible as it would abut everyone's property line. Board member, Jack Pare said a waiver under Article A under specific circumstances or exceptions under condominium agreements. He said it would require a work session to work out the details of the procedure. Mr. Morgan agreed. Mr. Richardson suggested they consult with legal council to consider as part of the subdivision regulations. He said they would need to distinguish that a private road is different than a private drive on plans. Mr. Stern suggested that they create standards for private roads and eliminate the complications associated with shared driveways. Mr. Richardson agreed. Chairman Hebert opened the discussion up to the public. He noted that someone had applied for a shared driveway permit after the public hearing had been noticed. A discussion ensued regarding their rights. Mr. Richardson suggested that Mr. Morgan consult with Town counsel to determine the requirements. Chairman Hebert continued the public hearing to February 24, 2014.

B) Proposal by **Sea-3** to reconfigure its terminal at **190 Shattuck Way** (Tax Map 14 Lot 2; and Map 20 Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and the export of same via ocean-going ships.

Chairman Hebert opened the continuation of the hearing to comments from the public.

Ms. Jane Sutherland of Dunlin Way, Portsmouth said she live 100' away from the railroad track. She said she felt the project should not be approved until the tracks had been surveyed and a written report was submitted that the tracks could withstand increased activity and speed had been submitted. Ms. Sutherland shared an article from the "New York Times" that said only 15% of all rails met safety standards, and asked how people would feel if only 15% of airplanes met safety standards. Mr. Paul Bogan, Operations VP of Sea-3 said he did not agree that only 15% of rails met standards. Mr. Richard DiPentima, also of Dunlin Way said this was a statement from the Association of American Railroads and statistics could be changed with an increase of hazards and volume just as it occurred with rail accidents in Canada, New York and North Dakota recently. Mr. DiPentima said these rail cars would not be hauling milk or grain though densely populated neighborhoods and hotels.

Mr. Richardson said the application was for Sea-3 and the Board did not have the authority to approve rail use directly, but he pointed out that propane transportation occurred elsewhere and safety risks were everywhere. Ms. Lamson said it was still important for them to look at the safety of the project that included the rails going

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through communities. Chairman Hebert said the rails were under Federal law, they had the right to operate and the Town could not inspect them because they went through multiple states and townships so they were sending letters to DOT and FRA requesting inspection of the rail conditions. He said the Town he would want a written okay before anything was approved. Ms. Sutherland said they would want written assurances. Chairman Hebert agreed that rail safety was the biggest issue, but the area still needs electric, gas and oil energy to come into the region at an affordable cost.

Ms. Laura Bygero with the Greenland Conservation Commission expressed concern for the safety and environmental degradation of the area. She asked the Planning Board to reject the proposal.

Mr. Jeff Barnum said he attended the meeting with the Conservation Law Foundation at Rockingham county and thought he heard that most of the propane would be sold to regional retailers and very little shipped overseas. Mr. Bogan said that was correct.

Mr. Robert Gibbons of Spinnaker Point in Portsmouth expressed concern with increased rail traffic, and safety risks resulting from the age and condition of the tracks. Mr. Gibbons asked why they wouldn't have safety zones around the propane cars just as they did with the 1,000-foot safety zone around freighters. Mr. Pare said the size of the tankers was a determining factor.

Mr. John Sutherland of Dunlin Avenue, Portsmouth said they were originally told the rails were classified for the cars to run at 10pm, but he recently heard they might go up to 25 mph. Cynthia Scarano, Executive VP of Pan Am Railways said the tracks were a Class I for up to 25 mph, but they currently operated at 10 mph, though that might change. Ms. Bygero said she checked the FRA website and only 10 mph was listed for a Class I rail. Mr. Richardson said they had previously said a Class I was for 10 mph and they could only increase their speed if they upgraded the rails. Chairman Hebert said he wanted clarification from the FRA.

Mr. Frank Higher, Portsmouth and Eliot, ME property owner asked about the impact of the operation on air, water, noise and light. Mr. Bogan said their operation would be smaller than the Searsport, ME proposal and they were not required to do impact studies. Mr. DiPentima expressed concerns for environmental, noise and light impacts beyond Newington that should be considered.

Mr. Barnum said he heard the operation might run 13-16 cars a day, 6 days a week. Stephen Haight, P.E., for Haight Engineering said they were proposing 12-16 cars a day. Chairman Hebert said they would need to come back if there were any plans for expansion.

Mr. Barnum said there had been a verbal statement to DOT that they would run at 10 mph, but he said it was important that there be yearly inspections of the railroad bridges, trestle and crossings.

Ms. Sherry Brandsema of Portsmouth said there were crossings on Maplewood Avenue, which was a major artery in the City. She said she had spoken with a former Portsmouth City employee who said the rail cars used to go through at higher speeds, and expressed concern that they might increase speeds again. She said Portland, ME denied similar requests in the past. She said Newington would be making a decision

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that would affect other communities, and expressed concern that the petroleum derived from fracking might be more flammable than what they have seen previously. Mr. Bogan said he was not a chemist, but he believed the product that was transported in the explosions in Quebec and North Dakota was a different product.

Mr. Bogan said liquid propane was of course flammable, but safety standards were followed and they had an excellent safety record over the last 38 years. They were increasing the number of cars coming in per week, but they were not proposing anything like 90 cars a day as some operations were doing. He said they were not increasing truck traffic exponentially either, and the 50 trucks they were proposing was significantly less than the 200 trucks they used to send out. Mr. Bogan explained that their LPG supply had been a foreign import, but the costs had gone up, and domestic supplies had gone down as a result of fracking so they needed to expand their operation to process domestic LPG coming in before most of it was trucked out to the NE Region, and some of it exported overseas.

Ms. Bygero said she was concerned that the railroads were not transparent about their safety records. She also expressed concerns that other states like ME and VT had taken up some of the costs of the rail repairs. Ms. Scarano said those contributions were only for passenger trains. Chairman Hebert said he could not see the Town making contributions to a business' capital gains.

Ms. Pat White of Spinnaker Point asked how often the cars would run, and Ms. Scarano said passenger rails took daytime precedence and there was no time table for freight cars, but they could run between 2 a.m. and 4 a.m.

Mr. Chris Hayden of Spinnaker Point, Portsmouth said he found it ironic that another town like Newington would make decisions for their community. Chairman Hebert said that was why Newington announced the Regional Impact to surrounding communities and invited their comments. Mr. Richardson said every abutting municipality had legal status as an abutter for commentary. Chairman Hebert said the applicants could move forward so long as they work with the DOT and FRA. Ms. Scarano agreed and said they already had a relationship with them. Chairman Hebert continued the hearing to February 10, 2014

C) Proposal to amend the site approval granted to Cumberland Farms to raze and rebuild a gas station at 97 Gosling Road, Tax Map 34, and Lot 2.

Attorney F.X. Bruton gave a quick update on the drainage easement, and said DOT was slow in their approvals, but thought they should be ready to proceed in a month or two.

Board of Selectmen representative, Rick Stern said the Town would be returning the \$10,000 donation for the COAST bus shelter that did not go forward. Attorney Bruton said Cumberland Farms was still interested in doing something to improve the entrance of the Town, perhaps with a marquee.

Mike Marconi moved to amend the site approval granted to Cumberland Farms to raze and rebuild a gas station at 97 Gosling Road, Tax Map 34, Lot 2 that would include a donation for a COAST bus line shelter. Rick Stern seconded, and all were in favor.

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D) Proposal by **Dolma Investment of Portsmouth, Inc.** to erect a hotel between Woodbury & Shattuck, Tax Map 20, Lot 4C.

This meeting was postponed to the March 17, 2014 meeting at the request of the applicant's attorney, Bernie Pelech.

2) **Driveway Permit Application:** Request by **Troy Leedberg** for land off **Hannah Lane, Tax Map 18, Lot 3A.**

Chairman Hebert stepped down and Vice-Chair Marconi chaired this portion of the meeting.

Mr. Troy Leedberg said he applied to the ZBA and was granted a variance at their December 30, 2013 meeting.

A brief discussion on the width of the driveway ensued and Mr. Leedberg agreed to make the driveway 18 feet.

Mr. Richardson said the general consensus of the ZBA was that the subdivision was approved with the understanding that the lot had sufficient frontage and was vested as a single-family lot. He said the wording of the ordinance did not suggest that all frontages had to be contiguous.

Rick Stern moved to accept the request for a driveway permit by Troy Leedberg for land off Hannah Lane, Tax Map 18, Lot 3A as depicted by the applicant's plan. Bernie Christopher seconded, and all were in favor.

Chairman Hebert said the Board should look more closely at the definitions that required legal counsel and variances. Mr. Stern said there was also a lot of influence and pressure from residents. Ms. Lamson agreed that the applicant went through a lot.

3) **Voluntary Lot Merger Pursuant to RSA 674:39-a:** Proposal by **Ken Latchlaw** for a lot merger at 48 Nimble Hill Road, Tax Map 12, Lot 1.

Mr. Richardson said he had talked with the applicant months ago in reference to the bike path so stepped down.

Mr. Ken Latchlaw said they recently discovered when they were doing their septic system that their house was on two lots with a seven-foot strip between the lots. Mr. Morgan said this came about as a result of the voluntary lot merger statute, which was intended to make mergers easier. Mr. Latchlaw said it was a State approved subdivision, but the Registry of Deeds could not accept a paper or digital deed and required a signed Mylar.

Chairman Hebert said he wanted to be sure they weren't giving someone else's land away. Vice-Chair Marconi said the applicant was correct, and they were not setting a precedent. Ms. Lamson agreed. Mr. Latchlaw said 40 years of taxes showed it as one parcel.

Mike Marconi moved to approve the proposal by Ken Latchlaw for a lot merger at 48 Nimble Hill Road, Tax Map 12, Lot 1. Peggy Lamson seconded, and all were in favor.

Mr. Latchlaw asked if he could get a statement on the approval, and Chairman Hebert asked Mr. Morgan if he would draft a Letter of Decision.

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Minutes: *Mike Marconi moved to approve the Minutes for the December 18, 2014 meeting with corrections and Justin Richardson seconded. Chairman Hebert, Peggy Lamson and Rick Stern were not at the meeting and recused themselves. Everyone else was in favor and the motion passed.*

Discussions:

Mr. Morgan said he received several inquiries from residents that surveyors were seen in town and said he and Chairman Hebert and Selectman Jan Stuart recently met with PSNH who was doing the surveying. He said they were looking into putting in new transmission lines from the Deerfield substation, under Great Bay and through town.

Chairman Hebert said he had discussed making the lines go underground. Mr. Stern said PSNH was switching from supplying electricity to transmitting electricity, and he was concerned they wouldn't put the lines underground. He said the Newington station was getting older. A discussion ensued regarding above ground versus underground lines, the aesthetics and the associated costs.

Mr. Richardson said the site evaluation committee was required to review their plans with municipal boards including the Board of Selectmen, the Planning Board and the Regulatory Planning Commission. Mr. Stern said Ms. Stuart was the point person and they were putting something on the Town website.

Adjournment: **Mike Marconi motioned to adjourn, and Rick Stern seconded. All were in favor and meeting adjourned at 9:30 p.m.**

Next Meeting: Monday, February 10, 2014

Respectfully
Submitted by: Jane K. Kendall, Recording Secretary

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- Call to Order:** Chair Denis Hebert called the February 10, 2014 meeting to order at 6:31 p.m.
- Present:** Vice Chair, Mike Marconi; Jack Pare; Justin Richardson; Alternate Member, Peggy Lamson; Board of Selectman Representative, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner
- Absent:** Bernie Christopher
- Public Guests:** Sea-3, Paul Bogan, Cynthia Scarano, Executive VP & Robert Culliford, Senior VP & General Counsel of Pan Am Railways; Steve Haight, Haight Engineering; Attorney Alec McEachern; Nick Cricenti, SFC Engineering; Senator Martha Fuller Clark; Portsmouth City Officials: Manager, John Bohenko; Deputy Manager, David Allen; Environmental and Sustainability Director, Peter Britz; Mayor, Robert Lister; Assistant Mayor, Jim Splaine; Councilor Ester Kennedy; Councilor Jack Thorsen; Councilor Stefany Shaheen, Portsmouth Herald Reporter, Joey Cresta; Greenland Resident, Laura B; Newington Resident, Paul Reardon; Portsmouth Residents: Lewis Brown; Joe Calderola; Rich and Catherine DiPentima; Pat Ford; Bob Gibbons; Jean Heino; Richard Langan; and John Chagnon, P.E., Ambit Engineering

1) **Informal Discussion:** Update by Seacoast Growers' Association to run a farmers' market at the Crossings.

No one appeared for this discussion so the Board moved on to the next item on the agenda.

2) **Public Hearings:** Proposal by **Sea-3** to reconfigure its terminal at **190 Shattuck Way** (Tax Map 14, Lot 2; and Map 20, Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and the export of same via ocean-going ships.

Due to the large number of regional impact officials and residents in the audience, Chairman Hebert requested that the meeting adjourn from the DeRoachmont Room to the Town Hall auditorium where the meeting reconvened at 6:40 p.m.

Town Planner, Tom Morgan introduced Mr. Richard Cricenti with SFC Engineering who had been engaged by the Town to complete an assessment of Sea-3's site plan. Mr. Cricenti said his review of the site was based on NH State codes as well as comments from the National Fire Protection Association to arrive at an impartial consensus. He said the NFPA would take a vote whether they approved of the site or not and give reasons for their decision. He said local government could not reduce those standards, but they could add requirements.

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Portsmouth City Mayor Robert Lister read his February 10, 2014 letter addressed to Chair Hebert and Planning Board members. Mayor Lister's letter said, "The City was primarily concerned about the public safety implications of increased rail traffic carrying hazardous materials close to neighborhoods and business areas." He also announced the City's web page: <http://cityofportsmouth.com/Sea-3.html> and the City's Environmental Planner, Peter Britz coordination of the City's interest in the project.

Portsmouth City Manager, John Bohenko also addressed the Chair and Board, expressing the City's concerns with the impact that the Sea-3 terminal expansion would have on Portsmouth and its citizens. Mr. Bohenko said they heard from the DOT, but had not heard from the FRA. He said they would meet with the Department of Transportation in the near future for a better understanding of the condition of the rails, and would coordinate their efforts with surrounding towns.

Chairman Hebert said the findings of the Federal Railway Association and the NH DOT were crucial. He said he had informed Sea-3 and Pan Am Railways that they needed to get the FRA to work with the Town.

Board member, Justin Richardson said Newington had received the opinion that they could take no action with Pan Am Railways. Chair Hebert agreed that they could not tell Pan Am what to do, but he said citizens had a right to public commentary and a right to know what the safety conditions of the rail tracks were. He said if the tracks were found to be unsafe, they would want to know what the FRA would do to make Pan Am resolve the issues. He said the FRA had offered to meet Town officials privately, but he would not consider a non-public meeting so there would be no question of transparency. Town could also deny the application if the FRA did not agree to a public meeting and provide them with an inspection report. Cynthia Scarano, V.P. of Pan Am Railways said they were determined to have safe tracks.

Alternate Board member, Peggy Lamson said they did not want to prevent the expansion of this business, but they needed confirmation of its safety. She said this transport would go through several states and NH towns and she felt the time had come to solicit the assistance of their Congressional delegation as well as local representatives and those from Concord.

Mr. Richardson asked Mr. Cricenti if he had discussed the review with the Town fire chief and Mr. Cricenti said he had not, but in the early 1990's the NFPA had changed the fire code to prevent fires by design. He said tanks were designed to absorb heat and the biggest fire would be confined to the longest pipe run so it would burn out. Mr. Richardson said the report mentioned that there was some additional information needed, and said it would be important to get answers to any questions before approval. Chairman Hebert said they wouldn't receive the State's approval until all the information was provided.

Ms. Lamson asked if the U.S. government required the use of odor in gasoline, and Mr. Cricenti said they did not. Ms. Lamson asked how anyone would know if leaks occurred if they didn't add odor to the LPG and how they could make sure that it did. Mr. Cricenti said odor was typically added in tanks, but the Town could make it a stipulation of approval.

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Mr. Paul Bogan, VP of Operations for Sea-3 identified the uses of the structures on the site, and explained their plans for the water-cooling systems. Vice-Chair Marconi asked how often they tested their safety systems, and Mr. Bogan said he believe they were required to test once a year, but they tested the system in the spring and fall.

Mr. Paul Reardon of Patterson Lane in Newington said there was an article in the "New York Times" that said tank cars didn't meet Federal standards. Mr. Bogan said those were a different type of tanker car for oil transport, but all propane tankers had to meet upgraded safety standards that included interlocking couplings so they would not puncture the tanks in the case of a crash, as well as insulated tanks with steel heat shields on the tankers to prevent puncture in case of accidents.

Mr. Rich DiPentima of Dunlan Way, Portsmouth agreed, but said the American Railroad Association supplied extensive studies that there would be "...no loss of product from tanks that traveled less than 5 mph."

Mr. Bogan said propane was a non-pollutant, but Mr. Richard Landry of Laurel Court said the diesel engines were polluting. Chairman Hebert said he understood what he was saying, but they had no jurisdiction over railroad operations because it was already in place and grand fathered.

Mr. Richardson said he thought Newington and Portsmouth should seek legal counsel. Mr. Morgan said the City of Portsmouth had a copy of Pan Am's legal opinion posted on the City website. Ms. Lamson said they should pass that on to their congressional delegation as well.

Mr. Reardon asked why they didn't look at alternate means of transporting the propane on freighters up the Piscataqua River. Mr. Bogan said in 1927 the U.S. Government enacted the Jones Act that said commodities could not be transported from one port to another unless it was U.S. built and crewed and there are no propane freighters built in the U.S.

Ms. Catherine DiPentima of Dunlan Way, Portsmouth passed out a list of safety data on railway accidents and incidents with Pan Am Railways in New England that showed increases over time.

Mr. DiPentima said he was sure the Town would fight against nuclear waste transport, and Board of Selectmen Chair, Rick Stern said there already is nuclear waste transport on the rail lines from the Portsmouth Naval Shipyard.

Mr. DiPentima went through a list of rail accidents and evacuations in various parts of the country. Mr. Richardson asked how much weight they should give to an incident that occurred in Canada and Mr. DiPentima said Canada's standards were higher than U.S. standards. He said 4,000 homes were evacuated as a result of an incident in Lincoln, CA in 2011. Chairman Hebert said there were no explosions in these incidents, but Mr. DiPentima said people were displaced for days and the town revoked the conditional use permit after the incident because the rail failed to apply proper safety procedures. Vice-Chair Marconi asked what the FRA's response was to the incidents, and Mr. DiPentima attributed the incidents to environmental, human or mechanical errors, but none of their own.

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Chairman Hebert reiterated that he was asking Ms. Scarano with Pan Am and Mr. Bogan with Sea-3 to assist the Town in getting the FRA to meet with them. He said the citizens had a right to know the safety condition of the rails and the Town also needed to hear assurances from the FRA before a decision on the site could be made. Ms. Scarano said the FRA did inspections and would act if there were any issues, including drug and alcohol issues and hours of service. She said they would provide correspondence. Chairman Hebert said they needed to see a face and Ms. Scarano said they were a Federal agency. Chairman Hebert said they would go through Federal representatives if necessary to get a response. Mr. Richardson asked if they could get a copy of the last inspection, and Chairman Hebert said they needed the findings as well as what was being done to improve conditions. Ms. Scarano said the inspection report was done by the FRA and was not Pan Am's document to provide.

Mr. Lewis Brown of Laurel Court said Portsmouth filed a Freedom of Information Act petition and the FRA had dodged the request. He suggested the proposal be put on hold until they received more information.

Ms. Jean Heino asked if Pan Am would be financially responsible in case of a disaster. Board member, Mr. Richardson said they could request a bond from Sea-3, Chairman Hebert said they couldn't ask Sea-3 to be financially responsible for Pan Am.

Mr. Gibbons said Seacoast Media received a response from that the FRA had a backlog of requests. He said he also read that Pan Am would not be responsible for any accidents. Ms. Scarano said the railroad carried a substantial amount of liability insurance.

Mr. Richard Langan asked if an environmental study needed to be done. Mr. Joe Calderola said he hadn't heard much about ground water recharge on the site plan. Chairman Hebert said this was a cursory review, and all of the information was not available yet, but they would get more information as they moved forward.

Ms. Laurie B, from Greenland said one of her concerns was that the tracks be improved to accommodate the increase in propane freight traffic. She asked if the trains would be running at a speed of 25 mph. Board member, Jack Pare said it sounded like they needed to do upgrades to travel at an increase speed, and Ms. Scarano acknowledged that they did. Ms. Scarano said the tracks were currently set up as a Class I for 10 mph, but they would be doing improvements to bring the rails up to a Class II that could go up to 25 mph, though they only intended to run them at 10 mph at this time.

Ms. Pat Ford of Spinnaker Point asked if there were be fewer trucks going out. Mr. Bogan said they used to send out 100-200 trucks a day when they were importing fuel, but this operation would only send out 50 trucks a day. Mr. DiPentima asked how they could verify a certain percentage would be shipped overseas, and Chairman Hebert said the Planning Board was not a regulatory commission.

Mr. Lou Salomi of Portsmouth asked what Sea-3's construction time table would be if approved. Mr. Bogan said they expected the project to take a year before it would be operational.

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City Councilor Jack Thorsen asked what action they might take to pursue the use of freighters as an alternate to rails. Chairman Hebert said that would involve changing the Jones Act. Vice-Chair Hebert said that would also require a presidential signature. Mr. Bogan said they had looked into that alternative and were told they could get a short-term waiver, but they would also have to build a vessel in that time period, and they were not in that business. Mr. Thorsen said that was all the more reason to insist that the rails be safe.

Chairman Hebert said the Board could not deny Pan Am's operations, but they could say they needed more safety information from the FRA before they approved Sea-3's proposal for expansion. He said the FRA agreed to meet informally, but they said they wouldn't meet in public. He said the FRA was a servant of this country and they needed the FRA to meet in public for transparency so there would be no perception of behind door deals being made. Vice-Chair Marconi agreed with what Ms. Lamson said that a letter should be written to the congressional delegates to put pressure on the FRA to respond. Mr. Morgan said he had been working with Carol Shea-Porter's staff and Senator Shaheen to gain cooperation and they were preparing a letter to the FRA.

Chairman Hebert informed Sea-3 that they could voluntarily request an extension in writing until more information became available, or the Board of Selectmen or the Planning Board could vote for an extension. Mr. Bogan said he understood the concerns and they weren't avoiding the safety issue of a report from the FRA. Chairman Hebert said Mr. Bogan had been very cooperative with the Board.

Chairman Hebert continued the public hearing to March 10, 2014.

Justin Richardson asked if they would get comments on the project from the Fire Chief and Chairman Hebert said he would meet with the new Fire Chief himself. Mr. Stern said they might also need to review the standards with a qualified consultant.

3) Curb Cut Application: Request by **Victoria & Ben Auger** for a driveway off of **Swan Island Lane**, Tax Map 53, Lot 16.

This item was postponed to March 10, 2014 at the applicant's request.

4) Request for Comments pursuant to RSA 674:41 regarding a proposal by **Great Bay Marine, Inc.** to obtain a building permit to construct a residence off a private road, Tax Map 6, Lot 5.

No one appeared for this discussion so the Board moved on to the next item on the agenda.

5) Old Business: Request by **KWA, LLC** for an extension of site plan approval for office building development off **Shattuck Way**, Tax Map 7, Lot 2A.

John Chagnon, P.E., Ambit Engineering appeared before the Board requesting a two year extension for their application that was first approved in January 2010 and received an extension on December 2011.

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Chairman Hebert asked if there had been any changes. Mr. Chagnon said all their permits were still in place. Chairman Hebert said they would need to return if there were any changes to the plans.

Vice-Chair Marconi asked if they were still planning on using glass on the building. Mr. Chagnon said they were. Vice-Chair Marconi said he was concerned with sun reflecting off the building and blinding drivers along the Spaulding Turnpike.

Vice-Chair Marconi asked when they intended to begin their project and Mr. Chagnon said they hoped to begin in two years once the Spaulding Turnpike expansion was done.

A discussion ensued as to how long the application should be extended.

Mike Marconi moved to extend site plan approval for an office building development off Shattuck Way, Tax Map 7, Lot 2A to 24 months from January 25, 2014 to January 24, 2016. Peggy Lamson seconded the motion. Rick Stern abstained as an abutter and all others were in favor.

6) **Preliminary Discussions:** Proposal by **Barbara Hallett** to expand the parking lot at **105 Gosling Road, Tax Map 28, Lot 1.**

No one appeared for this discussion. Chairman Hebert continued the discussion to the next meeting.

Minutes: ***Mike Marconi motioned to approve the Planning Board Minutes for January 27, 2014 with corrections as noted. Peggy Lamson seconded the motion. Mike Marconi was absent from meeting and abstained from voting and the motion passed with all others voting in favor.***

Discussion:

Mr. Morgan excused himself from the rest of the meeting while the Board discussed Warrant Article 6 that would eliminate the position of Town Planner and would hire a consultant on an as need basis.

Mr. Richardson said he didn't think the Town could operate properly with out a Town Planner. He said it would also affect the Planning Board.

Mr. Stern said there was a suggestion that Newington operate with a planning consultant as Seabrook does, but he said Seabrook has a full-time, paid technical review board. Ms. Lamson said Mr. Morgan started out as a consultant and the position grew into a full-time position. She said he attended and assisted with most all the land use boards.

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Chairman Hebert moved that the Planning Board supported the position of a Town Planner. Peggy Lamson seconded, and all were in favor with one abstention.

Adjournment: ***Rick Stern motioned to adjourn. Justin Richardson seconded, and all were in favor. The meeting adjourned at 9:25 p.m.***

Next Meeting: Monday, February 24, 2014

**Respectfully
Submitted by:** Jane K. Kendall, Recording Secretary

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Call to Order: Chair Denis Hebert called the March 10, 2014 meeting to order at 6:32 p.m.

Present: Vice Chair, Mike Marconi; Bernie Christopher; Jack Pare; Justin Richardson; Alternate Member, Peggy Lamson; Board of Selectman Representative, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner

Public Guests: Attorney Christopher Cole; Attorney Alec McEachern; Attorney John Ratigan; Paul Bogan, Sea-3 Vice President of Operations; Cynthia Scarano, Pan Am Executive Vice President; Robert Culliford, Pan Am Senior Vice President and General Counsel; Steven Haight, Haight Engineering; John Killooy, Federal Railroad Administration Representative; Nick Cricenti, SFC Engineering; John Bohenko, City Manager for Portsmouth; David Allen, Deputy City Manager for Portsmouth; Peter Britz, Environmental and Sustainability Planner for Portsmouth; Portsmouth City Councilors, Esther Kennedy and Stefany Shaheen; Senator Martha Fuller Clark; Portsmouth Residents: Joe Calderola; Catherine and Richard DiPentima; Pat Ford; Bob Gibbons; Jane Sutherland; Newington Residents; Nancy Cauvet; Jack O'Reilly; Melissa Prefontaine; Paul Reardon; Greenland Resident: Laura Bygero; Jeff McMenemy with the "Portsmouth Herald"; Doug LaRosa and Robert Stowell, Trittech Engineering; Attorney Dave Brown; Westinghouse Facility Manager, Fred Miller; David Choate with Choate International

1) **Informal Discussion:** Update by Seacoast Growers Association to run a farmers' market at the Crossings.

No one from Seacoast Growers Association appeared for this discussion.

2) **Public Hearings:**

A) Proposal by Sea-3 to reconfigure its terminal at 190 Shattuck Way (Tax Map 14 Lot 2; and Map 20 Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and the export of same via ocean-going ships.

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Chairman Hebert opened up the hearing and welcomed guests, introducing Portsmouth City Manager, John Bohenko who read a letter from Portsmouth Mayor Robert Lister who was not in attendance.

Chairman Hebert asked Ms. Cynthia Scarano, Pan Am Executive Vice President if it was true that Pan Am Railways intended to upgrade their tracks from Class I to Class II, but still keep to 10 mph. Ms. Scarano said that was correct that they intended on replacing approximately 10,000 ties and a number of cross ties. She said they were planning on upgrading to Class II, which could go up to 25 mph, but they were committed to staying to 10 mph. Chairman Hebert asked if there would be any reason to change the speed, and Ms. Scarano stated that they would not at this point though regulations allowed them to go up to 25 mph. Alternate Board member, Ms. Peggy Lamson asked Ms. Scarano to elaborate on her remark. Ms. Scarano replied that they didn't see any reason to go up to 25 mph at this point, but they couldn't guarantee that they would never go up to 25 mph. Chairman Hebert asked if they would stick to 10 mph for propane. Ms. Scarano said they would, but repeated that the regulations allowed them to go up to 25 mph.

Board member, Justin Richardson asked which portion of the tracks they would be traveling at 10 mph. Ms. Scarano stated that they would travel 10 mph from Rockingham Junction in Newfields to the Sea-3 Plant in Newington.

Chairman Hebert introduced John Killoy, Federal Railroad Association (FRA) Employee and Track Safety Administrator for the New England Region. Mr. Killoy said the FRA regulates the railroad and their partners to improve their tracks and employee safety.

Mr. Rich DiPentima of 16 Dunlin Way said the National Transportation and Safety Board made the recommendation that the transportation of hazardous routes be expanded to avoid populated areas. He said they were increasing the transportation of 20 propane tanks to 3,700 a year on the same route and wondered if the increase was consist with national increases. Mr. DiPentima then asked if twelve cars carrying propane were not considered hazardous materials. Mr. Killoy said the reports were for crude oil, but these cars would be carrying propane. Mr. DiPentima pointed out that they would be going through people's back yards.

Mr. Jeff Barnum, Great Bay and Piscataqua Water Keep said he understood DOT or FRA had not inspected the bridges, and Pan Am's inspection records were only available from the FRA by request. He asked if the FRA had looked at the records. Mr. Killoy said each railroad was responsible for their own bridges and several people would review those records with the railroad.

Chairman Hebert asked if there was any plan to follow up with the inspection findings. Ms. Scarano said both the bridges and the tracks have inspection schedules that were audited by the FRA. Chairman Hebert said he was under the impression that the FRA did inspections with DOT. Ms. Scarano said Pan Am did the inspections on an annual basis. Chairman Hebert asked if Pan Am did inspections and provided reports or if the FRA did the inspections. Mr. Killoy replied that they only had a few inspectors, but they did look at the structure of the tracks.

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Mr. Richardson asked what it would take to upgrade the railroad track to a Class II status and if they submitted a capital improvement plan to the FRA for review or if it was an internal process. Mr. Richardson said he wanted it to be an approvable project, but he wanted to know how the process worked. Mr. Killoy said the railroad owns and maintains the track to whatever standards they set. Mr. Killoy said the tracks would be inspected after the upgrade was done. Mr. Richardson asked when the tracks would legally become Class II and if there was more than one way to upgrade. Mr. Killoy said it would all go together.

Chairman Hebert again asked at what point the tracks would switch from one class to the other and if Pan Am made that decision. Ms. Scarano said whatever they decided to do, they would have to meet the FRA's regulations. Chairman Hebert asked how they would know if they were at that level. Ms. Scarano stated that the tracks would be taken out of service or they would be fined if they didn't meet the FRA standards.

Chairman Hebert asked if they had a capital improvement plan and Ms. Scarano said they needed new ties and cross ties, but they would wait until they had the business before they made the upgrade.

Mr. Richardson asked who would pay for the upgrades and Ms. Scarano said they were privately owned and would pay for their own upgrades.

Mr. Richardson said a utility would have a rate agreement for improvements and asked if there would be a document to show the public a plan for what improvements would be made. Ms. Scarano stated that the last inspection was done in January and the track was not taken out of service. Mr. Richardson said it was his understanding that portions of the tracks were designated as "excepted". Ms. Scarano said cars could still travel on "excepted" tracks so they were meeting regulations. Mr. Richardson said they were being asked to take Pan Am's word even though there was no documentation. Ms. Scarano said the railroad was regulated and they didn't expect town officials to understand railroad design and engineering. Mr. Richardson said experts would clearly understand the operation best, but even utilities had to show plans for improvements, document details and show budgets for the municipalities they were in. Ms. Scarano said various plans were filed with the FRA, including drug testing, speeds, cars, analysis of town populations, etc. and the FRA could audit them. Mr. Richardson asked if they could see a copy and Ms. Scarano replied that they could provide a copy of the regulations that were required to obtain a Class II rail line status. Ms. Scarano said that report wouldn't be available because it was part of the track design. Mr. Richardson said there would always be a budget document, however. Board member, Bernie Christopher said he understood Pan Am was a private organization that didn't want to give out information, but he assumed they gave information to the FRA so wondered why the Town couldn't get that information from the FRA.

Chairman Hebert said it was his understanding that engineers went along the tracks and replaced bad ties as they were found. Mr. Killoy said someone marks the bad ties ahead of time and then someone is sent out to replace them, but no plans would be submitted because the rails were already there. Chairman Hebert said Pan Am went on record saying they would put in 10, 0000 ties and the FRA was supposed

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to enforce the maintenance or they would be shut down. Ms. Scarano said the railroads had to stay within the regulations and they would be subject to fines if they didn't comply. Mr. Killoy said Pan Am owned the track, but the FRA did the inspection and that information was available through the Freedom of Information Act by request through the 96 Form.

Ms. Lamson asked Mr. Barnum, the Great Bay and Piscataqua Water Keeper for his comments regarding the bridge near the Great Bay Discovery Center. Mr. Barnum said the bridge was a wooden structure in the middle of nowhere crossing over the Squamset River at the head of Great Bay. He said he hoped the Board would continue to ask questions until they could get reports and plans for the bridge inspections. He said his understanding from DOT was that Pan Am had bridge inspection reports that were only available to the FRA and he was hoping they could get copies of those reports for review. Mr. Killoy said the FRA would audit their bridge inspections. Ms. Lamson said it was an extremely sensitive area and they needed to be concerned for the estuary that went into the Great Bay water system. Mr. Killoy said the inspectors take their jobs seriously. Ms. Lamson said she took her job representing the Town of Newington seriously too. Mr. Barnum said the same inspection would be required for the bridge in Portsmouth near the State pier.

Mr. Matthew Nania of 18 Dunlin Way said he wanted a better understanding of the inspection process. He asked if they inspected the entire line or just a section, and asked how they could find deficiencies during their January inspection when the ties were covered by snow. Mr. Killoy replied that they don't expect any plans for repairs right after the January inspection when the tracks were covered with snow. He said the FRA inspectors typically make an appointment to go back after the snow melts in the month of May to look at ties that hold rails together. He said defects found during the inspections in January were repaired immediately, however.

Mr. Nania asked if the inspection recommendations were for the current standard. Mr. Killoy said it depended on the current class and if standards were not met, the class could be dropped down.

Ms. Laura Bygero from Greenland said the "Portsmouth Herald" asked the FRA for inspection records from Pan Am in December and wanted to know how responsive Pan Am had been. Mr. Killoy said those records could be obtained from Washington, DC through the Freedom of Information Act. Chairman Hebert said Newington had not submitted a request, but he understood that the "Portsmouth Herald" had. "Portsmouth Herald" representative, Jeff McMenemy said they had not yet heard back from the FRA. Ms. Bygero said letters had been sent to the senators asking for records to be released also. Mr. Killoy said the senators would have to go through the same procedures to request information as well. Chairman Hebert said he read the letter from the senators and didn't get the sense that they asked for safety records. Ms. Bygero asked if they would. Mr. Killoy said he would send Chairman Hebert the link and show him the process for requesting the information.

Ms. Catherine DiPentima of 16 Dunlin Way said everyone, Sea-3, Pan Am, and various representative from the cities and towns were saying they were concerned with safety and the Planning Board had an enormous responsibility for the expansion of

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potentially explosive materials given that Pan Am had five incidents in last the month. She said her house was less than 100 feet from the railroad tracks. She said she was concerned for her family's safety and didn't think she was unique, that others with homes, families and businesses were also concerned. She said with such environmentally sensitive, densely populated residential and commercial areas, there was no reason not to conduct comprehensive studies. Mr. Killoy said the FRA didn't get involved in environmental impact studies.

Ms. Scarano said many goods moved through the country without incident. She said they had no deadlines or plans for any environmental impact studies, but some inspections were done weekly. She said Class I tracks were inspected once a month and Class II tracks were inspected twice a week.

Mr. Joe Calderola of Dennett Street asked if there were any FRA regulations prohibiting the railroad from releasing inspection audits from Rockingham Junction to Sea-3 over the last five years. Mr. Killoy's information could be obtained by going through the proper channels, but they would have to be specific.

Mr. Calderola asked when they did the last audit of Pan Am's internal inspection reports. Mr. Killoy said he thought they did an audit two years ago, but he couldn't remember for certain. Ms. Scarano said Pan Am just completed a hazardous material, a drug and alcohol and dispatchers audit. Mr. Killoy said the track and equipment inspection was done last spring.

Mr. Calderola asked about the safety of the railroad crossings and the cause of a recent accident in Pennsylvania. Mr. Killoy said the crossings were set up for speed and a broken rail caused the accident in Pennsylvania. Mr. Killoy said Pan Am tests crossings, but the upgrades of approaches are from states & towns. Ms. Scarano said states and towns also pay for gates if they are on state and town roads. Mr. Killoy said the railroads sometime donate their labor.

Mr. Bob Gibbons of 135 Spinnaker Way asked Mr. Killoy if he was familiar with the local tracks. Mr. Killoy said he looked at map, but hadn't seen the tracks himself. Mr. Gibbons asked if he was familiar with where the area of "excepted" tracks was and what the limitations were. Mr. Killoy said he had seen the inspection reports and the track on a map, but had not seen the track himself. He said "excepted" tracks were different than Class I and a certain level of degradation was allowed. Mr. Gibbons said he had read that only five hazardous cars were allowed to travel at one time, but then he read a conflicting statement on the FRA website that said there could be a risk of derailment with this amount of hazardous material traveling through a populated area. Mr. Killoy said he thought he was referring to unitrains, but this was a Class I track and incidents were usually as a result of a wheel falling off. He went on to say that events were usually not very significant with propane transportation going about 10 mph. Mr. Gibbons said he thought that would depend how close and how many people were in relation to an incident involving hazardous materials. Mr. Killoy said he thought the tanks were very safe.

Mr. Gibbons asked what the time line was for repairs to the tracks and Mr. Killoy said the rails could be left as they are forever, but it would be in their best interest to upgrade them.

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Mr. Lou Brown of 65 Laurel Court said the existing tracks that passed by his house were grandfathered even though they were on wetlands. He said concerns with freeze thaw cycles would be taken under consideration if new tracks were built there now. Mr. Killoy said the railroads put ballasts under the rails to stabilize and keep them from sinking and heaving in the interest of running the cars smoothly. For clarification, Vice-Chair Marconi said the area was dry before Mariner's Village was built.

Mr. Alhamdan Abdallah of 12 Dunlin Way said he was concerned with safety because the tracks pass by his backyard and his work place in Newington too. He asked if the propane tanks were required to be odorized. Mr. Killoy said the FRA inspects the tanks for safety appliances and structural integrity. He said odorizing depended on the customer and the product, for instance the product would not be odorized if used in a spray can,

Chairman Hebert asked Mr. Paul Bogan, Sea-3 Vice President of Operations to elaborate. Mr. Bogan said their product at the terminal was deodorized. He said propane could be labeled as deodorized when shipped, or equipment could be installed to deodorize it once delivered, and they hadn't decided yet which they would do. Board member, Jack Pare asked why they didn't use an odorizing agent in the refrigeration process. Mr. Bogan replied they didn't use an odorizing agent because it would congeal and cause the system to malfunction.

Mr. Abdallah asked if the FRA inspected tanks and how they rated them for safety and compliance. Mr. Killoy said the customers owned the cars, not the railroad, which just moved them, but they were inspected and typical defects were brake shoes or hand holds. Ms. Scarano added that they would tag a tank found with a defect so it couldn't be moved. Mr. Abdallah asked if Pan Am made sure the tanks cars were compliant. Ms. Scarano said they only did a visual inspection of the outside of the cars or tanks, but rest of the inspection would be up to the person who leased or owned the car.

Mr. Richardson asked if they would agree to put a note on the site plan that the railroad would be upgraded to Class II standards within a given period of time. Ms. Scarano said the capital plan was to upgrade over the coming summer. She went on to say that Sea-3 could put whatever they wanted on the plan, but Pan Am had no control over Sea-3 and they has no control over Pan Am. Attorney Alec McEachern, representing Sea-3 said the issue was that Sea-3 had no authority over Pan Am and couldn't put a condition that the railroad line be upgraded to Class II.

Mr. Richardson said the Board had to consider the health, safety and welfare of the public when reviewing the ordinance and regulations. Attorney McEachern said there was a lot of case law on the issue of jurisdiction and the ability of Planning Boards to regulate the operation of the railroads beyond their jurisdiction. He said he submitted a four page legal memo in reply to Attorney Christopher Cole's letter to the Board that came down to the Town having jurisdiction over what happens on Sea-3's site after Pan Am delivers the product, but Federal law had exclusive jurisdiction over the rails that brought the product to and from the site. Mr. Richardson said he read the cases and thought it was a valid point that the Board had the authority to approve or deny uses on Sea-3's property depending on the hazards to the surrounding community. He said the

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only recourse they would have to protect the public's safety would be to deny the application. Attorney McEachern said it would be illegal to do so because the town did not have the authority to regulate railroad operations. He said they could only enforce their zoning in respect to Sea-3's property, and could not deny the application based on the railroad lines, which was under Federal jurisdiction only. Mr. Richardson said some of the cases ruled that towns were in their authority to deny an application when it did not comply with the zoning ordinance when considering the health, safety and welfare of the public. Mr. Richardson asked if they were to accept that there was a capital improvements plan to upgrade the railroad without any documentation. Attorney McEachern said they had to rely on Federal law in respect to their jurisdiction of the railroad.

Chairman Hebert said he understood what Attorney McEachern was saying in regards to Federal jurisdiction of the railroad lines, but asked if Sea-3 if they would be willing to tell Pan Am they would not accept LPG delivery by rail unless they brought the railroad lines up to safe standards. Attorney McEachern replied that they were suggesting another party besides the FRA regulate the rails and that was illegal.

Ms. Susan Parker of 23 Bayridge Road in Greenland asked if an environmental study be done and what the change of classification might do to the environment. Mr. Killoy said the railroad owned the tracks and it was in their interest to make the tracks stable. Ms. Parker said as a former executive for the Department of Labor she knew how regulations change over time based on new science. She said she thought she heard Mr. Killoy say senators had to go through the same process to obtain information from the Freedom of Information Act just as citizens did. Mr. Killoy said senators couldn't release information without going through the process. Ms. Parker said her experience was that if a Senator Harkin sent a letter, an answer would be expected.

Attorney Chris Cole, a representative for several citizens of Portsmouth said neither he nor his clients were trying to regulate the rails, but they were trying to help the Town regulate this site because it had important safety implications. He asked to look at site-specific questions and didn't think Federal law would agree that was the limit of the Planning Board's power. He said they also wanted to ensure the site could handle the ingress and egress of traffic with propane. Attorney Cole referred to his letter requesting a comprehensive study for the 20 million gallons of propane they were bringing in annually. Chairman Hebert said he planned on asking Pan Am those questions later as they progressed through the review of the proposal.

Mr. Lou Salomi of Spinnaker Way asked what it would take to get the rails to Class II and who would decide if the speed would stay at 10 mph or if it could go up to 25 mph. Mr. Salomi read from a study that said out of 40,000 incidents, there was no loss of product when the train's speed was less than 5 mph, but even at 10mph there was a great risk of damages.

Chairman Hebert asked Pan Am for clarification on whether they were only keeping their speeds at 10mph prior to an upgrade and when they would be upgrading. Ms. Scarano said Pan Am was there to answer questions, but repeated that they were

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not before the Board looking for approval. She went on to say their construction season ran to frost, and if Sea-3 told them their proposal for expansion was approved and they were ready for operation, they would complete their rail upgrade in four to six weeks.

Mr. Richardson said it was his understanding that a Class I rail standard couldn't meet Sea-3's requirements to bring in propane. Ms. Scarano it was correct that they would need to upgrade to meet Sea-3's requirements for a sixteen car train, but she pointed out that Pan Am didn't need approval of Sea-3's building permit to travel seven days a week as a common carrier if a customer called for a pick up and delivery.

Mr. Richardson said it was a conundrum because the regulations said they had to determine there would be no impact on the public safety, and yet they were told they can't regulate the railroad. He said he heard them say they were upgrading to a Class II, but they had no agreement to keep their commitment. Ms. Scarano said towns did not make determinations as shown in case law. Vice-Chair Marconi asked if it would be their determination when they went up to 25 mph once they upgraded to a Class II and Ms. Scarano said that was correct.

A resident from Tidewater Farm Road in Greenland asked if there was any intention of exporting and Mr. Bogan explained that their main focus would be for domestic sales, but they might do some exporting in the summer when demands in the New England region were lower so long as they fulfilled their contractual domestic commitments. Mr. Bogan said they were requesting the installation of three additional towers with a future projection of two, but they didn't know if they would ever do that. Chairman Hebert said they would have to return to the Board for any additional expansion.

Mr. Barnum asked if there were any insurance requirements for propane carriers and Mr. Killoy said there were not. Mr. Barnum asked who would carry the insurance to cover accidents and Ms. Scarano said Pan Am had a considerable amount of insurance and Class II would have more coverage than Class I. Mr. Barnum said he thought the Planning Board would like documentation. Chairman Hebert said he knew Sea-3 had insurance and wanted to know what kind of insurance Pan Am had in case of a catastrophic event. Mr. Culliford said they had a \$25,000,000 insurance policy and had significantly more, but they couldn't make a commitment because of market fluctuations. Attorney Ratigan said this was Sea-3's application, not Pan Am's application.

Mr. DiPentima asked Mr. Killoy to respond to his comment that there had been no accidents at 10 mph considering the American Railroad Institute's findings. Mr. Killoy said he wasn't familiar with that study, but he thought a derailment at 10 mph wouldn't be the same as at 40 mph. Mr. DiPentima said there was no ability to control when Pan Am went up to 25 mph and asked what kind of incident would happen at 25 mph. Mr. Killoy said tank car integrity was typically solid and accidents usually occurred when wheels fell off. Mr. DiPentima said he felt they were being told they wouldn't discuss the results of a catastrophic incident. Mr. Killoy said there could be a lot of variables, but Ms. Scarano said they would be staying at 10mph on a track that could handle 25 mph. Chairman Hebert said he knew the Federal government was reviewing railroad safety.

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Ms. Melissa Prefontaine of McIntyre Road, Newington said they had discussed management plan costs and asked if there was any plan for education for local resources such as the fire and police departments to prepare in case of an emergency and how would pay for that. Mr. Bogan said they provided education to local fire, police and emergency responders over the years in case of accidents at the terminal as well as on the road. He said the Propane Gas Association of New England put together an emergency response document and twice a year they had three days of intensive training with live fire at the NH Fire Academy and in Massachusetts. Mr. Bogan said they have had discussions with the fire chief from Rockingham Junction who has been training his people for the project.

Ms. Prefontaine asked how they would mitigate a spill and Mr. Bogan said they did a little bit of environmental training during the program. Mr. Bogan said propane is a noncontaminant gas. Chairman Hebert added that propane evaporates.

Chairman Hebert said the meeting would continue on March 24, 2014 when the State would come in with more information on inspections.

Dr. Kozinski of Health Harbor on Deer Street said she had a sense that they cared for their customers and as a business owner, she found good will to be paramount, but was not hearing from Pan Am that they were concerned for people's safety. She said they were only seemed to be following the letter of law with limited regulations. She said the rail cars ran 5-10 feet from her parked car and there was a concern for her patients and employees.

Ms. Scarano said she was sorry that she felt that way and pointed out that they were regulated by agencies that knew the design of tracks and bridges and they were going beyond the regulations that were required of them. She said they were making a commitment to go below speed limits on other rails as well. Mr. Killoy said it was true that the FRA regulated a minimum standard, but railroads typically went above that standard, which was in their best interest.

Mr. Jack O'Reilly of Fox Point Road, President of Board of Trustees of Great Bay Stewards that was dedicated to the preservation of Great Bay said they were concerned with the effects that potential accidents and spills might have on Great Bay. He said their board generated a letter that was hand-carried to both senators in Washington, DC. He said they also sent a letter to the FRA who responded with the names of NH contacts, Mr. O'Reilly said he read that a Class I track had a certain site line, and asked if the site line would be met if the tracks were upgraded to Class II and traveled faster at 25 mph. Mr. Killoy replied that towns had to clear brush from crossings, but he didn't think there were any site line requirements. Mr. O'Reilly said that might be, but it stood to reason that a train could only go so fast on a blind curb, and Mr. Killoy agreed.

Ms. Jane Sutherland of 8 Dunlin Way said she lived 100' from the track. She said they heard a lot about track safety, upgrades and regulations. She then shared statistics from an FRA report that listed 140% increase in total accidents by Pan Am in 2013, a 200% increase in track caused incidents, a 166% increase in derailments, and a 200% increase in accidents with reportable damage of over \$100,000. In the previous ten years there was an increase of over 2,400 cars carrying HAZMAT materials. She asked how that happened if all the cars were as safe as they were told, and the tracks

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were inspected regularly then how did that happened and if it raised any concern for the review process. Mr. Killoy said he was not familiar with those statistics, but he knew there were people in Washington, DC that reviewed the statistics. He added that the more materials that were moved, the greater the likelihood that more things would happen.

Portsmouth City Councilor, Esther Kennedy of 41 Pickering Avenue, Portsmouth said she spent a lot of time on the Piscataqua River and was concerned with how the FRA looked at the pilings that the tracks crossed. She also encouraged to the Planning Board to ask Sea-3 put a safety plan together for all the surrounding communities. She said Portsmouth had a fireboat and asked where that fit in. Mr. Bogan said the Propane Gas Association put together an emergency response plan to cover the entire New England area that was distributed to every fire department in New England. Mr. Bogan said it was on the propane gas website and available for any fire dept to bring up on their computer in their fire track. Ms. Kennedy said she was looking for them to support the training and asked the Planning Board to make the agreement as part of their documentation.

Ms. Pat Ford of 135 Spinnaker Way asked for clarification on why Sea-3 was increasing the number of cars they were bringing in and Mr. Bogan explained that they were changing their supply to domestic from foreign import due to domestic market changes. Mr. Bogan explained that they were attempting to supply propane to the New England area at a more reasonable price. In response to further questions as to what was driving the need for site expansion, Ms. Scarano explained that the product didn't need to be chilled when it came in by ship, but did when coming in by rail.

Chairman Hebert asked if Pan Am owned the tracks on Sea-3's property and Ms. Scarano said they did not. Chairman Hebert then asked if the tracks on Sea-3's property were under their regulation. Mr. Steve Haight, of Haight Engineering said Sea-3 owned the existing rail siding, but Pan Am owned everything else. Chairman Hebert asked if Pan Am was responsible for the rail lines as they entered and left the property. Mr. Culliford, Counsel for Pan Am said regardless of who owned the underlying property or where the sidetrack was, all side tracks were regulated under the exclusive jurisdiction of the Surface Transportation Board.

Town Counsel, Attorney John Ratigan said he understood in order to have Federal jurisdiction the rail traffic had to be done by a licensed carrier on a railway, and thought the control of the rail cars shifted to Sea-3 when it was on their property and they were not a licensed rail carrier. Mr. Culliford said that was correct, but the jurisdictional statutes covered transportation by rail car and over sidings, facilities, grounds, yards and tracks that were necessary for transportation and operation regardless of ownership. He said even though those operations did not have licensing for rail operations, the rail operation was still under Federal jurisdiction.

Attorney Ratigan asked if that was independent whether or not there was agreement on the shift of responsibility and Mr. Culliford said that was correct. Attorney Ratigan asked for a description of how that would occur on the site physically once the cars were decoupled, the product was managed and handled by Sea-3 and then the cars were recoupled. Mr. Culliford said Sea-3 had a right to use the side rail as a

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customer, but any attempt by a town to regulate Sea-3's ability to receive rail traffic with a cease and desist, then they would be out of their jurisdiction as was found in the case of the City of Winchester. Attorney Ratigan asked for a letter spelling out the basis for their exemption from town jurisdiction. Mr. Culliford said they already had in their reference to the City of Winchester decision and the customer had a right to request common carrier service by Federal law and any attempt to regulate would be a conflict. He said towns and states realized they couldn't regulate the rails so they had seen attempts to regulate end users, which still met the conclusion that railroads wouldn't exist anymore if they weren't allowed to service customers.

Vice-Chair Marconi asked how long it would take a train to stop at 10pm or 25 mph. Chairman Hebert said it would depend upon the mass Vice-Chair Marconi clarified the question by asking how long it would take to stop a sixteen car train. Ms. Scarano said she didn't know the answer, but was sure she could find it.

Chairman Hebert said was not sure they could satisfy everyone's desire, but he wanted to be sure everyone had a voice and that was why they invited a representative from the FRA to answer everyone's questions.

Chairman Hebert said it was important to bring in propane to the area, but they needed to do it safely. He said the propane would be delivered by another method like tractor trailer trucks if trains didn't do the deliveries and that would put twice as many propane trucks on the roads which would be a lot more unsafe. He said if they couldn't do it safely, then the Board wouldn't vote for it, so they needed more discussion. He said they also needed to resolve truck traffic coming out of Newington with the NH DOT and Sea-3 needed to supply data on where trucks parked, lined up and idled. He said he was very concerned with the condition of bridge crossings and wanted to hear DOT's response to that as well.

Chairman Hebert said he would check with fire chiefs to be sure the operation was as safe as possible and asked Pan Am if there was any training for fire fighters, as they exist. Ms. Scarano said they did classes for towns.

Mr. DiPentima said Section 2A of the site plan regulations said the Board could request safety studies and could ask the applicant for reimbursement. Chairman Hebert said that was correct except they couldn't do studies on the railroad tracks that were under Federal jurisdiction. Ms. DiPentima asked about reviewing the impact to the wetlands and Chairman Hebert said the Board had no authority over the environmental impact of an existing railroad that was under Federal jurisdiction as well, but the Board would look into whatever controls they did have.

Chairman Hebert announced that the public hearing would continue on March 24, 2014.

B) Proposal by Bruce C. Belanger for a 3-lot subdivision at the corner of Nimble Hill Road and Fox Point Road, Tax Map 17, Lot 11-2.

This item was postponed until April 14, 2014.

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C) Proposal by the Estate of Paul J. Beane for a 3-lot subdivision at 233 Nimble Hill Road, Tax Map 17, Lot 4.

Mr. Doug LaRosa and Mr. Robert Stowell with Trittech Engineering appeared before the Board on behalf of the owners. Mr. Stowell presented changes to their plans to configure the lots with a common drive, which has since been reconsidered. Mr. Stowell presented a new plan showing new driveway plans.

Mr. Richardson asked if their new proposal met all the criteria for street construction. Mr. Morgan reminded the Board that they needed to determine if the application was substantially complete before proceeding further. He went on to remind the Board that it was determined at the last meeting that the applicant needed to supply a copy of the deed and a letter from utilities.

Mr. Morgan said he reviewed the subdivision file and believed the application to be mostly complete although he had a couple of concerns with the design such as the drainage analysis that was for a shared drive, but not a street that would cause more hot top. Mr. LaRosa said the drainage study had been upgraded.

Mr. Richardson asked Mr. Morgan what the requirements were for the line of site from the curb cut. Mr. Morgan said the requirements called for 100 feet. Mr. Richardson expressed concern over additional traffic issues on that section of Nimble Hill Road. Chairman Hebert said that was a serious concern that they needed to review carefully. He wondered if it made sense for the curb cut to come off Nimble Hill Road or if it could go through the Town Hall parking lot. Mr. Pare said that would be a problem because the parking lot was not built to the same standard as Town roads.

Further discussion ensued regarding the line of site. Mr. Richardson said he wouldn't mind accepting the application as substantially complete, but they needed a study on the speed, safe stopping distance, line of site, traffic, etc. Chairman Hebert said it was up to the applicant to show the Board a study with the line of sight and then the Town's engineering consultant would review the study.

Chairman Hebert said the applicant would need to restore the stonewall if it was removed for the curb cut. Mr. Morgan said this was one of the most pristine historic properties in Newington with one of the most impressive stonewalls. He said ordinarily applicants were encouraged to have informal discussions before the Board before scheduling public hearings and he regretted that they had not because he had a few design concerns, one of which was where the road ingress was presented. Mr. Stowell said the problem was that they couldn't meet the site distance requirement if they put the driveway in another place.

Chairman Hebert recommended a site walk and to have a wetlands expert review the property because it appeared that they were trying to squeeze a lot of development into a very wet lot. Mr. Morgan said West Environmental had reviewed the property before, but they needed to look at the plan. He said Mr. West reviewed the lot three years ago and said it could support two lots, but not three.

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Mr. LaRosa said the homes would be built on two knolls and there would be adequate drainage. Mr. Stowell said they did test pits highlighted the wetlands. Chairman Hebert said he understood subdivisions and land development was about a person making a living, but some of the land was marginal and he wanted to make sure developments were sustainable and livable.

Mr. Richardson said the statute said the Board had to vote to accept the application as substantially complete or not before going further. Chairman Hebert said they would normally have a work session prior to a public hearing. Mr. Pare said they had not received enough information and he was not comfortable in making a decision yet. Mr. Christopher said his main concern was with the site lines over the hump on Nimble Hill Road.

Mr. LaRosa and Mr. Stowell told the Board they had presented a subdivision plan with drainage, house placement, septic and wetlands and asked why they were being delayed. Chairman Hebert said a lot of paperwork had been done, but it had not been presented to the Board for review. Further discussion ensued whether the application was substantially complete, and how the Board should proceed. Mr. Richardson agreed that he didn't like the way the developer presented the application, and the Board could disapprove, but in a nutshell it looked substantially complete.

Chairman Hebert said they could continue the hearing next month after they did a site walk and had West Environmental and their engineering consultant review the plan. Mr. Richardson said the application was submitted on March 7, 2014 and they had to make a decision if the application was substantially complete before 30 days was up. Chairman Hebert said they still didn't have enough information to make a complete decision to approve the proposal however.

Rick Stern moved to accept the proposal by the Estate of Paul J. Beane for a 3-lot subdivision at 233 Nimble Hill Road, Tax Map 17, Lot 4 as substantially complete. Bernie Christopher seconded and all were in favor.

Chairman Hebert continued the public hearing to April 14, 2014.

3) **Curb Cut Application:** Request by Victoria & Ben Auger for a driveway off of Swan Island Lane, Tax Map 53, Lot 16.

Victoria and Ben Auger postponed this application for a later date.

4) **Request for Comments** pursuant to RSA 674:41 regarding a proposal by Great Bay Marine, Inc. to obtain a building permit to construct a residence off a private road, Tax Map 6, Lot 5.

Attorney Dave Brown appeared before the Board on behalf of Great Bay Marine President, Ellen Griffin to build on a vacant residential lot.

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Attorney Brown said they reviewed the history and did some title work so they could sell the lot. He said there was plenty of acreage and 500' frontage. He said it had been taxed as a buildable lot since 1973 and a subdivision plan with a private road was approved in 1977. He said the private road would have straight site lines and low traffic.

Chairman Hebert asked why the Board of Selectmen were involved. Attorney Brown said it was required by State statute. Mr. Morgan said the Board's function was to review and comment. Mr. Richardson asked if they should have gone to the Board of Selectmen first. Additional discussion ensued whether the road was a Class 6 road or not. Mr. Morgan said it had been determined to be a private road.

Chairman Hebert suggested Attorney Ratigan review the application for a correct interpretation with Mr. Richardson and then go ahead to the Board of Selectmen once everything was in place except the utilities and perk tests, the siting and well.

Mr. Richardson said at some point the fire chief would need to determine if a fire truck could gain access. Mr. Stern said he wasn't sure if that was required if it was a private road. Mr. Richardson said the statute said the applicant would have to waive emergency access if approved. Mr. Morgan said the applicant could tell the Board of Selectmen that the applicant had been paying taxes for many years. Mr. Richardson said Attorney Ratigan should explain further. Chairman Hebert suggested that a surface for a fire truck be able to gain access, and a turnaround would be a factor. Attorney Brown said the fire chief would need to look at the road. Mr. Richardson asked that they bring in the deed and the right of way agreement.

5) Preliminary Discussions:

A) Proposal by Westinghouse to place an office trailer at 25 Shattuck Way, Tax Map 19, Lot 14.

Westinghouse Facilities Manager, Fred Miller came before the Board requesting approval for an office trailer for office space for visiting foreign nationals outside of the main building. He said the building would be three feet off the main building facing Shattuck Way. He said they planned on having a small transformer, self-contained with a restroom with a water holding tank that would be pumped weekly. Vice-Chair Marconi said they wanted to make sure no one would be spending the night. Mr. Miller said no one would be spending the night, but someone might work at night.

Mr. Miller said it would be a standard William Scotsman trailer in use for a period of 24 months. Vice-Chair Marconi said the ordinance normally allow trailers beyond a year. Mr. Morgan recommended that the Board take no jurisdiction because the alternative would be to notify abutters.

Chairman Hebert said permits were based on square footage and asked if the building inspector was aware of the application and would charge accordingly. Vice-Chair Marconi said they also needed to inform the building inspector that they would be there for two years. Mr. Richardson said they could recommend that the building inspector allow a temporary use. Chairman Hebert said that was what take no jurisdiction meant. Mr. Stern said that could mean longer than 24 months. Mr. Morgan

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asked Mr. Miller if he would write the Board a letter that said the trailer would not remain on the site longer than 24 months, and Mr. Miller said he would.

Vice-Chair Marconi moved to take no jurisdiction on the proposal by Westinghouse to place an office trailer at 25 Shattuck Way, Tax Map 19, Lot 14. Bernie Christopher seconded and all were in favor of the motion.

B) Proposal by American Medical Response to garage ambulances in the old Neslab paint shop, now owned by 25 Nimble Hill Road LLC, Tax Map 12, Lot 16.

Mr. David Choate reminded the Board that New England Parts had purchased the building at 25 Nimble Hill Road from Thermo Fisher Scientific and Thermo had leased back 3,500 s.f. for their remaining operation. He said New England Parts ended up moving to another location and was now trying to lease out more space to another tenant, akin to the way Allard Park did to tenants.

Mr. Roland said they planned on using the space to house five to six ambulances and three to four wheelchair vans for their service which transported patients from one medical facility to another, 3-4 wheelchair vans. He said it was a 24 /7 operation of overnight services, primarily transported patients to Portsmouth Regional Hospital.

Mr. Morgan said he considered one of the permitted uses in the office district was storage.

Chairman Hebert asked if the vehicles would be stored inside. Mr. Roland said the State of NH required that all ambulances be housed inside, but the wheelchair vans might be housed outside. Chairman Hebert asked if they would use exhaust or ventilation systems and Mr. Roland said they were looking at both.

Mr. Richardson asked if they needed a variance and Chairman Hebert said they already received a variance when New England Parts Warehouse applied for the space.

Mr. Stern asked how long the shifts would be and Mr. Roland said there would be eight, ten and twelve hour shifts over 24 hours. Mr. Stern asked if anyone would be sleeping there and Mr. Roland said they would not.

Mr. Choate addressed the parking and presented a plan. Chairman Hebert said he would like to see something to scale to show how fire trucks could get in and out. Mr. Choate said the fire chief was there and he had no problems. Mr. Morgan passed out a letter from the fire chief.

Chairman Hebert asked that they put their plans together and work with Mr. Morgan. He said the earliest they could schedule a public hearing would be on April 7, 2014 at the earliest.

Minutes:

Vice-Chair Marconi moved to accept the minutes of February 24, 2014 as corrected. Rick Stern seconded and all were in favor.

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Adjournment: *Rick Stern motioned to adjourn. Bernie Christopher seconded, and all were in favor. The meeting adjourned at 10:35 p.m.*

Next Meeting: Monday, March 24, 2014

**Respectfully
Submitted by:** Jane K. Kendall, Recording Secretary

(The Board approved these minutes on March 24, 2014 with minor corrections.)

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- Call to Order:** Chair Denis Hebert called the March 24, 2014 meeting to order at 6:35 p.m.
- Present:** Vice Chair, Mike Marconi; Bernie Christopher; Christopher Cross; Jack Pare; Justin Richardson; Alternate Member, Peggy Lamson; Board of Selectman Representative, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner
- Public Guests:** Attorney Christopher Cole; Attorney Alec McEachern; Attorney John Ratigan; Paul Bogan, Sea-3 Vice President of Operations; Cynthia Scarano, Pan Am Executive Vice President; Robert Culliford, Pan Am Senior Vice President and General Counsel; John Robinson, NH DOT Rail Inspections; Philip Sherman, P.E., Fire Protection Engineering and Building Code Consulting; Kim Eric Hazarvartian, P.E., Transportation Engineering, Planning and Policy; Newington Fire Chief, Andrew Head; Steven Haight, Haight Engineering; David Allen, Deputy City Manager for Portsmouth; Peter Britz, Environmental and Sustainability Planner for Portsmouth; Senator Martha Fuller Clark; Portsmouth Residents: Catherine and Richard DiPentima; Pat Ford; Bob Gibbons; Jane Sutherland; Newington Residents; Mr. Paul Bagley; Jack O'Reilly; Bill Sweeney; Greenland Resident: Laura Bygero; Jeff McMenemy with the "Portsmouth Herald"

A) Proposal by Sea-3 to reconfigure its terminal at 190 Shattuck Way (Tax Map 14 Lot 2; and Map 20 Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and the export of same via ocean-going ships.

Alternate Board member, Peggy Lamson opened the meeting by thanking Mr. Rich DiPentima and his wife, Catherine of Portsmouth for all their research that they shared.

Mr. Dave Allen, Deputy City Manager for Portsmouth read Portsmouth City Manager, John Bohenko's email to Newington Town Planner, Tom Morgan regarding a preliminary inventory on the condition of rail infrastructure in Portsmouth, which would cost approximately \$2,400,000 for upgrades. He also pointed out that there was over a mile and a half of excepted track, which was the lowest condition grade of track, running through the most densely populated sections of the City.

A) Track Inspection – Report by John Robinson, of NH DOT

Chairman Hebert introduced Mr. John Robinson, railroad safety inspector for the NH Department of Transportation Rail and Transit Bureau. Mr. Robinson mentioned that he had recently discussed track inspections with the City of Portsmouth.

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Mr. Leonard Schwab of 59 Great Bay Drive in Greenland asked Mr. Robinson to address a report that was published in the "Portsmouth Herald" regarding the removal of I.D. tags from the crossties. Mr. Robinson said date nails were something that had been used in the past to monitor the manufacturers and lifespan when rail ties were changed more frequently, but had been phased out and were not required by the FRA. Mr. Robinson couldn't say why they were removed, but they were a popular item with rail fans and were often pillaged. He said a seasoned rail person would be able to tell the age of railroad ties, however.

Mr. Schwab asked Mr. Robinson how he assessed the percentage of ties that were punky or rotten on a 15 mile run. Mr. Robinson said there were between 3,000 and 3,200 railroad ties per mile and Federal regulations were written to address 39 feet at a time. He said in Class I classification eight non-defective crossties in 39 feet were required. He said the location of the ties had to be effectively distributed to support the track, for instance, out of twenty-five ties on a Class I railroad track, five had to be classified as non-defective. Mr. Schwab asked Mr. Robinson if that would mean 20 ties could be defective and Mr. Robinson confirmed that was correct. Mr. Robinson stated that a certain amount of deflection was engineered into tracks to prevent steel failure. Mr. Schwab said he could appreciate the engineering, but it was hard to feel comfortable with those figures.

Mr. Bob Gibbons of 135 Spinnaker Way said the report said he inspected 21 segments and asked if the 39 feet was a segment. Mr. Robinson said the track inspection was done by units and different appliances were considered units. Mr. Gibbons asked if the inspection was from Rockingham Junction to Newington and Mr. Robinson said it was. Mr. Gibbons said there was no mention in the report of excepted track in downtown Portsmouth and Mr. Robinson said they looked at it, but only certain regulations applied. Mr. Gibbons asked how the track in its current condition would handle the proposed propane tanker traffic. Mr. Robinson stated that excepted tracks were available to transport hazardous materials with no more than five cars, but not passenger service. Mr. Gibbons said the proposal was for sixteen cars. Mr. Robinson said that was correct and it would create an operational challenge for the railroad.

Mr. Gibbons asked what it would take to build the tracks back up to Class I standards and Mr. Robinson said generally the replacement of ties, leveling and aligning the track better. Mr. Gibbons asked if it would require a substantial upgrade and Mr. Robinson didn't think so as the difference between excepted tracks and Class I was nominal.

Mr. Rich DiPentima of 16 Dunlin Way said Sea-3's proposal was for twelve to sixteen cars a day. Mr. Robinson stated that Pan Am would only be able to move five cars a day with the tracks in their current condition. Mr. DiPentima asked where the cars would stay and Mr. Robinson said they could resort to leaving the cars at Rockingham Junction, bringing five cars at a time or they could leave some of the cars at the beginning of Portsmouth rail yard, but they could not have more than five cars at a time on an excepted track. Mr. DiPentima said the cars would be unprotected and unguarded. Mr. Robinson said that was correct if the tracks were not upgraded.

Mr. DiPentima read from the Newington Master Plan that stated the railroad tracks in town were not up to par. Chairman Hebert responded that the tracks appeared to be in poor condition, but it was not a qualified statement as Newington had no railroad inspector giving that information.

Mr. DiPentima asked about the safety of track defects and Mr. Robinson said a certain number of defects were not outside the realm of other Class I tracks and they were considered safe.

Ms. Catherine DiPentima of 16 Dunlin Way asked if the six months between inspections was the typical period of time between inspections, saying it seemed like a long time. Mr.

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Robinson agreed that it did. Ms. DiPentima said she lived 100 feet from the tracks and they looked in terrible condition. Mr. Robinson said his focus had revolved around the Down Easter passenger service over the past 10 years and freight lines in this area were standard to low. He said the DOT and the Federal Railroad Association (FRA) did joint inspections, and he had recently mentioned to the FRA inspector that it was time to focus on other lines now that the Down Easter was squared away with the Portsmouth and Newington branch being front and center. He said they walked three miles of track in 2012 and the 32 defects found were promptly repaired within 30 days. Ms. DiPentima said a lot of propane could travel over the tracks in 30 days. Mr. Robinson said the railroads were on notice that they could still conduct business at the designated speeds, but they could not go beyond the 30 days to repair the defects and the inspectors could not go back for another inspection until the 30 days were up.

Ms. DiPentima asked if they reviewed the inspection reports that were released. Mr. Robinson said a "Portsmouth Herald" reporter that requested the reports from the Freedom of information Act sent him a couple of pages of the FRA summary document. He admitted that the document was very hard to follow. He stated that some defects were more severe than others.

Mr. Raymond Faulkner said he lived across the Piscataqua River from Sea-3 in Eliot, Maine and had worked for the U.S. Coast Guard and with environmental compliance for many years and was concerned with the safety of the LPG ships. Mr. Faulkner reminded everyone living close to the rails that Portsmouth had an active rail yard for 67 years. He said all transportation methods had some risk, but he didn't think Pan Am wanted any incidents on their watch.

Mr. Faulkner said there was a speed limit for the Portsmouth traffic circle yet people still went at different speeds. He said roads were in bad repair, the bridge over the Piscataqua was in poor condition, but it was still used. He said there were dangers at railroad crossings and no railroad crossing had a right of way for cars - there were yield signs that said, "Look, Listen and Live" and people had to take some responsibility for their own safety.

Mr. Bill Sweeney of 90 Patterson Lane said there were trees growing between the rails past Sea-3 and asked if there were plans for the trains to continue on that line. Mr. Robinson said the Newington branch ended at the Sprague, but was out of service and it would only be put into use by making the required repairs. Mr. Sweeney said many hunters walked those tracks. Mr. Sweeney asked if there were plans to put them back in use and Mr. Robinson said it was not a secured area.

Mr. Jack O'Reilly asked if there was adequate line of sight and stopping distance at the crossings and Mr. Robinson said trains have the right of way, there was little a train could do if someone crossed in front of it.

Ms. Pat Ford of 135 Spinnaker Way handed out a map of Pease Development and displayed the map with highlighted areas showing the existing rail lines going to Newington, and a proposed line that would return the train line to a former line through Pease. Ms. Ford said this alternate route could eliminate crossings in Greenland, running through downtown Portsmouth, Maplewood Avenue, Christian Shores, Dunlin Way, Atlantic Heights, Spinnaker Way and Osprey Landing, reducing the hazard of railcars going through their backyards and providing for access in case of emergency. Mr. Robinson said he started his position in 2000 and he was not familiar this plan and could not speak on Pan Am's business plan.

Chairman Hebert said the Master Plan discussed what could potentially be done if someone wanted to throw money at it, but the line never continued all the way through Pease and that would take quite a lot of money and time to complete. He said he liked that people

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were throwing ideas out and understood people were concerned with the track, but reminded them that it was not Pan Am that was before the Board.

Ms. Ford said there was a fund called the Railroad Rehabilitation Fund from the U.S. Department of Transportation under the FRA for loans to finance railroad infrastructure that would give public benefits for safety, the environment and economic development with loan terms and repayment periods at current interest rates. She added that Pan Am owned a subsidiary that manufactured railroad ties. Ms. Ford said she had no idea what the cost or time frame would be, but it seemed someone could come up with an alternative route through Pease to reduce the safety risk for residents and improve their business. She asked Pan Am if they would be willing to consider the feasibility. Ms. Cynthia Scarano, Pan Am Executive Vice President said that she didn't believe Pan Am owned that property through Pease any longer. Chairman Hebert said it probably always belonged to the U.S. government and now the State probably owned it. Alternate Board member, Peggy Lamson agreed that the rail was always part of the Federal government. She said continuing the line from Pease to the port was considered, but it was determined that it was not feasible because it was owned by the U.S. government and put away on the shelf. Chairman Hebert said the Master Plan listed a passenger service for consideration, but Pease Development Authority and the State and Federal Government would have to be on board with completing the line, and he didn't see that happening anytime soon. He said the Board had forty-five days to make a decision on the Sea-3 proposal and they probably couldn't even get on the PDA agenda in forty-five days.

Chairman Hebert asked Mr. Robinson who owned the railroad crossings and who was responsible for the costs according to RSA: 373 for municipalities. Mr. Robinson said RSA: 373 was probably the least clear RSA, but it did say that the railroad was responsible for the right of way, the maintenance of signage, signals, and tracks. As for road surface, the acid test was historic documentation on what came first, the railroad or the public way. He said the duty of the railroad was to provide suitable crossings for the public, but the railroad says they build railroad not roads. He said as part of a hearing process, a town official could petition the transportation commissioner for a change of protection. Mr. Robinson would testify on road traffic, number of trains and speed of trains, and the commissioner would make a decision on who was responsible for upgrades and distribution of costs. Chairman Hebert said Route 33 was an example of a major highway with a crossing in front of Lowe's and he didn't know if there were enough signals there and they would need to have further discussions as time went on.

Mr. Jeff Barnum, Great Bay Piscataqua Water Keeper said the railroad was only as good as the bridges. He said there were crossings over waterways in Stratham, Pickering Brook, over Winnicut River in Greenland, and in Portsmouth. Mr. Barnum asked Mr. Robinson who did inspections, how often and where the reports were kept for the Planning Board to review before they passed judgment. Mr. Robinson said he was not a licensed engineer, but he made cursory inspections with railroad personnel. He said he did not do subterranean or underwater inspections himself. He said Federal law required that annual, comprehensive bridge inspection be in place with records, ratings and results of changes available to the FRA and himself. Mr. Barnum said he heard the Planning Board couldn't get a hold of the reports and asked if DOT could review the reports. Mr. Robinson said he would be privy to look at the records and numerical rating system, but it was not likely that a licensed engineer from DOT would do the inspections. Mr. Barnum asked if the Planning Board had to go to the FRA who would get that information from Pan Am. Mr. Robinson said that was correct.

Mr. Richardson said he read RSA: 373:3 and looked online for the DOT regulations for calculations and he couldn't find them. Mr. Robinson said RSA: 373 was listed under the Public Utilities Commission and up to 1985, the railroad went under Public Utilities oversight and then

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was given to DOT. Mr. Richardson asked how the Planning Board would determine cost to municipalities for the project and upgrades to crossings. Mr. Robinson said he thought the City of Portsmouth was exploring the Federal Section 130 Program that a lot safety upgrades and there would be a match with the City. He said the railroad often participates with construction forces for the installation or upgrade of signals at crossings.

Mr. Richardson said the Board was running out of statutory time to make a determination and asked the City of Portsmouth representatives if they would work out those costs, so not to throw a burden on the City's shoulders. Mr. Allen, Portsmouth's Deputy City Manager nodded that they would. Chairman Herbert said the process was new, but Pan Am mentioned they sometimes supplied labor if the towns supplied materials. He said after that the railroad owned and maintained it.

Chairman Hebert said like it or not how this was how the U.S. government set up the railroads and it was not within the Planning Board's purview to tell Pan Am what to do. He said it was they had to get engineering involved and trust the FRA guidelines and what DOT would do and it was in their best interest to begin that process as soon as possible. Ms. Scarano said they were meeting with town of Greenland to begin the process. She said towns and the railroad used to work separately, but they were now trying to sit down together to discuss what to do at crossings and how to proceed.

Chairman Hebert said every crossing needed to be assessed to determine what needed to be done, and to set priorities. He said he didn't know how much it would cost, but the Board was trying to make everything safer if this project was approved. He said the Board had to move away from the railroad, which was not in their purview and look at the site to consider if site changes were necessary. Mr. Robinson said he heard they might consider a third party inspector, but clarified that as the railroad safety inspector for the State, he was free to inspect private and industrial railroad tracks on a State level outside if they felt there was any reason for concern.

Mr. Mark Willis of 16 Caswell Drive in Greenland expressed concern that the railroad trestles were self-inspected and wanted to know why those reports were not available to all citizens. Mr. Robinson said rail bridges were private infrastructure going over public waters and that was why it had come under Federal scrutiny recently so he thought the records would be available through the Federal Freedom of Information Act. He said one of the problems with making inspection reports available to the public was they were open to interpretation that required a certain amount of expertise for proper understanding. He went on to say that a competent inspection would take training beyond his training and he was not an engineer. He said the reports were numerically rated, and if a situation were beyond his knowledge, he would refer to an engineer for his opinion to validate his concern. Mr. Robinson said a railroad employee accompanied a majority of the inspections. He said they were signing off and if he saw anything that was a peril, he would call the FRA immediately and impose an emergency order to stop operations on Federal order.

Mr. Richardson said he understood the railroad was under Federal jurisdiction and the Board couldn't tell the railroad what to do, but he wondered if the Board might be able to discuss the offsite costs and municipal share of highway improvements. Mr. Robinson said DOT could play the role of facilitator, but he never recalled the railroad offering to improve crossings because their top priority was not ride quality, although the railroad did want safe crossings. Mr. Robinson said the railroad owned their own tie company, but they were not road builders so they often referred to contractors. Mr. Richardson asked who would pay for widening the lane if it was necessary on the Maplewood Avenue crossing where major developments were being proposed. Mr. Robinson said DOT made decisions how costs would be allocated. He said after

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a new signal went in at the cost \$150,000 to \$200,000, the railroad had a continuing expense of \$5,000 per location per year to inspect and maintain that signal that the highway uses free of cost from there out. He said the railroad always starts contentiously, but they do want safety, as does the Town of Newington. He said they might like signals at every crossing in the State, but they could not engineer out poor judgment and complacency. He said if gates and bells malfunction, they operate in the most restrictive mode closing town roads. Mr. Richardson asked if signal requirements increased with Class II tracks and Mr. Robinson said the crossings, speed, and the number of trains were a determination, but signalization was not class specific to a class standard.

B) Fire Safety Analysis – Report by Philip Sherman

Mr. Philip Sherman, P.E., Fire Protection Engineering and Building Code Consulting said he reviewed the Sea-3 design against the New Hampshire fire code. He said there was a requirement for a fire safety analysis that was intended to include LPG release and fire to coordinate with local response to consider the safety of workers as well as the public. He said it was centered on product control to keep the product in the piping and equipment where it belonged to minimize hazards. He said an analysis of exposure to other properties, analysis of water supply and protection measures were also reviewed.

Mr. Sherman said Mr. Paul Bogan, Sea-3 Vice President of Operations sat on the board and they came to a meeting of the minds with some modifications to ensure sufficient water to support the installation, relocation of the hydrants as necessary, and fire access through Sprague and the rail right of way. Mr. Sherman said they looked at all the required setbacks at the site and adjacent structures off site and a decision was made to provide fixed water spray so someone at the control booth could press a button and everything could be sprayed and cooled, depending where the incident was.

Chairman Hebert asked Mr. Sherman if he was a P.E. and if he put his stamp on the plans. Mr. Sherman said he did put his P.E. stamp on the plans, and Chairman Hebert said another P.E. would review the plan before approval.

Board member, Jack Pare asked where the existing fire monitors would be relocated for flexible use. Mr. Sherman said the existing monitors were on a nozzle attached to hydrants. He said they were of some use in a fixed site, but of no use for multiple sites. He said that was part of what drove them to a fixed water spray system directed at the tanks. The hydrants would be used in conjunction with the fire dept. Mr. Pare asked if fire monitors would not be reutilized and Mr. Sherman said they would not.

Mr. Pare asked if the UV detectors detected flame or non-odorized vapor. Mr. Sherman said there were flame detectors. Mr. Pare asked if there were any sniffers and Mr. Sherman said there were not. Mr. Bogan said UV and gas detectors were already in place and they would duplicate that with state of the art equipment for the new construction.

Mr. Pare referred to increasing the number of LPG trained firefighters and asked about training firefighters in Newington and surrounding communities. Mr. Sherman said Newington had a small number of firefighters on duty so firefighters from surrounding areas would respond. He said they took a conservative view of available labor that included firefighters and first alarm people on duty. Mr. Bogan said they provided training in the past and would again for Newington, Portsmouth, Greenland and Stratham.

Mr. Pare asked if there were a train accident, would the training address that kind of effort. Mr. Bogan said yes, there was an emergency response plan to address off site incidents, which was on their website as well. Mr. Richardson asked what resources that Sea-3 had on

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site should an accident occur and what Sea-3's role would be. Mr. Bogan said Sea-3 had equipment and personnel available to go to the scene. Ms. Chairman Hebert asked Pan Am if they provided training to fire fighters to respond to an accident off site. Ms. Scarano said they often worked with the FRA to provide a day of training for local fire departments.

Chairman Hebert said there was a mutual aid agreement with different towns. He said there would be an on scene commander, which was usually the fire department head that would call for assistance with their apparatus and equipment to stabilize the scene. Newington Fire Chief, Andrew Head agreed. Chairman Hebert said hazardous and flammable materials like jet fuel or heating fuel could contaminate the soil and environment, but these responders would control propane that usually remained contained.

Chief Head said if something happened down the track off the Sea-3 site, they would be called to assist, but it would not be their responsibility and the railroad police would be there quickly to respond. Mr. Richardson said there had been an incident with an engine fire that Newfields or Newmarket responded to and had to burn for a while because the equipment was in the way and they couldn't put it out. He asked what the local fire departments would do to respond to a fire. Chief Head said they would have the party in charge of the equipment explain what the best way to put the fire out would be. He said they might use lots of water to keep a tank cool, or if necessary, allow the spill to vaporize or burn off depending on the circumstances. Ms. Lamson asked if it would be the Newington fire chief's responsibility to seek the assistance of Sea-3 if there was a disaster on the rail line once the tank filled with propane left Sea-3. Chief Head said they could look to Sea-3 for information, but their doing anything more would be a liability.

Chairman Hebert asked if the fire department had what it needed for training and equipment to respond. Chief Head said they were in the preliminary stages, but he thought they were all set. He said he hadn't seen the system yet, but there was only a short distance of track in Newington off the facility. He said if the proposal was passed, they would review the full plan, but everything in their area should be in place, along with the fire trucks. He said they would also seek any training available. Mr. Bogan said funding from the National Propane and Gas Association would pay for the training.

Mr. Pare noted that they listed the public water supply, but asked if it would be worthwhile to install a dry stand pipe for the nearby Piscataqua if there was not enough pressure. Mr. Sherman said the intent was to see if there was enough water and the intent of the flow test was to see if there was enough pressure. Chairman Hebert asked if the nearby salt water could be used. Chief Head said there was too much of a draft pull and it didn't work. Vice-Chair Marconi asked Mr. Bogan if the facility had a backup tank and Mr. Bogan said they did. Mr. DiPentima said there was a derailment of a propane tank car in near Woodbury Avenue and Market Street in August 2001 that fortunately didn't have any loss of product, but that might change at 25 miles per hour. He asked if they had written evacuation plans for the hotels, restaurants and shops within a one-mile radius in a catastrophic event of an LPG explosion that addressed how long it would take and where people would go. Chief Head said Newington was his jurisdiction and it would be up to Portsmouth to set up their own evacuation plans. Chief Head said two years ago they did drills with the State for evacuation for an incident at the Seabrook nuclear power plant. Mr. DiPentima said he helped write the Seabrook evacuation plan in the 1980's for a stationary site, but this was a mobile hazard going through densely populated areas and thought they needed plans in place for a catastrophic event of regional impact to prevent the loss of life and destruction of property. Chief Head said the State emergency management plans included evacuations with escape routes for the whole area, but he didn't know of any drills.

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Mr. Richardson said it was his understanding that part of the Clean Air Act was an emergency response plan for the Sea-3 facility that Newington participates in. Chief Head said they would receive a 911 and they would investigate any reports of leaks and recommend an evacuation of everyone in the area, including the malls with the assistance of the police department to get everyone on the highway. He said they were working on a phone tree system in conjunction with some of the other industrial facilities.

Chairman Hebert summed up by saying the fire chiefs from each town were responsible for emergency responses for their area and would call for assistance from other towns. He said it would be similar to the emergency response required for any incident involving an LPG tanker going down the highway. He said he was not trying to defend Sea-3 or Pan Am, but scenarios change, so they prepared with apparatus, equipment, personnel, and chains of command and practiced what they could on a regular basis. Chairman Hebert said the simulators used for putting out fires were all propane, which they could control better than oil fires, which were hazardous to the environment.

Mr. O'Reilly said the chief was co-director of the town's emergency plan, which included flooding, hurricanes, etc. and suggested they work with Sea-3 to include propane fires if they didn't already have that in place.

Mr. Richardson said there were requirements for separation distances and fencing in their plan and asked if there were any concerns with security. Mr. Bogan said that would be part of their upgrade with security, fencing, lighting, and surveillance. He said U.S. Homeland Security governed them and they would have to upgrade their plan if they went forward with the project.

Senator Martha Fuller Clark said the emergency response booklet to communities was developed in the 1980's and she wondered if it had been updated. Mr. Joe Rose, President of the Propane and Gas Association of New England said they updated their plan twice a year. He said the focus of the plan was to provide resources and tools for fire services that they might need to control situations should they occur. He said they had three day practice sessions with live fire and an actual rail car and rail car head with valves and fittings to teach fire fighters what would actually happen. Senator Clark asked who would address the plan for evacuation and Mr. Rose said that would be the local fire chief and the emergency management plan.

Board member, Chris Cross asked if the fire trucks were expected to drive over the railroad tracks for emergency access. Chief Head said Shaftmaster would have to lose some parking spaces for the trucks to fit and they were also concerned with where rails cars would be stored. Mr. Cross said driving over rails would be constraining and he thought a suitable secondary route would need to be available, plowed and maintained. Mr. Sherman said fire safety code required fire access roads before they could obtain a legal permit. Mr. Bogan said a second access would be built to code beside the tracks so trucks wouldn't have to go over ties.

Mr. Cross said the site plan for compressors, pumps and other facilities appeared to use overhead lines and he wondered if they might run underground. Mr. Bogan said Public Service lines were already running over them, and they could run future lines from the pole underground. He pointed out that fire codes from the Propane and Gas Association that would determine how many feet away electric lines would have to be from the equipment and that would be reviewed. Chief Head said the power lines to compressors would run underground.

C) Traffic Study – Report by TEEPP, LLC

Mr. Kim Hazarvartian, P.E., with Transportation Engineering, Planning and Policy reviewed his traffic assessment regarding truck traffic. He said the site had a waterside

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component with bulk transport vessels, the rail side, and the land side component with LPG transport trucks. Mr. Hazarvartian said the trucks left the site, went down Avery Avenue, down Shattuck Way and then split directions up the Spaulding Turnpike or down I-95. He said site modifications would not materially affect the trucking component, which would stay the same with a capacity of filling ten trucks per hour. Mr. Hazarvartian reviewed the truck transportation history from February 2002 to present with an average of 103 to 161 trucks per day for all years except 2012 and 2013 due to market conditions. He said the site changes would not increase those volumes, as the site capacity was limited to ten trucks an hour.

Mr. Richardson asked how many trucks could be on the site at once, and asked where trucks queuing at the gate would go. Mr. Bogan said they had five transport loading spots, but they had an agreement with Newington Energy to stack trucks if they were backing up on Avery road.

Mr. Hazarvartian said at ten trucks an hour in a sixteen hour day, there could be as many as 161 trucks. Discussion ensued whether it would be possible for more trucks to come in and out of the site. Mr. Bogan said they had to factor in the time for drivers to pull on and off the rack. He also said they didn't have capacity to store rail cars, so they would unload product and store it in tanks.

Chairman Hebert asked about ships. Mr. Bogan said they would fill local market contracts and demands in the winter months first and then they could export any remaining product in summer months.

Mr. Morgan asked if they had any idea where the customers were and the percentages of product going north and south. Mr. Bogan said he thought it might be an even distribution between, New Hampshire, Maine and Massachusetts. Mr. Morgan said they relied on historic data for truck trips, but the propane market was expanding and he thought it might be helpful to get some information on consumer trends. Mr. Rose said New England was the only place in the United States where the demand for propane was increasing at a rate of 8% over the last five years because customers were converting from oil for clean and cheaper propane. He said Sea-3 distribution was constrained by the reality of a twenty-four hour day with a maximum of 200 trucks a day at peak capacity.

Mr. Morgan wondered if they could increase more than one train per day to supply product for export if recent events in Ukraine created a bigger demand in Europe, and how that would affect traffic. Mr. Bogan said the capacity of their chilling, drying and storage equipment could only handle sixteen cars a day and they would have to expand, but he didn't believe there was room at their site for required setbacks. Mr. Rose said they would have to have space for extra rail cars. He said New England's propane supply was 75% dependent on rail, but 87 million gallons came in by ship this winter because rail cars were not available and couldn't keep up. He said most of the gas for Europe came in quicker and cheaper from North Africa, across the Mediterranean. Mr. DiPentima said he didn't see how they could meet the increasing demands of propane without increasing truck traffic beyond historic levels. Mr. Hazarvartian said the decrease in traffic in 2012 and 2013 was an anomaly and they were only returning the level of traffic that they had previously, not increasing it from that number. Ms. Laura Bygero of Greenland expressed concern that Sea-3 might expand as an exporter to foreign markets that would bring in more propane tankers over the rails and that Sea-3 would return to the Board at a later date with a request to expand their capacity. Mr. Bogan reiterated that they had to comply with fire and safety setback regulations and they couldn't expand beyond 16 tankers a day because of the size of the property.

Ms. Bygero said it was harder to build a gas pipeline than rail lines so the shortage of rails was a national issue that was being looked at to address the increase of supply coming out

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of fracking. Mr. Bogan said there was a difference between LPG and natural gas. Chairman Hebert asked if natural gas could be brought in and processed as Sea-3 for shipment, and Mr. Bogan said they could not be mixed and they were only doing LPG. Chairman Hebert said by law no board could restrict a business from making expansion proposals; they could only evaluate them fairly by law.

Mr. Richardson said he understood there was a limit to how much propane could be processed, but they couldn't use that as a stipulation for approval any more than they could require the railroad to upgrade to a Class II or limit the number of trains. Chairman Hebert said they couldn't regulate the rails, but they were reviewing the traffic study on the number of trucks going in and out of the facility, which had a limitation on how much product it could process due to the site limitations. Mr. Bogan again stated that the equipment could only handle 16 cars per day, unless there was a change in design and they were not doing that.

Mr. Mark Willis of Greenland said he was confused because the number of tankers and trucks reported was inconsistent. Chairman Hebert said the operation would be sending out the same average number of trucks a week depending on the demand as it had in the past. He added that the site had a limited capacity for processing and storage so there was a limited number of tankers that could come in as well. Ms. Scarano said there might be fewer tankers sent out some weeks, but those were the maximum numbers. Board member, Bernie Christopher asked Mr. Bogan to elaborate on what their storage capacity was. Mr. Bogan said they were bringing in 180 million gallons a year by ship and were proposing 16 tankers a day, but they would fall short during a peak year so additional product would be pumped out of the summer storage to make up difference during the heating season. He said eventually the tanks would be empty and then they would only operate on 16 tankers a day.

Mr. O'Reilly said it came down to economics – it was cheaper to buy domestic propane than importing foreign supply, so it was a matter of increased profit, but capacity was still capacity and that was not changing. Mr. Bogan said that was correct, that the expense of foreign supply had priced them out of the market over the last couple of years and this was an attempt to keep up the domestic supply at an affordable price.

Ms. Jane Sutherland of Dunlin Way said she thought the application was for export, not regional distribution. Chairman Hebert read Sea-3's application to reconfigure their LPG terminal to accommodate rail deliveries, truck shipments throughout New England *and* export via ocean going ships. Ms. Catherine DiPentima asked if there was a change of process if the application included export. Chairman Hebert said even if they were changing the method that they did business, it was still the same business with the same number of trucks going out so the Board could only look at changes to the site. Mr. Richardson said the zoning ordinance and site regulations applied to the site changes to accommodate the rail to plant changes, but the existing use for trucking LPG was approved in 1996 and it was in effect grandfathered as an existing, lawful use. He said the Board could only revoke approval if they were to expand beyond that 1996 agreement that would have to come back to the Board or Energy Board.

D) Emergency Response – Report by Fire Chief Andrew Head

Chairman Hebert said the fire safety details of an application were worked out with the Fire Chief and the State Fire Marshall. If issues were not addressed, the Planning Board backed the Fire Marshall up.

Mr. DiPentima said he read about the Pan Am incident that occurred recently in Westford, Massachusetts where propane tankers were teetering on a bridge and Pan Am didn't notify local officials. He said the only way it came to their attention was when the local Fire Chief

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drove by. Ms. Scarano said local fire and police were notified, but the town manager was not notified. Mr. DiPentima said he heard there was no Federal regulation to notify local officials. Ms. Scarano said that was true, but she was not going to have a disagreement with the town manager in the newspaper.

Board of Selectmen representative, Rick Stern asked Chief Head how many people a year they sent out for the propane safety training. Chief Head said they try to send out two in the spring and two in the fall, but everyone in the department went through the training two years ago. Mr. Stern asked if he had been to the training and Chief Head said he had not, but others in the department had.

Portsmouth Assistant Mayor, Mr. Jim Splaine said he was chair of the traffic safety commission in the late 70's when Sea-3 was starting and they were quite concerned with the rail track conditions at that time. The police chief and the fire chief at the time worked out an informal arrangement to receive notifications of the Sea-3 rail traffic, which they shared with local fire departments. He said it seemed quite useful to the planning and preparation for any emergency that might occur, and he wondered if Chief Head would find such an arrangement with Sea-3 and Pan Am agreeable. Chief Head said there were few rails that came into Newington, but they received lists of ships once a day, including propane shipment notices from the Coast Guard so he imagined a list from the railroad would be helpful.

Chairman Hebert said the Board couldn't regulate or restrict the railroad, but he thought it was reasonable for Pan Am to work out a schedule voluntarily out of consideration of the noise impact to the local community. Ms. Scarano said the railroad operated on an as needed basis that was not scheduled, but they did give as much information as possible on what was going over the rails to the fire department. Chairman Hebert said they had said they planned on upgrading and replacing 10,000 cross ties, and he was asking if they would set up a liaison with the community and voluntarily avoid noises such as running engines in the yard unnecessarily. Ms. Scarano said she personally took calls from the community and they wanted to do what they could. She said they had a safety person who would work with local fire departments, but they were not a scheduled service so they would not be willing to make an agreement at anytime. Chairman Hebert said there were some things about the railroad that were outdated and needed to be reviewed, but that was not within the Board's purview. However, he did think there were some things the railroad could do to keep a good community relationship going.

Ms. Bygero said as a Great Bay steward she was asked by their president to express their concern for the environment and supported a request by the Portsmouth community to request a comprehensive safety and environmental impact study. She said they would also like to ask Pan Am to release their bridge inspection reports. Ms. Scarano said the bridges were inspected all the time, but they did not release their findings publically. Ms. Sutherland said no one understood how they could do an objective and thorough study on their own equipment without a conflict of interest.

Attorney Ratigan said Federal law was clear that local government had no say over environmental regulations in regards to rail improvements. Chairman Hebert said the reason these powers were given to the railways that were built across the country a long time ago was that they weren't going to ask for permission from every town they went through and those Federal laws hadn't changed. He suggested the only way to change things was to ask representatives in Washington to change the laws. He said they had discussed it with legal counsel for many hours and the Board could not consider anything to do with the rails, not even on site, but he hoped Pan Am would cooperate voluntarily to mitigate the impact on the communities.

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Mr. DiPentima asked about the issues that affected the public health, safety and welfare. Attorney Ratigan said they listened to fire and traffic studies and the Board would review their finding with an independent consultant, but purview of the Board was limited to the Sea-3 site and they had no jurisdiction over the rails and rail traffic.

Chairman Hebert said cheap fuel could come through ship, but the Jones Act said they couldn't go from U.S. port to U.S. port unless it was piloted and crewed with a U.S. made ship and there were none. He said the Jones Act was another law with unintended consequences that was hurting the country. He said they could only go to their elicited officials to change laws. He said it had been an educational process for everyone.

Mr. Gibbons said there were many subjects that could not be discussed or disputed by the Planning Board, but there was an economic impact that will be thrown on all the abutting communities to protect citizens from increased traffic and speed hazards by building gateways across Maplewood Avenue and Market Street where there was high traffic. He said the expected time of travel would be in the early morning hours after bars let out, which would require an increase in safety considerations. Chairman Hebert said Pan Am worked with towns in the past to share costs, and Mr. Robinson said the State set up the process. He said unfortunately, there was more traffic as towns and cities grew. He said everyone liked the region and resources, and sometimes that meant that something like a railroad or a power line was proposed near people's homes in the interest of benefiting the larger community as a whole.

Senator Clark said she understood there were some difficulties with an alternate line, but asked if there was any way that Newington could reach out to the PDA to discuss a solution if it was practical and responsible to find an economic and safe solution to avoid dense residential and traffic areas. Chairman Hebert said they would ask those questions.

Mr. Richardson said they had been told that the lines would be upgraded to Class II and he thought it fair to say that these things would be done. He said the zoning ordinance called for determinations that they make sure projects were safe for neighborhoods. He said cases had been cited, and the idea that the Board could do nothing was something he would look into. Attorney McEachern said Pan Am said the lines would be upgraded to Class II, not the applicant. Ms. Scarano agreed that Pan Am came because they were asked to and they did not have an application before the Board.

Mr. DiPentima said this project had been declared as a development of regional impact and other towns had limited abutter status. He asked why the Planning Board couldn't ask the Portsmouth City Council and other planning boards to vote to see if they were in support or not. Chairman Hebert said there were near the end of the road regarding new information and the Board would need to make a decision soon and they could continue the discussion at the next meeting on Monday, April 14, 2014.

2) New Business: PSNH Transmission Lines

Chairman Hebert said the Town had just begun communicating with PSNH who was doing preliminary land surveys, borings, identifying types of soil in the river in consideration of replacing their distribution lines with transmission lines from Durham through Gundalow Landing to Hannah Lane. He said they were proposing going above ground by Hannah Lane and were told the town wouldn't accept the lines above ground. He said they were also looking at alternative routes. He said the schedule was for this and next year to be completed by 2015.

Mr. Paul Bagley of Hannah Lane said the right of way was already there and thought they could do whatever they wanted. Chairman Hebert said their right of way was for a distribution line and they might over burden their right of way with transmission lines, but he

Town of Newington, NH
PLANNING BOARD

Meeting Minutes – Monday, March 24, 2014

wasn't sure what the easement said. Attorney Ratigan said PSNH might talk to residents while they were doing their surveys about acquiring additional land to widen their right of way and it would be helpful to let the Planning Board know so they could negotiate with them. He said PSNH had the right, but they typically didn't like to use eminent domain. Mr. Bagley said it sounded like they were similar to the railroad, but he had a little hope that he would get compensation.

Chairman Hebert said there was legislation in the State to regulate above ground power lines. He said they tried to put language in that would require them to show why they couldn't go underground. Mr. Bagley said the lines had to be buried underground on the Frink farm because of air traffic, but Mrs. Abbott's lot was right in front of Hannah Lane. Chairman Hebert said the Abbott property on Hannah Lane could be in a good position because there was more land. Mr. Stern said needing more land could encourage them to bury the lines instead of buying the land.

Chairman Hebert said they were staying in contact and the Town wanted to be involved in the process of routes chosen. Mr. Bagley asked if there was a better route. Chairman Hebert said possibly on the other side of Arboretum Drive, or at the edge of Great Bay Wildlife Refuge. Mr. Richardson asked why would need to go near the refuge. Chairman Hebert said it was near the river following the boundary of the refuge. Ms. Lamson said she believed they were surveying beyond Welch's Cove and agreed that the refuge boundary could be a good spot.

Minutes: *Mike Marconi motioned to approve the Planning Board Minutes for March 10, 2014 with changes. Ms. Lamson seconded the motion, and all members voted in favor.*

Discussion: Chairman Hebert recommended having a work session with Attorney Ratigan before the next meeting

Adjournment: *Mike Marconi motioned to adjourn. Bernie Christopher seconded, and all were in favor. The meeting adjourned at 10:15 p.m.*

Next Meeting: Monday, April 7, 2014

**Respectfully
Submitted by:** Jane K. Kendall, Recording Secretary

Town of Newington, NH
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Meeting Minutes – Monday, April 14, 2014

- Call to Order:** Chair Denis Hebert called the April 14, 2014 meeting to order at 6:45 p.m.
- Present:** Vice Chair, Mike Marconi; Bernie Christopher; Christopher Cross; Jack Pare; Alternate Member, Peggy Lamson; Board of Selectman Representative, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner
- Absent:** Justin Richardson
- Public Guests:** Attorney Alec McEachern; Attorney John Ratigan; Paul Bogan, Sea-3 Vice President of Operations; Steven Haight, Haight Engineering; Cynthia Scarano, Pan Am Executive Vice President; Robert Culliford, Pan Am Senior Vice President and General Counsel; Dirk Grotenhuis, Senior PE, RSG Traffic; Portsmouth Assistant Mayor, Jim Splaine; Peter Britz, Environmental and Sustainability Planner for Portsmouth; Senator Martha Fuller Clark; Jeff Barnum, Great Bay Water Keeper; Andy Jones, Toxic Actions Center, Portland, Maine; Portsmouth Residents: Abdullah; Lou Brown; Catherine and Richard DiPentima; Pat Ford; Bob Gibbons; Beth Moreau; David Rheame; Lou Salomi; Jane and John Sutherland; Greenland Resident: Fred Mason

1) Public Hearing: Proposal by **Sea-3** to reconfigure its terminal at **190 Shattuck Way** (Tax Map 14 Lot 2; and Map 20 Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and the export of same via ocean-going ships.

Chairman Hebert commented that the Board had heard from many people in regards to their concerns with the safety of the rails. He said the Town's legal counsel were told by Pan Am Railways legal counsel that the Board only had jurisdiction over the Sea-3 site and jurisdiction of the rails came under the Federal Railroad Association and the rail inspector from the New Hampshire Department of Transportation. He said the Board would continue to review information as it came in, but at this point the Board needed to move forward with the Sea-3 site review. He asked that anyone speaking from the public keep their remarks to new information that the Board could act upon.

Portsmouth Assistant Mayor, Jim Splaine said the City of Portsmouth sent a letter that they were opposed to the expansion of Sea-3

He said he was Assistant Mayor in the 1970's when Sea-3 was first proposed, and they were concerned with the safety of the rail lines then. He said he was also involved with the Pease Redevelopment Authority in the early 1990's and at that time they considered Pease as a transportation hub for the industrial corridor.

Assistant May Splaine said Newington has done great job developing of developing industry along the river, but asked if they really wanted an Energy North

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Central in Newington feeding NH, ME, NE for the next 20-30 yrs. He said if the Board agreed to the expansion, they would have to allow further expansion if they returned, and asked if that was what they wanted for the community He wondered what the younger generation to look back and say they could have stopped it, but they didn't.

Mr. Rich DiPentima of 16 Dunlin Way said the City of Portsmouth, neighborhood representatives and the Great Bay Stewards have asked for environmental and safety studies of the Sea-3 site and the subsequent rail lines on two different occasions. Chairman Hebert reminded Mr. DiPentima that the Board had been told that they had no authority to request or base their decision on environmental or safety studies. Mr. DiPentima said there was a decision in November that the proposal had regional impact and out of the five categories listed in the RSA, one of the impacts included transportation networks. He said they were told that they could not interfere with interstate commerce, and yet the Massachusetts Department of Transportation received a rail transportation safety report even though both states were covered by Federal jurisdiction. Chairman Hebert said he understood the question and would look into it.

Mr. Andy Jones of Hyde Street in South Portland, Maine said he was a community organizer from Toxic Actions Center, an public health and environmental non-profit that worked with communities to clean up neighborhoods. He said they were concerned with the review of the Sea-3 expansion that was rushing past environmental and safety impact studies.

Mr. Jones said he grew up and lives in South Portland, Maine where there was an oil pipeline that passes from Coos County in New Hampshire and up to Montreal. He said there was a proposal to use the pipes for the export of tar sands that would cross three states. The reverse process would put strains on old pipes. He said because the pipes passed through three states and an international border, they were told it was not their concern and the commerce laws prevented local evaluation. He said they were also told they would be sued if took any actions. They passed a moratorium on the construction tar sands infrastructure, their city council has appointed legal experts to draft a zoning ordinance to block tar sands from their community, and a lawsuit has not materialized.

Mr. Jones said local officials and residents have been told they have no power over their own safety. He said he was sympathetic to market changes and the need for businesses to be flexible. He said if a project was feasible, they needed to get buy in from the community and be forthcoming with safety reports. He said Sea-3 needed to demonstrate expansion is safe before they get approval

Mr. Bob Gibbons of 130 Spinnaker Way said the Sea-3 expansion would impose an economic impact upon all the abutting communities that would have to provide for the safety of those on the major thoroughfares such as Market Street and Maplewood Avenue. He asked why residents should subsidize the project, and suggested Sea-3 cover the costs instead. Chairman Hebert said the Board invited an FRA representative and the rail line inspector for the NH DOT, and communities could contact the State with questions about railroad crossing impacts. He said that process was set up by the U.S. Government and pre-empted local jurisdiction.

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Mr. Gibbons said railroad crossings were not the only concerns. He said he was also concerned that communities were not adequately equipped for the types of emergencies that would occur if anything went wrong on the rails. Chairman Hebert reminded Mr. Gibbons that they were talking about rails again. Mr. Gibbons said he was talking about the impact Sea-3 on the safety of citizens and he was asking if they had a right to impact fees, whether it was on communities or through the State.

Catherine DiPentima said she was also concerned about living with for generations with things like emergency preparedness and thought Sea-3 should cover the costs.

Mr. David Rheume and Ms. Beth Moreau, members of Islington Creek Neighborhood Association said they both served on land use boards in Portsmouth and would like to talk about the hours Sea-3 would be allowed to accept deliveries. Mr. Rheume asked if Pan Am could operate any time they wanted and Chairman Hebert said there were court cases dealing with rail operations and the Board could not interfere with rail operations.

Mr. Jeff Barnum, Great Bay Water Keeper and speaking for the Conservation Law Foundation said most people didn't understand that the trestle that went over the Squamset River was not a single trestle, but was actually two trestles 455 feet long, separated by a causeway in between and on either end, totally 1500 feet. Chairman Hebert said he was talking about the rail bridge and they had already discussed. Mr. Barnum said he thought he heard Chairman Hebert say he wouldn't make a decision on the proposal unless he had bridge inspection. He said NH DES oil recovery could not respond to an accident in less than two hours in the summer and could not respond in the winter whatsoever. Chairman Hebert said they were not discussing the transportation of other hazardous materials over the rails. He said the proposal before the Board was for propane, which evaporated.

Mr. DiPentima said when Mr. Paul Bogan, Sea-3 Vice President of Operations was asked in November 2013 what the worst case scenario on the Sea-3 site would be, he said a boiling vapor catastrophe. Mr. DiPentima asked if the Town of Newington had the ability to respond or if they would rely on surrounding communities. Chairman Hebert said the fire chief addressed that at the last meeting and he would be able to handle the situation and all the fire chiefs in the region said the same. Mr. DiPentima said Sea-3 should provide the infrastructure for a mutual aid agreement that was supported by taxpayers.

Mr. Lou Salomi of 142 Spinnaker Way asked if the Board allowed the Sea-3 expansion would the propane would have to stay on the storage site, and the rail could not move it. Chairman Hebert said they keep going back to the railroad. Mr. Salomi said suggested the approval for the storage of propane could not be separated from the railway operation. Chairman Hebert said the proposal was for the propane coming in by rail, being trucked out and also exported by ship. Chairman Hebert said the expansion was not for storage, but for changing drying and refrigeration to support the receipt of the propane. He said nothing else was changing on their site. Mr. Salomi said the additional rail cars coming in was a change, and it was not correct to say there was no change coming in, at or leaving the facility. Chairman Hebert said they had no say on

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the rail. Mr. Salomi said there had been a broad regional safety review inviting surrounding communities to share their opinions up until this point, but then a veil was brought down and he asked why that changed.

Chairman Hebert said they would go on to the traffic study. Chairman Hebert asked Mr. Dirk Grotenhuis, Senior PE, of RSG who was hired by Newington to share their responses to the applicant's traffic assessment memo. Mr. Grotenhuis said he normally reviewed traffic impact studies, but a memo was provided, which did not provide complete information. He said it appeared the traffic would remain the same as what was seen in the past with 160 trucks on an average day. He said they looked at how the truck traffic affected intersections, including changes with changes to the Spaulding Turnpike, which might alleviate some of the traffic down Woodbury Avenue and through Portsmouth. He said they also looked at the impact of trucks to and from site and rail crossings.

Mr. Bogan said a few trucks might go by way of Route 33. Alternate Board member, Peggy Lamson asked if there would be one or how many. Mr. Bogan there would be a few and Ms. Lamson asked for an exact number of how many. Mr. Bogan said between five and ten. Ms. Lamson said she would like to know because they would be crossing in front of Target. Chairman Hebert asked why they would travel Route 33 and Mr. Bogan said they would pick up Route 101 for the southern route. Chairman Hebert why they weren't taking Route I-95, Mr. Bogan said they could. Ms. Lamson said Route 33 was a shorter connection to Route 101 for them, but it would impact more communities.

Vice-Chair Marconi asked if there were any river traffic studies and Mr. Grotenhuis said they mostly did land traffic studies.

Mr. John Sutherland of 8 Dunlin Way said he asked if they were increasing the truck terminal within the site. Mr. Bogan said they were using the same slots they used since mid 1980's.

Mr. Sutherland asked if there would be an expansion to handle more rail cars and Mr. Bogan said they were expanding their rail car offloading to unload ambient temperature product that could go into ambient storage or into chiller.

Mr. Lou Brown of 56 Laurel Court asked if there would be increased volume and traffic going out from the refrigerated product. Chairman Hebert explained that the truck traffic would not increase and it had already been approved in a previous application.

Ms. Jane Sutherland of 8 Dunlin way asked Mr. Grotenhuis if he incorporated any studies of non-propane traffic, general traffic, and mall traffic that had increased over the last ten years. Chairman Hebert said the Town built an industrial corridor for Con Ed to reduce truck traffic going onto the highway. Mr. Grotenhuis said they didn't produce the study, but reviewed the study that the applicant prepared. Chairman Hebert said the Town did a traffic study in 1999.

Abdullah Alhamdan of 12 Dunlin Way said he was an engineer and relied on data. He said the memo provided by the applicant was not really a study and asked if they could see a more comprehensive report because the math for the number of trucks going out didn't account for all the propane coming in. Chairman Hebert said they only had five slots to load the trucks and couldn't load any more. He said they already had

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permission for that same number of trucks and they weren't changing the number of trucks for the last 30 years. He said the increased propane coming in by rail would be chilled and stored. Mr. Bogan said the chilling would cause the liquid to contract a little for storage at very low pressure and then they would heat it up when they took it out so that would be the same volume that came in. Chairman Hebert said higher temperatures would cause the product to evaporate, but it could be shipped out at higher temperatures in tankers with thicker walls. Board member, Jack Pare said there was confusion because they were receiving more product by rail, but not increasing the number of trucks, but they were only replacing the foreign supply that had been shipped in with domestic rail supply. He said they would refrigerate and store some of the product to send out later during higher demand.

Mr. Fred Mason of Tidewater Farm in Greenland said he understood that Sea-3 might export a shipload during the summer season, and wondered if they would return to the Board for another expansion if they were able to ship out more. Mr. Bogan said they never said they would only export one ship, but they did say they would have to return to the Board if they wanted to expand the rail car unloading facilities.

Mr. Gibbons asked for clarification with the volume of rail cars, truckloads and ships, and asked if it wasn't possible for them to expand. Chairman Hebert said the offloading capacity of the trucks was not possible. Mr. Bogan said they would bring in sixteen cars, fill storage in 45 days, and load trucks as well. Once they had used up the stored product, they would still only be able to get sixteen cars a day based on the time it took to offload.

Mr. Gibbons said there was no way they could furnish enough propane to supply regional demands. Chairman Hebert said they only said they would contribute to regional demand, not supply the entire region. Mr. Gibbons asked if they would stop accepting ships and Mr. Bogan said they would still accept ships if foreign prices came down. Mr. Gibbons calculated that it might be possible to increase to 17 cars a day and Mr. Bogan said he would have to return to the Board if they were to do that.

Mr. Mason asked what factors the Board used when assessing a future expansion. Chairman Hebert said to be fair, he could not say what would be proposed in future or how future boards would decide, but he could say they would have to follow or what the ordinances. Board member, Chris Cross said any proposal for Sea-3 would be evaluated by whether the site could handle and process more than sixteen cars. Mr. DiPentima asked if accepting sixteen cars were inherent in the application or a condition. Chairman Hebert said it was not posted, but he thought the Board could make it a condition if approved.

Chairman Hebert commented that they had reviewed a tremendous amount of information, and they needed to review new information because the law said their time to make a decision was running out. He said they couldn't review it all at the last minute, but they would review it. Ms. Lamson said the information helped the Board to do due diligence. Vice-Chair Marconi said will need time to review material to assist with their decisions.

Chairman Hebert said when they started, he thought they could request safety improvements on the rails a condition, but found out they were completely dependent

Town of Newington, NH

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Meeting Minutes – Monday, April 14, 2014

on U.S. and State representatives to change the laws. Chairman Hebert said the laws in the country were as they were and with no limitations of product, just speed on certain standards of track. He said the value of a public hearing was tremendous and he hoped Pan Am would bring the rails up to Class II from excepted and Class I for greater safety. Ms. Cynthia Scarano, Pan Am Executive Vice President said there would be one trip up and back.

Mr. Pare said most of the concerns were with railroad safety and not so many over the Sea-3 site. He said the existence of heavy freight rail was there, but things could be done to mitigate concerns in the long term, whichever way this decision went. He suggested the public could ask their State representatives to reroute through the rail line through Pease without crossing Route 33. He said it wouldn't be quick, but it could be done. He said the largest holder of instate track mileage was the State of NH all the way north of Concord to Canada so there was a precedent. Chairman Hebert said a letter was sent regarding alternate routes, but it would not be a two-year process,

Senator Martha Fuller Clark said she was also a resident of Portsmouth and was meeting with the DOT Commissioner to look at a variety of steps. She said it was something to pursue and she would work with the Newington Planning Board. She agreed it would not be something that could be done quickly, but she was also looking into additional legislation to expedite the process.

Mr. Cross said he was a returning Board member as of March and had some site-specific questions for applicant to catch up on his understanding of the proposal. He asked if there would be an evening crew to offload evening deliveries. Mr. Bogan said there would be a crew of three on site overnight. Additional discussion ensued regarding the unloading process.

Mr. Cross asked if there was an easement from the power plant on the south side for underground piping for seawater. Mr. Bogan said it was an electric company easement with no road. He said he assumed it was sleeved so the rails could go over. Mr. Cross asked if there was an emergency access road and Mr. Bogan said there was a second exit off Shaftmaster Road on the property. Mr. Cross asked if heavy fire trucks could cross over the easement and Mr. Bogan said they could, but he didn't think they would get that close.

Mr. Cross asked if Pan Am owned the rail corridor. Ms. Scarano said that was correct. Mr. Cross asked if the five new off loading stations were within the Pan Am corridor and Mr. Bogan said that was correct. Mr. Cross said they were building a new offloading delivery site on Pan Am's property and asked if Pan Am assumed any liability for that operation. Mr. Bogan said Sea-3 was leasing the Pan Am property. He said he thought Sea-3 would assume liability. Mr. Cross asked if there was a condition on the lease that Sea-3 would vacate their equipment from the property if their operation ever moved. Mr. Bogan said he assumed that would be correct. Mr. Cross suggested the Board see a copy of the lease.

Chairman Hebert said the drawings the Board received were different than what was just described. Mr. Morgan asked if the Board had the correct plan. Mr. Steven Haight of Haight Engineering said the Pan Am corridor had always been on the plan.

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Meeting Minutes – Monday, April 14, 2014

Chairman Hebert said he had been under the impression that all offloading stations were on Sea-3 properties. Mr. Cross said he thought it was probably a frequent occurrence between businesses and the railroad. Chairman Hebert asked who would own the off loading station and Mr. Bogan said Sea-3 would own them. Chairman Hebert said wanted it to be on record that the infrastructure would be removed from Pan Am property if the lease ended so Sea-3 wouldn't walk away from the operation and Pan Am could take over. Ms. Scarano said this was a different scenario than Pan Am building for a customer. Mr. Bogan said they could make it part of the lease agreement or a stipulation. *(Board of Selectman Representative, Rick Stern arrived at this point of the meeting at 8:45 p.m.)*

OK

Mr. Cross asked if the storage tanks could be placed end to end for additional safety where they were the strongest in case of an accident, rather than side-by-side. Mr. Bogan said the property had only so much acreage available to work with so that was the only configuration they could do. He said the tanks themselves would have a water system for fire protection cooling purposes.

Mr. Cross asked if the piping going up to the offloading stations or chillers would go over or under the ground. Mr. Bogan said the pipes were able to handle more than 200 psi. He said the line **coming off tank and chillers would go to the existing** pipe rack, go over the railroad and continue to the refrigerating system. Mr. Cross asked if the FRA determined the clearance. Ms. Scarano said that was correct and they had a chief engineer that worked with Sea-3.

Mr. Cross said there had been some discussion regarding the potential of additional cars that couldn't fit on the site because of scheduling being stored at different locations between the Newfields Junction and the Sea-3 site. He asked if any additional cars would be stored at the Georgia-Pacific Gypsum Plant. Mr. Bogan said that area would be deactivated and they wouldn't use it anyhow because it went up a steep grade.

Vice-Chair Marconi asked if a safety bond would be required for liability for the leased property from the railroad. Mr. Robert Culliford, Pan Am Senior Vice President and General Counsel said there were insurance requirements that were standard to the industry.

Mr. Pare asked about the second access point along Pan Am's 85' right of way where there had been discussions about getting fire trucks along side the tracks. He said the fire chief made a comment about the access down Shaftmaster Road. He said a lot of trucks parked in that area and he was not sure who owns what, but there might be a concern if a large ladder truck needed access. He asked if there was willingness to work with the town to improve Shaftmaster for fire access. Mr. Bogan said they would make improvements as needed to get fire trucks to a new access road, but Shaftmaster had already been improved in the last year or two. Mr. Morgan said trailers associated with the fish processing plant parked in that area and there wasn't a lot of room for a fire truck when the trucks were parked. Mr. Bogan said he looked at Pan Am's 85' wide right of way plan and the existing track was not dead center. Mr. Haight said they need 15' but seemed to be more than adequate access for fire truck, if trucks were parked there it could be an enforcement issue. Chairman Hebert said he was not aware of parked

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trucks, but it was a private road with a 75' easement and there should no blockages so enforcement might need to be a condition for approval.

Sea-3 counsel, Attorney Alec McEachren said Mr. Bogan would be out of town traveling and asked if they could continue the hearing to May 5, 2014. Mr. Morgan said extending the deadline would not be a problem if the applicant requested it. Vice-Chair Marconi asked if May 5, 2014 would be a public hearing. Chairman Hebert said the meeting would be for Board deliberations, not a public hearing.

Chairman Hebert informed everyone that they would close the public hearing and took a voice vote with all members approving.

Adjournment: ***Vice-Chair Marconi motioned to adjourn and Bernie Christopher seconded, and all were in favor. The meeting adjourned at 9:15 p.m.***

Next Meeting: Monday, April 21st, 2014

**Respectfully
Submitted by:** Jane K. Kendall, Recording Secretary

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

THE CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON PLANNING BOARD

Docket No. 218-2014-CV-00654

SEA-3, INC.'S MOTION TO INTERVENE

NOW COMES SEA-3, Inc., ("SEA-3") and moves to intervene pursuant to Superior Court Rule 15. In support, SEA-3 states as follows:

1. The above captioned matter is an appeal from a decision of the Town of Newington's Planning Board to grant conditional site plan approval to SEA-3 for the construction of five additional rail car unloading berths, with associated equipment, at SEA-3's existing propane storage terminal at 190 Shattuck Way in Newington.

2. Superior Court Rule 15 provides in pertinent part that:

Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause. . . .

3. As the owner of 190 Shattuck Way and the holder of the conditional site plan approval that is the subject of this appeal, SEA-3 has a direct interest in this action.

WHEREFORE, SEA-3, Inc. requests this Honorable Court:

- A. Grant its Motion to Intervene in this action; and
- B. Grant such other and further relief as the Court may deem just.

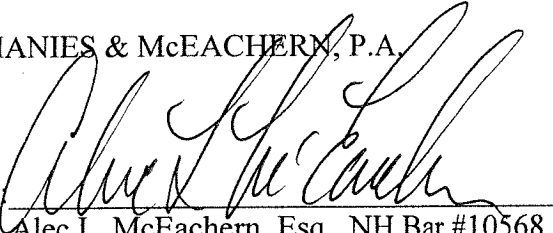
Respectfully submitted,

SEA-3, Inc.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

By



Alec L. McEachern, Esq., NH Bar #10568
282 Corporate Drive, P.O. Box 360
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(603) 436-3110 (telephone)
(603) 436-2993 (facsimile)
alec@shaines.com

Dated: June 27, 2014

CERTIFICATE OF SERVICE

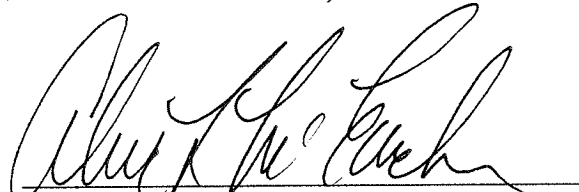
I certify that on this date I have forwarded a copy of the foregoing via U.S. Postal Service, first class mail to the following:

John J. Ratigan, Esq.
225 Water Street
Exeter, NH 03833

Jane Ferrini, Esq.
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

Christopher Cole, Esq.
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701

Dated: June 27, 2014


Alec L. McEachern, Esq.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

THE CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON PLANNING BOARD

Docket No. 218-2014-CV-00654

SEA-3, INC.'S OBJECTION TO MOTION TO INTERVENE
BY PORTSMOUTH RESIDENTS RICHARD AND CATHERINE DIPENTIMA, JOHN AND
JANE SUTHERLAND, MARGARET AND LOUIS SALOME, ROBERT GIBBONS,
PATRICIA FORD, MATTHEW AND ERICA NANIA, THOMAS AND CORRINE SZOPA,
STEVE AND CAROLE EDWARDS

NOW COMES SEA-3, Inc., ("SEA-3") and objects to the Motion to Intervene filed by Portsmouth residents Richard and Catherine DiPentima, John and Jane Sutherland, Margaret and Louis Salome, Robert Gibbons, Patricia Ford, Matthew and Erica Nania, Thomas and Corrine Szopa and Steve and Carole Edwards (collectively hereinafter "Portsmouth Interveners"). In support, SEA-3 states as follows:

1. This case involves an appeal from the decision of the Town of Newington Planning Board ("Newington") to grant conditional site plan approval to SEA-3 for the construction of five additional rail berths and associated equipment at its existing propane storage facility located at 190 Shattuck Way in Newington, NH.

2. Upon information and belief, the City of Portsmouth's Petition was filed with the Court on June 17, 2014, and the Portsmouth Interveners' mailed their Motion to Intervene to the Court for filing on June 18, 2014, prior to the issuance of Orders of Notice or service of the Petition upon the defendant Town of Newington Planning Board ("Newington").

3. SEA-3 objects to the Portsmouth Interveners' Motion to Intervene in this action on the grounds that their interest in this action is insufficient to grant standing under the standard set forth in *Weeks Restaurant Corp. v. City of Dover*, 119 N. H. 541, 544-45 (1979).

4. In determining standing, "[t]he trial court may consider factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings." *Id.* at 545 (citing *Renard v. Dade County*, 261 So.2d 832, 837 (Fla.1972); *Allen v. Coffel*, 488 S.W.2d 671 (Mo.App.1973)).

5. The Portsmouth Interveners have no proximity to SEA-3's property and do not even live in Newington, SEA-3's proposed site changes seek to enhance existing rail capacity at an existing propane storage and distribution facility located in Newington's Waterfront Industrial Zoning District; the facility has been in operation for approximately 38 years. Further, the Portsmouth Interveners have failed to identify any immediate injury and instead rely on vague speculation about the possible effects of increased rail traffic by Pan Am Railways in the City of Portsmouth. Even if the Portsmouth Interveners could substantiate an immediate, concrete injury from an increase in Pan Am's rail traffic, federal law preempts state and local regulation of rail operations. *See* 49 U. S. C. § 10501(b) and 49 U. S. C. § 10102(9)(A).

6. "Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis." *Golf Course Investors of NH, LLC v. Town of Jaffrey*, 161 N. H. 675, 680 (2010).

7. The factual determination of whether the Portsmouth Interveners' interest is sufficient to confer standing in this case is based on information contained in the certified record, which has not yet been filed with the Court.

8. Because the certified record has not been filed with the Court, SEA-3 hereby reserves its right to file a Memorandum in support of this Objection, within a reasonable period of time upon the filing of the certified record with the Court.

WHEREFORE, SEA-3, Inc. requests this Honorable Court:

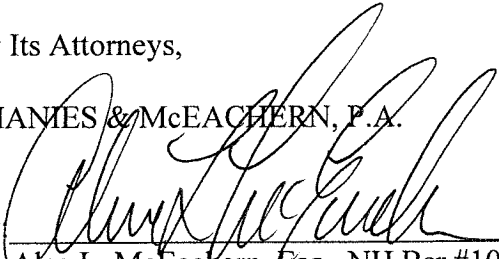
- A. Allow SEA-3 a reasonable period of time following the filing of the certified record to supplement this Motion with a Supporting Memorandum;
- B. Deny the Portsmouth Intervenors' Motion to Intervene in this action; and
- C. Grant such other and further relief as the Court may deem just.

Respectfully submitted,

SEA-3, Inc.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

By 
Alec L. McEachern, Esq., NH Bar #10568
282 Corporate Drive, P.O. Box 360
Portsmouth, NH 03802-0360
(603) 436-3110 (telephone)
(603) 436-2993 (facsimile)
alec@shaines.com

Dated: June 27, 2014

CERTIFICATE OF SERVICE

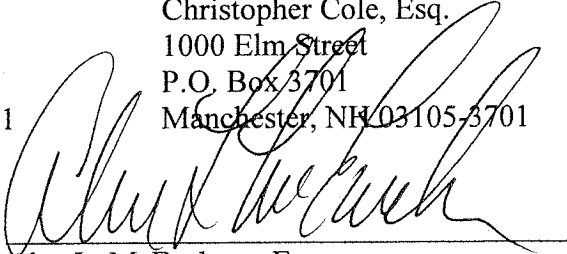
I certify that on this date I have forwarded a copy of the foregoing via U.S. Postal Service, first class mail to the following:

John J. Ratigan, Esq.
225 Water Street
Exeter, NH 03833

Jane Ferrini, Esq.
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

Christopher Cole, Esq.
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701

Dated: June 27, 2014


Alec L. McEachern, Esq.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**Alec L. McEachern, ESQ
Shaines & McEachern PA
282 Corporate Drive
PO Box 360
Portsmouth NH 03802-0360**

Case Name: **City of Portsmouth v Newington Planning Board**
Case Number: **218-2014-CV-00654**

Enclosed please find a copy of the court's order of June 25, 2014 relative to:

Order Staying Case

June 30, 2014

Raymond W. Taylor
Clerk of Court

(507)

C: Jane Mackin Ferrini, ESQ; Christopher Cole, ESQ; John J. Ratigan, ESQ

ROCKINGHAM COUNTY
Docket No. 218-2014-CV-654

SUPERIOR COURT

The City of Portsmouth

v.

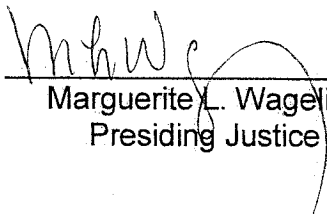
Newington Planning Board

ORDER

Plaintiff's counsel having advised the Court that the plaintiff has also appealed the Newington Planning Board's Decision to the Newington Zoning Board of Adjustment, in accordance with RSA 677:15, I-a this appeal is stayed until resolution of matters pending before the Newington Zoning Board of Adjustment.

So Ordered.

Date: June 25, 2014



Marguerite L. Wageling
Presiding Justice

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

SUPERIOR COURT

Docket No. 218-2014-CV-654

THE CITY OF PORTSMOUTH

v.

NEWINGTON PLANNING BOARD

**REPLY OF PORTSMOUTH RESIDENTS/PROPOSED INTERVENORS TO TOWN OF
NEWINGTON PLANNING BOARD AND SEA-3, INC.'S OBJECTIONS TO MOTION TO
INTERVENE**

The proposed Intervenor, all of whom are residents of the City of Portsmouth, by and through their counsel, Sheehan Phinney Bass + Green, P.A., respectfully submit this reply to the Town of Newington Planning Board's Objection and proposed Intervenor SEA-3, Inc.'s Objection to the Portsmouth Residents' Motion to Intervene.

1. The Town of Newington Planning Board and proposed Intervenor SEA-3, Inc. challenge the Portsmouth Residents' standing to participate in this appeal, which was filed by the City of Portsmouth, challenging the Planning Board's approval of SEA-3's site plan application. SEA-3's proposed project would significantly expand shipments of LPG via rail lines that run through the City of Portsmouth, directly abutting the proposed Intervenor's residential properties. It is undisputed that the proposed project has a direct and meaningful impact on the Portsmouth Residents and the City of Portsmouth.

2. RSA 677:15, I, confers standing to appeal on "[a]ny persons aggrieved by" a planning board decision. In Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541 (1979), the New Hampshire Supreme Court held that this standard must be interpreted broadly to avoid

unduly constraining rights of individuals affected by a planning or zoning decision even if the appealing party is not an “abutter” to the property. Weeks represented an expansion of the limitations on standing to appeal a decision of a local land use board, conferring standing on all parties who have “a definite direct interest in the outcome.” Id. at 545. To determine whether a party has “a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing,” the trial court “may consider factors such as the proximity of the plaintiff’s property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff’s participation in the administrative hearings.” Id. at 544-45 (emphasis added). This list is not exhaustive, and no single factor is considered dispositive. Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 767 (2013).

3. The proposed Intervenor participants participated in the underlying Planning Board hearings once the project was understood and declared to have regional impact. They demonstrated amply to the Planning Board their direct interests in the outcome of the proceedings, which include environmental, health and safety concerns and the potential diminution in value of their residential properties located along the rail line. The potential harm to the proposed Intervenor participants is not the same as the generalized concerns of other Portsmouth residents (or those of other neighboring communities) who live farther from the railroad tracks and may have a generalized potential injury from increased rail traffic, noise and other pollution. Cf. Hannaford Bros. Co., 164 N.H. at 769-70 (finding that Hannaford Bros. lacked standing to challenge variance for proposed competing supermarket located 3.8 miles away based on generalized harm from potential business competition and possible limitations on future development of Hannaford’s property). The proposed Intervenor participants directly abut the rail line through Portsmouth – most live within 100 feet of the rail line leading to the Sea-3 property – and they will be impacted by the

expansion in ways that other Portsmouth residents will not, including potential direct impact to their homes and property values. This close proximity and these concerns are immediate and direct enough to confer standing on the proposed Intervenors, who are not simply voicing generalized concerns held by the citizenry at large. See Libertarian Party of New Hampshire v. Secretary of State, 158 N.H. 194 (2008) (“The requirement that a party demonstrate harm to maintain a legal challenge rests upon the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions.”).

4. The extent of the Planning Board’s authority to evaluate, review or oversee the method and means of transportation to and from SEA-3’s facility has no bearing on whether the proposed Intervenors have a direct interest in the outcome of the proceedings. See Weeks Restaurant Corp., 119 N.H. at 545 (“The question whether Weeks is a proper party to appeal from the planning board’s decision is, of course, separate from the merits of the appeal.”). Thus, even if the Planning Board’s authority to regulate any aspect of rail transportation is preempted by federal regulation (as the Planning Board appears to insist), the issue of preemption does not impact the proposed Intervenors’ standing in this appeal.

5. Finally, even if the proposed Intervenors lack standing to appeal under RSA 677:15, it is within this court’s sound discretion to grant intervenor status. Samyn-D’Elia Architects v. Satter Companies of New England, Inc., 137 N.H. 174, 177 (1993). “The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice.” Lamarche v. McCarthy, 158 N.H. 197, 200, 965 A.2d 992, 995 (2008) (quoting Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 446 (2002)). Superior Court Civil Rule 15 allows “[a]ny person shown to be interested” to become a party through a motion to intervene. “In order for a person to intervene in a case, that person ‘must have a right involved

in the trial and his [or her] interest must be direct and apparent.” Samyn-D’Elia Architects, 137 N.H. at 177 (quoting Snyder v. N.H. Savings Bank, 134 N.H. 32, 35 (1991)). As set forth above, the proposed Intervenors have direct interests in the outcome of this appeal proceeding that are more specific and direct than the generalized interests of other Seacoast residents.

WHEREFORE, the Intervenors respectfully requests that this Court:

- A. Conduct a hearing as necessary in which the proposed Intervenors can demonstrate their direct, immediate and real interests in the above-captioned litigation;
- B. Permit the proposed Intervenors to intervene in the above-captioned matter for the purpose of submitting legal memoranda and oral argument in this appeal pursuant to RSA 677:15; and
- C. Grant such other and further relief as the Court deems necessary and just.

Respectfully submitted,

**RICHARD AND CATHERINE DIPENTIMA,
JOHN AND JANE SUTHERLAND,
MARGARET AND LOUIS SALOME,
ROBERT GIBBONS AND PATRICIA FORD,
MATTHEW AND ERICA NANIA,
THOMAS AND CORRINE SZOPA,
STEVE AND CAROLE EDWARDS**

By Their Attorneys,

**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**

Dated: July 8, 2014

By:  for

Christopher Cole, Esquire (Bar No. 8725)
Karyl R. Martin, Esquire (Bar No. 16468)
1000 Elm Street
P. O. Box 3701
Manchester, NH 03105-3701
(603) 627-8223
ccole@sheehan.com
kmartin@sheehan.com

Certification of Service

I hereby certify that on July 8, 2014 the foregoing pleading was sent, first class mail, postage prepaid to Jane Ferrini, Esq., counsel for the City of Portsmouth; John Ratigan, Esq., counsel for the Town of Newington Planning Board, and Alec L. McEachern, Esq., counsel for SEA-3, Inc.

 for

Christopher Cole

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

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NOTICE OF DECISION

**ALEC L. MCEACHERN, ESQ
SHAINES & MCEACHERN PA
282 CORPORATE DRIVE
PO BOX 360
PORTSMOUTH NH 03802-0360**

Case Name: **City of Portsmouth v Newington Planning Board**
Case Number: **218-2014-CV-00654**

Please be advised that on July 23, 2014 Judge Wageling made the following order relative to:

Motion to Intervene by Portsmouth Residents; The Court stayed this action as of 6/25/14 due to Plaintiff's appeal to the Newington ZBA. Once the Court is advised the appeal is concluded, the Court will take action as appropriate.

SEA-3, Inc.'s Motion to Intervene; The Court stayed this action by order dated 6/25/14 due to Plaintiff's appeal to the Newington ZBA. Once the Court is advised the appeal is concluded, the Court will take action as appropriate.

July 24, 2014

Raymond W. Taylor
Clerk of Court

(507)

C: Jane Mackin Ferrini, ESQ; Christopher Cole, ESQ; John J. Ratigan, ESQ

ROCKINGHAM, SS

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT
Docket 218-2014 CV- 654

THE CITY OF PORTSMOUTH

v.

NEWINGTON PLANNING BOARD

MOTION FOR RELIEF FROM STAY

NOW COMES the Petitioner, the City of Portsmouth, and files this Motion for Relief from Stay and in support thereof states as follows:

1. The Petitioner, the City of Portsmouth (hereinafter "City"), appealed the Town of Newington Planning Board's decision to approve Sea-3 Inc.'s site plan Application by filing a Petition with this Court on June 17, 2014 which initiated the present case.

2. Because the Town of Newington Planning Board's decision raised issues of whether the Planning Board properly interpreted the Town of Newington's Zoning Ordinance, the City also filed an appeal with the Newington Zoning Board of Adjustment.

3. The City apprised the Court of its appeal filed with the Newington Zoning Board of Adjustment and the Court stayed the underlying matter until the matter was resolved before the Newington Zoning Board of Adjustment by Order dated June 25, 2014.

4. The City's appeal was denied by the Newington Zoning Board of Adjustment at its September 15, 2014 hearing.

5. The City promptly filed a Request for Rehearing with the Newington Zoning Board of Adjustment on October 3, 2014.

6. The Newington Zoning Board of Adjustment considered the City's Request for Rehearing on October 30, 2014 and rendered its decision on November 7, 2014, denying the City's Request for Rehearing.

7. The City has exhausted its administrative remedies before the Town of Newington Zoning Board of Adjustment and files today, along with this Motion for Relief from Stay, its Petition appealing the Newington Zoning Board of Adjustment's denial of its Request for Rehearing pursuant to RSA 677: 3, RSA 677:4 and RSA 677:15 1-a (a).

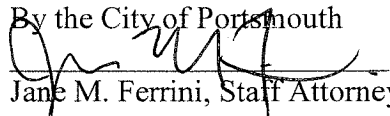
8. Because the City has exhausted its administrative remedies before the Newington Zoning Board of Adjustment, and has timely filed its Petition appealing the denial of its Request for Rehearing, the City respectfully requests that the stay be lifted and that the underlying appeal of the Planning Board's decision and the City's appeal of the Newington Zoning Board of Adjustment's denial of its appeal and Request for Rehearing be consolidated and set for hearing at the Court's earliest convenience.

WHEREFORE, the City respectfully requests that this Court:

- A. Consolidate both of the City's appeals;
- B. Issue a Summons with instructions for service on all pending matters;
- C. Schedule a hearing on the merits to hear all matters relative to both of the City's appeals; and
- D. And for such other and further relief as justice may require.

Respectfully submitted,

By the City of Portsmouth


Jane M. Ferrini, Staff Attorney

N.H. Bar 6528

1 Junkins Avenue

Portsmouth, NH 03801

(603) 610-7256

jferrini@cityofportsmouth.com

Dated: 11/25/14

CERTIFICATE OF SERVICE

I, the undersigned, Jane Ferrini, Attorney for the Appellants, the City of Portsmouth, hereby certify that on this 25th day of November, 2014, a true and correct copy of the foregoing Motion was sent by first class mail to the following counsel of record:


John Ratigan, Esquire
Attorney for the Newington Planning Board
225 Water Street
Exeter N.H. 03833

Walter Mitchell, Esquire
Attorney for the Newington Zoning Board of Adjustment
Mitchell Municipal Group, P.A.
25 Beacon St E Suite 2
Laconia, NH 03246

Alec McEachern, Esquire
Attorney for Sea-3, Inc.
Shaines & McEachern, P.A.
282 Corporate Drive, Unit 2
Portsmouth, NH 03801

Christopher Cole, Esquire
Attorney for Intervenors
1000 Elm Street
P.O. Box 3701
Manchester, New Hampshire 03105-3701

Denis Hebert
Chair of the Town of Newington Planning Board
200 Nimble Hill Road
Newington, New Hampshire 03801



Jane M. Ferrini

ROCKINGHAM, SS

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

THE CITY OF PORTSMOUTH
1 Junkins Avenue
Portsmouth, New Hampshire 03801

v.

NEWINGTON ZONING BOARD OF ADJUSTMENT
205 Nimble Hill Road
Newington, New Hampshire 03801

and

TOWN OF NEWINGTON
205 Nimble Hill Road
Newington, New Hampshire 03801

**PETITION FOR APPEAL OF THE TOWN OF NEWINGTON
ZONING BOARD OF ADJUSTMENT DECISION
PURSUANT TO RSA 677: 2, 3, 4 and 677:15, I-a (a)**

NOW COMES the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue and appeals a decision by the Town of Newington Zoning Board of Adjustment pursuant to RSA 677:2, 3 and 4, and RSA 677:15 I-a (a) as follows:

PARTIES

1. The Petitioner/Appellant is the City of Portsmouth ("City") a municipal corporation with an address of 1 Junkins Avenue, Portsmouth, New Hampshire 03801.
2. The Newington Zoning Board of Adjustment is a local land use board established by the Town of Newington pursuant to RSA 673 ("ZBA").
3. The Town of Newington is a legally existing New Hampshire Town with an office located at 205 Nimble Hill Road, Newington, New Hampshire 03801.

JURISDICTION AND VENUE

4. The City appeals the Newington ZBA's denial of its appeal and Request for Rehearing of the Newington Planning Board's decision to grant Sea-3, Inc.'s site plan Application pursuant to RSA 677:2, 3, 4 and 677:15I-a (a).

5. This Court has jurisdiction pursuant to RSA 677:4 and RSA 677:15, I-a (a). Venue is proper pursuant to RSA 507:9.

BACKGROUND

6. Sea-3 Inc. ("Sea-3") owns two parcels of property located off Shattuck Way in Newington, New Hampshire. These two lots are divided and separated by the rail way owned and operated by Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am Railways ("Pan Am").

7. Sea-3 presently uses both parcels to import foreign Liquefied Petroleum Gas ("LPG") by ship to distribute domestically by rail and truck.

8. The first parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 13 ("Lot 13"). This parcel is a 7.02 acres located within both the General Industrial District ("I") and the Waterfront Industrial and Commercial District ("W"). The Zoning District boundary bisects the western most LPG storage tank. Lot 13 is located west of the rail line and contains a main building, truck loading racks, two large storage tanks for the storage of Liquefied Petroleum Gas (LPG), a smaller distribution tank and associated pipelines.

9. The second parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 2 ("Lot 2"). This parcel is 3.92 acres located within the Waterfront Industrial and Commercial District ("W"). Lot 2 contains a small building, 3 rail berths with pipelines to

transport LPG between the waterfront loading docks through pipes located in Lot 2 to the storage tanks located in Lot 13.

10. Sea-3 has submitted an application (“Application”) that has been approved by the Newington Planning Board to reconfigure its property and construct improvements to convert its operation from one that imports foreign LPG by ship to a facility that receives LPG domestically by rail and truck to distribute domestically by rail and truck and to export to foreign markets by ship.

11. This change in use requires construction of new facilities on the site to accommodate a substantial increase in volume of LPG that will be received, stored, chilled and distributed from the site.

12. The improvements proposed by Sea-3 are located on three separate parcels, on Lots 13 and 2 as described above and on land owned by Pan Am that includes the railway and surrounding property that bisects Lots 13 and 2. The proposed improvements are as follows:

- a. Lot 13: The installation of new piping to transport LPG to tanks located on Lot 13.
- b. Lot 2: The construction of three 90,000 gallon storage tanks, unloading compressors, pumps, condensers, dryers and heaters along with a machinery building for refrigeration equipment and the relocation of the flare tower; and
- c. Property owned by Pan Am: The construction of five rail unloading berths new rail sidings and new pipes to transport LPG from Lot 2 to the storage tanks on Lot 13.

13. Article III, Section 1 of the Newington Zoning Ordinance divides the Town of Newington into different districts or zones and provides that “the boundaries of these districts are

hereby established as shown on the Official Zoning Map. Said map is hereby made a part of this ordinance.”

14. Each district has separately delineated “Description and Purpose”, uses permitted and uses prohibited and no district incorporates by reference the description and purpose, uses permitted and prohibited from any other district.

15. Article IV, Section 1 of the Town of Newington Zoning Ordinance, provides that “no structure shall be erected, constructed, reconstructed, moved or altered unless in conformity with all regulations herein specified for the district in which it is located. The omission of a use from the list of those allowed in a particular district constitutes prohibition of that use in that district.”

16. Lot 13 is in both the “I” and “W” district and Lot 2 is in the “W” district. The Town of Newington Zoning Map clearly bisects Lot 13 with one half of the lot closer to the rail line being in the “W” district and the other half located in the “I” district. The lot line passes through the smaller of the two LPG storage tanks on the lot.

17. Storage above or below the ground of any explosive or hazardous fluid (including waste), toxic or noxious matter, or material causing odor, dust, fire hazard, smoke, gas or fumes is a use prohibited in the General Industrial “I” Zone. Town of Newington Zoning Regulation, Article V, Section 5, C (3).

18. Storage and handling of above or below the ground of any material which is explosive, toxic, noxious, or capable of causing odor, dust, fire hazard, smoke, gas, or fumes shall be a permissible use in the Waterfront “W” Commercial District when the use complies with the shipping, handling and storage requirements and regulations of the National Fire Protection Association Standards (NFPA), Department of Transportation (DOT) and

Environmental Protection Agency (EPA). Town of Newington Zoning Regulations, Article V, Section 6, D (3) a-c.

19. LPG is explosive and a fire hazard. The storage tank partially located in the "I" district is not a permitted use under the current Zoning Ordinance, therefore, on information and belief, this tank is either currently unlawful or was a pre-existing non-conforming use and no variance has been granted to allow this nonconforming use in the "I" zone.

20. The Applicant did not request a variance for the tank in its present Application. Article XIII, Section 1 of the Zoning Ordinance expressly provides that "non-conforming uses and non-conforming structures shall not be enlarged, expanded or extended."

21. Absent a variance or proof that the site proposal does not "enlarge, expand or extend" the existing non-conformity, the Applicant's operations currently run afoul of the Zoning Ordinance and the proposal simply exacerbates a non-conforming use, in violation of New Hampshire law.

PROCEDURAL HISTORY

22. The Newington Planning Board approved Sea-3's site plan Application at its May 19, 2014 hearing.

23. On June 17, 2014, the City appealed the decision of the Newington Planning Board to approve Sea-3's site plan Application to the Rockingham County Superior Court in the Matter of *The City of Portsmouth v. Newington Planning Board*, Docket Number 218-2014-CV-00654.

24. On June 17, 2014, the City also appealed the decision of the Newington Planning Board to the Newington ZBA. See Appeal attached and incorporated hereto as Exhibit "A".

25. This Court stayed the City's appeal of the Planning Board's decision to approve the site plan (Docket 218-2014-CV-00654) pending resolution of the City's appeal to the Newington ZBA pursuant to its Order dated June 25, 2014.

26. The City's appeal was denied by the Newington ZBA at its September 15, 2014 hearing.

27. The City filed a Request for Rehearing with the Newington ZBA on October 3, 2014. See Request for Rehearing attached and incorporated hereto as Exhibit "B".

28. The Newington ZBA considered the City's Request for Rehearing on October 30, 2014 and rendered its decision on November 7, 2014, denying the City's Request for Rehearing.

29. The City has exhausted its administrative remedies before the Newington ZBA and files today, along with this Petition, a Motion for Relief from Stay, requesting that both of the City's appeals be consolidated and set for hearing pursuant to RSA 677:15 1-a (a).

COUNT I
BOARD OF ADJUSTMENT APPEAL RSA 677:4
(Planning Board Relied on the Wrong Zoning Ordinance)

30. The City re-alleges and incorporates the above allegations.

31. The ZBA's vote to deny the City's appeal and Request for Rehearing was unreasonable and illegal in that:

a. The ZBA has jurisdiction over appeals from Planning Board's decision that arise from decision or interpretations of the Newington Zoning Ordinance. See RSA 676:5, III.

b. Storage above or below ground of any explosive or hazardous fluid... is a use prohibited in the General Industrial Zone ("I"). See Town of Newington Zoning Regulation, Article V, Section 5, C (3).

- c. The storage tank located on Lot 13 is partially located in the “I” Zone.
- d. The ZBA erred when it did not find that the Planning Board relied on the wrong Zoning Ordinance (Article V, Section 5, C (3)) to support its conclusion that the use and proposed expansion of the Sea-3 site complied with the Zoning Ordinance and promoted the general welfare of the community.
- e. Specifically, the ZBA erred in not concluding the Planning Board misapplied the Zoning Ordinance when the Planning Board, in reliance on Article V, Section 5, C (3), found that “this proposed expansion of a long-standing use that is permitted in the Industrial Zone” and further found that the “proposed location, construction and operation will not injure present or prospective industrial development in the district, or the health and welfare of residential districts in the vicinity. The Board expressly finds that this application is precisely the type of business development and land use that the Industrial District is intended to protect and promote.” See Exhibit “A” (paragraph 60 and the Minutes dated May 19, 2014 attached to it as Exhibit B) and See also Exhibit “B” (and the Zoning Regulations attached to it as Exhibit C).
- f. All reasons for error of the Board contained in Exhibits “A” and “B” are incorporated herein.

COUNT II
BOARD OF ADJUSTMENT APPEAL RSA 677:4
(Zoning Board misapplied burden or proof)

- 32. The City re-alleges and incorporates the above allegations.
- 33. The vote to deny the City’s appeal and Request for Rehearing was unreasonable and illegal in that:

- a. Sea-3 alleged that the tank in Lot 13 was a legally valid preexisting non-conformation use that was grandfathered.
- b. The ZBA incorrectly concluded that it was the City's burden to disprove that the tank located in the "I" zone was a vested grandfathered use.
- c. All reasons for error of the Board contained in Exhibits "A" and "B" are incorporated herein.

COUTN III
BOARD OF ADJUSTMENT APPEAL RSA 677:4
(Zoning Board failed to properly applied nonconforming use test)

34. The City re-alleges and incorporates the above allegations.
35. The vote to deny the City's appeal and Request for Rehearing was unreasonable and illegal in that:

- a. The ZBA erred in concluding that the tank located in the "I" district was not an impermissible expansion of a nonconforming use.
- b. The ZBA failed to apply the test set forth in Hurley v. Hollis, 143 NH 567, 71-72, specifically, whether the use will have a substantially different effect on the surrounding neighborhood.
- c. The ZBA was obligated to analyze the character, nature, scope and effect on the surrounding neighborhood and failed to do so.
- d. All reasons for error of the Board contained in Exhibits "A" and "B" are incorporated herein.

COUNT IV
(BOARD OF ADJUSTMENT APPEAL RSA 677:4
(Failure to Issue a Decision)

36. The City re-alleges and incorporates the above allegations.

37. The ZBA's vote to deny the City's appeal and Request for Rehearing was unreasonable and illegal in that:

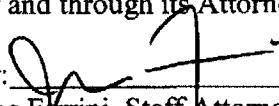
- a. The Town of Newington Board of Adjustment Rules of Procedure Application/Decision 4 provides that "[i]f an appeal is denied or deferred, the notice shall include the reasons therefore".
- b. The Decision of the ZBA denying the City's appeal was not set forth in any Notice of Decision but was set forth in the Minutes of the hearing.
- c. The ZBA's violation of its own procedure was unreasonable and illegal.
- d. All reasons for error of the Board contained in Exhibits "A" and "B" are incorporated herein.

WHEREFORE, the City respectfully prays that this Court grant it the following relief:

- A. That the decision of the ZBA be overturned; or
- B. In the alternative, that the Court remand this matter back to the ZBA for further hearing; and
- C. For such other and further relief as the Court may deem appropriate.

The City of Portsmouth

By and through its Attorney

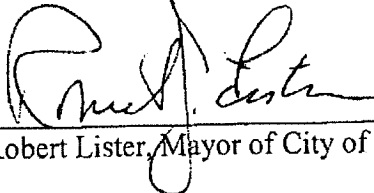
By: 
Jane Ferrini, Staff Attorney
NHBM # 6528
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7256

Dated: 11/25/17

VERIFICATION

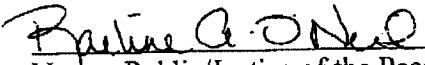
I, Robert Lister, Mayor of the City of Portsmouth, being first duly sworn according to law, depose and say that all of the facts and allegations set forth in this document, to the extent based on my personal knowledge, are true and correct to the best of my knowledge, information and belief.

Dated: November 21, 2014


Robert Lister, Mayor of City of Portsmouth

STATE OF NEW HAMPSHIRE
COUTNY OF ROCKINGHAM

Personally appeared the aforementioned and affirmed to me that the facts and recitals set forth in the foregoing document are true and correct to the best of his knowledge, information, and belief.


Notary Public/~~Justice of the Peace~~
Commission Expires 10/17/17

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**ALEC L. MCEACHERN, ESQ
SHAINES & MCEACHERN PA
282 CORPORATE DRIVE
PO BOX 360
PORTSMOUTH NH 03802-0360**

Case Name: **City of Portsmouth v Newington Planning Board, et al**
Case Number: **218-2014-CV-00654 218-2014-CV-01287**

Please be advised that on December 08, 2014 Judge Wageling made the following order relative to:
Motion for Relief from Stay and to Consolidate

Granted.

December 09, 2014

Raymond W. Taylor
Clerk of Court

(507)

C: Jane Mackin Ferrini, ESQ; Christopher Cole, ESQ; John J. Ratigan, ESQ

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

City of Portsmouth

v.

Town of Newington Planning Board

Docket No. 218-2014-CV-00654

ANSWER OF THE TOWN OF NEWINGTON

NOW COMES the Town of Newington Planning Board, by and through its attorneys, Donahue, Tucker & Ciandella, PLLC and states in response to Portsmouth's appeal of the Newington Planning Board's decision on the SEA-3 application as follows:

1. Admitted.
2. Admitted.
3. Denied and leave Petitioner to prove same.
4. Denied and leave Petitioner to prove same.
5. Denied and leave Petitioner to prove same.
6. Denied and leave Petitioner to prove same.
7. Admitted.
8. Admitted as to the first two sentences of this paragraph.
9. Admitted that the SEA-3 has submitted an application to construct

improvements on its property. Denied, that the SEA-3 is reconfiguring its property. The balance of the paragraph is denied and Petitioner has leave to prove same.

10. Denied and leave Petitioner to prove same.
11. Admitted.

12. Admitted that Pan Am is not the applicant. SEA-3 has been authorized by Pan Am to submit the site plan application showing improvements as proposed on Pan Am's property. The balance of this paragraph is denied.

13. Denied and leave Petitioner to prove same.

14. Admitted that on or about August 23, 2013, Pan Am, through its engineer, Haight Engineering, LLC, submitted plans for conceptual site plan review to the Newington Planning Board. The balance of the paragraph is denied and Petitioner has leave to prove same.

15. Admitted that the Town of Greenland submitted a letter to the Newington Town Planner, Tom Morgan, requesting that the SEA-3 project be "declared a development of regional impact under NH RSA 36:54." The balance of the paragraph is denied.

16. Denied and leave Petitioner to prove same.

17. Admitted.

18. Denied and leave Petitioner to prove same.

19. Denied and leave Petitioner to prove same.

20. Denied. By way of further answer, the Newington Planning Board voted on November 18, 2013 that a regional impact notice shall be sent to the surrounding Towns of Greenland, Portsmouth, Newfields and Stratham.

21. Denied and leave Petitioner to prove same.

22. Admitted that a Notice of Regional Impact was sent to the 4 planning commission and the 4 municipalities who "are accorded the status of abutters pursuant to

N.H. RSA 36:57, and are welcome to testify at the December 9 hearing.” The balance of the paragraph is denied and Petitioner has leave to prove same.

23. Admitted. By way of further answer, public hearings on the site plan application were also held on November 18, 2013 and January 13, 2014.

24. Admitted that a number of Portsmouth municipal elected officials and public employees participated in the public hearing process and provided written information to the Newington Planning Board on the SEA-3 application. Denied that the residents of Portsmouth who participated in the public hearing process had participation that can be attributed in some manner to the Petitioner. The balance of the paragraph is denied and Petitioner has leave to prove same.

25. Denied and leave Petitioner to prove same.

26. Admitted that the Newington Planning Board declined to require the applicant SEA-3 to conduct certain types of studies that were requested by the various persons. The balance of the paragraph is denied and Petitioner has leave to prove same.

27. Denied and leave Petitioner to prove same.

28. Admitted.

29. Admitted that the Newington Planning Board voted at its 5/5/14 Planning Board meeting not to require the applicant to produce a safety study akin to one that had been produced in Massachusetts with respect to a different rail project, admitted that the Planning Board approved SEA-3's site plan application at its 5/19/14 meeting, and that condition of approval #5 specified:

“Several safety plans were adopted in conjunction with the original SEA-3 site plan approval. They shall be reviewed by SEA-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for

review and approval prior to the commercial operation of the improvements authorized by this approval.”

The balance of this paragraph is denied and Petitioner has leave to prove same.

30. The Petitioner has no paragraph 30.

31. Denied.

32. Denied that Petitioner has standing and Petitioner has leave to prove same.

33. This is a statement of law and it is denied on the facts presented and Petitioner has leave to prove same.

34. This is a statement of law and it is denied on the facts presented and Petitioner has leave to prove same.

35. This is a statement of law and it is denied on the facts presented and Petitioner has leave to prove same.

36. This is a statement of law and it is denied on the facts presented and Petitioner has leave to prove same.

37. This is a statement of law and it is denied on the facts presented and Petitioner has leave to prove same.

38. Denied and leave Petitioner to prove same.

39. Denied and leave Petitioner to prove same.

40. Denied and leave Petitioner to prove same.

41. Admitted that a number of Portsmouth elected officials and employees appeared at the public hearings and that letters were written by Portsmouth elected officials and employees. The balance of the paragraph is denied and Petitioner has leave to prove same.

42. This is a statement of law and on the facts presented, it is denied and Petitioner has leave to prove same.
43. Denied and leave Petitioner to prove same.
44. The first sentence is admitted. The balance of the paragraph is denied and Petitioner has leave to prove same.
45. This is a statement of law and on the facts presented, it is denied and Petitioner has leave to prove same.
46. Denied and leave Petitioner to prove same.
47. Denied.
49. Denied and leave Petitioner to prove same.
50. Denied and leave Petitioner to prove same.
51. Denied and leave Petitioner to prove same.
52. Denied and leave Petitioner to prove same.
53. Denied and leave Petitioner to prove same.
54. Denied and leave Petitioner to prove same.
55. Denied and leave Petitioner to prove same.
56. Denied and leave Petitioner to prove same.
57. Denied and leave Petitioner to prove same.
58. Denied and leave Petitioner to prove same.
59. Admitted.
60. Denied and leave Petitioner to prove same. By way of further answer, the Planning Board has no jurisdiction over Zoning Board matters.
61. Denied and leave Petitioner to prove same.

62. Denied and leave Petitioner to prove same.

63. Denied and leave Petitioner to prove same.

64. Denied.

65. Admitted that the referenced paragraph correctly sets forth the first paragraph of Newington Site Plan Regulation Section 5. The balance of the paragraph referring to subsections e, h, and i are incomplete, and thus, to the extent Petitioner is seeking to accurately refer to these subsections, it is denied and Petitioner has leave to prove same.

66. Denied.

67. Denied.

68. Denied and leave Petitioner to prove same.

69. Denied.

70. This is a statement of law and upon the facts presented, it is denied and Petitioner has leave to prove same.

71. Denied.

72. Denied and leave Petitioner to prove same.

73. Denied and leave Petitioner to prove same.

74. Denied and leave Petitioner to prove same.

75. This is a statement of law and upon the facts presented, it is denied and Petitioner has leave to prove same.

76. This is a statement of law, and upon the facts presented it is denied and Petitioner has leave to prove same.

77. Denied.

78. Denied and leave Petitioner to prove same.

79. Denied and leave Petitioner to prove same.

80. Denied and leave Petitioner to prove same.

81. This is a statement of law, which on the facts presented is denied and
Petitioner has leave to prove same.

82. Denied and leave Petitioner to prove same.

83. Denied and leave Petitioner to prove same.

84. Denied and leave Petitioner to prove same.

85. Denied and leave Petitioner to prove same.

86. Denied and leave Petitioner to prove same.

87. Denied and leave Petitioner to prove same.

88. Denied and leave Petitioner to prove same.

89. Denied and leave Petitioner to prove same.

90. Denied and leave Petitioner to prove same.

91. Denied and leave Petitioner to prove same.

92. Denied and leave Petitioner to prove same.

93. Denied and leave Petitioner to prove same.

WHEREFORE, the Town of Newington Planning Board respectfully requests that
this Honorable Court:

- A. Dismiss Petitioner's Complaint for lack of standing;
- B. Deny Petitioner's prayers for relief;
- C. Uphold the Newington Planning Board's decision;
- D. Dismiss Petitioner's Complaint; and,

E. Grant such other relief as may be fair and just.

Respectfully submitted,

THE TOWN OF NEWINGTON
PLANNING BOARD

By its attorneys:

DONAHUE, TUCKER & CIANDELLA, PLLC

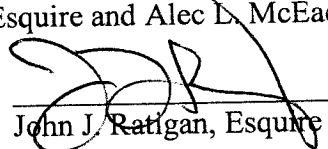
Date: 2/12/15

By: 

John J. Ratigan, Esquire
NHB #4849
225 Water Street
Exeter, NH 03833
(603) 778-0686
jratigan@dtclawyers.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer of the Town of Newington Planning Board was this 12 day of February, 2015, forwarded by first class mail, postage prepaid to Jane M. Ferrini, Esquire and Alec L. McEachern, Esquire.


John J. Ratigan, Esquire

S:\NA-NE\Newington\SEA-3 Rail Safety Issues\PB Pleadings - 218-2014-CV-654\2015 02 12 ANSWER.doc

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

THE CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON PLANNING BOARD, ET AL.

Docket No. 218-2014-CV-00654 and
218-2014-CV-01287

SEA-3, INC.'S MOTION TO INTERVENE

NOW COMES SEA-3, Inc., ("SEA-3") and moves to intervene in Docket No. 218-2014-CV-01287 pursuant to Superior Court Rule 15. In support, SEA-3 states as follows:

1. Docket No. 218-2014-CV-01287 is an appeal from a decision of the Town of Newington's Zoning Board of Adjustment to deny the City of Portsmouth's Appeal from a decision of the Town of Newington's Planning Board to grant conditional site plan approval to SEA-3 for the construction of five additional rail car unloading berths, with associated equipment, at SEA-3's existing propane storage terminal at 190 Shattuck Way in Newington.

2. Superior Court Rule 15 provides in pertinent part that:

Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause. . . .

3. As the owner of 190 Shattuck Way and the holder of the conditional site plan approval that is the subject of this appeal, SEA-3 has a direct interest in this action.

4. SEA-3 submits this Motion without prejudice to the arguments raised in its Motion to Dismiss the consolidated appeals.

WHEREFORE, SEA-3, Inc. requests this Honorable Court:

- A. Grant its Motion to Intervene in Docket No. 218-2014-CV-01287; and
- B. Grant such other and further relief as the Court may deem just.

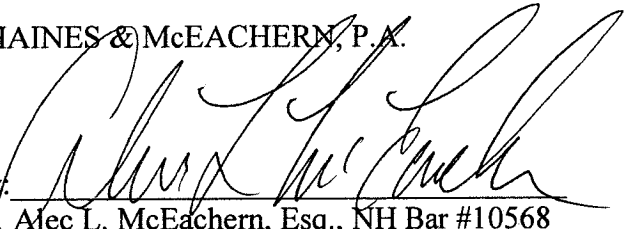
Respectfully submitted,

SEA-3, Inc.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

By:



Alec L. McEachern, Esq., NH Bar #10568
282 Corporate Drive, P.O. Box 360
Portsmouth, NH 03802-0360
(603) 436-3110 (telephone)
(603) 436-2993 (facsimile)
alec@shaines.com

Dated: February 18, 2015

CERTIFICATE OF SERVICE

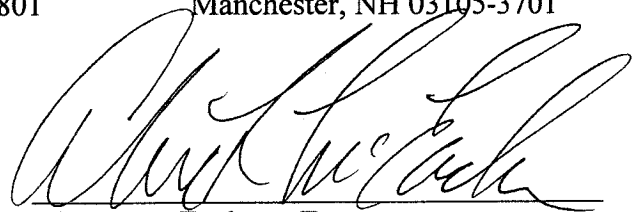
I certify that on this date I have forwarded a copy of the foregoing via U.S. Postal Service, first class mail to the following:

John J. Ratigan, Esq.
225 Water Street
Exeter, NH 03833

Jane Ferrini, Esq.
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

Christopher Cole, Esq.
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701

Dated: February 18, 2015



Alec L. McEachern, Esq.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

THE CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON PLANNING BOARD, ET AL.

Docket Nos. 218-2014-CV-00654
218-2014-CV-01287

INTERVENOR SEA-3, INC.'S MOTION TO DISMISS and LIMITED ANSWER

NOW COMES the Intervenor, SEA-3, Inc., by and through counsel, Shaines & McEachern, P.A., and respectfully submits this Motion to Dismiss and Limited Answer and in support thereof states as follows:

1. The City of Portsmouth filed two Petitions for Appeal concerning decisions by the Town of Newington Planning Board and Zoning Board of Adjustment. This Court consolidated the matters.
2. SEA-3, Inc. (hereinafter "SEA-3") filed a Motion to intervene in Portsmouth's Petition for Appeal of the Town of Newington Planning Board's Decision (Docket No. 218-2014-CV-00654).
3. Contemporaneously with the filing of this Motion, SEA-3 filed a Motion to Intervene in Portsmouth's Petition for Appeal of the Town of Newington Zoning Board of Adjustment's Decision (Docket No. 218-2014-CV-01287). SEA-3's Motion to Intervene is pending.
4. SEA-3 respectfully submits that the Court should dismiss both of the City of Portsmouth's Petitions for Appeal in their entirety because:

a. The Court lacks subject matter jurisdiction over the matter due to federal preemption. See 49 U.S.C. § 10501(b); and

b. The City of Portsmouth lacks standing to appeal the decisions of the Town of Newington Planning Board and Zoning Board of Adjustment. See Golf Course Investors of NH v. Town of Jaffrey, 161 N.H. 675, 680 (2011); Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 766-67 (2013).

5. In further support of its Motion, SEA-3 relies on the accompany Memorandum of Law, exhibits annexed thereto, the Certified Record of the Town of Newington Planning Board, and the Certified Record of the Town of Newington Zoning Board of Adjustment.

6. Due to the dispositive nature of this Motion, SEA-3 has not sought the City of Portsmouth's concurrence with the relief requested herein.

7. To the extent an Answer is required, SEA-3 reserves the right to make such Answer until a decision on the within Motion, which is potentially dispositive as to all claims, has been issued. See Superior Court Civil Rule 9(b).

WHEREFORE, SEA-3, Inc. requests this Honorable Court:

- A. Grant and allow SEA-3, Inc.'s Motion to Dismiss;
- B. Alternatively, schedule oral argument on this Motion to Dismiss; and
- C. Grant such other and further relief as the Court may deem just.

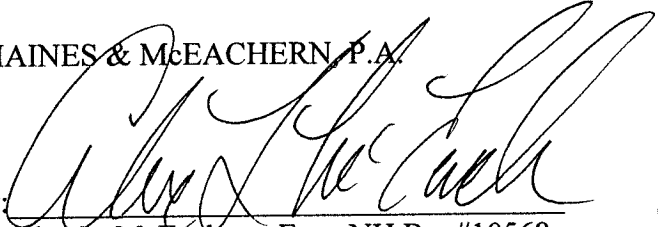
Respectfully submitted,

SEA-3, Inc.

By Its Attorneys,

SHAINES & McEACHERN P.A.

By:


Alec L. McEachern, Esq., NH Bar #10568
282 Corporate Drive, P.O. Box 360
Portsmouth, NH 03802-0360
(603) 436-3110 (telephone)
(603) 436-2993 (facsimile)
alec@shaines.com

Dated: February 18, 2015

CERTIFICATE OF SERVICE

I certify that on this date I have forwarded a copy of the foregoing via U.S. Postal Service, first class mail to the following:

John J. Ratigan, Esq.
225 Water Street
Exeter, NH 03833

Jane Ferrini, Esq.
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

Christopher Cole, Esq.
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701

Dated: February 18, 2015


Alec L. McEachern, Esq.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

THE CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON PLANNING BOARD, ET AL.

Docket Nos. 218-2014-CV-00654
218-2014-CV-01287

MEMORANDUM IN SUPPORT OF SEA-3, INC.'S MOTION TO DISMISS

[HEARING REQUESTED]

NOW COMES the Intervenor, SEA-3, Inc., by and through counsel, Shaines & McEachern, P.A., and respectfully submits the within Memorandum of Law in Support of its Motion to Dismiss the City of Portsmouth's consolidated appeals.

INTRODUCTION

The Court should dismiss the City of Portsmouth's Petitions for Appeal because federal law preempts state or local decisions and actions that directly or indirectly regulate the railroad. The Court should also dismiss Portsmouth's Petitions for lack of standing.

SEA-3, Inc. (hereinafter "SEA-3"), owns and operates a propane storage and distribution terminal (the "Facility") in the Town of Newington, which has been in continuous operation since 1975. The Facility has a storage capacity of 560,000 barrels and is one of only two large scale propane (a/k/a "LPG") storage facilities in New England and the only one with rail access. SEA-3 receives LPG by ship and rail car, with the majority arriving by ship. The Facility has only three (3) rail berths, allowing it to offload 6 rail cars per day. Rail service is provided by a common rail carrier over the Newington Branch, a rail line that travels through the City of Portsmouth.

In November 2013, SEA-3 applied to the Newington Planning Board for site approval to add five additional rail berths and associated offloading equipment at its Facility. The additional capacity would allow SEA-3 to receive the majority of its LPG requirements by rail from domestic sources, which is critical to SEA-3's business as it is no longer economically viable to import foreign propane by ship due to a change in the world energy market.

Portsmouth's Petitions for Appeal arise out of an attempt to thwart the Town of Newington from allowing SEA-3 to make improvements to its existing operations. Portsmouth's sole concern about the improvements is the potential for increased railway traffic through Portsmouth. Portsmouth appeared before and submitted written statements to the Town of Newington Planning Board and Zoning Board of Adjustment. Portsmouth did so after the Town of Newington deemed the project a "development of regional impact" pursuant to RSA § 36:55. The Town of Newington Planning Board's Certified Record demonstrates that Portsmouth's only voiced concern was increased rail traffic through Portsmouth.

The result of the Town of Newington Planning Board and Zoning Board of Adjustment's decisions is that SEA-3 is permitted to make its improvements. Portsmouth's Petitions for Appeal followed.

As described below, Portsmouth's Petitions for Appeal should be denied because of broad, express preemption by 49 U.S.C. § 10501(b) and its associated provisions.

SUMMARY OF MATERIAL FACTS AND PROCEDURAL HISTORY

The following facts are taken from allegations of the Petitions for Appeal as well as the Town of Newington Planning Board's Certified Record and other written statements by Portsmouth. The Court may properly consider the additional documentation without converting this to a motion for summary judgment because it raises defenses separate and apart from the

sufficiency of the Plaintiff's legal claim. See Atwater v. Town of Plainfield, 160 N.H. 503, 507, 8 A.3d 159, 162-63 (2010).¹

The pertinent allegations from the Petitions for Appeal are as follows:

- SEA-3 owns two parcels of property located in Newington, New Hampshire. The two lots are divided and separated by the railway owned and operated by Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am Railways (“Pan Am”). Planning Board Petition ¶ 7; Zoning Board Petition ¶ 6.
- The first lot, depicted on the Town of Newington’s Tax Map at Map 20, Lot 13, is 7.02 acres and located within both the General Industrial District and the Waterfront Industrial and Commercial District. Planning Board Petition ¶ 7; Zoning Board Petition ¶ 8.
- The second lot, depicted on the Town of Newington’s Tax Map at Map 20, Lot 2, is 3.92 acres and located within the Waterfront Industrial and Commercial District. Planning Board Petition ¶ 8; Zoning Board Petition ¶ 9.
- SEA-3 submitted an application that the Newington Planning Board unanimously approved, to allow SEA-3 to increase its rail offloading capacity to receive more LPG by rail than by ship. Planning Board Petition ¶ 9; Zoning Board Petition ¶ 10.
- The Town of Newington noticed Portsmouth of SEA-3’s application because Newington designated the Application a “development of regional impact”. Planning Board Petition ¶¶ 21-22.
- On June 17, 2014, Portsmouth filed a Petition to Appeal the Planning Board’s approval of SEA-3’s site plan Application; Portsmouth also appealed the decision to the Newington

¹ SEA-3 also expressly denies that the City of Portsmouth states a legally sufficient basis for appeal of decisions by either the Town of Newington Planning Board or the Zoning Board of Adjustment. Pursuant to Superior Court Civil Rule 9(b), SEA-3 will submit an Answer within thirty days after the Court decides this Motion to Dismiss.

Zoning Board of Adjustment. Zoning Board Petition ¶¶ 23-24. The Zoning Board Petition necessarily relies on the claims in the Planning Board Petition.

- Portsmouth opposed SEA-3's Application. Planning Board Petition ¶ 24. Portsmouth raised its concern about the "volume and speed of railcars transporting hazardous materials through its residential neighborhoods and through its downtown." Id. ¶ 25.

The Town of Newington Planning Board's Certified Record and the annexed exhibits demonstrate that Portsmouth's sole concern has been the rail transportation of LPG through Portsmouth. SEA-3's site is 4,400 linear feet from Portsmouth's nearest boundary with Newington, and is 5,400 feet via the shortest traveled way. Zoning Board C.R., Exh. E (Affidavit of S. Haight, P.E.).² The existing tanks on SEA-3's site would not be enlarged. The record is devoid of any evidence that SEA-3's proposed construction would make SEA-3's facility any more dangerous.

STANDARD OF REVIEW

Superior Court Civil Rule 12(d) permits the filing and consideration of motions to dismiss. The Court may grant a motion to dismiss unless the "plaintiff's allegations are 'reasonably susceptible of a construction that would permit recovery.'" Bohan v. Ritzo, 141 N.H. 210, 212-13, 679 A.2d 597, 599 (1996) (quoting Wenners v. Great State Beverages, 140 N.H. 100, 102, 663 A.2d 623, 625 (1995) (quotation omitted), cert. denied, *213 516 U.S. 1119, 116 S.Ct. 926, 133 L.Ed.2d 854 (1996)). The Court must "test the facts contained in the petition against applicable law." 22 Lenox Ave. LLC v. Town of Derry, 2014 WL 5398108 (N.H.Super.), 1 (citing Jay Edwards, Inc. v. Baker, 130 N.H. 41, 44 (1987)).

² The consolidated appeals include two certified records: The Town of Newington Planning Board's Certified Record, which has been filed with the Court, and the Zoning Board of Adjustment's Certified Record, which has not yet been filed. This Memorandum references both Certified Records, citing as follows:

- a. To the Planning Board's Certified Record: "Planning Board C.R. [page number]"; and
- b. To the Zoning Board of Adjustment's Certified Record: "Zoning Board C.R. [exhibit letter]".

“Generally when a motion to dismiss is reviewed, all facts properly pleaded by the plaintiff are deemed true.” Alacron, Inc. v. Swanson, 145 N.H. 625, 628 (2000) (quotation omitted). “However, when ‘the motion to dismiss does not challenge the sufficiency of the plaintiff’s legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff’s unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief.’” Atwater v. Town of Plainfield, 160 N.H. 503, 507, 8 A.3d 159, 162-63 (2010) (quoting Provencher v. Buzzell-Plourde Associates, 142 N.H. 848, 853, 711 A.2d 251, 254 (1998)). The defense of subject matter jurisdiction is one such exception permitting the Court to further assay the facts. See Atwater, 160 N.H. at 507.

ARGUMENT

I. THE SUPERIOR COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE CITY OF PORTSMOUTH’S APPEALS BECAUSE OF FEDERAL PREEMPTION PRINCIPLES.

The Court should dismiss the City of Portsmouth’s appeals because the Court does not have subject matter jurisdiction over the regulation of railroads. The City of Portsmouth’s proscribed purpose in this appeal is to directly or indirectly regulate the railroad. All of the issues raised by the City of Portsmouth are governed by the Interstate Commerce Commission Termination Act (“ICCTA”) (codified in part at 49 U. S. C. §§ 10101-16106), which includes a broad, express preemption provision.

“Subject matter jurisdiction may be raised at any time in the proceedings, including on appeal, by the parties, or by the court *sua sponte*.” State v. Demesmin, 159 N.H. 595, 597 (2010). “It is well settled law here that parties cannot confer jurisdiction by consent if jurisdiction of the subject matter is lacking.” Pokigo v. Local No. 719 Int’l Bhd. of Elec.

Workers, 106 N.H. 384, 385, 213 A.2d 689, 690 (1965) (citing Keenan v. Tonry, 91 N.H. 220, 222, 16 A.2d 705, 709 (1940); Hartnett v. Hartnett, 93 N.H. 406, 407, 43 A.2d 153, 153 (1945)).

a. The ICCTA's Preemption Provisions.

By federal statute, the Surface Transportation Board exercises exclusive jurisdiction over “transportation by rail carriers and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers” 49 U.S.C. § 10501(b) (hereinafter “10501(b)"). 10501(b) expressly states that the STB's jurisdiction is “exclusive” and “[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” Id. “Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” Boston and Maine Corporation and Springfield Terminal Railroad Company – Petition for Declar. Order, Finance Docket No. 35749 (S.T.B. July 19, 2013) (hereinafter “Boston and Maine”).

Upon its enactment, ICCTA:

broadened the express preemption provision of the Interstate Commerce Act to the point that “[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations.” CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N. D. Ga. 1996). Section 10501(b) gives the Board exclusive jurisdiction over ‘transportation by rail carriers,’ and the term ‘transportation’ is defined by our statute, at 49 U. S. C. 10102(9), to embrace all the equipment, facilities, and services relating to the movement of property by rail. Moreover, section 10501(b) expressly preempts any state law remedies with respect to the routes and services of Board-regulated rail carriers. Thus, under the plain language of the statute, any state or local attempt to determine how a railroad's traffic should be routed is preempted.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005).

Pursuant to 10501(b)'s preemption provisions, state and local entities are prohibited from deciding matters regulated by the STB. As the STB has explained:

In interpreting the reach of 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g. railroad rates, services, construction, and abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's ability to conduct rail operations. Thus, state or local permitting or preclearance requirements including building permits, zoning ordinances, and environmental and land use permitting requirements are preempted.

Boston and Maine, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013).

Based on § 10501(b)'s broad reach, any state or local law that allows a non-federal entity to restrict or prohibit a federal rail carrier's operations is preempted, regardless of whether the state or local law is expressly directed at the carrier's operations. For example, in Norfolk Southern Ry Co. v. City of Alexandria, the Fourth Circuit Court of Appeals ruled that a city ordinance regulating third party truckers travelling to Norfolk Southern's transloading facility to pick up ethanol was preempted as an impermissible attempt to regulate transloading operations at the facility. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010) (citing Green Mtn. R. R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005)). The ruling demonstrates that local governments cannot indirectly regulate interstate commerce by regulating third parties.

The New Hampshire Supreme Court has upheld an administrative ruling that § 10501(b) preempts the New Hampshire Public Utilities Commission's state statutory authority to decide whether removal of rail track was not consistent with the public good. In re Conservation Law Found., 147 N.H. 89, 95, 782 A.2d 909, 913 (2001). The Court observed: "It has been noted that 'it is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" Id., 147 N.H. at 92 (quoting CSX Transp., Inc. v. Georgia Public Serv. Com'n, 944 F.Supp. 1573, 1581 (N.D.Ga.1996)).

b. ICCTA's Preemption Provision Applies to SEA-3 and Pan Am.

ICCTA's broad preemption provision covers SEA-3 and Pan Am. "The statute defines 'transportation' expansively to encompass any property, facility, structure or equipment 'related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.'" Boston and Maine, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013) (quoting 49 U.S.C. § 10102(9)). Pursuant to 49 U.S.C. § 11101, SEA-3 has the legal right to receive common carrier rail service from Pan Am because Pan Am is a "rail carrier providing transportation or service subject to the jurisdiction of [the STB]" 49 U.S.C.A. § 11101(a) (West) (conferring rights to common carrier rail service); Boston and Maine, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013) (identifying Pan Am as a common rail carrier). SEA-3 is therefore entitled to receive LPG rail cars from Pan Am over the Newington Branch.

c. All of the City of Portsmouth's Claims Are Preempted by ICCTA.

The City of Portsmouth's concern in this matter is limited to the rail transportation of LPG through its city limits. Portsmouth's concern is preempted by § 10501(b). Portsmouth's appeal is preempted for two reasons: 1) Portsmouth's appeal grounds directly concerning the railway are preempted; and 2) Portsmouth's singular purpose—limiting rail transportation—requires preemption of any allegedly non-railroad bases of appeal. This section addresses each argument in turn.

i. *Portsmouth's Appeal Grounds Concerning the Railway are Preempted.*

As set forth in Portsmouth's Pleadings, Portsmouth alleges it will be immediately impacted by the Planning Board's Approval because railroad traffic will increase, causing it to spend money to upgrade crossings and devaluing its tax base.³ Portsmouth's Petition for Appeal

³ The claimed immediate impacts from fire assistance and supplying water to the site already exist. Simply changing the method by which propane is delivered to the site will have no impact on these existing obligations.

¶ 40. On this basis, Portsmouth claims standing to proceed on all of its Superior Court Petition and ZBA Appeal issues.⁴ SEA-3 submits that any state or local proceeding that seeks a remedy for injuries allegedly caused by a federal carrier's railroad operations is preempted by § 10501(b), regardless of whether the specific claims are directly related to railroad operations.

As evident from the forgoing, federal law preempts state and local entities from resolving Portsmouth's concerns with LPG rail traffic:

[A]ny permitting or preclearance regime that could be applied to deny a railroad the right to conduct any part of its operations, or any other attempt by a state or local body to regulate the routing and movement of rail cars, is necessarily preempted under section 10501(b) without regard to the particular circumstances sought to be addressed by the state or local action. Where there is a particular local situation presenting safety or security concerns, those concerns must be directed to the federal authorities charged with assessing them and determining what measures (if any) would be appropriate to address the concerns in a manner that takes into account the operational needs of the national rail network.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 7 (S.T.B. May 3, 2005). As noted above, if Portsmouth has any safety concerns regarding the Newington Branch rail line, it must address those concerns to the Federal Railroad Administration which is solely responsible for the safety of the Newington Branch rail line under the Federal Railroad Safety Act (“FRSA”).

ii. Portsmouth's Singular Purpose Requires Preemption of Other Claimed Bases of Appeal, If Any.

The City of Portsmouth's concern has remained singularly trained on the rail traffic issue. The City's lone purpose appears throughout the Certified Record. See, e.g., Planning Board C.R. at 108 (letter dated Dec. 9, 2013 from Rick Taintor to Newington Planning Board, stating “The

⁴ Under New Hampshire law, Portsmouth is required to establish that it has legal standing in order to challenge the Planning Board's Approval at the Superior Court and at the ZBA. To have standing under New Hampshire law, Portsmouth must prove, among other factors, the immediacy of its claimed injury. See Golf Course Investors of NH, LLC v. Town of Jaffrey, 161 N.H. 675, 680 (2010); Joyce v. Town of Weare, 156 N.H. 526 (2007) (standing will not be given to those who allege a speculative injury).

potential impacts of this project on the City of Portsmouth relate to the possible storage of rail cars at the rail yard adjacent to North Mill Pond and the increased frequency of rail transport through the City and in particular through the downtown area.”); Planning Board C.R. at 171 (Newington Planning Board Minutes for Feb. 10, 2014, stating “[Portsmouth] City Councilor Jack Thorsen asked what action they might have to take to pursue the use of freighters as an alternate to rails.”); Planning Board C.R. at 228 (letter dated Mar. 6, 2014 from Mayor Lister to Denis Hebert, stating “Portsmouth has concerns with the operational changes specific to rail operations that will be implemented as a result of the site improvements proposed by Sea-3.”); and Planning Board C.R. at 425 (letter from Tom Morgan to Newington Planning Board summarizing requests for “safety impacts along the rail corridor”).

Specific statements demonstrate that Portsmouth’s concern has always been trained on preempted railroad issues. For example, the City of Portsmouth described its concerns regarding the development via a letter dated February 10, 2014 from Portsmouth’s Mayor Lister to the Newington Planning Board. See Exh. A.⁵ In that letter, Mayor Lister explained that Portsmouth is concerned about the rail corridor, stating, *inter alia*:

We are pleased to be working together with the Town of Newington, in addition to the other towns along the rail corridor and the State and Federal Agencies to craft a solution that will meet the needs of the applicant while not compromising the safety of those living and working in the corridor.

Id.

Eight days later, on February 18, 2014, Portsmouth Mayor Lister wrote to United States Senator Jeanne Shaheen, asking her to compel a study of the railroad tracks. See Exh. B. In that letter, Mayor Lister stated, *inter alia*:

⁵ Only the first page of Mayor Lister’s letter was included in the Planning Board Certified Record at 165. A full copy of the letter is annexed hereto as Exhibit A.

The City has concerns about the proposed terminal expansion not due to the site plan itself but to the operational changes that will be implemented as a result of the site improvements.

The Newington Planning Board has asked for documentation from the applicant that this corridor has been inspected and is in fact safe according to the National Railroad Administration. Neither the applicant nor the Town of Newington have been able to get a response as to the safety of the rail.

By way of this letter, I am asking that your office formally request the Federal Rail Administration provide inspection records documenting the condition of the Pan Am railroad tracks from Newfields, NH junction to the Sea-3 site in Newington, NH. Additionally, given the potential regional impact of this project and the breadth of concerns raised by residents in the four communities this rail line traverses, we request that you ask the Federal Rail Administration to send a representative who can meet with the communities in our region to answer questions and provide information as to how the safety of the rail can be confirmed.

Id.

Similarly, Portsmouth asked the Pease Development Authority to investigate routing the railroad through Pease Tradeport. See Planning Board C.R. 429-430 (letter dated May 5, 2015 [sic] from Pease Development Authority to Mayor Lister). The Pease Development Authority replied to Portsmouth's request, stating:

The most recent discussions related to the expansion of the Sea-3 terminal in Newington and the City of Portsmouth's concern about the increased burden on the existing rail corridor through residential areas is not operationally related to the public airport and the study of the same is an inappropriate use of airport revenue.

Id.

The City's purpose remained singular even after it signed the Petition for Appeal of the Planning Board's Decision. For example, in a letter dated June 18, 2014 from Portsmouth's Mayor Robert Lister to Governor Margaret Hassan, Mayor Lister stated, *inter alia*:

This is an issue of great concern for the City of Portsmouth because the proposed expansion will significantly increase the volume of LPG transported through residential neighborhoods and the heart of downtown Portsmouth. **Due to the**

recent approval of the expansion of the Sea-3 LPG facility in Newington, the residents of the City of Portsmouth and our central business district will be traversed by 16 LPG tank cars per day over track that is typically used only once or twice a week.

While the Newington Planning Board performed a thoughtful and deliberate review of this application, there was reluctance on the part of the Planning Board to address the significant impacts on safety this project places on the abutting communities. **During the public hearing process, the City specifically requested that Newington require a safety/hazard assessment to identify the risks and hazards associated with the transporting LPG through the City and other affected communities. Unfortunately, no such stipulation was required of the applicant and the city has appealed the Newington Planning Board's approval of the Sea-3's expansion to compel such a study.**

Exh. C.

The record establishes that, throughout Portsmouth's participation in the public hearings at-issue, it was only concerned with the effect of LPG rail traffic upon Portsmouth's citizens. Portsmouth made no other claim and in fact it publicly disavowed any interest in regulating the site itself, as stated in its letter to United States Senator Shaheen. See Ex. B. Furthermore, after Portsmouth filed its Superior Court Petition and ZBA Appeal, it publicly stated to New Hampshire's Governor that its purpose in appealing the Planning Board's Decision was to compel a study of the risks and hazards of transporting LPG through the City. See Ex. C. Portsmouth even asked the Pease Development Authority to investigate whether the railroad could be relocated to run through its property. See Planning Board C.R. at 429. Portsmouth's intent is to regulate the rail, either directly or indirectly.

Having publicly admitted that its purpose in appealing the Planning Board's Approval is to impose a *per se* impermissible preclearance requirement on rail operations, see Ex. C, Portsmouth should not be allowed to indirectly regulate rail operations by seeking to overturn the Planning Board's Approval on purportedly non-railroad issues, particularly when it failed to raise these issues itself at the Planning Board and publicly stated that it had no issues with the

site plan. See Ex. B. Even indirect attempts to regulate the railroad are preempted by ICCTA. See supra at pp. 6-7 (discussing preemption of indirect attempts at regulation, citing Boston and Maine Corporation, Finance Docket No. 35749 (S.T.B. July 19, 2013); City of Alexandria, 608 F.3d at 158). Given Portsmouth's numerous, consistent statements of its singular intent, the Board should not allow Portsmouth to use a *post hoc* rationalization to attempt an end run around federal preemption.

II. THE CITY OF PORTSMOUTH LACKS STANDING TO APPEAL THE RELEVANT DECISIONS BY THE TOWN OF NEWINGTON'S PLANNING BOARD AND ZONING BOARD OF ADJUSTMENT.

Portsmouth alleges that it has standing to appeal, even though it is not an abutter. See Planning Board Petition at ¶¶ 32 - 47. To have standing as a non-abutter, Portsmouth must show "some direct, definite interest in the outcome of the action or proceeding." Golf Course Investors of NH v. Town of Jaffrey, 161 N. H. 675, 680 (2011). In evaluating whether a non-abutter has standing to appeal, the Court must "consider the following factors: (1) the proximity of the challenging party's property to the subject site; (2) the type of change proposed; (3) the immediacy of the injury claimed; and (4) the challenging party's participation in the administrative hearings. Hannaford Bros. Co. v. Town of Bedford, 164 N. H. 764, 766 (2013).

In evaluating these factors, "the trial court must look beyond the petitioner's allegations and determine, based on the facts, whether the petitioner has sufficiently demonstrated its right to claim relief." Hannaford Bros. Co., 164 N. H. at 766-67 (citing Johnson v. Town of Wolfeboro Planning Bd., 157 N. H. 94, 96 (2008)). The facts demonstrate that Portsmouth's interest in SEA's site is insufficient to establish standing. This section addresses in turn each of the four factors identified above.

a. Proximity

In support of its claim of proximity, Portsmouth alleges, “The City of Portsmouth is a community that abuts Newington.” See Planning Board Petition at ¶ 38. This allegation lacks specificity and fails to establish Portsmouth’s proximity to the Site. In fact, the Site is 4,440 linear feet from Portsmouth’s nearest boundary with Newington, measured on a straight line, and is 5,400 linear feet via the shortest traveled way. See Zoning Board C.R., Exhibit E, Affidavit of Stephen Haight, P. E. (to be filed by Town).

At nearly a mile away, Portsmouth is far removed from the Site and there is no evidence in the Certified Record that Portsmouth will be impacted by any of the activities occurring on the Site.

b. Type of Change Proposed

SEA-3’s existing LPG storage and distribution facility was constructed in 1975 and is located on two parcels (Lot 20-13 and Lot 14-2, collectively the “Site”). The parcels are separated from each other by the Newington Branch Rail Line (the “Rail Line”). The Rail Line is owned by the Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am Railways (“Pan Am”). Lot 20-13 and Lot 14-2 are physically joined by pipelines that span over the Rail Line, transferring LPG from the rail and dock receiving facilities to the storage and distribution facilities. See Planning Board C.R. at p’s 10 and 551 (Sheets EX-1 and EX-2).

Lot 14-2 (the “Waterfront Lot”) currently contains a small equipment shed, three rail unloading berths with associated piping, a flare and LPG transmission pipes. LPG that is received at the rail unloading berths is at ambient temperature when it arrives and is piped to Lot 20-13 (the “Upper Lot”) for refrigeration or immediate distribution. LPG that arrives by ship

is already refrigerated and is unloaded at a dock on an abutting property (Lot 14-16) and then piped across the Waterfront Lot directly into the refrigerated storage tanks on the Upper Lot where it is held for distribution. The Waterfront Lot is located entirely within the Waterfront Industrial Zoning District.

The Upper Lot contains LPG transmission pipelines, a 400,000 barrel refrigerated storage tank, a 160,000 barrel refrigerated storage tank, a main building containing refrigeration equipment, offices and control room, a truck loading facility and an ambient LPG storage tank. See Planning Board C.R. at p's 14 and 551 (Sheet EX-1). LPG that is stored in the two refrigerated storage tanks is released from the tanks, brought up to ambient temperature and sent to the ambient storage tank prior to distribution through the truck loading facility. The Upper Lot is located partly in the Waterfront Industrial Zoning District and partly in the Industrial Zoning District.

Historically the Site has received the majority of its LPG from international sources via 12-13 import ships per year delivering an approximate annual total of 180 Million gallons of LPG. See Planning Board's C.R. at p's 11 and 326. Due to changes in the energy markets, SEA-3 plans to replace foreign source LPG received by ship with domestically produced LPG received by rail. To do this, SEA-3 must increase its rail offload capacity.

SEA-3 proposes to construct five new rail unloading berths on the property of Pan Am, between the Waterfront Lot and the Upper Lot, with associated improvements on the Waterfront Lot for the unloading, refrigeration and transfer of LPG to the Site's existing refrigerated storage tanks (the existing refrigeration equipment on the Upper Lot is not large enough to process 16 rail cars per day). These improvements will be located within an existing cleared, graveled and

fenced-in area in the Town's Waterfront/Industrial Zoning District. See Planning Board C.R. at p. 551 (Sheets C-1 and C-2).

The only proposed change for the Upper Lot is the addition of LPG transmission pipelines on the existing pipe rack assembly to carry refrigerated LPG to the junction located between the two large refrigerated storage tanks. The proposed change on the Upper Lot will be located entirely within the Waterfront Industrial Zoning District.

The proposed improvements will allow SEA-3 to replace higher cost international LPG that is received by ship with lower cost, domestically produced LPG that is received by rail. See Planning Board's C.R. at p's 10 and 394. While rail deliveries to the Site will increase, ship traffic will decrease and truck traffic will see little or no change. See C.R. at p's 393-94 and 522.

As demonstrated by the above information, the only effect of the proposed changes will be to increase rail traffic and decrease ship traffic. Because the Court has no jurisdiction to regulate rail traffic, it must disregard any rail related justification advanced by Portsmouth. The proposed changes at the Site will have no effect upon the City of Portsmouth.

c. Immediacy of the Claimed Injury

Pure speculation is insufficient to grant standing, which must be based on an actual immediate injury. Speculative injury "does not give rise to a definite interest in the outcome." Hannaford Bros. Co., 164, N. H. at 769 (citing Joyce v. Town of Weare, 156 N. H. 526, 530 (2007)).

In its Petition, Portsmouth claims it will be injured by the proposed improvements to SEA-3's property because any "catastrophic event at the site would likely require the evacuation of City's residents and the loss of property and damage." See Planning Board Appeal at ¶ 38. Portsmouth's claim of injury is pure speculation and conveniently overlooks the fact that all of

the claimed dangers associated with having LPG at SEA-3's Site currently exist as it has been a LPG storage and distribution facility for the past 40 years.

The Certified Record is devoid of any evidence regarding the likelihood or extent of damage that might result from a "catastrophic event or even what is meant by that term. To the extent Portsmouth is claiming it could be damaged from a massive explosion involving the refrigerated storage tanks, that possibility has existed since the facility opened. Furthermore, Portsmouth's own fire chief stated that:

The Portsmouth Fire Department and other area fire departments are not debating or questioning the many concerns of our elected representatives or citizens. We met to review and discuss the product, the mode of transportation, our ability to respond, and other related fire and life safety concerns. At this time the general consensus is that the risk of fire and the accidental release of product is extremely low, but no zero. Most fire departments are extremely familiar with the product and the emergency response required if there is an accidental release or fire.

See Planning Board C.R. at p. 577.

d. Participation in the Administrative Hearings

While there is no dispute that Portsmouth participated in the Planning Board's Hearings, its concerns were consistently and specifically confined to addressing the potential impact of increased LPG rail traffic through Portsmouth. See Planning Board C.R. at p's 108, 165, 168, 179, 208, 228, 279, 369, 375, 390, 425 and 429. Not once did the City of Portsmouth voice any concern with the Site itself. In fact, during the Hearings, Portsmouth publicly represented that it had no concerns with the Site itself. See Exhibit B.

Portsmouth's present attempt to raise issues with the Planning Board's review of the Site is nothing more than an attempt to avoid the effect of federal preemption. Because Portsmouth's only reason for opposing the proposed improvements is its opposition to LPG

railcar traffic through Portsmouth, its participation in the Planning Board's Hearings should be given no weight, as it has failed to demonstrate any direct, definite interest in the Site itself.

Based on Portsmouth's failure to satisfy any of the criteria necessary to establish standing in this matter, its Petitions should be dismissed.

CONCLUSION

The Court should dismiss the City of Portsmouth's Petitions because the matter is preempted by federal statute. Further, the City of Portsmouth cannot establish that it has standing to challenge the actions taken by the Town of Newington. The City of Portsmouth's purpose has been consistent and singular: to prevent increased rail traffic running through its city limits. The laws of preemption and standing prohibit Portsmouth from petitioning this Court for that purpose.

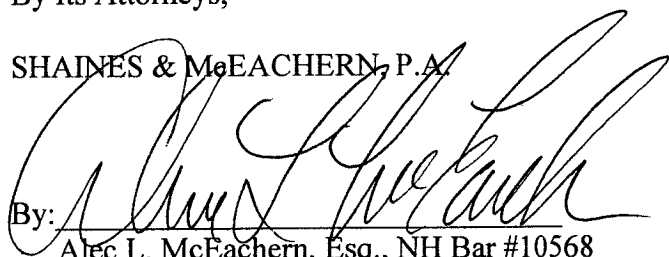
Respectfully submitted,

SEA-3, Inc.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

By:



Alec L. McEachern, Esq., NH Bar #10568
282 Corporate Drive, P.O. Box 360
Portsmouth, NH 03802-0360
(603) 436-3110 (telephone)
(603) 436-2993 (facsimile)
alec@shaines.com

Dated: February 18, 2015

CERTIFICATE OF SERVICE

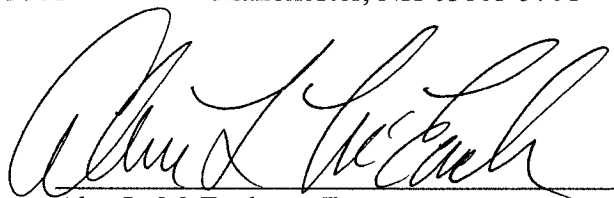
I certify that on this date I have forwarded a copy of the foregoing via U.S. Postal Service, first class mail to the following:

John J. Ratigan, Esq.
225 Water Street
Exeter, NH 03833

Jane Ferrini, Esq.
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

Christopher Cole, Esq.
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701

Dated: February 18, 2015


Alec L. McEachern, Esq.

INDEX OF EXHIBITS⁶

<u>Exhibit Letter:</u>	<u>Date:</u>	<u>Subject:</u>
Exh. A	Feb. 10, 2014	Letter, Portsmouth Mayor Lister to Newington Planning Board
Exh. B	Feb. 18, 2014	Letter, Portsmouth Mayor Lister to U.S. Sen. Jeanne Shaheen
Exh. C	June 18, 2014	Letter, Portsmouth Mayor Lister to Gov. Margaret Hassan

⁶ The Town of Newington Planning Board's Certified Record and the Zoning Board of Adjustment's Certified Record have been or will be separately filed by the Town of Newington. The Certified Records are not reproduced or annexed to this Memorandum.



CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7200
Fax (603) 427-1526

Robert J. Lister
Mayor

February 10, 2014

Denis Hebert, Chair
Newington Planning Board
205 Nimble Hill Road
Newington, NH 03801

Subject: Sea-3 Expansion Proposal at 190 Shattuck Way

Dear Planning Board Members:

Thank you for including the City of Portsmouth as an abutter in the land use review process now before you by Sea-3 of 190 Shattuck Way. Their proposal to reconfigure their terminal in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail and export of same via ocean-going ships has been the subject of a great deal of interest and concern by the Portsmouth City Council and residents of the City.

We appreciate the determination by the Newington Planning Board that this project has potential regional impacts beyond Newington's municipal boundaries and the rights that have been granted to the City of Portsmouth as abutters in this process. The City has created a webpage to provide information about the process (<http://cityofportsmouth.com/Sea-3.html>) and City Manager, John P. Bohenko has designated the City's Environmental Planner, Peter Britz to coordinate the City's interest in this project.

The City is primarily concerned about the public safety implications of increased rail traffic carrying hazardous materials close to neighborhoods and business areas. There are two components to this issue. First, we are concerned that this rail corridor has not been maintained adequately to support the level and type of rail use proposed for this project, as reflected by the current limitations on travel speed. Given the lack of rail traffic volume on the corridor to date, it is understandable that the corridor has not been maintained to a higher level. However, the proposed increase in volume of rail traffic combined with the hazardous nature of the cargo warrants a higher standard of maintenance.

The second aspect of our safety concern has to do with the equipment that will be used to transport LPG through the City. It is our understanding that the majority of tank cars carrying propane are not built to the latest industry safety standards.

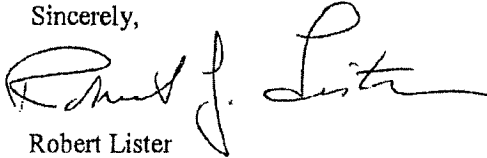
February 10, 2014

Page 2

We understand that the land use review process is typically focused on the site and immediate surroundings rather than on impacts to other communities, and we also understand the federal preemption of local oversight with respect to railroads. To that end, as you know, Portsmouth and the communities in the region including Newington, have requested assistance from both the Federal Rail Administration and the New Hampshire Department of Transportation. However, we request that the Newington Planning Board do all it can within its authority to ensure that the rail operations necessary for the proposed expansion of the Sea-3 terminal does not threaten public safety.

We are pleased to be working together with the Town of Newington, in addition to the other towns along the rail corridor and the State and Federal Agencies to craft a solution that will meet the needs of the applicant while not compromising the safety of those living and working in the corridor. If you have any questions or need additional information please do not hesitate to contact Peter Britz, Environmental Planner/Sustainability Coordinator for the City at (603) 610-7215 or plbritz@cityofportsmouth.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Lister". The signature is fluid and cursive, with a large initial "R" and "L".

Robert Lister
Mayor of Portsmouth



CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7200
Fax (603) 427-1526

Robert J. Lister
Mayor

February 18, 2014

The Honorable Jeanne Shaheen
U.S. Senator
1589 Elm St., Suite 3
Manchester, NH 03101

Dear Senator Shaheen:

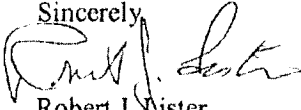
As you may know the Town of Newington has an application for expansion of the Sea-3 liquefied petroleum gas LPG at 190 Shattuck Way in Newington. The City has concerns about the proposed terminal expansion not due to the site plan itself but to the operational changes that will be implemented as a result of the site improvements.

It is our understanding that the upgraded facility will be receiving propane deliveries by rail 6 days per week, with each delivery consisting of up to 16 rail cars. Each rail trip to or from the Sea-3 terminal will require those trains with tank cars to travel through Portsmouth neighborhoods, commercial areas and the downtown traversing six (6) at grade crossings of City streets, six (6) underpass or overpass crossings in the City as well as a number of private property drive crossings. It goes without saying that the safety of the Citizens of Portsmouth and our infrastructure facilities are paramount. The Newington Planning Board has asked for documentation from the applicant that this corridor has been inspected and is in fact safe according to the National Railroad Administration. Neither the applicant nor the Town of Newington have been able to get a response as to the safety of the rail.

By way of this letter, I am asking that your office formally request the Federal Rail Administration provide inspection records documenting the condition of the Pan Am railroad tracks from Newfields, NH junction to the Sea-3 site in Newington, NH. Additionally, given the potential regional impact of this project and the breadth of concerns raised by residents in the four communities this rail line traverses, we request that you ask the Federal Rail Administration to send a representative who can meet with the communities in our region to answer questions and provide information as to how the safety of the rail can be confirmed.

The City has created a webpage on our website <http://www.cityofportsmouth.com/Sea-3.html> to provide information as it becomes available and the City Manager has designated the City's Environmental Planner, Peter Britz the coordinator of this topic. If you have any questions or need additional information, please do not hesitate to contact Peter Britz at (603) 610-7215 or plbritz@cityofportsmouth.com.

Sincerely,



Robert J. Nister
Mayor of Portsmouth

RJL/jed

c.: Portsmouth City Council Members



CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7200
Fax (603) 427-1526

Robert J. Lister
Mayor

June 18, 2014

The Honorable Maggie Hassan
Office of the Governor
State House
107 North Main Street
Concord, NH 03301

Dear Governor Hassan:

As you may be aware, the Town of Newington has recently approved the expansion of Sea-3 Inc.'s facility that will increase the site's capacity to receive, store and distribute liquefied propane gas ("LPG") throughout the State. This is an issue of great concern for the City of Portsmouth because the proposed expansion will significantly increase the volume of LPG transported through residential neighborhoods and the heart of downtown Portsmouth. Due to the recent approval of the expansion of the Sea-3 LPG facility in Newington, the residents of the City of Portsmouth and our central business district will be traversed by 16 LPG tank cars per day over track that is typically used only once or twice a week. The condition of the tracks in Portsmouth, owned and operated by Pan Am, is listed by the Federal Railway Administration as "excepted" or "Class 1". These are the lowest two ratings for track conditions where Class 1 limits train speeds to 10 mph for freight and excepted track limits speeds to under 10mph and hazardous cargo to a maximum of 5 cars per train.

After abutting communities requested that the Planning Board declare this project a "development of regional impact", the City actively participated in the public hearing process. While the Newington Planning Board performed a thoughtful and deliberate review of this application, there was reluctance on the part of the Planning Board to address the significant impacts on safety this project places on the abutting communities. During the public hearing process, the City specifically requested that Newington require a safety/hazard assessment to identify the risks and hazards associated with the transporting LPG through the City and other affected communities. Unfortunately, no such stipulation was required of the applicant and the City has appealed the Newington Planning Board's approval of the Sea-3's expansion to compel such a study.

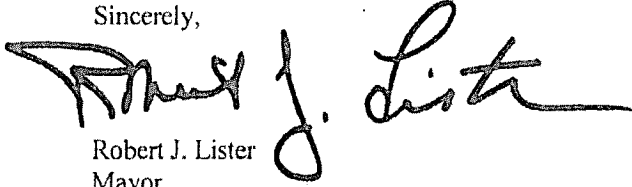
However, this safety issue is not just a local issue but is one of statewide concern because transportation of hazardous material is an issue of public health, safety and welfare. This letter is to request that the State, through the Department of Safety and Department of Transportation, perform a comprehensive safety and risk analysis regarding all aspects of the

June 18, 2014

transportation of LPG throughout the State, which would include: hazard identification; vulnerability assessment; risk evaluation; environmental risk assessment; analysis of emergency response capabilities and a security assessment.

The City of Portsmouth looks forward to the opportunity to work with the State to address this important public safety issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Lister". The signature is fluid and cursive, with a large initial "R" and "L".

Robert J. Lister
Mayor

RJL/jed

c.: Portsmouth City Council Members
Portsmouth Legislative Delegation

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, S.S.

SUPERIOR COURT

City of Portsmouth

v.

Newington Zoning Board of Adjustment and Town of Newington

Docket No. 218-2014-CV-00654

ANSWER

NOW COME the Newington Zoning Board of Adjustment and the Town of Newington (collectively "the town" or "the board"), by and through their attorneys, Mitchell Municipal Group, P.A., and in answering the *Petition for Appeal of the Town of Newington Zoning Board of Adjustment Decision Pursuant to RSA 677:2, 3, 4 and RSA 677:15, I-a(a)* in the above captioned matter states as follows:

1. The allegations contained in paragraph 1 of the Petition are admitted.
2. The allegations contained in paragraph 2 of the Petition are admitted.
3. The allegations contained in paragraph 3 of the Petition are admitted.
4. The allegations contained in paragraph 4 of the Petition are admitted.
5. The allegations contained in paragraph 5 of the Petition are admitted.
6. The allegations contained in paragraph 6 of the Petition are admitted.
7. The allegations contained in paragraph 7 of the Petition are denied as stated.

SEA-3 presently receives LPG by rail, truck and ship at the properties; it distributes the LPG by truck only.

8. The allegations contained in paragraph 8 of the Petition are admitted.
9. The allegations contained in paragraph 9 of the Petition are admitted except the proper designation is Map 14, Lot 2.
10. The allegations contained in paragraph 10 of the Petition are admitted,

except that it is denied that SEA-3 proposes to “reconfigure” the property. There are no changes to any of the property lines or boundaries. While SEA-3 is seeking to add equipment that will allow it to expand its existing rail capacity, it is not converting any equipment and it will continue to have the ability to import LPG by ship if business conditions allow. .

11. In response to the allegations contained in paragraph 11 of the Petition, the town states that the change in use requires construction of new facilities on the site to accommodate an increase in volume of LPG that will be received, stored, chilled and distributed from the site.

12. The allegations contained in paragraph 12 of the Petition are admitted, although it is noted that the improvements on Lot 13 referenced in subparagraph (a) are not located on the portion of the lot zoned “I.”

13. The allegations contained in paragraph 13 of the Petition are admitted.

14. The allegations contained in paragraph 14 of the Petition are denied.

Although it is irrelevant to the issues before the Court, the Historic District incorporates by reference the uses permitted in the Single Family Residential District.

15. The allegations contained in paragraph 15 of the Petition are substantially accurate quotations from the zoning ordinance.

16. The allegations contained in paragraph 16 of the Petition are admitted.

17. The allegations contained in paragraph 17 of the Petition are admitted.

18. The allegations contained in paragraph 18 of the Petition are admitted.

19. The allegations contained in paragraph 19 of the Petition are admitted. By way of further answer, the board states that it concluded that the use was a nonconforming use.

20. The allegations contained in paragraph 20 of the Petition are admitted. By way of further answer, the town states that no variance was required as the portion of the storage tank in the I district is not being expanded, nor is any other construction occurring in the I district.

21. The allegations contained in paragraph 21 of the Petition are denied as stated. The board found that there was no proposed expansion of LPG storage in the "I" zone. The nonconforming use may therefore continue. RSA 674:19.

22. The allegations contained in paragraph 22 of the Petition are admitted.

23. The allegations contained in paragraph 23 of the Petition are admitted.

24. The allegations contained in paragraph 24 of the Petition are admitted, except that the appeal is dated June 16, 2014.

25. The allegations contained in paragraph 25 of the Petition are admitted.

26. The allegations contained in paragraph 26 of the Petition are admitted.

27. The allegations contained in paragraph 27 of the Petition are admitted.

28. The allegations contained in paragraph 28 of the Petition are admitted.

29. The allegations contained in paragraph 29 of the Petition require no answer.

30. The allegations contained in paragraph 30 of the Petition require no answer.

31. The allegations contained in paragraph 31 of the Petition are denied.

a. The allegations contained in paragraph 31a of the Petition are admitted.

b. The allegations contained in paragraph 31b of the Petition are admitted.

c. The allegations contained in paragraph 31c of the Petition are admitted.

- d. The allegations contained in paragraph 31d of the Petition are denied.
- e. The allegations contained in paragraph 31e of the Petition are denied.
- f. The allegations contained in paragraph 31f of the Petition require no

answer.

32. The allegations contained in paragraph 32 of the Petition require no answer.

33. The allegations contained in paragraph 33 of the Petition are denied.

- a. The allegations contained in paragraph 33a of the Petition are admitted.

- b. The allegations contained in paragraph 33b of the Petition are denied as stated.

- c. The allegations contained in paragraph 33c of the Petition require no answer.

34. The allegations contained in paragraph 34 of the Petition require no answer.

35. The allegations contained in paragraph 35 of the Petition are denied.

- a. The allegations contained in paragraph 35a of the Petition are denied.

- b. The allegations contained in paragraph 35b of the Petition are denied.

- c. The allegations contained in paragraph 35c of the Petition are denied.

The board did consider whether the alleged intensification of the use of the storage tank within the existing structure partially located in the "I" district would have any effect on the neighborhood and concluded that it would not.

- d. The allegations contained in paragraph 35d of the Petition require no answer.

36. The allegations contained in paragraph 36 of the Petition require no answer.

37. The allegations contained in paragraph 37 of the Petition are denied.

- a. The allegations contained in paragraph 37a of the Petition are admitted.
- b. The allegations contained in paragraph 37b of the Petition are admitted.
- c. The allegations contained in paragraph 37c of the Petition are denied. By way of further answer, the town states that the reasons for the denial are explained in the minutes, there was no harm in the town's inadvertent failure to send a notice of decision, the statute does not provide for the reversal of a board decision based on a failure to send a notice of decision, and the board again fully explained its original decision in its narrative response to the appellant's motion for rehearing.
- d. The allegations contained in paragraph 37d of the Petition require no answer.

WHEREFORE, the Newington Zoning Board of Adjustment and the Town of Newington respectfully request that this Honorable Court:

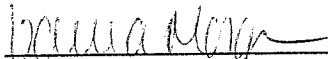
- A. Deny all relief sought by petitioner;
- B. Affirm the decision of the zoning board of adjustment and dismiss the petition; and
- C. Grant such other and further relief as the Court deems just and necessary.

Respectfully submitted,

**NEWINGTON ZONING BOARD OF
ADJUSTMENT AND TOWN OF
NEWINGTON**

By Their Attorneys
MITCHELL MUNICIPAL GROUP, P.A.

Date: 2-18-15

By: 
Walter L. Mitchell, Bar No. 1778
Laura Spector-Morgan, Bar No. 13790
25 Beacon Street East
Laconia, New Hampshire 03246
(603) 524-3885

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via first class mail, postage prepaid, to Jane Ferrini, Esquire, and John Ratigan, Esquire, counsel of record.

Date: 2-18-15


Laura Spector-Morgan