

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

**CERTIFIED RECORD OF PROCEEDINGS BEFORE
THE TOWN OF NEWINGTON ZONING BOARD OF ADJUSTMENT**

Laura Spector-Morgan, Esquire, NHB# 13790
Mitchell Municipal Group, P.A.
25 Beacon Street East
Laconia, NH 03246
603-524-3885

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, S.S.

SUPERIOR COURT

City of Portsmouth

v.

Newington Zoning Board of Adjustment and Town of Newington

**INDEX TO THE CERTIFIED RECORD
OF THE TOWN OF NEWINGTON ZONING BOARD OF ADJUSTMENT**

Tab	Description	Date
A	Application for Appeal of Administrative (Planning Board) Decision	6-17-14
B	Letter from Attorney Ferrini to Zoning Board of Adjustment requesting continuance	8-25-14
C	Minutes of Newington Zoning Board of Adjustment Meeting	8-25-14
D	Justin Richardson's Notes from May 4, 2014	9-15-14
E	SEA-3, Inc.'s Objection to Appeal	9-15-14
F	Newington Planning Board's Memorandum of Law	9-15-14
G	Minutes of Newington Zoning Board of Adjustment Public Hearing	9-15-14
H	Application for Rehearing	10-3-14
I	Minutes of Newington Zoning Board of Adjustment Meeting	10-30-14
J	Decision on Motion for Rehearing	11-7-14
K	Zoning Ordinance	

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

CERTIFICATION OF RECORD

I, Martha Roy, Town Administrator, hereby certify that, to the best of my knowledge and belief, the attached is a complete and accurate copy of the zoning board of adjustment's file in the above captioned matter.

Respectfully submitted,

Date: 2-12-15

By:

Martha J Roy
Martha Roy, Town Administrator
Town of Newington

Town of Newington, New Hampshire

Application Form

Zoning Board of Adjustment

Appellant		Applicant's Agent	
Property Owner	<u>City of Portsmouth</u>	Name	_____
Name	<u>City of Portsmouth</u>	Address	_____
Address	<u>1 Junkin Ave</u>	Telephone	_____
	<u>Portsmouth NH 03801</u>	Fax	_____
Telephone	<u>603 610 7256</u>	Email	_____
Fax	<u>603 427 1577</u>		
Email	<u>jferrini@cityofportsmouth.com</u>		

Location of Property	Fee
Address <u>Shattwell Way</u>	\$50
Tax Map <u>20</u> Lot <u>13</u>	
Tax Map <u>20</u> Lot <u>2</u>	

Applicant's Request(s)

(Check applicable requests)

- Variance from Article _____ in order to _____
- Special Exception to allow _____
- ~~Administrative~~ Appeal from the decision of Newington Planning Board on 5/19/14 (date) regarding site plan approval for Sea-3 Inc.
See attached.
- Equitable Waiver of Dimensional Requirements
- Rehearing

Property Owner's Consent

I have read Newington's land use regulations and will comply with all the requirements therein.

Jane M. Ferrini

 Signature(s) of all property owners & date signed
Jane M. Ferrini,
Staff Attorney
City of Portsmouth

000001

STATE OF NEW HAMPSHIRE

THE CITY OF PORTSMOUTH'S APPEAL OF THE DECISION OF THE
NEWINGTON PLANNING BOARD TO APPROVE THE SITE PLAN OF SEA-3 INC.
PURSUANT TO RSA 676:5, III AND RSA 677:15, I-a (a)

PARTIES

1. The Petitioner is the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue, Portsmouth, New Hampshire 03801.
2. The Newington Planning Board is a local land use board established by the Town of Newington pursuant to RSA 673.
3. The Town of Newington's Zoning Ordinance requires that the Planning Board review site plans under its Site Plan Review Regulations. No site plan will be approved until it complies in all respects to any and all pertinent zoning ordinances. (RSA 674.43, RSA 674.44, Town of Newington Site Plan Review Regulations, Section 1 and 2).
4. This City appeals the decision of the Planning Board pursuant to 676:5, III and 677:15, I-a (a) because it misapplied and misinterpreted the Newington Zoning Ordinance.

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, three (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 the owner of the rail lines, Pan Am, which 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 seven (7) public hearings was the site plan Application presented to the Planning Board 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

000003

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 variance requests for the frontage and set back issues raised by the Newington 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 Planning Board deemed the project a "development of regional impact" pursuant to RSA 36:55.

21. A "development 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 community's 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 Stratham 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 Rheaume, and Lou Salomi. The Portsmouth 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 assessment and granted Sea-3's site plan Application at its May 19, 2014 meeting, conditioning approval on receipt of an updated "safety plans" from Sea-3's prior site plan approval in 1996 before a building permit will issue.

30. The City has also appealed the Planning Board's decision to the Superior Court pursuant to RSA 677:15. I and RSA 677:15. I-a (a).for its failure to properly apply its site review regulations.

31. The City appeals the Planning Board's decision as unlawful and unreasonably because it misapplies and misinterprets the Town of Newington Zoning Ordinance as more fully set forth below.

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 so-called 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 issue 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 conducting operations or unreasonably burden interstate commerce, its decision to allow Sea-3's expansion will cause a material and substantial 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 the City and its 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 taxpayers will pay for this burden but 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 potentially substantial diminution in value of certain 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). This is particularly true where, as in this matter, the municipalities are closely connected by economic and resource concerns, and where the municipalities effectively share infrastructure and logistics.

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 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 misapplied and misinterpreted its Zoning Ordinance.

**THE PLANNING BOARD MISINTERPRETED AND MISAPPLIED THE
NEWINGTON ZONING ORDINANCE**

ZONING DISTRICT

48. No site plan will be approved until it complies in all respects to any and all pertinent ordinances and regulations. Town of Newington Site Plan Regulations, Section 2.

49. 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."

50. Article III, Section 3 provides that "unless otherwise indicated, the district boundary lines are the nearest lot lines, the center lines of the streets or such lines extended, pier head or bulk head lines, or the town boundary lines."

51. Zones districts must be described with certainty. Nottingham v. Harvey, 120 NH 889 (1980).

52. The fixing of zoning lines is a matter of legislative discretion and necessarily results in classifications of uses on either side of the line. Windham v. Alford, 129 NH 24, 31 (1986).

53. 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.

54. 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."

55. 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 railroad 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.

56. 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).

57. 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 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.

58. LPG is explosive and a fire hazard. The storage tank partially located in the "I" zone is, therefore, 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" District.

59. 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." 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.

60. Paragraph 50 of the Minutes of May 19, 2013, sets forth Findings whereby "[t]he Board expressly finds that this proposed expansion of a long-standing use that is permitted in the Industrial Zone is consistent with the aim of Newington Zoning Ordinance Article V, Section 5, A, which anticipates that land zoned Industrial will be able to accommodate "expansion of existing industry.. and to enhance economic development and employment opportunities."

61. However, the Planning Board misinterprets and misapplies the Town of Newington's Zoning Ordinance because storage and handling a gas that is explosive material and is a fire hazard and is not a permitted use in the General Industrial Zone, of which Lot 13 is a part.

62. Paragraph 51 of the Findings set forth in the Planning Board's minutes of May 19, 2014 states that "[t]he Board expressly finds, as is required by Newington Zoning Ordinance Article V, Section 5, B that per the terms of this site plan application, "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."

63. Again, the Planning Board misinterprets and misapplies the Town of Newington's Zoning Ordinance because storage and handling of LPG, an explosive material that is a fire hazard, is a prohibited use in the General Industrial Zone.

64. Paragraph 52 of the Findings set forth in the Planning Board's minutes of May 19, 2014 states that "[t]he Board expressly finds and recognizes that, in the aftermath of the recent economic recession, the importance of supporting business in the Industrial District, and promoting economic development and local employment, cannot be understated as an important purpose of this Industrial District."

65. Yet again, the Planning Board misinterprets and misapplies the Town of Newington's Zoning Ordinance because the storage and handling of explosive material and material that is a fire hazard is a prohibited use in the General Industrial District.

66. The Planning Board's approval of the site plan was based on its reliance on a provision of the Zoning Ordinance that prohibits the proposed use at the site and as such, the Planning Board's decision was illegal and unreasonable and should be reversed.

67. Because the tank is a non-conforming and not a permitted use, at a minimum, the Applicant's request, involving the site's expansion to increase the delivery, storage and distribution of LPG, is an impermissible expansion of a non-conforming use. Because no variance was granted, the Planning Board misapplied the Zoning Ordinance, and as such, its decision to approve the site plan should be overturned.

PUBLIC HEALTH SAFETY AND WELFARE

68. Article 1 of the Town of Newington's Zoning Ordinance provides that the purpose of the zoning ordinance is to "promote the health, safety, morals, convenience and general welfare of the community" and Article 3 provides that the purpose of the ordinance is for "promoting the health, safety, morals, prosperity, convenience or general welfare."

69. The Planning Board misapplied and misinterpreted Article 1 and Article 3 of the Zoning Ordinance because it did not require and review a safety/hazard assessment prior to granting site plan approval.

70. The only mention by the Planning Board regarding a safety/hazard plan 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.

71. The City, through its Mayor, Assistant Mayor, City Councilors, City Manager, City Staff and citizens, as evidenced in the record, repeatedly and vociferously requested that the Planning Board require a safety study/hazard assessment of the site prior to approval of the site plan.

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

73. 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 RSA 36 that requires Newington to give prompt and effective notice to affected communities of "development of regional impact" in order to facilitate comment on the project.

000011

74. Review of updated "safety plans" -outside public hearing process and the scrutiny of residents of the Town and abutters from other affected municipalities- denies the affected communities the 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 other the opportunity to comment on these "safety plans" in violation of RSA 36 and constitutes a procedural error and also violates the Zoning Ordinance because approving a site plan without a safety/hazard assessment does not promote the health, safety and general welfare of the community, which in this case, includes the City, and as such, the Planning Board's decision to approve the Application should be overturned.

75. Nothing in the record in the current proceeding indicates that the 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 have surrounding populations, abutters and transportation routes, rendering the original 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.

76. The Planning Board's approval of a site plan without first reviewing a site/hazard assessment was a misapplication and misinterpretation of the Zoning Ordinance as it could not evaluate whether the site promoted the health welfare and safety of the public without first reviewing a site/hazard assessment.

77. Because the Planning Board misinterprets and misapplied the zoning ordinance, its decision should be reversed and the Application denied.

DELAY IN DECLARING PROJECT OF DEVELOPMENT OF REGIONAL IMPACT

78. The City was prejudiced and other abutters were prejudiced in the Zoning Board's delay in declaring this a "development of regional impact".

79. 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.

80. 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.**" RSA 36:56 (emphasis added).

81. The appeal and request for variance was 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 variance was granted.

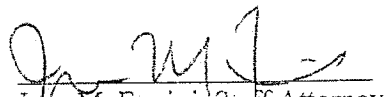
82. Abutters were not given notice of the hearing and were denied the ability to comment on the project.

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

CONCLUSION

84. For all the foregoing reasons, the Zoning Board of Adjustment should deny the approval of the site plan. In the alternative, the Zoning Board of Adjustment should remand the matter to the Planning Board for further proceedings consistent with the Town of Newington's Zoning Ordinance.

The City of Portsmouth
By and through its Attorney



Jane M. Ferrini, Staff Attorney
NHBM # 6528

1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7256

CERTIFICATE OF SERVICE

I, the undersigned, Jane Ferrini, Attorney for the Appellants, the City of Portsmouth, hereby certify that on this 17 day of June, 2014, a true and correct copy of the foregoing Appeal was served upon the Town of Newington and hand delivery to the following counsel of record:

John Ratigan, Esquire
225 Water Street
Exeter N.H. 03833

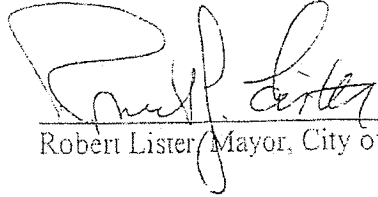

Jane M. Ferrini

000013

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.

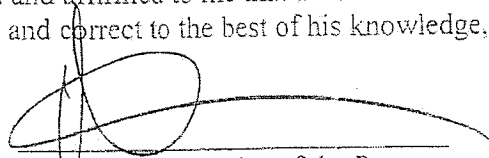
Dated: June 16, 2014



Robert Lister Mayor, City of Portsmouth

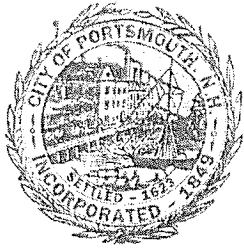
STATE OF NEW HAMPSHIRE
COUTNY OF ROCKINGHAM

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



CITY OF PORTSMOUTH

LEGAL DEPARTMENT

Robert P. Sullivan, City Attorney – 603-610-7204 (Direct Dial)
Suzanne M. Woodland, Deputy City Attorney – 603-610-7240 (Direct Dial)
Kathleen M. Dwyer, Assistant City Attorney – 603-427-1338 (Phone/Fax)

August 25, 2014

SENT BY FAX AND EMAIL

Matt Morton, Chairman
Zoning Board of Adjustment
Town of Newington
205 Nimble Hill Road
Newington, NH 03801

**RE: City of Portsmouth v. Town of Newington Planning Board
Appeal of the Planning Board's decision to approve the
site plan of Sea-3 Inc. pursuant to RSA 675:5, III and
RSA 677:15, I-a (a)**

Dear Chairman Morton:

The City of Portsmouth is requesting a continuance of the above-matter scheduled for Monday, August 25, 2014. Sea-3, Inc. and the City of Portsmouth have agreed to discuss a possible settlement of this matter that is the subject of the City's appeals to the Newington Zoning Board of Adjustment and the Superior Court.

The City waives the 30-day requirement pursuant to RAS 676:7 in requesting this continuance and Sea-3, Inc. also assents to this waiver. Sea-3 Inc. and the City will attempt to negotiate a settlement over the next two weeks. If the parties are unable to do so, the City will request that the Zoning Board of Adjustment reschedule the hearing at its next available date.

Given that this continuance will assist in resolving this matter which would avoid the time and cost associated with further protracted litigation, it is in the best interest of the City, Sea-3, Inc. and the Town of Newington to grant this continuance.

Sincerely,


Jane M. Ferrini
Staff Attorney

000015

cc: Walter Mitchell, Esq.
John Ratigan, Esq.
Tom Morgan, Town Planner (copy enclosed)
Martha Roy, Town Administrator (copy enclosed)
Alec McEachern, Esq. Attorney for Sea-3 Inc.
John P. Bohenko, City Manager
Robert P. Sullivan, City Attorney

h:\rps\litigation\sea 3\letters\court

000016

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT
Meeting Minutes – August 25, 2014

- Call to Order:** Chair Matt Morton called the August 25, 2014 meeting at 6:30 PM.
- Present:** Matt Morton, Chair; Ted Connors; Ralph Estes; John Frink; Jim Weiner and Jane Kendall, Recorder and Martha Roy, Town Administrator
- Absent:** Planning Board Representative, Justin Richardson (recused)
- Public Guests:** Newington Town Counsel, Attorney Walter Mitchell; City of Portsmouth Attorney, Jane Ferrini; Portsmouth Deputy Manager, David Allen; Attorney Alec McEachren; Paul Bogan with Sea-3; Pan Am Counsel, Robert Culliford; Attorney John Ratigan; Denis Hebert; Chris Cross; Justin Richardson; Edna Mosher; Richard DiPentimo

1) **Public Hearings:** The City of Portsmouth's appeal of the Newington Planning Board's decision to approve the **Sea-3** site plan for property located at **190 Shattuck Way, Tax Map 20, Lot 13, and Map 14, Lot 2.**

Town Counsel for the Board, Attorney Walter Mitchell said he had received a call from City of Portsmouth Attorney, Jane Ferrini that the City was filing a continuance. He said he told them that he wouldn't inform the Chairman unless she could tell him that was agreeable with Sea-3. He said he then heard from Sea-3's counsel, Attorney Alec McEachren that they had no objection to the continuance. He said he didn't know the details, but he was told the City had requested the continuance because they thought there was a possibility of the City and the developer reaching a resolution and then they would withdraw the appeal. Attorney Mitchell said it was up to the Board whether they wanted to grant the continuance. He recommended that the Board take a motion to continue the appeal and discuss it and set a date if it was granted.

Chairman Morton entertained a motion to continue the appeal.

Ralph Estes moved to continue the City of Portsmouth's appeal of the Newington Planning Board's decision to approve the Sea-3 site plan for property located at 190 Shattuck Way, Tax Map 20, Lot 13, and Map 14, Lot 2. Ted Connors seconded the motion.

Mr. Denis Hebert, Newington Planning Board Chair asked to speak and Chair Morton said they were in a motion. Mr. Hebert said they made the motion to continue another hearing without hearing from the public.

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT
Meeting Minutes – August 25, 2014

The motion to grant the continuance was approved unanimously.

Mr. Hebert said the motion had already been made, but he thought there should have been an opportunity for public comment considering there were members of the public present. He said a lot of money had been spent and he thought people needed to know the purpose of the delay. He said he heard Portsmouth and Sea-3 were working on an agreement and he thought it was a disservice not to include Newington and Portsmouth residents in those discussions.

Chairman Morton said everyone read the appeal and they would like to consider the appeal without a lawsuit. Discussion on mutually available dates ensued. Chairman Morton said the Planning Board representative could not be present at the meeting. Board member, John Frink said he thought the meeting should not conflict with the Planning Board meeting so the Planning Board chair could be present as a member of the public for his input.

John Frink moved to continue the appeal to September 15, 2014. Ted Connors seconded and the motion passed unanimously.

Minutes: *No motion was taken to approve the Minutes of June 2, 2014.*

Adjournment: *Ralph Estes motioned to adjourn, and Ted Connors seconded. All were in favor, and the meeting adjourned at 6:45 p.m.*

Next Meeting: Monday, September 15, 2014

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

Justin Richardson's ~~AA~~ Notes from
May 5, 2014

Prior to the issuance of a building permit by the Building Inspector, the prospective user shall submit the following information:

(1) An estimate of the maximum number of employees contemplated for the proposed development and the number of shifts during which they would work.

(2) A description of the operation proposed in sufficient detail to indicate the effect of those operations in producing traffic congestion, or problems of noise, glare, sewerage, odor, air or water pollution, fire safety hazards or other factors detrimental to the health, safety and welfare of the area. Upon a finding by the Planning Board that the contemplated use will constitute a development of sustained desirability and stability, that it will be in harmony with the character of the surrounding area, and consistent with the overall long-range plans for the community, that it will not result in an over-intensive use of the land, that it will not result in undue traffic congestion or traffic hazards, that the plans indicate that it will be adequately landscaped and otherwise promote the health, safety and welfare of the community, the Building Inspector shall issue a permit for a proposed development in the "W" District.

D - Uses Prohibited

(1) Any new use of an existing building or premises without the approval of the Planning Board.

(2) Residential uses are specifically excluded from the "W" District except for watchman, caretaker or janitor.

(3) Storage and handling 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 only be allowed when the following are complied with:

(a) National Fire Protection Association (NFPA) Standards

(b) Department of Transportation (DOT) regulations and standards on shipping and handling

(c) Environmental Protection Agency (EPA) regulations relating to the storing and handling such materials.

3/13/12

Z-18

Request by
Pl. Bd. for this
sheet underlined by
J. Richardson to be
entered into record.

000019

STATE OF NEW HAMPSHIRE

TOWN OF NEWINGTON

ZONING BOARD OF ADJUSTMENT

In the Matter of: City of Portsmouth v. Town of Newington Planning Board

SEA-3, INC.'s OBJECTION TO APPEAL

NOW COMES, SEA-3, Inc. ("SEA-3"), the owner of the real estate that is the subject of the present Appeal, and objects to the City of Portsmouth's Appeal and requests that the Board deny the Appeal for the reasons stated herein:

I. Introduction

1. The City of Portsmouth ("Portsmouth") appeals the Newington Planning Board's decision to approve SEA-3's application for site plan approval for the construction of five additional rail loading berths on the property of Pan Am Railways with associated improvements on SEA-3's property located at 190 Shattuck Way (the "Site"). See C. R. at p. 547.
2. The Site currently contains an LPG storage and distribution facility with three rail loading berths and has operated continuously since 1975 without incident.
3. Historically the Site has received 12-13 import ships per year delivering an approximate annual total of 180 Million gallons of LPG from international sources. See C. R. at p's 11 and 326.
4. The proposed increase to SEA-3's rail capacity will allow it switch sources from international LPG received by ship to domestic LPG received by rail. See C. R. at p. 394.
5. This Appeal is taken pursuant to pursuant to RSA 676:5, III as provided for in RSA 677:15, I-a (a).
6. Portsmouth claims the Planning Board misinterpreted and misapplied Newington's Zoning Ordinance by: (1) not requiring SEA-3 to obtain a variance for an existing storage tank, part of which is located in the General Industrial (I) Zoning

District; (2) approving the site plan application in violation of the Town's zoning ordinance by not requiring SEA-3 to conduct a safety study; and (3) failing to timely designate SEA-3's application for site plan approval as a project of regional impact under RSA 36:56. For the reasons discussed below, Portsmouth's Appeal must be denied.

II. Threshold Issues.

7. Portsmouth's Appeal presents several threshold issues, including whether Portsmouth has standing to appeal; whether the issues raised are properly before this Board and, if so whether they were timely appealed.

A. Standing to Appeal

8. Portsmouth argues that it has standing to appeal even though it is not an abutter. 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).

9. "When evaluating whether an appealing party has standing in this context, we 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 criteria, it is evident that Portsmouth has failed to establish standing.

10. When standing to sue is challenged, "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. v. Town of Bedford, 164 N. H. at 766-767.

(1) Proximity

11. In support of proximity, Portsmouth alleges it "is a community that abuts Newington." See Pet. At ¶ 38. This allegation fails to establish Portsmouth's proximity to the Site.

12. In fact, the Site is 4,440 linear feet from Portsmouth's nearest boundary with Newington as the crow flies and is 5,400 linear feet via the shortest traveled way. See Affidavit of Stephen Haight, P. E., attached hereto as Exhibit A.

13. At nearly a mile away, Portsmouth is far removed from the Site and its operations and there is no evidence that it will be impacted by anything that occurs on the Site.

(2) Type of Change Proposed

14. The type of change proposed is an enhancement of the Site's existing rail facilities through the construction of five additional rail berths along with associated refrigeration equipment.

15. This additional rail capacity will allow SEA-3 to replace internationally sourced LPG, which arrives by ship, with domestic LPG, which arrives by rail. 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.

(3) Immediacy of the Claimed Injury

16. 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 Appeal at ¶ 38. This claim is pure speculation.

17. There is no evidence in the record regarding the likelihood or extent of damage that could 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 almost forty years ago and the proposed changes will have no effect on that existing condition.

18. 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. v. Town of Bedford, 164, N. H. at 769 (citing Joyce v. Town of Weare, 156 N. H. 526, 530 (2007)).

19. Portsmouth's other basis for claiming immediate injury centers on its claims that it will be adversely impacted by increased rail traffic traveling through Portsmouth. See Appeal at ¶¶ 32-47.

20. The Town's ability to regulate rail operations or otherwise address Portsmouth's claimed railroad injuries is preempted by federal law.

21. The Interstate Commerce Act expressly provides that the jurisdiction of the Surface Transportation Board 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 . . . is exclusive." 49 U.S.C. § 10501(b) (hereinafter "§ 10501(b)"). Similarly, the safety of rail transportation is within the exclusive jurisdiction of the Federal Railroad Administration, which is solely responsible for the safety of the Newington Branch rail line under the Federal Railroad Safety Act ("FRSA"). See C. R. at p. 524.

22. Any attempt by Portsmouth to remedy its claimed railroad injuries through the Town of Newington's site review process is preempted by federal law – as the Planning Board correctly ruled - and any appeal that seeks relief from this Board based on these same alleged railroad injuries is likewise preempted.

23. Standing alone, Portsmouth's participation in the Planning Board Hearings is insufficient to establish standing in this matter and its Appeal should be denied on this basis.

B. Timeliness of Appeal on Denial of Request for Study.

24. Portsmouth argues that the Planning Board erred in interpreting the Town's zoning ordinance by failing to require a safety study.

25. Portsmouth requested a study in its letter to the Planning Board dated April 9, 2014. See C. R. at p. 375.

26. The Planning Board voted to deny the request for a safety study at its May 5, 2014, Meeting. See C. R. at p's 435-36

27. Under RSA 676:5, III, Portsmouth was required to appeal the Planning Board's denial of its request for a study within 30 days of that vote, in accordance with the Board's Rules of Procedure. See Atwater v. Town of Plainfield, 160 N. H. 503, 509 (2010) ("[I]nterpreting RSA 676:5, III to mean that a planning board decision about a zoning ordinance is ripe and appealable to the ZBA when such a decision made. This will allow a zoning board to correct any alleged errors made by the planning board as early as possible in the application review process.")

28. Portsmouth's failure to appeal this denial within the requisite time period is fatal to its claim that a study should have been conducted.

C. Board's Jurisdiction under RSA 676:5, III.

29. With regard to Portsmouth's claim that the Planning Board failed to designate SEA-3's application for site plan approval as a project of regional impact in a timely manner under RSA 36:56, this Board does not have jurisdiction to resolve such claim.

30. Pursuant to RSA 676:5, III, this Board has jurisdiction over any "any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer." [Emphasis added.]

31. Whether the Planning Board designated SEA-3's site plan application as a project of regional impact in a timely manner is an issue of state law that does not involve the Town's Zoning Ordinance. Because this claim does not involve the Town's Zoning Ordinance, the Board has no jurisdiction to decide the question.

III. The Merits

A. Variance Claim

32. Portsmouth argues that the Planning Board erred in not requiring a variance because the permitted improvements will result in an impermissible expansion of use of the 160,000 barrel refrigerated storage tank that is located partly in the General Industrial District.

33. Portsmouth argues the 160,000 barrel tank is a nonconforming use and that any expansion of that use requires a variance.

34. Portsmouth's argument lacks evidentiary support. As evident from the approved site plan, there were no changes planned or approved for the 160,000 barrel tank. Furthermore, none of the permitted improvements are even located in the General Industrial Zoning District. See C. R. at p. 551.

35. SEA-3 constructed the 160,000 barrel refrigerated storage tank under its 1996 site plan approval. The current site plan application involves no changes to this structure or its use.

36. Any argument that a variance is required because the LPG that will be stored in this existing tank is now going to be delivered to the site by railroad instead of by ship lacks merit. There will be no change to the use or configuration of the 160,000 barrel tank and therefore no variance is required. How the LPG is delivered to the site is irrelevant to the question of whether the tank itself is being enlarged, expanded or extended. There are no changes proposed to the 160,000 barrel tank and no variance was required.

B. Study Claim

37. Portsmouth asserts the Planning Board violated the Town's Zoning Ordinance by not requiring a safety study. In support of this requirement, Portsmouth cites Article I – Purpose of Zoning and Article I, Section 3 – Purposes of the Town Zoning Ordinance.

38. Nowhere in Article I – Purpose of Zoning, or in Article I, Section 3 - Purposes, does it mandate that the Planning Board require a safety study. These sections simply set forth the purposes of zoning as a pretext for the following provisions of the Zoning Ordinance which identify the specific zoning requirements.

39. While there was no requirement in the Zoning Ordinance for a safety study in this case, the record is clear that the Planning Board engaged in an unprecedented effort to promote the safety of the Town by holding seven public hearings, receiving testimony from numerous experts (including its own retained fire safety expert) and on this basis concluded that the public's safety would be enhanced by this application. Furthermore, as a condition of its approval, the Planning Board required that SEA-3 review and update its existing site safety plans for submission to the appropriate public officials at the Town, including its Fire Chief, for their review and approval prior to allowing commercial operation of the improvements.

40. Any suggestion that the Planning Board failed to carry out the general purpose of the Town's Zoning Ordinance or otherwise failed to follow the Town's Zoning Ordinance in this matter is without merit.

C. Regional Impact Notice Claim

41. Portsmouth's factual allegations in support of its claim that the Planning Board delayed in designating the project as having regional impact are factually incorrect.

42. Portsmouth alleges that the Planning Board did not designate SEA-3's project as having regional impact until its December 9, 2013, Meeting. See Appeal at ¶ 79.

43. In fact, the vote to designate SEA-3's project as having regional impact was taken at the Planning Board's November 18, 2013, Meeting, which was the first meeting to occur after the filing of SEA-3's site plan application on November 5, 2013. See C. R. at p's 34 and 92.

44. The record is clear that once the application was filed and the Planning Board convened to consider the submitted application, it promptly designated the project as having regional impact and sent out all of the required notices.

45. In fact, Portsmouth responded to this notice as indicated by its Planning Director's December 9, 2013, Letter to the Planning Board, thanking Newington for designating the project and pointing out Portsmouth's concerns with the increased railroad traffic. See C. R. at p. 108.

46. The record clearly establishes that the Planning Board acted promptly and correctly in making the regional impact designation at its first meeting following the submission of the application.

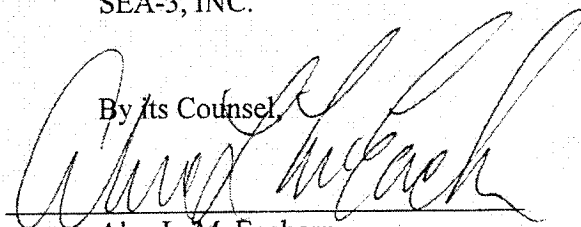
47. Portsmouth's claim of delayed notice is factually and legally incorrect and must be denied.

IV. Conclusion

For all of the foregoing reasons, SEA-3 respectfully submits that Portsmouth Appeal should be denied in its entirety.

Respectfully submitted,
SEA-3, INC.

By its Counsel,



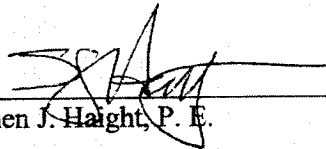
Alec L. McEachern
Shaines & McEachern, P. A.
282 Corporate Drive, Unit 2
Portsmouth, NH 03801
(603) 436-3110

Dated: September 15, 2014

Affidavit of Stephen J. Haight, P. E.

My name is Stephen J. Haight and I am a professional engineer licensed by the State of New Hampshire. I am a principal with Haight Engineering, PLLC, of P. O. Box 1166, 181 Watson Road, Dover, New Hampshire 03820 and upon being duly sworn, do depose and state as follows:

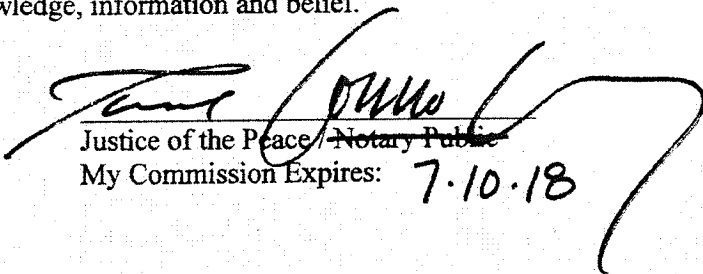
1. I was asked by Attorney Alec L. McEachern to determine both the straight-line distance and traveled way driving distance from SEA-3, Inc.'s distribution terminal at 190 Shattuck Way, Newington, NH (the "Site") to the City of Portsmouth's closest city limit (west side of Gosling Road).
2. Using the distance tool in the interactive USGS map 7.5 min Portsmouth Quadrangle (1956 revised in 1993), I measured the distance both as a straight-line distance and along the shortest traveled way.
3. Using this distance tool, I determined that the shortest straight-line distance from SEA-3, Inc. to the Portsmouth city limit is 4,440 +/- linear feet and the shortest traveled way distance is 5,400 +/- linear feet.



Stephen J. Haight, P. E.

State of New Hampshire
County of Strafford, ss.

Personally appeared before me this 15th day of September 2014, the above named Stephen J. Haight and did swear and affirm that the foregoing statement is true and accurate to the best of his knowledge, information and belief.



Justice of the Peace / Notary Public
My Commission Expires: 7.10.18

THE STATE OF NEW HAMPSHIRE

NEWINGTON ZONING BOARD OF ADJUSTMENT

APPEAL TO THE ZBA OF THE NEWINGTON PLANNING BOARD'S DECISION BY THE
CITY OF PORTSMOUTH PER RSA 676:5, III

NEWINGTON PLANNING BOARD'S MEMORANDUM OF LAW

NOW COMES the Newington Planning Board, by and through its attorneys, Donahue, Tucker and Ciandella, PLLC, and states in support of the Planning Board's decision:

I. THE PETITIONER, CITY OF PORTSMOUTH, LACKS STANDING TO BRING THIS APPEAL BEFORE THE ZBA.

Portsmouth has alleged that the Newington Planning Board has erred in its interpretation of the zoning ordinance. RSA 676:5 specifies that "any person aggrieved" by certain types decisions or interpretations of the zoning ordinance by the planning board during site plan or subdivision review may be appealed to the ZBA. To have standing to appeal to the ZBA, a person must be "aggrieved." This standing requirement applies to Portsmouth.

To have standing to appeal to the ZBA, Portsmouth must demonstrate that it is "directly affected", which requires it show "some direct, definite interest in the outcome of the action or proceeding. Golf Course Investors of NH, LLC v. Jaffrey, 161 N.H. 675, 680 (2011). "[T]o determine whether a non-abutter" has a 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.

Though a petitioner does not have to meet each factor to demonstrate standing, the NH Supreme Court 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). “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. 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.

The Petitioner has failed, on the face of its Appeal, to allege both sufficient proximity to the Property and any concrete injury necessary to confer standing on non-abutters under the Golf Course Investors Corp. and Weeks Restaurant v. Dover, 119 N.H. 541 (1979) cases.

Accordingly, and despite Petitioner’s participation in the Planning Board meetings, the Petitioner lacks standing in this matter and its Appeal should be dismissed.

Petitioner is not an abutter to the SEA-3 property. Petitioner does not own property immediately adjacent to the site and is merely an abutting community whose participation in the site review process was statutorily secured and not the product of true abutter status under RSA 672:3. See, Petitioner’s Appeal, ¶138. Nonetheless, anticipating a standing issue, Petitioner insists that it satisfies the proximity analysis of the Weeks factors based upon two amorphous assertions. First, Petitioner asserts that it “shares transportation systems of rivers, roads and rails.” Id. Second, Petitioner asserts that in the event of an ambiguous and hypothetical “catastrophic event” at the Property or “logistical issue” with the railway, City residents *may* require evacuation and traffic *may* be affected. Id. (emphasis added).

Notwithstanding the Planning Board’s extensive findings regarding the security and manning of the Property, the nature of LPG, and SEA-3’s emergency response procedures and track record, Petitioner’s speculation regarding the potential second and third order effects of hypothetical, emergency, or catastrophic events do not establish proximity to the Property or represent a concrete injury. If the mere potential of emergency related traffic at an Industrial or

Commercial Property was sufficient grounds to establish proximity under the Weeks analysis, virtually any property owner in the greater Portsmouth/Newington area could claim traffic impacts as a means of satisfying this requirement. Moreover, Petitioner's proximity argument arises from hypothetical problems on the railways servicing the Property. Hypothetical issues on the railways servicing the Property are distinctly not within the Planning Board's jurisdiction and are not a part of SEA-3's site review application. Under the circumstances, the Petitioner lacks proximity to the Property. See, Golf Course Investors (fact that respective property owner's properties were located between 450 and 2,400 feet from the site did not confer standing).

Petitioner also fails the "immediacy of the injury" analysis under the Weeks factors because it does not allege a concrete injury. Incidentally, Petitioner incorrectly labels this prong of the Weeks factors in its Appeal, utilizing the word "impact" instead of "injury." Appeal, ¶40. Under the law, the Petitioner must allege an injury, not an impact. The basis of Petitioner's claimed "impact" is its anticipation of \$480,000¹ in expenses to improve rail crossing within its borders; the hypothetical and speculative need to supplement the Town of Newington's Fire Department in the event of an emergency; the hypothetical and speculative impact on water resources in the event of an emergency; and, the "potential substantial diminution in value of certain property in the City, specifically those residential neighborhoods that abut the railway, reducing the city's tax base." Id. Petitioner had ample opportunity to document any examples of "immediacy of the injury" that it would experience as a result of the site plan approval, but no specific documentation was provided. No specific rail crossing improvements necessitated by this approval were identified by the Petitioner.

¹ This figure is based on Petitioner's Appeal Petition ¶48 claim that several rail crossing improvements would cost an estimated \$2,400,000, 20% of which would be borne by the City. The 20% figure is contradicted in the record by the 2/12/14 meeting minutes of a Portsmouth City Staff Meeting, at which in a presentation by N.H. DOT's Melodie Esterberg, Chief of Design, she stated that the State programs will pay 90% of upgrades to rail crossings and 100% of the costs of preventive devices.

“[T]o have standing, a party is required to identify an injury that its particular property would incur as a result of” the decision. Hannaford Bros. Co., 164 N.H. at 769 (emphasis added, citations and quotations omitted). Petitioner does not allege an injury to its property that will incur as a result of the site plan approval in this case. On the contrary, it lists speculative and unsubstantiated “impacts” of SEA-3’s operation, many of which are contingent on the occurrence of a catastrophic event or emergency. These allegations do not constitute concrete injuries under the law because they are speculative in nature. The Petitioner cannot rest on unsubstantiated allegations alone. Golf Course Investors, 161 N.H. at 680.

In Hannaford Bros. Co., the petitioner alleged that the Board of Adjustment’s interpretation would directly affect its operations and “future expansion options.” Id. (emphasis in original). The Supreme Court of New Hampshire appropriately highlighted the speculative nature of petitioner’s alleged injury stating “the petitioner’s claimed injury is, at most, speculative, and does not give rise to a definite interest in the outcome of the appeal.” Id. (citations and quotations omitted).

Putting aside Petitioner’s unsubstantiated allegations, the Planning Board specifically found that SEA-3 would continue to offer training to surrounding community fire departments and public safety professionals, that the proposed reconfiguration of the Property would add a secondary means of emergency access to the site, that the proposal would not increase the truck traffic to and from the site, that it would not result in an adverse change to existing dust, erosion or run-off conditions, and would not alter the existing security lighting. The Planning Board found that the proposal would ultimately lead to the replacement, by Pan Am, of approximately 10,000 railroad ties between Rockingham Junction and the SEA-3 facility. None of these findings have been contested.

Additionally, there was evidence before the Planning Board that the City of Portsmouth's Fire Department currently has the resources and training necessary to respond to an LPG incident in Portsmouth and that the Portsmouth Fire Department's current resources and training are sufficient to meet the risks presented by the proposed increase in LPG traffic. C.R. pg. 275.

As petitioner lacks proximity and has failed to allege any concrete injury to its particular property, the Weeks factors, on balance, do not support the petitioner's claim to standing in the appeal. Id. at 770.

II. THE PLANNING BOARD DID NOT ERR IN APPROVING THE SITE PLAN APPLICATION UNDER THE TERMS OF THE NEWINGTON ZONING ORDINANCE.

The SEA-3 application proposes site improvements on the two lots that make up the SEA-3 property (lots 20-13 and lot 14-2), and on the property leased from Pan Am Railways that bisects these two SEA-3 lots (CR pg. 551, sheet C-1). Lot 14-2, the leased Pan Am property, and the majority of lot 20-13 are situated in the Waterfront Industrial zone (CR pg. 551, sheet C-1). The dividing line between the General Industrial and Waterfront Industrial zoning districts crosses lot 20-13, with roughly the front half of the lot in the General Industrial zone and the rear portion in the Waterfront Industrial zone.

Petitioner claims that the SEA-3 site plan approved by the Planning Board misinterprets the zoning ordinance to the extent that it authorizes an expansion of the LPG storage in the General Industrial zoning district and impermissibly allows an expansion of a non-conforming use without the benefit of a variance. The SEA-3 application proposes no site or infrastructure improvement for land or buildings situated in the General Industrial zoning district. To repeat, the SEA-3 application proposes no site or infrastructure improvement for land or buildings situated in the General Industrial zoning district. All of the improvements will be made on land and to buildings located in the Waterfront Industrial zone (CR pgs. 214; 551, sheets C1-

C4). SEA-3's existing use in the General Industrial zone is a legal use that has been in existence for approximately 38 years. (CR pgs. 10, 91). The LPG tank on lot 20-13 that is bisected by the General Industrial zone and the Waterfront Industrial zone district boundary is currently used for LPG storage. The present use of this tank will continue for this purpose. As the tank will not expand; the storage use will not expand. The use of SEA-3's land and buildings that lie in the General Industrial zoning district will not change (compare the existing conditions site plan with the proposed site plan, (CR pg. 551, sheets Ex 1 & 2 to sheets C 1-4).

RSA 674:19 expressly establishes the right to maintain legal non-conforming uses. There is no expansion of any existing use proposed for the land and improvements located in the General Industrial zoning district. The un-contradicted traffic expert testimony presented to the Board by the applicant's expert was that historic truck traffic at the site ranged from 103-161 trucks per day (CR pgs. 312-315, 324). The Town's traffic engineer confirmed that truck traffic was estimated to remain the same (CR pg. 393). The Petitioner has presented no facts from the record to support its assertion that there will be an impermissible expansion of a use of the property. The ZBA should find that the Planning Board did not err in approving the site plan under the terms of the zoning ordinance as has been alleged in its appeal at paragraphs 59-67 of Petitioner's appeal.

III. THE PLANNING BOARD DID NOT ERR IN INTERPRETING THE ZONING ORDINANCE BY DECLINING TO REQUIRE A SITE HAZARD/SAFETY ASSESSMENT.

- i. The Petitioner Did Not Appeal the Planning Board's Decision on This Issue Within 30 Days of the Decision. Absent a Timely Appeal, the ZBA Has No Jurisdiction to Review This Issue.**

After considerable discussion, the Planning Board voted unanimously at its May 5, 2005 meeting to decline to require the applicant to provide a separate safety/hazard study, akin to the Massachusetts DOT study that was submitted to the Board as a suggested safety study model

(CR pgs. 432-436). The New Hampshire Supreme Court has stated in Atwater v. Plainfield, 160 N.H. 503 that “[t]he plain language of RSA 676:5, III, in turn, makes clear that when a planning board makes a decision applying or interpreting the ordinance, that decision must be appealed to the zoning board of adjustment pursuant to the procedures set forth for appeals to the zoning board of adjustment under RSA 676:5.” Atwater at pg. 509. The time period for appeals of administrative decisions to the ZBA in Newington is 30 days. See, Newington ZBA Rules of Procedure, copy attached. The Petitioner filed its appeal to the ZBA with the Town of Newington on June 17, 2014. As the appeal was not filed within the 30 day time period following the Board’s May 5, 2014 decision on this safety study issue, the ZBA must dismiss this portion of Petitioner’s appeal, as the ZBA does not have jurisdiction to review it.

ii. The Planning Board Has Discretion To Determine What Studies It Requires. The Record Is Replete With Safety Information And The Planning Board Did Not Err In Declining To Require A Particular Study.

No provision of the Newington Zoning Ordinance imposes a requirement that a safety/hazard study shall be done as a pre-condition to the final review and approval of any application or land use. The Planning Board’s Site Plan Review Regulations at section 20 provides that, “the applicant shall reimburse the Town for the Board’s administrative expenses and costs of special investigation and review of documents and other matters that may be required by particular applications. This includes, but is not limited to, review of consulting engineers or other consultants to assess impact, or any other study deemed necessary by the Planning Board in order to make an informed decision.” The decision on whether or not to require reviews or studies is within the Board’s discretion.

The certified record is replete with expert and professional information that was required by or otherwise supplied to the Board:

--Fire Safety information in a memo from Fire Chief Sylvia to the Planning Board dated 10/9/13 that recommends conditional approval of the site plan in concept. (CR. Pg. 31).

--A 11/15/13 Fire Safety Analysis by Philip Sherman, P.E. which concludes that, "the preliminary design for the proposed plant expansion is in accordance with NFPA 58, 2011 subject to the comments in this preliminary analysis." (CR pgs. 49-86).

--A 1/29/14 letter from the Town's fire consultant, Nick Cricenti, P.E. of SFC Engineering Partnership, Inc., which concludes that the site plan presents "general compliance with FNPA 58 and 54." (CR pgs. 144-147).

--A 2/11/14 letter from Shelley Winters, N.H. DOT Administrator, Bureau of Rail & Transit to Newington Board of Selectman Chair Rick Stern, detailing the limits of State of New Hampshire jurisdiction of railroad inspections and safety, and outlining the jurisdiction of the FRA (Federal Railway Administration) over such matters (CR pgs. 176-177).

--A 3/22/14 news article quoting Portsmouth Fire Chief Steven Achilles that confirms the substance of his discussions with the Newington Fire Chief, and which quotes Chief Achilles as saying that, "it was our general feeling that the additional propane tank car transportation does not pose an additional significant hazard that does not exist right now...if something were to happen, most of the time we can handle it...this is something the fire service is prepared for." (CR pg. 375).

--A 4/9/14 letter from the Town's fire safety expert, SFC Engineering Partnership, Inc., which concludes that the design is "in general compliance with NHPA 58, and the NGPA FSA manual, with additional documentation to be supplied prior to the issuance of a building permit." (CR pgs. 376-379).

The Planning Board required a fire safety analysis by the applicant. It had the benefit of visits to the site not only by the Newington Fire Chief, but also by two Fire Marshals from the

N.H. State Fire Marshal's Office. (CR pg. 31). The Planning Board hired its own Fire Safety consultant to review the submittals by the applicant and to independently analyze the site plan for fire safety regulation compliance.

The Planning Board was asked by Portsmouth residents to have SEA-3 prepare a safety/hazard study such as the 3/29/13 Mass. DOT study set forth in the certified record. (CR 441). The Planning Board had before it significant site fire safety information. It has received input from the Newington Fire Chief and from Portsmouth Fire Chief Achilles that the fire departments had the resources and training to respond to an LPG incident along the rail line and at the site. On these facts, and considering the discretionary authority of the Planning Board to require such studies and information as it needs to aid in its decision making, the Board did not err in interpreting the zoning ordinance when it declined to require SEA-3 to perform the off-site safety study that the Petitioner requested.

IV. PETITIONER'S CLAIMS WITH RESPECT TO THE APPLICATION OF RSA 36:54, THE REGIONAL IMPACT STATUTE, ARE NOT PROPERLY BEFORE THE ZBA, AS THE ZBA HAS NO JURISDICTION TO REVIEW STATE STATUTES.

The regional impact statute claims set forth in paragraphs 78-83 of Petitioner's appeal are not a subject matter that the ZBA can properly review, as these claims do not involve a "decision or determination [by the planning board, in the exercise of site plan or subdivision review] which is based upon the terms of the zoning ordinance, or upon any construction, interpretation or application of the zoning ordinance...". Petitioner, at paragraph 78 of its appeal petition, states that, "[the] City was prejudiced and other abutters were prejudiced in the Zoning Board's delay in declaring this a "development of regional impact."

The jurisdictional appeal authority of the ZBA established in RSA 676:5, III arises from decisions or interpretations of the zoning ordinance made by the Planning Board "in the exercise of site plan or subdivision review." RSA 676:5, III authorizes no review authority of Zoning

Board decisions and no review authority over interpretations of state statutes. The paragraph 78-83 claims must be dismissed as the ZBA has no subject matter jurisdiction to review them.

V. CONCLUSION.

The Planning Board requests that the ZBA find that the Petitioner has no standing to maintain this appeal. The Planning Board requests that, as to the illegal expansion of a non-conforming use issue, the ZBA find that the Planning Board did not err as alleged by the Petitioner. On the safety study issue, that the ZBA find it has no jurisdiction to review the issue because it was not appealed timely and that the Planning Board did not err on the record before it in declining to require such a study. Lastly, on the alleged ZBA error related to the delay by the ZBA in giving RSA 36:54 regional impact notice, that the ZBA find that it has no jurisdiction to review issues relating to the state statutes.

Respectfully submitted,

TOWN OF NEWINGTON PLANNING BOARD
By its attorneys:

DONAHUE, TUCKER & CIANDELLA, PLLC

Date: September 15, 2014

By: 

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

S:\NA-NE\Newington\SEA-3 Rail Safety Issues\ZBA\2014 08 22 PB Memo of Law.docx

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

- Call to Order:** Chairman Matt Morton called the September 15, 2014 meeting at 6:30 PM.
- Present:** Matt Morton, Chair; Ted Connors; Ralph Estes; Jim Weiner and Jane Kendall, Recorder and Martha Roy, Town Administrator
- Absent:** John Frink
- Public Guests:** Newington Town Counsel, Attorney Walter Mitchell; City of Portsmouth Attorney Jane Ferrini; City of Portsmouth Attorney, Robert Sullivan; Portsmouth Deputy Manager, David Allen; City of Portsmouth Mayor Robert Lister and Councilor Ester Kennedy; Attorney Alec McEachren; Paul Bogan with Sea-3; Steve Haight of Haight Engineering; Pan Am Counsel, Robert Culliford; Attorney John Ratigan; Denis Hebert; Bernie Christopher; Chris Cross; Mike Marconi; Jack Pare; Justin Richardson; Rick Stern; Newington resident, Edna Mosher; Bill and Sandy Sweeney; Portsmouth Residents, Richard Dipentimo and Lou Salomi

Public Hearings: The City of Portsmouth's appeal of the Newington Planning Board's decision to approve the **Sea-3** site plan for property located at **190 Shattuck Way, Tax Map 20, Lot 13, and Map 14, Lot 2.**

Chairman Morton informed the public that the City of Portsmouth and Sea-3 were not able to come to an agreement in a private meeting so they were going to continue with their appeal that was postponed on August 25, 2014. He also announced that the Board was short one member, and that all four members present would be voting. He asked the City of Portsmouth and Sea-3 if they were willing to go forward with the hearing without five voting members. Attorney Alec McEachren, representing Sea-3 said they wanted to go forward with the appeal and Portsmouth City Attorney, Jane Ferrini also agreed to go forward with the appeal.

Town counsel, Attorney Walter Mitchell recommend that the Board determine whether they had jurisdiction over one or more of the appeal issues before they proceeded with discussing the merits of the appeal. He said the only jurisdiction the Board had was on the interpretation, construction and application of the zoning ordinance. He said he would provide his interpretation of the appeal document and the relationship between the questions and application of the zoning ordinance and recommended that the Board then listen to responses from the City of Portsmouth's attorney and Sea-3's attorney on each issue before making a decision.

Attorney Mitchell said there were three questions raised in the appeal and the first question was regarding the non-conforming use of the existing tanks on Lot 13 and

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

Lot 2 where the zoning line passed through. He said the tanks contained hazardous materials that were not permitted by the current zoning ordinance and the appellant claimed that the expansion of the non-conforming use was therefore prohibited. He said it was a proper question and Board members should speak up if they disagreed or they would go onto the next question. All the Board members concurred that the question was valid.

Attorney Mitchell said the second question on page 10 of the appeal had two parts with the first being that the Planning Board did not require and review a new safety hazard assessment. He said the second was that the Planning Board required that an update to a safety assessment that was done 15-20 years ago be submitted to the appropriate officials, but it would not be available for public review and comment. He said the question was whether this complaint had anything to do with the interpretation, construction or application of the zoning ordinance. He said the argument was that there was an effort to pull that complaint under the language of Article 1 and Section 3 of Article 1 of the zoning ordinance regarding promoting the health, safety and general welfare of the community. He said the theory in the appeal was that those goals couldn't be satisfied if the Planning Board declined to require safety assessments. He recommended that appeal was outside the Board's jurisdiction because it was outside the meaning of the statute, which would subject all Planning Board decisions to ZBA appeals.

Attorney Ferrini disagreed with Attorney Mitchell's characterization of Article 1 and Article 3 of the zoning ordinance was not properly before the Board. She said the fundamental premise of all zoning was to protect public health, safety and welfare and even though the articles were broadly written, the specific application in the appeal was a safety study. Attorney Ferrini said the first issue was whether the Planning Board appropriately denied the numerous requests for safety studies. She said the Planning Board denied the requests, concluding that they complied with the zoning ordinance and that their approval of the application would be a benefit to the public. She said paragraph 5 of the decision stated that studies had been done previously and that they would be updated and given to the appropriate officials in Newington. She said she asked for the original file from 1975 on three occasions and was told that it was missing so it would be impossible for the Planning Board to review it for updates. She said there were six separate, all encompassing studies done by Sea-3 in 1995 that totaled 200 pages. She said the Planning Board also required additional studies in 1995 and recommendations by two experts were part of the Planning Department's approval at that time. Attorney Ferrini stated that any analysis of those 200 pages outside of a public hearing process would not be appropriate and those studies should have been reviewed as part of the determination of whether the project was compliant with the zoning ordinance and the public's health, safety and welfare. She said she was surprised that there was such resistance to a review of safety studies in 2014 that would include climate, marine safety, and evacuation in the event of a catastrophic event and believed it would be appropriate.

Chairman Morton asked Attorney Ferrini if she had a copy of the 1995 studies and she said she did.

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

Attorney McEachren said he agreed with Attorney Mitchell they would be opening a Pandora's box if the Board went along with the City of Portsmouth on this point. He said the zoning ordinance was intended as a guide and their questions went back to the purpose of the zoning ordinance. He said counsel for Portsmouth was not pointing to any provision that said a safety study was required in every instance. He said there were extensive studies in 1996 for the second expansion. He said the fire chief also had an opportunity to tell the Planning Board if he didn't approve of the application.

Attorney McEachren referenced the Supreme Court's Atwater decision that said anyone that disagreed with a Planning Board decision needed to appeal within 30 days and not wait for the final decision and therefore, the appeal had not been timely filed and was not properly before the Board.

Attorney McEachren said the site already had three rail loading berths and the Planning Board had approved five. He said the City of Portsmouth was approaching the application as if it was a new project, but it was actually an expansion of an existing rail facility. He said it would be appropriate that existing studies be referenced instead of doing everything over from scratch.

Mr. Paul Bogan, Vice President of Operations for Sea-3 said to the best of his knowledge of the six studies that were quoted, the Planning Board only requested one study that had to do with the construction of the additional tank. He said the others were from the EPA, the Coast Guard, and OSHA.

Board member, Jim Weiner asked Portsmouth's counsel why they had not requested an appeal within 30 days and Attorney Ferrini said she didn't attend May 5, 2014 meeting, but did attend the May 9, 2014 meeting where there was a straw vote and a lot of discussion. She said deliberation occurred on May 19, 2014 and the Board's alternate member raised an issue of a rail study. She said that decision was not closed and it was the City's position that there was still an open issue and the request for an appeal was not untimely.

Attorney John Ratigan, representative for the Planning Board invited them to read the May 5, 2014 meeting minutes. He said the decision was the decision and it was not jurisdictional because the appeal was not filed within 30 days of May 19, 2014, but was filed on June 17, 2014. Attorney Mitchell said the timing issue raised by Attorney McEachren may or may not have merit, but it was something no one heard prior to the meeting to review closer so he recommended that the Board not take any action on that request. He said those issues could be argued later if the issue went to court, but right now the Board needed to decide if there was any jurisdiction to hear matters on the second appeal.

Board member, Ralph Estes added that their bylaws were about land use and there was nothing there about studies.

Mr. Justin Richardson of 32 Old Post Road and Planning Board member said he thought Section 5 of the zoning ordinance for both the Industrial and Waterfront districts said the building inspector would issue a permit upon findings of the Planning Board. He said the Planning Board wrestled with whether the language required a safety study and it was determined that they were only required to make a finding.

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

Ted Connors moved that the Board had no jurisdiction on the second appeal. Jim Weiner seconded the motion and all were in favor.

Attorney Ferrini said their question was not just in regards to the purpose and timing of a safety study, but the second piece was that the outcome of the study would be outside of the public hearing process. Mr. Mitchell said the motion were only in response to the subject matter and had nothing to do with timeliness.

Attorney Mitchell said the third issue of the appeal claimed that the City and other abutters were prejudiced in the Board's delay in declaring the application a development of regional impact and also that abutters were not given notice in error before the variance proceedings at the end of 2013. He said he didn't believe that had anything to do with the Planning Board's decision and recommended that the Board find no jurisdiction in the matter.

Chairman Morton said he recalled discussing the matter with the Town planner and recalled that all commercial abutters were notified, but some individual homes were not actual abutters to Sea-3 so he didn't think that complaint was valid. Attorney Mitchell said the Planning Board was not mentioned anywhere in that item.

Attorney Ferrini said the issue on notice was that the Planning Board received information relative to a regional impact, and the Town of Greenland wrote to the Town planner on October 28, 2013 requesting that the project be deemed one of regional impact so the issue was not the notice of abutters, but that none of the surrounding communities received a regional impact notice so they couldn't fully participate in the hearings.

Attorney McEachren said the statute said the Board had jurisdiction on the construction and application of the zoning ordinance and this question did not relate to the zoning ordinance.

Jim Weiner moved that item 3 failed and was outside of the jurisdiction of the Board. Ralph Estes seconded and all were in favor.

Chairman Morton said the appellant could now address the first issue of the appeal.

Attorney Ferrini said the industrial and waterfront district bisected the tank that was owned by the railroad and hazardous and explosive materials were prohibited in the general industrial "I" zone, stating that LPG propane in any form would fit that description. She said the files were missing so there was no way to know the details of the findings for the original site construction in 1975, but the Planning Board findings said the expansion was consistent with a long standing use in the industrial zone, despite the use not being permitted. She said the May 19, 2014 minutes again referred to uses permitted in the industrial zone, which it said was intended to promote economic development and employment opportunities. She went on to read paragraph 51 of the minutes that said that the terms of the site plan application, the proposed location, construction and operation would not injure present or prospective development in the district or the health and welfare of resident districts in the vicinity. She said the Board

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

found that this application was the type of business development that land use in the industrial district intended to protect and promote. She reiterated that the use was not appropriate for the "I" district and could be an exception in the waterfront district so long as they complied with the EPA.

Chairman Morton commented that the use had been in operation since 1975 and Attorney Ferrini said if it was a non-conforming use, then it was an expansion of that use and an intensification, which could not have a negative impact on its neighbors. She said she understood that the jurisdiction of the rails were addressed, but the City of Portsmouth was saying it put a strain on shared transportation routes, rivers, rails and roads.

Mr. Estes asked if the City of Portsmouth was asking for the removal of the operation and Attorney Ferrini said they wanted a safety study on the issues raised and the ZBA had the authority to remand back to the Planning Board for a study.

Mr. Weiner said the existing tanks were there, the proposal was for an expansion with three new tanks on the water district side that met the requirements of that district and nothing had changed on the industrial side. Attorney Ferrini said she believed the rail and truck transportation would increase on the industrial side.

Attorney McEachren said all improvements proposed would take place in the waterfront district where it was allowed. He said there would be no changes to the tank in the industrial area.

Mr. Steve Haight of Haight Engineering agreed that there would be no improvements in the industrial section of the site and showed the plan where the zoning line bisected the smaller tank and the new tanks would be placed in the waterfront. He said the Town's transportation expert concluded that there would be no change to in the volume of trucking from the original approval because the site could not support an increase. He said the majority of LPG supply had previously been received by ship from international sources and the proposal was to increase the rail delivery capacity. He said the site had been in operation for nearly 40 years without incident.

Mr. Weiner asked if the expansion would create additional shipping exports and Attorney McEachren said they had received 180 million gallons of LPG from 12-13 ships a year, but under the new delivery configuration by rail they would probably only export one to two ships during the summer.

Mr. Estes asked if this project would alleviate the shortage of propane the region experienced last year and Attorney McEachren said the regional demand was growing at 8% per year. He said there was a declaration of emergency declared by the Department of Safety that referenced their site last year. He said the international prices were above the domestic prices and rail was the way to bring it in. He said 75% of the propane coming into New England came by rail.

Attorney Mitchell asked if there was an acknowledgement that the LPG product Sea-3 handled was an explosive and hazardous material as described under Article 5, Section 5C of the ordinance. Attorney McEachren agreed that it was flammable material as referenced under that section of the ordinance. Attorney Mitchell said the City of Portsmouth's attorney was suggesting that the Planning Board said something contrary that was not consistent with the ordinance. Attorney McEachren said it was a non-

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

conforming use. Attorney Mitchell inquired if the City of Portsmouth had suggested that this was an illegal non-conforming use and Attorney McEachren said they had not. Attorney Mitchell asked if it was an extension of a non-conforming use and Attorney McEachren said there were no changes to the tank in the industrial district and there would be no difference in how the propane would be distributed by truck from the site.

Portsmouth resident, Richard Dipentima said there was an intensification of the use of the existing tanks in the "I" zone that was inconsistent with the zoning ordinance. He said Sea-3 had received most of their product by ship with only a few rail cars and now they were proposing to receive 16 rail cars six days a week throughout the year.

Planning Board member, Justin Richardson said he made the motion on the Planning Board's decision and the Planning Board looked at each criteria in the zoning ordinance phrase by phrase when they made their findings. He said they were concerned that there might be an increase in traffic, but noted that the truck deliveries would be limited due to the capacity to load.

Mr. Bogan said they previously used only a small number of rail cars, but it was not their primary means of transportation because rail transportation was expensive. He said they used to have more truck distribution, but international prices went up and put them out of business over the last couple of years and now they were proposing a change to their business with rail deliveries so that their truck deliveries would return to the same number as before when business was doing better. He said they could only put out 48 trucks with 16 rail car deliveries a day and the traffic study said the roads could handle that amount of traffic.

Attorney Ferrini commented that Sea-3 was a subsidiary, which could absorb losses. She said she was not convinced that Sea-3's expansion would solely serve domestic shortages because the Planning Board minutes gave testimony from an attorney in Maine that said they could make more money exporting to foreign sources than they could by providing to the domestic market.

Denis Hebert, Chairman for the Planning Board agreed that they never approved an increase of truck traffic beyond their current loading capacity, but it would increase from slow years to busy years.

Mr. Weiner asked if Attorney Ferrini wanted to comment on the traffic issue and Attorney Ferrini said the use seemed quiet over the last couple of years and the new change would increase the traffic and that would be an intensification of use.

Attorney Ratigan said he had presented a memo to the Board to address the issue, which agreed that the Town's traffic engineer confirmed the number of trucks and the City had not presented any evidence to contradict those findings. He said the number of ships had been a permitted use for a long time and would be changing from 12-13 to one or two in the summer.

Attorney Mitchell said the claim was that the LPG storage tank was not allowed in the industrial zone and boats and trucks had nothing to do with the issue. He said Attorney McEachren acknowledged that it was a non-conforming use that had apparently been grand fathered so the only issue in the appeal was if the plans would result in an enlargement, extension, or expansion of LPG storage in the tank that was partly in the industrial zone which was prohibited in the ordinance.

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

Discussion ensued on the wording of the motion. Attorney Mitchell recommended that Attorney McEachren admitted that the storage of an explosive substance was not permitted in the Industrial zone, but was grand fathered. He said the question was whether there was an expansion in that zone. Chairman Morton commented that they hadn't expanded the tank.

Jim Weiner moved that there was no proposed expansion of the LPG storage in the industrial zone. Ralph Estes seconded the motion and all were in favor.

Mr. Lou Salomi of 142 Spinnaker Way said he thought a representative of Sea-3 had said earlier in the meeting that there would be a safety or environmental study of the study that was done 18 years prior and he wondered who would purchase a product that had a safety study that had been done 18 years ago.

Adjournment: Ted Connors motioned to adjourn, and Ralph Estes seconded. All were in favor, and the meeting adjourned at 7:47 p.m.

Respectfully
Submitted by: Jane K. Kendall, Recording Secretary

Town of Newington, New Hampshire

Application Form

Zoning Board of Adjustment

	<i>Appellant</i>		<i>Applicant's Agent</i>
Property Owner		Name	_____
Name	City of Portsmouth	Address	_____
Address	1 Jenkins Ave. Portsmouth, NH 03801	Telephone	_____
Telephone	603 610 7256	Fax	_____
Fax	603 427 1577	Email	_____
Email	j.ferrini@cityofportsmouth.com		

Location of Property	Fee
Address <u>Shattuck Way</u>	\$50
Tax Map <u>20 Lot 13</u>	
<i>Tax Map</i> <u>14 Lot 2</u>	

Applicant's Request(s)

(Check applicable requests)

- Variance from Article ____ in order to _____
- Special Exception to allow _____
- Administrative Appeal from the decision of _____
on _____ (date) regarding _____
- Equitable Waiver of Dimensional Requirements
- Rehearing

Property Owner's Consent

I have read Newington's land use regulations and will comply with all the requirements therein.

Jane M. Ferrini
 Signature(s) of all property owners & date signed
 Jane M. Ferrini
 Staff Attorney
 City of Portsmouth

000045

IN RE: The City of Portsmouth's Appeal of the Decision of the Newington Planning Board to Approve the Site Plan of Sea-3 Inc. Pursuant to RSA 676:5, III and RSA 677:15, 1-a (a)

REQUEST FOR REHEARING

NOW COMES, the City of Portsmouth, through its attorney (hereinafter "City"), and files this Request for Rehearing regarding the decision of the Town of Newington Zoning Board of Adjustment (hereinafter "BOA") in the matter of *The City of Portsmouth's Appeal of the Decision of the Newington Planning Board to Approve the Site Plan of Sea-3 Inc. Pursuant to RSA 676:5, III and RSA 677:15, 1-a (a)*, and in support thereof states as follows:

STANDARD FOR REQUEST FOR REHEARING

1. The City files this Request for Rehearing because the BOA's decision to deny the City's appeal was unlawful and unreasonable for the reasons set forth below. The City has standing to bring this action within 20 days of the BOA's decision pursuant to the deadline set forth on its Application Form. The BOA denied the City's appeal on September 15, 2014. This Request for Rehearing is timely filed.

PROCEDURAL HISTORY

2. The Planning Board of the Town of Newington granted approval of Sea-3's site plan on May 19, 2014.
3. The City of Portsmouth appealed the Planning Board's decision to the BOA and a hearing was held on September 15, 2014.
4. The BOA did not issue a Notice of Decision. In its Minutes from the September 15, 2014 hearing, the BOA determined that it had jurisdiction.

000046

to hear whether the Planning Board misinterpreted and misapplied the Newington Zoning Ordinance.

5. The only issue addressed by the BOA was a unanimous vote approving a motion finding that there "was no proposed expansion of the LPG storage in the industrial zone". The City's appeal was denied.
6. The BOA did not address any other issue raised by the City of Portsmouth in its appeal in error.

ARGUMENT

THE BOA FAILED TO ADDRESS THE PLANNING BOARD'S MISAPPLICATION OF THE ZONING ORDINANCE

7. The BOA misconstrued the City's legal position regarding the Planning Board's misinterpretation and misapplication of the Town of Newington's Zoning Ordinance.
8. The City argued that the Planning Board misinterpreted and misapplied the Newington Zoning Ordinance because it relied on the wrong zoning ordinance 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.
9. The City argued that the storage tank partially located in the "I" zone on Lot 13 was not a permitted use because storage above or below 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).
10. At the September 15, 2014 hearing, Sea-3 stated that storage of explosive material was not a permitted use in the "I" zone:

Attorney Mitchell asked if there was an acknowledgement that the LPG product Sea-3 handled was an explosive and hazardous material as described under Article 5, Section 5C of the ordinance. Attorney McEachern agreed that it was flammable material as referenced under that section of the ordinance. Attorney Mitchell said the City of Portsmouth's attorney was suggesting that the Planning Board said something contrary that was not consistent with the ordinance. Attorney McEachern said it was a non-conforming use.

See September 15, 2014 Minutes of BOA, at pages 5 and 6, attached hereto as Exhibit A.

000047

11. Sea-3's admission that handling explosive and hazardous material was prohibited in the "I" Zone at the hearing before the BOA contradicts the conclusion of the Planning Board. The Planning Board found "that this proposed expansion of a long-standing use that is permitted in the Industrial Zone." See City's Appeal, paragraph 60, quoting paragraph 50 of the May 19, 2014 Minutes of the Planning Board attached as Exhibit B.
12. Paragraph 62 of the City's appeal quotes paragraph 51 of the Findings set forth in the Planning Board's Minutes of May 19, 2014 as follows:

The Board expressly finds, as is required by Newington Zoning Ordinance Article V, Section 5, B that per the terms of this site plan application, "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 Town of Newington Zoning Regulation, Article V, Section 5- General Industrial "I" and Section 6 -Waterfront Industrial and Commercial District "W" at pages Z-16 – A-18, attached and incorporated as Exhibit C.

13. The BOA 's jurisdiction over appeals from Planning Board decisions is established in RSA 676:5, III, and arises from decision or interpretations of the zoning ordinance made by the Planning Board.
14. The Planning Board's reliance on and interpretation of Article V, Section 5 of the Zoning Ordinance was in error because the use proposed by Sea-3 is specifically prohibited by this Ordinance.
15. The discussion of whether there was an expansion of a non-conforming use is separate and distinct from whether or not the Planning Board relied on the wrong provision in the zoning ordinance to support its decision. This issue was not addressed by the BOA in error.
16. Because the BOA erred by failing to address the issue of the Planning Board's misinterpretation and misapplication of the zoning ordinance as set forth above, the City requests a rehearing.
17. Attorney McEachern represented that the use in the "I" zone was a non-conforming use that had been grandfathered.
18. "Because the general policy of zoning law, however, is to carefully limit the extension and enlargement of non-conforming uses, we strictly construe

000048

provisions that permit the continuance of such uses, and the party asserting that a proposed use is not new or impermissible bears the burden of proof." Guy v. Town of Temple, 157 NH 642, 650 (2008).

19. It was Sea-3's burden, not the City's, to prove that the use of Lot 13 was a legally valid and existing non-conforming use that had been grandfathered.
20. Attorney Mitchell, counsel for the BOA, alluded to Sea-3's unmet burden and lack of evidence when he stated that "Attorney McEachern acknowledged that it was a non-conforming use **that had apparently been grandfathered...**". See BOA Minutes at page 6 attached hereto as Exhibit A.
21. Sea-3, not the City, had the burden as the original Applicant and putative non-conforming user to show that the use was either legal in the "I" zone or was a validly grandfathered non-conforming use. Sea-3 did not offer any evidence for either position other than the opinion of its Counsel.
22. The BOA concluded that there was no expansion of a non-conforming use in the Industrial District. However, the BOA never made any specific findings, nor did the Applicant provide sufficient proof, to support the conclusion that the site expansion was not an impermissible expansion of a non-conforming use as required by the test set forth in Hurley v Hollis, 143 NH 567, 571-72 as follows:
 - (1) The extent of the use in question reflects the nature and purpose of the prevailing non-conforming use;
 - (2) Whether the use at issue is merely a different manner of utilizing the same use or constitutes a use different in character, nature, and kind; and
 - (3) Whether the use will have a substantially different effect on the neighborhood.
23. Attorney Mitchell, counsel for the BOA, said the claim was that the "LPG storage tank was not allowed in the industrial zone and boats and trucks had nothing to do with the issue." See BOA Minutes at page 6 attached as Exhibit A.
24. However, the character, nature, scope or effect on the surrounding neighborhood is part of the required analysis of whether or not a site is an expansion of a non-conforming use. See Salem v. Wickson 146 NH 328, 331 (2001).

000049

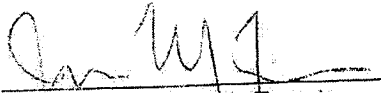
25. The BOA made no specific finding regarding the City's argument that the intensification of the use would have a negative impact on its neighbors regarding the increase in rail, road and river traffic.
26. The Town of Newington Board of Adjustment Rules of Procedure Application/Decisions 4 provides that "[i]f an appeal is denied or deferred, the notice shall include the reasons therefore." See Rules of Procedure attached and incorporated as Exhibit D.
27. The Minutes are not a Notice of Decision and they are insufficiently detailed and lack the BOA's stated reasons for their decision and are insufficient.
28. Because the BOA made conclusions without sufficient evidence, failed to provide reasons for its decision, failed to consider or misconstrued evidence, the City is request a rehearing.

WHEREFORE, the City requests that the BOA grant a rehearing and for such other and further relief as may be just.

Respectfully submitted,

CITY OF PORTSMOUTH
By its attorneys

Dated: October 3, 2014

By: 
Jane M. Ferrini, Esquire
Staff Attorney
NHBA # 6528
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801
(603) 610-7256
jferrini@cityofportsmouth.com

CERTIFICATE OF SERVICE

I, the undersigned, Jane Ferrini, Attorney for the Appellants, the City of Portsmouth, hereby certify that on this 3rd day of October, 2014, a true and correct copy of the foregoing Request for Reconsideration was hand delivered to the Town of Newington and sent by first class mail to the following counsel of record:

000050

Walter L. Mitchell, Esquire
Attorney for the Town of Newington BOA
Mitchell Municipal Group, P.A.
25 Beacon St E Suite 2
Laconia, NH 03246

John Ratigan, Esquire
Attorney for Town of Newington Planning Board
225 Water Street
Exeter NH 03833

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


Jane M. Ferrini

000051

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

EXHIBIT A

Meeting Minutes – September 15, 2014

- Call to Order:** Chairman Matt Morton called the September 15, 2014 meeting at 6:30 PM.
- Present:** Matt Morton, Chair; Ted Connors; Ralph Estes; Jim Weiner and Jane Kendall, Recorder and Martha Roy, Town Administrator
- Absent:** John Frink
- Public Guests:** Newington Town Counsel, Attorney Walter Mitchell; City of Portsmouth Attorney Jane Ferrini; City of Portsmouth Attorney, Robert Sullivan; Portsmouth Deputy Manager, David Allen; City of Portsmouth Mayor Robert Lister; Councilor Ester Kennedy; Attorney Alec McEachren; Paul Bogan with Sea-3; Steve Haight of Haight Engineering; Pan Am Counsel, Robert Culliford; Attorney John Ratigan; Denis Hebert; Bernie Christopher; Chris Cross; Mike Marconi; Jack Pare; Justin Richardson; Rick Stern; Newington resident, Edna Mosher; Bill and Sandy Sweeney; Portsmouth Residents, Richard Dipentimo and Lou Salomi

Public Hearings: The City of Portsmouth's appeal of the Newington Planning Board's decision to approve the **Sea-3** site plan for property located at **190 Shattuck Way, Tax Map 20, Lot 13, and Map 14, Lot 2.**

Chairman Morton informed the public that the City of Portsmouth and Sea-3 were not able to come to an agreement in a private meeting so they were going to continue with their appeal that was postponed on August 25, 2014. He also announced that the Board was short one member, and that all four members present would be voting. He asked the City of Portsmouth and Sea-3 if they were willing to go forward with the hearing without five voting members. Attorney Alec McEachren, representing Sea-3 said they wanted to go forward with the appeal and Portsmouth City Attorney, Jane Ferrini also agreed to go forward with the appeal.

Town counsel, Attorney Walter Mitchell recommended that the Board determine whether they had jurisdiction over one or more of the appeal issues before they proceeded with discussing the merits of the appeal. He said the only jurisdiction the Board had was on the interpretation of construction and application of the zoning ordinance. He said he would provide his interpretation of the appeal document and the relationship between the questions and application of the zoning ordinance and recommended that the Board then listen to responses from the City of Portsmouth's attorney and Sea-3's attorney on each issue before making a decision.

Attorney Mitchell said there were three questions raised in the appeal and the first question was regarding the non-conforming use of the existing tanks on Lot 13 and

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

Lot 2 where the zoning line passed through. He said the tanks contained hazardous materials that were not permitted by the current zoning ordinance and the appellant claimed that the expansion of the non-conforming use was therefore prohibited. He said it was a proper question and Board members should speak up if they disagreed or they would go onto the next question. All the Board members concurred that the question was valid.

Attorney Mitchell said the second question on page 10 of the appeal had two parts with the first being that the Planning Board did not require and review a new safety hazard assessment. He said the second was that the Planning Board required that an update to a safety assessment that was done 15-20 years ago be submitted to the appropriate officials, but it would not be available for public review and comment. He said the question was whether this complaint had anything to do with the interpretation, construction or application of the zoning ordinance. He said the argument was that there was an effort to pull that complaint under the language of Article 1 and Section 3 of Article 1 of the zoning ordinance regarding promoting the health, safety and general welfare of the community. He said the theory in the appeal was that those goals couldn't be satisfied if the Planning Board declined to require safety assessments. He recommended that appeal was outside the Board's jurisdiction because it was outside the meaning of the statute, which would subject all Planning Board decisions to ZBA appeals.

Attorney Ferrini disagreed with Attorney Mitchell's characterization of Article 1 and Article 3 of the zoning ordinance was not properly before the Board. She said the fundamental premise of all zoning was to protect public health, safety and welfare and even though the articles were broadly written, the specific application in the appeal was a safety study. Attorney Ferrini said the first issue was whether the Planning Board appropriately denied the numerous requests for safety studies. She said the Planning Board denied the requests, concluding that they complied with the zoning ordinance and that their approval of the application would be a benefit to the public. She said paragraph 5 of the decision stated that studies had been done previously and that they would be updated and given to the appropriate officials in Newington. She said she asked for the original file from 1975 on three occasions and was told that it was missing so it would be impossible for the Planning Board to review it for updates. She said there were six separate, all encompassing studies done by Sea-3 in 1995 that totaled 200 pages. She said the Planning Board also required additional studies in 1995 and recommendations by two experts were part of the Planning Department's approval at that time. Attorney Ferrini stated that any analysis of those 200 pages outside of a public hearing process would not be appropriate and those studies should have been reviewed as part of the determination of whether the project was compliant with the zoning ordinance and the public's health, safety and welfare. She said she was surprised that there was such resistance to a review of safety studies in 2014 that would include climate, marine safety, and evacuation in the event of a catastrophic event and believed it would be appropriate.

Chairman Morton asked Attorney Ferrini if she had a copy of the 1995 studies and she said she did.

000053

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

Attorney McEachren said he agreed with Attorney Mitchell they would be opening a Pandora's box if the Board went along with the City of Portsmouth on this point. He said the zoning ordinance was intended as a guide and their questions went back to the purpose of the zoning ordinance. He said counsel for Portsmouth was not pointing to any provision that said a safety study was required in every instance. He said there were extensive studies in 1996 for the second expansion. He said the fire chief also had an opportunity to tell the Planning Board if he didn't approve of the application.

Attorney McEachren referenced the Supreme Court's Atwater decision that said anyone that disagreed with a Planning Board decision needed to appeal within 30 days and not wait for the final decision and therefore the appeal was not properly before the Board and claimed this portion of the appeal had not been timely filed.

Attorney McEachren said the site already had three rail loading berths and the Planning Board had approved five. He said the City of Portsmouth was approaching the application as if it was a new project, but it was actually an expansion of an existing rail facility. He said it would be appropriate that existing studies be referenced instead of doing everything over from scratch.

Mr. Paul Bogan, Vice President of Operations for Sea-3 said to the best of his knowledge of the six studies that were quoted, the Planning Board only requested one study that had to do with the construction of the additional tank. He said the others were from the EPA, the Coast Guard, and OSHA.

Board member, Jim Weiner asked Portsmouth's counsel why they had not requested an appeal within 30 days and Attorney Ferrini said she didn't attend May 5, 2014 meeting, but did attend the May 9, 2014 meeting where there was a straw vote and a lot of discussion. She said deliberation occurred on May 19, 2014 and the Board's alternate member raised an issue of a rail study. She said that decision was not closed and it was the City's position that there was still an open issue and the request for an appeal was not untimely.

Attorney John Ratigan, representative for the Planning Board invited them to read the May 5, 2014 meeting minutes. He said the decision was the decision and it was not jurisdictional because the appeal was not filed within 30 days of May 19, 2014, but was filed on June 17, 2014. Attorney Mitchell said the timing issue raised by Attorney McEachren may or may not have merit, but it was something no one heard prior to the meeting to review closer so he recommended that the Board not take any action on that request. He said those issues could be argued later if the issue went to court, but right now the Board needed to decide if there was any jurisdiction to hear matters on the second appeal.

Board member, Ralph Estes added that their bylaws were about land use and there was nothing there about studies.

Mr. Justin Richardson of 32 Old Post Road and Planning Board member said he thought Section 5 of the zoning ordinance for both the Industrial and Waterfront districts said the building inspector would issue a permit upon findings of the Planning Board. He said the Planning Board wrestled with whether the language required a safety study and it was determined that they were only required to make a finding.

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

Ted Connors moved that the Board had no jurisdiction on the second appeal. Jim Weiner seconded the motion and all were in favor.

Attorney Ferrini said their question was not just in regards to the purpose and timing of a safety study, but the second piece was that the outcome of the study would be outside of the public hearing process. Mr. Mitchell said the motion were only in response to the subject matter and had nothing to do with timeliness.

Attorney Mitchell said the third issue of the appeal claimed that the City and other abutters were prejudiced in the Board's delay in declaring the application a development of regional impact and also that abutters were not given notice in error before the variance proceedings at the end of 2013. He said he didn't believe that had anything to do with the Planning Board's decision and recommended that the Board find no jurisdiction in the matter.

Chairman Morton said he recalled discussing the matter with the Town planner and recalled that all commercial abutters were notified, but some individual homes were not actual abutters to Sea-3 so he didn't think that complaint was valid. Attorney Mitchell said the Planning Board was not mentioned anywhere in that item.

Attorney Ferrini said the issue on notice was that the Planning Board received information relative to a regional impact, and the Town of Greenland wrote to the Town planner on October 28, 2013 requesting that the project be deemed one of regional impact so the issue was not the notice of abutters, but that none of the surrounding communities received a regional impact notice so they couldn't fully participate in the hearings.

Attorney McEachren said the statute said the Board had jurisdiction on the construction and application of the zoning ordinance and this question did not relate to the zoning ordinance.

Jim Weiner moved that item 3 failed and was outside of the jurisdiction of the Board. Ralph Estes seconded and all were in favor.

Chairman Morton said the appellant could now address the first issue of the appeal.

Attorney Ferrini said the industrial and waterfront district bisected the tank that was owned by the railroad and hazardous and explosive materials were prohibited in the general industrial "I" zone, stating that LPG propane in any form would fit that description. She said the files were missing so there was no way to know the details of the findings for the original site construction in 1975, but the Planning Board findings said the expansion was consistent with a long standing use in the industrial zone, despite the use not being permitted. She said the May 19, 2014 minutes again referred to uses permitted in the industrial zone, which it said was intended to promote economic development and employment opportunities. She went on to read paragraph 51 of the minutes that said that the terms of the site plan application, the proposed location, construction and operation would not injure present or prospective development in the district or the health and welfare of resident districts in the vicinity. She said the Board

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

found that this application was the type of business development that land use in the industrial district intended to protect and promote. She reiterated that the use was not appropriate for the "I" district and could be an exception in the waterfront district so long as they complied with the EPA.

Chairman Morton commented that the use had been in operation since 1975 and Attorney Ferrini said if it was a non-conforming use, then it was an expansion of that use and an intensification, which could not have a negative impact on its neighbors. She said she understood that the jurisdiction of the rails were addressed, but the City of Portsmouth was saying it put a strain on shared transportation routes, rivers, rails and roads.

Mr. Estes asked if the City of Portsmouth was asking for the removal of the operation and Attorney Ferrini said they wanted a safety study on the issues raised and the ZBA had the authority to remand back to the Planning Board for a study.

Mr. Weiner said the existing tanks were there, the proposal was for an expansion with three new tanks on the water district side that met the requirements of that district and nothing had changed on the industrial side. Attorney Ferrini said she believed the rail and truck transportation would increase on the industrial side.

Attorney McEachren said all improvements proposed would take place in the waterfront district where it was allowed. He said there would be no changes to the tank in the industrial area.

Mr. Steve Haight of Haight Engineering agreed that there would be no improvements in the industrial section of the site and showed the plan where the zoning line bisected the smaller tank and the new tanks would be placed in the waterfront. He said the Town's transportation expert concluded that there would be no change to in the volume of trucking from the original approval because the site could not support an increase. He said the majority of LPG supply had previously been received by ship from international sources and the proposal was to increase the rail delivery capacity. He said the site had been in operation for nearly 40 years without incident.

Mr. Weiner asked if the expansion would create additional shipping exports and Attorney McEachren said they had received 180 million gallons of LPG from 12-13 ships a year, but under the new delivery configuration by rail they would probably only export one to two ships during the summer.

Mr. Estes asked if this project would alleviate the shortage of propane the region experienced last year and Attorney McEachren said the regional demand was growing at 8% per year. He said there was a declaration of emergency declared by the Department of Safety that referenced their site last year. He said the international prices were above the domestic prices and rail was the way to bring it in. He said 75% of the propane coming into New England came by rail.

Attorney Mitchell asked if there was an acknowledgement that the LPG product Sea-3 handled was an explosive and hazardous material as described under Article 5, Section 5C of the ordinance. Attorney McEachren agreed that it was flammable material as referenced under that section of the ordinance. Attorney Mitchell said the City of Portsmouth's attorney was suggesting that the Planning Board said something contrary that was not consistent with the ordinance. Attorney McEachren said it was a non-

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

conforming use. Attorney Mitchell inquired if the City of Portsmouth had suggested that this was an illegal non-conforming use and Attorney McEachren said they had not. Attorney Mitchell asked if it was an extension of a non-conforming use and Attorney McEachren said there were no changes to the tank in the industrial district and there would be no difference in how the propane would be distributed by truck from the site.

Portsmouth resident, Richard Dipentima said there was an intensification of the use of the existing tanks in the "I" zone that was inconsistent with the zoning ordinance. He said Sea-3 had received most of their product by ship with only a few rail cars and now they were proposing to receive 16 rail cars six days a week throughout the year.

Planning Board member, Justin Richardson said he made the motion on the Planning Board's decision and the Planning Board looked at each criteria in the zoning ordinance phrase by phrase when they made their findings. He said they were concerned that there might be an increase in traffic, but noted that the truck deliveries would be limited due to the capacity to load.

Mr. Bogan said they previously used only a small number of rail cars, but it was not their primary means of transportation because rail transportation was expensive. He said they used to have more truck distribution, but international prices went up and put them out of business over the last couple of years and now they were proposing a change to their business with rail deliveries so that their truck deliveries would return to the same number as before when business was doing better. He said they could only put out 48 trucks with 16 rail car deliveries a day and the traffic study said the roads could handle that amount of traffic.

Attorney Ferrini commented that Sea-3 was a subsidiary, which could absorb losses. She said she was not convinced that Sea-3's expansion would solely serve domestic shortages because the Planning Board minutes gave testimony from an attorney in Maine that said they could make more money exporting to foreign sources than they could by providing to the domestic market.

Denis Hebert, Chairman for the Planning Board agreed that they never approved an increase of truck traffic beyond their current loading capacity, but it would increase from slow years to busy years.

Mr. Weiner asked if Attorney Ferrini wanted to comment on the traffic issue and Attorney Ferrini said the use seemed quiet over the last couple of years and the new change would increase the traffic and that would be an intensification of use.

Attorney Ratigan said he had presented a memo to the Board to address the issue, which agreed that the Town's traffic engineer confirmed the number of trucks and the City had not presented any evidence to contradict those findings. He said the number of ships had been a permitted use for a long time and would be changing from 12-13 to one or two in the summer.

Attorney Mitchell said the claim was that the LPG storage tank was not allowed in the industrial zone and boats and trucks had nothing to do with the issue. He said Attorney McEachren acknowledged that it was a non-conforming use that had apparently been grand fathered so the only issue in the appeal was if the plans would result in an enlargement, extension, or expansion of LPG storage in the tank that was partly in the industrial zone which was prohibited in the ordinance.

000057

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

Discussion ensued on the wording of the motion. Attorney Mitchell recommended that Attorney McEachren admitted that the storage of an explosive substance was not permitted in the Industrial zone, but was grand fathered. He said the question was whether there was an expansion in that zone. Chairman Morton commented that they hadn't expanded the tank.

Jim Weiner moved that there was no proposed expansion of the LPG storage in the industrial zone. Ralph Estes seconded the motion and all were in favor.

Mr. Lou Salomi of 142 Spinnaker Way said he thought a representative of Sea-3 had said earlier in the meeting that there would be a safety or environmental study of the study that was done 18 years prior and he wondered who would purchase a product that had a safety study that had been done 18 years ago.

Adjournment: Ted Connors motioned to adjourn, and Ralph Estes seconded. All were in favor, and the meeting adjourned at 7:47 p.m.

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

000058

Town of Newington, NH
PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

- Call to Order:** Chair Denis Hebert called the May 19, 2014 meeting to order at 6:35 p.m.
- Present:** Mike Marconi, Vice Chair; 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 Alec McEachern; Attorney John Ratigan; City of Portsmouth, Attorney Jane Ferrini; 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; Sandy Sweeney; Jeff Barnum, Great Bay Water Keeper; Laura Bergeron; Bob Gibbons; Lou Salome

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 passed out the most recent updates conditions and findings draft by Town counsel, Attorney John Ratigan. Alternate Board member, Peggy Lamson asked if the Board agreed on the findings and Chairman Hebert said the point of the non-binding straw vote was to allow Mr. Morgan and Attorney Ratigan to determine the conditions based on the findings to date for the Board to review. He said he didn't know which way the Board wanted to go and it could still change.

Attorney Ratigan said he and Town Planner, Tom Morgan drafted the list after the last deliberation, and Mr. Morgan's suggestions were also incorporated. He said another issue came up on the last page of Condition 5 which read "...that several safety plans were adopted in conjunction to the original Sea-3 site plan..." would now read that the "...safety studies shall be reviewed by Sea-3, updated and submitted to public officials, including the Newington Fire Chief..." to show that there were several safety studies instead of just one. Chairman Hebert said the original study was done in increments and included emergency management practices. He said each study could stand alone, but some needed updating to present day standards. He said the fire chief said they also needed some equipment updates, but the plan itself needed to be updated as well. Ms. Lamson said Dale Sylvia was fire chief at the time and asked Chief Head if he conferred with former Chief Sylvia before he departed. Chief head said he did not.

Chairman Hebert commented that the rails would be safer once Pan Am upgraded the tracks because there would be one instance of 16 cars traveling to and

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

from the side instead of five cars at a time. Board member, Justin Richardson said he was confused because Pan Am wasn't the applicant, but the applicant was operating on Pan Am property where some of the improvements would occur. Board member, Chris Cross said that was the intent of the lease. Mr. Richardson said it was significant that part of the project was on Pan Am property, yet Pan Am made statements that they were not applicant. Chairman Hebert said he thought he was satisfied that they were only leasing the land and weren't doing anything with the equipment.

Attorney Ratigan summarized Pan Am's letter of April 21, 2013 that said they would lease a portion of its land to the applicant, but advised the board that they were not the applicants, were not asking the Board for any approvals and were not subject to the town's land use language. However, he did think it appropriate to add Mr. Richardson's language stating that a portion of the improvements were on Pan Am's property. Mr. Richardson read through the conditions and Attorney Ratigan agreed to change the wording to say "Pan Am was consenting to the application to the extent that a portion of the improvements were on their property leased to the applicant"

Mr. Morgan said they had received an update from Pan Am earlier stating that Pan Am was now recognized as one of property owners. Mr. Cross said Pan Am was the owner of the property, but they were not the owner of any of Sea-3's improvements on the leased property.

Mr. Richardson recommended that the wording on #45 at the bottom of page 6 that said the Board found that public safety would be enhanced and add "Pan Am has to upgrade..." Chairman Hebert recalled that Ms. Cynthia Scarano, Pan Am Executive Vice President said if the Sea-3 expansion was approved, they would upgrade the tracks, although he understood it was a non-binding statement. Mr. Morgan said the correct verb to use would be "declared". Mr. Richardson agreed that they should strike "have to" and separate their intent and regulatory requirements by clarifying that this would need to be done in order to accommodate 16 cars per day. Board member, Jack Pare said they needed clarification on the number of rail cars traveling five at a time, noting that more than five cars could travel in a day, but only five at a time could travel on accepted tracks. He said Sea-3 stated that they would have to come back if wanted to receive more than 16 cars a day, but they were still limited to five at time if improvements were not made. Mr. Pare pointed out another instance of a reference to five cars per day on the top of page 7. Chairman Hebert recommended the wording say, "...based on evidence before them, the Board finds that...Pan Am declared that they would upgrade to Class II status. Attorney Ratigan said the limit of cars was five at a time on excepted tracks, but they were proposing up to sixteen cars per day if they improved the track to Class II.

Mr. Morgan pointed out that Pan Am could still transport sixteen cars a day on Class I tracks. Mr. Richardson referred to paragraph 40 on page 6 and said Ms. Scarano expressed the intention to upgrade the rails with 10,000 new railroad ties. He recommended adding that the Board was relying on the representation that the upgrade would promote public safety if upgraded from excepted tracks to Class II. He said that understanding was the cornerstone of public safety. Chairman Hebert said the Board had many discussions and the Board had no authority to make any of those statements

000060

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

binding. Board member, Bernie Christopher agreed, but said those statements were still part of the Board's findings.

Attorney Ratigan said he didn't recollect any discussion by the Board linking their findings to safety and he thought the Board was trying to walk close to that line while remaining within their jurisdiction. Mr. Cross disagreed that safety did not depend on the number of ties because it was clear there would be an increase in traffic, but to do so they would have to meet FRA regulations. He said he didn't believe anyone had the ability or legal standing to make that point, but everyone was aware of the site development and he had confidence that they would meet the regulations. Vice-Chair Marconi agreed that they couldn't get to that area.

Ms. Lamson said she agreed with Mr. Richardson because of her concerns for safety. Mr. Richardson said he specifically addressed the safety issue when they went into deliberations at the previous hearing, which he thought the minutes would reflect. He said it was much easier to approve a project than to say they couldn't determine if upgrades would be made and then asked if safe to bring 16 cars over, which created a dilemma and paradigm. Chairman Hebert said couldn't agree. Mr. Richardson said they had to determine safety improvements would be made for the community and he wasn't sure he could vote in favor of the project if they couldn't agree. Mr. Cross said the FRA would make sure safety improvements would be made if necessary.

Mr. Richardson said there had been many discussions on railway accidents, which had the attention of the public, Senator Shaheen, Senator Ayotte, and Carol Shea-Porter, but he had to ask what would happen ten years from now when that attention was gone and the tracks became excepted again. He said it would be important to include that there had been a statement that the excepted tracks would be eliminated in the residential areas.

Chairman Hebert said he was surprised when informed at the beginning of the process that the Board had no say concerning the operation and condition of the tracks, which were solely under FRA and State jurisdiction, but several attorneys agreed. He said he was hearing him say that the Board should put a finding that they would vote based on being swayed on what Pan Am said they would do. He said he was afraid that he was suggesting they would try to hold them responsible as part of the regulation responsibility. Mr. Richardson said he just wanted to include a statement that they were relying on Pan Am's statement that they would upgrade the tracks. He said he was not suggesting any jurisdiction over the rails, just on the site. Chairman Hebert recalled a discussion about including a similar note on the site drawings and thought they came to an understanding that they could not make any stipulations that involved the operation of the rails. Mr. Richardson said in March and April they discussed the Sea-3 amplification and then a letter sent on April 21, 2014 showed that Pan Am was part of the land on which some of the improvements would be made so thought he their status shifted from a member of public. For that reason, Mr. Richardson was suggesting that the project would promote the safety of the public based on the finding that the railroad tracks would be upgraded.

Attorney Ratigan said at the conclusion of the meeting on May 5, 2014, the Board discussed a possible condition that Sea-3 would notify the Town and the

000061

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

Planning Board if they learned that the track degenerated. He said that statement could satisfy protecting public safety without going beyond their jurisdiction. Board of Selectman Representative, Rick Stern said #45 already addressed the finding for public safety. Mr. Richardson said one characterized a basis for a finding and the other addressed the mechanics. He said he agreed with Attorney Ratigan's comments. Chairman Hebert said he recalled discussions of making a condition that Sea-3 would have to come back if the tracks degraded. Mr. Richardson said it shouldn't be a cat and mouse game where if only five cars showed up, then the applicant would know if there were rail impairments that limited their ability to transport sixteen cars at a time.

Mr. Cross asked if it was Mr. Richardson's intention that the Board would review and withdraw approval. Mr. Richardson said the Board's jurisdiction ended with the approval, but suggested that if the track deteriorated, then someone could go to Sea-3 and say the approval was based on an understanding of upgrade. Mr. Cross said he thought problems would be reported to the FRA, but he didn't think that would vacate Sea-3's approval. Chairman Hebert said if the applicant noticed the tracks deteriorated, then the Board could notify DOT or the FRA, but code enforcement had no jurisdiction. Ms. Lamson said she didn't have a lot of faith in the FRA. Chairman Hebert said any town notified could go through the proper channels to notify the FRA, but the building inspector had no authority. Ms. Lamson said the building inspector only had jurisdiction over the site and then asked if Greenland saw a problem they could work with the FRA and the State. Chairman Hebert agreed and said Sea-3 could also notify the proper authorities.

Mr. Richardson said they had wandered from the intent of the language, which was limited to Sea-3 in paragraph 40. He suggested adding the sentence, "...that the Board relies on this representation in determining that the project would promote public safety as required by the zoning ordinance..." Chairman Hebert said the railroad was not the applicant and they didn't apply to town boards and the Board had no jurisdiction over the railway. Mr. Richardson said the zoning ordinance required that they make finding that the project would promote public safety in the neighborhood and was not limited to the site. Mr. Pare said that language was already in #45. Chairman Hebert said it would cross the jurisdictional line, but the condition that Attorney Ratigan wrote up made sense and could be added.

Attorney Ratigan read #6 that said, "...if, after the track has been upgraded to Class II status, and Sea-3 learns that the Class II track has degraded to a lower level of service, then the Board of Selectman and the Planning Board shall be notified in writing by Sea-3 of this reduction and level of service within 7 days of learning. This is to allow Newington to notify the proper authorities." Chairman Hebert suggested adding "...for purpose of notifying the proper authorities." Mr. Richardson said he wanted to be sure the building inspector had all the tools necessary to review the safety of the site. Chairman Hebert said he had no problem if they were talking about the site, but the rail was beyond the building inspector's jurisdiction.

Chairman Hebert said he didn't like that the FRA only had jurisdiction over the rails coming in and out of the site, and town having none, but that was how it was. Attorney Ratigan said if the track wasn't upgraded, or was, but then degraded, then the

000062

Town of Newington, NH
PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

railroad could only run five tankers at a time and it would be under utilized, but there was no jurisdiction over the rail operation any more than it could be said that the railroad had jurisdiction over the site. Mr. Richardson said approving an expansion with the number of trains going over the tracks significantly could have an effect on public safety. Attorney Ratigan said the Board could only determine if the site could handle the receipt of those tanks. Mr. Richardson said if there was no plan to upgrade, and the zoning ordinance required the Board to find the project would promote public safety in the neighborhood, then the Board could deny the application. Chairman Hebert said he couldn't see how they could make that determination. Mr. Richardson asked if they could deny the application on the basis that it affected public safety based on the condition of the track. Attorney Ratigan said the applicant had the right to present a plan, build and have an underutilized plan. He said it would be self-executing if the track degraded or something like the market changing so that Sea-3 could no longer bring propane in anymore, which would be addressed under Condition # 6. Mr. Richardson agreed that the market would see-saw.

Ms. Lamson said the site review procedures required the Board to look at the health, safety, welfare and environment and she was concerned that they were not following site review procedures. Mr. Richardson said if the based approval on the intention to upgrade rails, and they did not upgrade the rails, then they could say they were not in compliance. Attorney Ratigan said they could not make any decisions regarding the rails. Chairman Hebert said Pan Am could deliver one train at a time, but they had said they would upgrade the tracks to Class II if Sea-3 were approved. He said they could consider the statement as showing good intent, but the Board still had to decide whether the proposal was acceptable without taking the railroad into account.

Mr. Richardson asked Attorney Ratigan if the Sea-3 could be considered an agent of the Boston and Maine Corporation that was listed on the site plan. Attorney Ratigan said the railroad's property was being leased, and they only had jurisdiction on the portion of land that was being leased for non-rail improvements.

Ms. Lamson said she didn't see any sense in listing #48 regarding the Mass DOT Transport report because an independent study on the local rails was requested and it had nothing to do with this case. Chairman Hebert, Mr. Pare, Mr. Cross and Mr. Richardson all agreed that they wanted to leave in to show similarities and nothing further could be done.

Mr. Richardson said for him the threshold was the excepted rail. Chairman Hebert thought they should stick to Class II because that was what was represented. Vice-Chair Marconi said the railroad inspector required the rails address the issue if he found something wrong. Mr. Richardson said the problem was that no one outside the railroad could get the inspection reports. Mr. Richardson said they needed a basic agreement that Sea-3 would notify them if the tracks fell into disrepair. He said he didn't want them to sit on the information so he wanted there to be an obligation to make officials know as soon as possible in case there was a situation where someone needed to respond, which couldn't happen if they were ignorant of the situation. Attorney Ratigan said they could make it less ambiguous by changing the wording from "...if they

Town of Newington, NH
PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

should learn..." to "...if Sea-3 learned or had reason to believe..." because they couldn't ignore what was in front of them.

Mr. Cross said Pan Am ran the rails, not Sea-3. Chairman Hebert said they didn't expect Sea-3 to inspect the tracks, but the purpose of the condition was to inform the Town if they become aware of a problem, and then move forward.

Mr. Stern said they might want to make not if their rate of delivery changed which would indicate a problem with the tracks. Chairman Hebert said he was especially concerned if the track standard went below Class II, but they could list both. Mr. Richardson said they could specify notification if the rate of delivery dropped to five cars per day. Chairman Hebert said the rails could do self-inspection. Mr. Pare said the FRA was to be informed if the rate of delivery dropped to five cars per day. Mr. Richardson said the FRA said repairs only had to be done within thirty days. Attorney Ratigan read the changes that specified notification if there was a carrier reduction of service to five or less.

Vice-Chair Marconi said it was beyond the Board or Sea-3's jurisdiction to regulate the rails. Mr. Cross agreed and said they couldn't pull site approval if a trucking company came in less often because there were hazards that were under DOT jurisdiction. Mr. Stern said it was the same thing with ships coming in. Mr. Richardson said the corollary was that the Board could say that they would only allow deliveries to vehicles that had proper inspections. Chairman Hebert said the problem was that he was suggesting that Sea-3 do the regulation.

A majority of Planning Board members agreed to the adoption of the following Findings:

1. The applicant's proposal seeks to improve the site's existing rail off-loading facilities for liquefied propane gas ("LPG") and add additional LPG rail off-loading facilities on its property and on property to be leased from Pan Am Railways.
2. The purpose of the proposed site improvements is to allow the applicant to continue its historical LPG distribution operations by increasing the capability to receive domestically sourced LPG, which is only available by railroad. The existing capacity to receive internationally sourced LPG from ocean vessels would be unchanged.
3. The Board finds that the shipment by rail of LPG via rail to the SEA-3 facility at 190 Shattuck Way has been occurring since 1995, consistent with the existing site plan approval that SEA-3 has obtained from the Planning Board.
4. If constructed, the proposed site improvements would not materially change operations on the site, which would continue to meet local propane gas distribution needs through its existing truck distribution facilities.
5. LPG is a combustible, non-toxic gas that evaporates into the atmosphere upon discharge.

000064

Town of Newington, NH
PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

6. The applicant's site is manned 24 hours a day, 365 days a year, by personnel who are trained in emergency safety response procedures.

7. The Board finds that SEA-3 has a long history of facilitating and providing LPG fire safety training and incident response training to its personnel and to other public safety personnel, both in Newington and in the region. Further, that Mr. Bogans of SEA-3 has represented that these training opportunities would continue to be available to Newington's firefighters and public safety professionals, and to other communities in the region.

8. The applicant's site is regulated by the U.S. Department of Homeland Security, as overseen by the United States Coast Guard, and is required to comply with these agencies' regulations for security lighting, surveillance and fencing.

9. In his October 9, 2013 interoffice memorandum to the Planning Board, then Fire Chief, Dale Silva, stated with regard to the proposed site improvements that:

"In reference to SEA-3's request to expand their rail capability, we have been researching this a great deal. I met with N.H. Fire Marshal's office to discuss the operation with two Fire Marshals, we inspected the proposed site. In addition to fire protection, we are reviewing federal laws and how this may affect our neighboring communities. From a fire department view, I believe this is a positive for Newington, because it gives us the opportunity to update and increase fire protection systems that are already in place but outdated. The operation they are proposing is not dramatically different than their current operation.

Working with the Fire Marshal's office, we are also going to require a third party Fire Engineer review, but one that specializes in propane operations. The State is researching potential engineers for us.

Having said that, we recommend conditional approval in concept. If approved by the Newington Planning Board is to go forth, SEA-3 will have numerous requirements set by Newington Fire, with the assistance of the State Fire Marshal's office and an Independent Engineer."

10. The proposed site improvements will update and modernize the site's existing fire protection systems.

000065

Town of Newington, NH
PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

11. That Newington Fire Chief Head testified that his department has the resources that it needs to respond to an incident, whether it be a SEA-3 facility, or along the railroad tracks. Chief Head said that his department would continue to take advantage of any training that it may require and that the final plan designs would be reviewed and approved by his office, and by the N.H. State Fire Marshal's office.

12. That Ms. Scarano of Pan Am represented to the Board, on the issue of fire incident response training and safety, that Pan Am often worked with the Federal Railroad Administration [FRA] to provide a day of training for local fire departments.

13. Chief Head stated that as to jurisdiction over incident response, his department handles Newington, and jurisdiction for incidents in Portsmouth or other communities lies with the Fire Chiefs in those communities. Each community can call upon neighboring communities for mutual aid, if such aid is advisable. He also indicated that there are emergency management plans that include evacuation plans which have been put in place by the State of New Hampshire for the seacoast region, should an event occur of such magnitude that the plan is activated.

14. It has been reported from several sources that Portsmouth Fire Chief Steven Achilles has stated that he currently has the resources and training necessary to respond to a LPG incident in Portsmouth related to the LPG rail traffic that currently travels through the City, and that the Portsmouth Fire Department's current resources and training are sufficient to meet the risks presented by the proposed increase in LPG traffic presented by this site plan application.

15. Based on its review of the proposed site plan, the Town's retained safety expert, SFC Engineering Partnership, Inc. ("SFC"), concluded in its January 29, 2014 report, "Overall the site plan appears to be in general compliance with NFPA 58 and 54. In terms of fire safety compliance, no significant problems have been found with this layout."

16. The applicant's Fire Safety Analysis determined that there is adequate water volume and pressure on site to service the proposed fire suppression system.

17. In its written review of the applicant's Fire Safety Analysis ["FSA"] dated April 9, 2014, SFC concluded, "This FSA document appears to be in general compliance with NFPA 58, and NFPA FSA manual. No significant problems have been found with the proposed system or the FSA at this point; however, the above listed detailed documentation should be submitted and reviewed prior to the issuance of a building permit and system commissioning."

18. The applicant has represented that the final design and construction of the site improvements would comply with NFPA 58 and 54.

000066

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

19. The proposed site improvements would add a second means of emergency access to the site over the property of Pan Am Railways.
20. The proposed site improvements would maintain the site's existing vegetative buffers and add a 6-8' earthen berm at the southeastern corner of the site, within the existing fence line, where the site abuts a residential use.
21. The proposed site improvements will result in no change to the site's existing motor vehicle parking or truck distribution facilities.
22. Mr. Hazarvartian, P.E. of Transportation Engineering, Planning and Policy, performed a traffic assessment for the applicant and concluded that the proposed site plan would not alter the historic truck traffic volume which averaged 103 to 161 trucks per day, from 2002 to the present (excepting 2012 and 2013, which were substantially below these numbers due to market conditions).
23. Mr. Bogans testified that there are site constraints that limit the number of LPG rail cars that SEA-3 can receive to 16 rail car tankers with LPG per day, even with the site improvements proposed by this application. (3/24/14 PB mtg. minutes).
24. Mr. Grotenhuis, Senior P.E. of RSG, reviewed for the Planning Board the applicant's traffic assessment and concluded that the truck traffic volume would remain essentially the same, at 160 trucks on average per day. He further found that ongoing changes to the Spaulding Turnpike may alleviate some of the traffic down Woodbury Avenue and through Portsmouth.
25. Based on the evidence presented, the site plan proposal will not increase the truck traffic to and from the site.
26. The proposed site improvements will not change the site's existing distribution capacity or increase traffic impacts associated with existing uses on the site.
27. The motor vehicle area of the proposed site improvements is currently hard packed gravel and will remain hard packed gravel, with the exception of where the improvements are affixed to the ground.
28. The proposed site improvements will result in no adverse change to existing dust, erosion or run-off conditions.
29. The proposed site improvements will upgrade the existing storm drainage system.
30. The applicant has received Shoreland Impact Permit No. 2014-00105, a copy of which was provided to the Planning Department by e-mail dated March 24, 2014.

000067

Town of Newington, NH
PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

31. The applicant has received Alteration of Terrain Permit No. AoT-0695, a copy of which was provided to the Planning Department by e-mail dated March 24, 2014.
32. The proposed site improvements will not alter the existing security lighting, which was installed in accordance with a security lighting plan required and approved by the U.S. Department of Homeland Security.
33. In its April 21, 2014 letter to the Planning Board, Pan Am Railways confirmed in writing that it will lease a portion of its land to the applicant for a portion of the proposed site improvements, but advised the Board of its position that Pan Am Railways is not the applicant. It is not asking the Board for any approvals and it is not subject to the Town's land use regulations. Pan Am is assenting to this application to the extent that a portion of the improvements are located on property that it will lease to SEA-3.
34. John Robinson, the N.H. Railway Safety Inspector at the N.H. Department of Transportation, testified that he met with Portsmouth officials to discuss track inspection issues.
35. Mr. Robinson testified that Pan Am would only be able to move 5 tank cars at a time to the SEA-3 facility over the tracks north of Rockingham Junction while the tracks were in their current condition (3/24/14 PB mtg. minutes).
36. Mr. Robinson said that he (as N.H. DOT's representative) and the FRA over joint track inspections of the Portsmouth and Newington branch line.
37. Mr. Robinson testified that N.H. RSA Chapter 373 governs the process by which N.H. municipalities can request a change of safety protection at railroad-roadway crossings. This is a N.H. DOT administrative hearing process that would examine whether the safety protections at the crossing are adequate, and if not, who would be responsible for the upgrades and how that cost would be allocated.
38. Mr. Robinson testified that federal law required annual, comprehensive bridge inspections by Pan Am to be in place with records, ratings, and results available to the N.H. DOT and to the FRA.
39. Ms. Scarano of Pam Am stated that Pan Am was currently working with the Town of Greenland to begin the process of examining road crossing safety protections and reiterated that Pan Am would work constructively with communities on road/rail crossing issues.

000068

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

40. Ms. Scarano of Pan Am testified that if SEA-3's application is approved, Pam Am intends to replace approximately 10,000 ties from Rockingham Junction to the SEA-3 facility, and that it would upgrade its tracks Class II status along this section of the railway.
41. Mr. John Killoy, Track Safety Administrator for the New England region of the Federal Railroad Administration (FRA) testified that the FRA regulates rail safety and employee safety. He stated that the railroad owns and maintains the track to whatever standards it sets for its use, and that tracks would be inspected by the FRA, once an upgrade of track has been completed to a new track class. (3/10/14 PB mtg. minutes).
42. The Board finds that rail safety regulations and inspections lie solely with the Federal Government under the jurisdiction of the FRA and the State of New Hampshire, through N.H. DOT. The Planning Board has heard lengthy, detailed testimony from John Killoy of the FRA and John Robinson of N.H. DOT. Each reaffirmed the Board's understanding that exclusive jurisdiction over rail safety, inspections and operations lies with these governmental bodies and not with N.H. municipal planning boards.
43. While Pan Am has supplied the Board with important information, SEA-3, and not Pan Am, is the applicant before the Board.
44. The Board finds that there are existing safety studies which detail the safety protocols and procedures to be followed on the SEA-3 property in the event of a LPG incident.
45. Based upon the evidence before it, the Board finds that public safety will be enhanced by this application, as Pan Am declared it will upgrade its tracks to Class II status. This will have to be done in order to accommodate a proposed increase to 16 tank car deliveries per day of LPG to the SEA-3 site, above the present limit of 5 cars at a time.
46. Public safety will also be enhanced by the new, state-of-the-art safety improvements that are to be installed on-site as proposed by the applicant.
47. The Planning Board has conducted 7 public hearings on this application. The Board has encouraged and received substantial public input from neighboring communities and their residents, after having declared this project to be a proposed development that has a potential for regional impact per N.H. RSA 36:57.
48. While the Planning Board received and reviewed a report prepared by the Massachusetts Department of Transportation entitled, "Report on the Safety Impacts of Ethanol Transportation by Rail" dated March 29, 2013, the Board finds that the circumstances of this study are not related to this application, as the product being transported in Massachusetts is different (ethanol in Boston vs. LPG in N.H.). The

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

Massachusetts Legislature adopted a law in 2012 that required the Massachusetts DOT to commission this study; there are Massachusetts state permits required to transport ethanol through Boston that are not pertinent to New Hampshire. Most importantly, the rail lines within the Massachusetts study area over which the ethanol would travel are owned by the MBTA, and not by private rail carriers such as Pan Am.

49. The Board expressly finds that the requirements of Newington Zoning Ordinance Article 5, Section 6 have been satisfied, that the contemplated use would constitute a development of sustained desirability and stability, that it would be in harmony with the character of the surrounding area, and consistent with the overall long range plans for the community, that it would not result in an over-intensive use of the land, that it would not result in undue traffic congestion or traffic hazards, and that the plans indicate that it would be adequately landscaped and otherwise promote the health, safety and welfare of the community.

50. The Board expressly finds that this proposed expansion of a long-standing use that is permitted in the Industrial Zone is consistent with the aim of Newington Zoning Ordinance Article V, section 5, A, which anticipates that land zoned Industrial will be able to accommodate "expansion of existing industry...and to enhance economic development and employment opportunities."

51. The Board expressly finds, as is required by Newington Zoning Ordinance Article V, section 5, B that per the terms of this site plan application, "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.

52. The Board expressly finds and recognizes that, in the aftermath of the recent economic recession, the importance of supporting business in the Industrial District, and promoting economic development and local employment, cannot be understated as an important purpose of this Industrial District.

53. That the Board finds that SEA-3 helps to provide a variety of energy sources to the N.H. seacoast area and the region, and to the extent that this approval will continue to allow SEA-3 to provide energy alternatives to local energy customers, Newington and the region benefit by having enhanced competition in the energy marketplace.

54. The proposed site improvements meet all applicable requirements of the Town of Newington's Site Plan Review Regulations.

000070

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

Mr. Richardson moved to grant site plan approval in order to permit 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 consistent with the Sea-3 site plans dated November 4, 2013 (revised May 19, 2014), subject to the following conditions:

1. Trucks exiting the SEA-3 facility shall make a right hand turn only and shall travel north on Shattuck Way to the Spaulding Turnpike's Exit 4.
2. The SEA-3 facility shall be authorized to receive no more than 16 rail tank cars carrying LPG per day. Any proposal by SEA-3 to receive more than 16 tank cars carrying LPG per day shall require further site plan review and approval by the Newington Planning Board.
3. Any lease between SEA-3 and Pan Am (or their successors or assigns) on land leased to SEA-3 for the siting of the unloading racks and other improvements to be constructed and operated by SEA-3 on such leased land, shall contain a provision that SEA-3 shall remove all such improvements prior to any termination of the lease. The lease shall further provide that if SEA-3's operation is ever moved or discontinued, such improvements shall not be transferred to Pan Am. These required lease provisions shall be submitted to the Planning Board for review and approval by the Board and its legal counsel, and any proposal to amend such lease provisions shall require the pre-approval of the Planning Board.
4. The final design and plan shall meet the requirements of the N.H. Fire Code and the NFPA Code, per the opinion of the Newington Fire Chief and the Town's Fire Safety Consultants.
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.
6. If, after the track has been upgraded to a Class II status, SEA-3 learns, or has reason to know, that the Class II track has degraded to a lower level of service, or there is a carrier mandated reduction in rail car deliveries to 5 cars or less, the Selectmen and the Planning Board shall be notified in writing by SEA-3 of this reduction in the level of service within seven (7) business days of receiving such information. This is to allow Newington officials to notify the proper authorities.

Bernie Christopher seconded the motion.

000071

Town of Newington, NH
PLANNING BOARD
Meeting Minutes – Monday, May 19, 2014

Mr. Richardson said he was uncertain if he would vote in favor of the proposal, but he thought the Board did all it could to protect the public safety, health and welfare and he thought the conditions discussed, particularly #6 went as far as possible. Vice-Chair Marconi agreed, including having the trucks turning onto exit 4 to keep trucks out of Portsmouth.

Chairman Hebert called for the vote. ***The Board voted to pass the motion unanimously.***

Ms. Lamson commented for the record that they had a full board and as an alternate she could not vote, but if she could have, she would not have because she felt they didn't look into the health and safety or environment of the area.

Chairman Hebert said he was bothered to discover they had no jurisdiction over the rail. He said it put them in a tough place along with the surrounding towns. He said he commended everyone for sticking to their positions no matter what their positions were. He said they covered a lot and it was best public hearing he had ever seen. He said Mr. Morgan had done a lot of work too.

Mr. Richardson said Portsmouth officials had told them they needed money for their railroad crossings, but they never came forward with information on what portions would be attributable to this project. He said the only thing he heard was that the City Council voted to put the rail line through Pease, which was a non-starter because it was impossibility for this project. Mr. Christopher said it was all political. Chairman Hebert said the alternate route was a political hot potato and there was barely anything left of former track. Mr. Richardson said it was too bad because the real issue on the table was if the rail crossings were safe. Ms. Lamson said Greenland had ten crossings. Mr. Cross said there was a State application process for upgrading town crossings. Mr. Richardson said if anyone was aware of an unsafe intersection, then they should have been informed with the specifics to consider.

Chairman Hebert said the surrounding towns were aware of the process and it was up to each town to contact the DOT and FRA if there were any concerns. He added that it was up to individuals to contact officials for change if they didn't like the laws.

Chairman Hebert said the FRA had told him that they had never been to a town before and wasn't sure if the DOT bridge inspector had ever been to a town hearing before either. Mr. Cross said they had visited with the Rockingham Planning Commission before.

Mr. Pare said he would like to see an invitation to participate with the Rockingham Planning Commission to study alternate routes for the rail line. Chairman Hebert said they sent a letter out previously and would consider if separately. Mr. Stern also recommended that the fire departments participate in training with Sea-3. Vice-Chair Marconi thought they should put a notice in local papers. Chairman Hebert said it would become public knowledge once they sent the letters to surrounding towns. Ms. Lamson said the Beckett plan for future economic development that including the rail coming from Portsmouth to Pease was still referred to on the plan.

Town of Newington, NH
PLANNING BOARD

Meeting Minutes – Monday, May 19, 2014

Chairman Hebert passed out a chronological listing of what the Board did while reviewing application. He said he wanted to capture what the Board had tried to do for those who were not present for all meetings. He said he also wanted to send out a synopsis to abutting towns on the Town letterhead and signed as chairman of the Board. Chairman Hebert asked if anyone was opposed to the letter and with no one raising their hands, he said would send it out.

Vice-Chair Marconi said he wanted to be sure that any calls or correspondence went through the chairman, the town planner or town attorney.

Mr. Richardson presented an example of a letter from the Moultonborough town planner's office listing staff recommendations on projects. Vice-Chair Marconi said he liked the checklist. Ms. Lamson asked how large Moultonborough's staff was and Mr. Richardson said they had a staff as one and Mr. Pare said their town was the same size as Newington. Chairman Hebert said he liked, but Newington only had one town planner on staff so he asked Mr. Morgan to review and comment for the next meeting.

Vice-Chair Marconi thanked Mr. Morgan for all his work and Chairman Hebert agreed and also thanked Town counsel, Attorney Ratigan along with many talented people that had reviewed evidence.

Mr. Paul Bogan, Sea-3 Vice President of Operations thanked the Board for their time and effort on behalf of himself and Sea-3. He said he would do his best to pull the project off and comply with the Board's conditions. He said the Sea-3 would be available to train the fire departments in the surrounding towns.

Chairman Hebert said the oil and gas delivery was keeping the rails so busy that they were too busy to deliver food.

Minutes: *Vice-Chair Marconi motioned to approve the Planning Board Minutes for May 12, 2014 with changes as discussed. Peggy Lamson seconded the motion, and all members voted in favor.*

Adjournment: *Vice-Chair Marconi moved to adjourn and Ms. Lamson seconded. All were in favor and the meeting adjourned at 8:25 p.m.*

Next Meeting: Monday, June 9, 2014

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

000073

SECTION 5 - General Industrial "I"

A - Description and Purpose: The "I" District is established as a zone in which the principal use of the land is for industry and associated uses. Certain open areas favorably situated with respect to transportation and containing other factors conducive to industrial development are also included. This is for the purpose of reserving suitable land for the expansion of existing industry and location of new industry, and to enhance economic development and employment opportunities. Any future development which would interfere with the growth or continuation of industry is prohibited. The off-street parking and loading requirements of this ordinance shall be provided.

B - Uses Permitted:

(1) Industries provided that they shall not produce traffic congestion, cause injurious or obnoxious noise, glare, vibration, air or water pollution, hazardous waste, sewerage problems, odor, dust, fire safety hazards or other factors detrimental to health, safety and welfare of the area. The Building Inspector shall issue a permit upon the finding by the Planning Board that the proposed location, construction and operation will not injure present and prospective industrial development in the district, or the health and welfare of residential districts in the vicinity

(2) Businesses customarily serving such industries

(3) Public utility, transportation or communication facilities

(4) Business signs subject to Article IV, Section 6

(5) Warehouses, truck terminals and storage

(6) Bulk oil stations

(7) Public facilities and grounds

(8) Telecommunication facilities, subject to the provisions of Article XIV.

C - Uses Prohibited:

(1) Any uses not listed under *Uses Permitted* are prohibited.

(2) Residential uses are specifically excluded from the "I" (Industrial) District except for watchman, caretaker or janitor.

(3) Storage above ground or below ground of any explosive or hazardous fluid (including waste), toxic or noxious matter, or material causing odor, dust, fire hazard, smoke, gas or fumes.

SECTION 6 - Waterfront Industrial and Commercial District "W"

A - Description and Purpose: The "W" District is established as a zone in which the principal use is for activities which depend upon the ocean for transport or resources. There is a relatively limited amount of deep water frontage in the State of New Hampshire. This prime land is recognized as an invaluable natural resource of the Town of Newington and should be reserved for optimum utilization so that the economic benefits may be realized to their fullest extent. Any installation on shore or offshore, temporary or permanent which interferes with the purposes of this district is prohibited. The "W" District extends along the Piscataqua River from the Portsmouth line to Bloody Point near the General Sullivan Bridge, except for a single-family residential district "R" bounded and described as follows:

Beginning at a point on the southerly side of Patterson Lane at the boundary line between land of McCabe and Yeaton, thence running in a southerly direction along that boundary to southeasterly direction along that boundary to the southeast corner of land of Yeaton; thence turning and running northeasterly by other land of Yeaton, land of Sherman Spinney, and land of Labrie, and by a line drawn parallel to Patterson Lane a distant of 400 feet southerly therefrom to the Piscataqua River. Also a district on the northerly side of Patterson Lane bounded as follows: Beginning on Patterson Lane at a point opposite in the McCabe-Yeaton property, thence running in northwesterly direction perpendicular to Patterson Lane for 400 feet, thence turning and running in a northeasterly direction parallel to Patterson Lane to the Piscataqua River.

B - Uses Permitted

- (1) Any Industrial or Commercial activity dependent upon the ocean for transport or resources.
- (2) Any research laboratory or testing or experimental facility related to the ocean.
- (3) Business Signs, subject to the provisions of Article IV, Section 6.
- (4) Telecommunication facilities, subject to the provisions of Article XIV.

Prior to the issuance of a building permit by the Building Inspector, the prospective user shall submit the following information:

- (1) An estimate of the maximum number of employees contemplated for the proposed development and the number of shifts during which they would work.
- (2) A description of the operation proposed in sufficient detail to indicate the effect of those operations in producing traffic congestion, or problems of noise, glare, sewerage, odor, air or water pollution, fire safety hazards or other factors detrimental to the health, safety and welfare of the area. Upon a finding by the Planning Board that the contemplated use will constitute a development of sustained desirability and stability, that it will be in harmony with the character of the surrounding area, and consistent with the overall long-range plans for the community, that it will not result in an over-intensive use of the land, that it will not result in undue traffic congestion or traffic hazards, that the plans indicate that it will be adequately landscaped and otherwise promote the health, safety and welfare of the community, the Building Inspector shall issue a permit for a proposed development in the "W" District.

D - Uses Prohibited

- (1) Any new use of an existing building or premises without the approval of the Planning Board.
- (2) Residential uses are specifically excluded from the "W" District except for watchman, caretaker or janitor.
- (3) Storage and handling 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 only be allowed when the following are complied with:
 - (a) National Fire Protection Association (NFPA) Standards
 - (b) Department of Transportation (DOT) regulations and standards on shipping and handling
 - (c) Environmental Protection Agency (EPA) regulations relating to the storing and handling such materials.

BOARD OF ADJUSTMENT

TOWN OF NEWINGTON

RULES OF PROCEDURE

AUTHORITY

1. These rules of procedure are adopted under the authority of New Hampshire Revised Statutes Annotated 1983, Chapter 676:1, and the Zoning Ordinance and map of the Town of Newington.

OFFICERS

1. A Chairman shall be elected annually by a majority vote of the board in the month of April. He shall preside over all meetings and hearings, appoint such committees as directed by the board and shall affix his signature in the name of the board.
2. A Vice-Chairman shall be elected annually by a majority vote of the board in the month of April. The Vice-Chairman shall preside in the absence of the chairman and shall have full powers of the chairman on matters which come before the board during the absence of the chairman.
3. A clerk shall be elected annually by a majority vote of the board in the month of April. He shall maintain a record of all meetings, transactions and decisions of the board, and perform such other duties as the board may direct by resolution.
4. All officers shall serve for one year and shall be eligible for re-election.
5. Up to five alternate members shall be appointed, as provided for by the local legislative body, to serve whenever a regular member of the board is unable to fulfill his responsibilities.

MEETINGS

1. Meetings will be held at the call of the chair.
2. Quorum. A Quorum for all meetings of the Board shall be three members, including alternates sitting in place of members.
If any regular board member is absent from any meeting or hearing, or disqualifies himself from sitting on a particular case, the chairman shall designate one of the alternate members to sit in place of the absent or disqualified member, and such alternate shall be in all respects a full member of the board while so sitting.

RSA 674:33 III, provides that "...the concurring vote of 3 members of the board shall be necessary to reverse any action of an administrative official or to decide in favor of any appeal..." For this reason, the board will make every effort to ensure that a full five-member board is present for the consideration of the appeal.

If any regular board member is absent from any meeting or hearing, or disqualifies himself from sitting in a particular case, the chairman shall designate one of the alternate members to sit in place of the absent or disqualified member, and such alternate shall be in all respects a full member of the board while so sitting.

3. Disqualification. If any member finds it necessary to disqualify himself from sitting in a particular case, as provided in RSA 673:14, he shall notify the chairman as soon as possible so that an alternate may be requested to sit in his place. When there is uncertainty as to whether a member should be disqualified to act on a particular application, that member or another member of the board may request the board vote on the question of disqualification. Any such request shall be made before the public hearing gets underway. The vote shall be advisory and non-binding. The disqualification shall be announced by either the chairman or the member disqualifying himself before the beginning of the public hearing on the case. The disqualified member shall absent himself from the board table during the public hearing and during all deliberation on the case.

4. Order of Business. The order of business for regular meetings shall be as follows:
a) Roll call by Clerk. b) Public Hearing. c) Unfinished Business. d) New Business. e) Adjournment.

APPLICATION/DECISION

1. Applications.

a. Each application for a hearing before the board shall be made on forms provided by the board and shall be presented to the clerk of the board of adjustment who shall record the date of receipt over his signature. Appeals from an administrative decision taken under RSA 676:5 shall be filed within 30 days of the decision. At each meeting the clerk shall present to the board all applications received by him at least 30 days before the meeting.

b. All forms and revisions presented shall be adopted by resolution of the board and shall become part of these rules and procedures.

000078

2. Public Notice.

- a. Public notice of hearing on each application shall be given in the Portsmouth Herald and shall be posted at the Town Hall and South Newington Bulletin Board not less than five (5) days before the date fixed for the hearing. Notice shall include the name of the applicant, description of the property to include tax map identification, action desired by the applicant, provisions of the zoning ordinance concerned, the type of appeal being made and the date, time, and place of hearing.
- b. Personal notices shall be made by certified mail to the applicant and all abutters not less than 5 days before the date of the hearing. Notice shall be given to the Planning Board, Town Clerk and other parties deemed by the board to have special interest. Said notice shall contain the same information as the public notice and shall be made on forms provided for this purpose.
- c. Costs for all required notices must be paid for, in advance, by the applicant.

3. Public Hearing. The conduct of public hearings shall be governed by the following rules:

- a. The chairman shall call the hearing in session and ask for clerk's report on the case.
- b. The clerk shall read the application and report on how the public notice and personal notice was given.
- c. Members of the board may ask questions at any point during testimony.
- d. Each person who appears shall be required to state his name and indicate whether he is a party to the case or an agent or counsel of a party to the case.
- e. Any member of the board, through the chairman, may request any party to the case to speak a second time.
- f. Any party to the case who wants to ask a question of another party to the case must do so through the chair.
- g. The applicant shall be called to present his appeal and those appearing in favor of the appeal shall be allowed to speak.
- h. Those in opposition to the appeal shall be allowed to speak.
- i. The applicant and those in favor shall be allowed to speak in rebuttal.

000079

- j. The opposition to the appeal shall be allowed to speak in rebuttal.
- k. Any person who wants the board to compel the attendance of a witness shall present his request in writing to the chairman not later than three (3) days prior to the public hearing.
- l. The board of adjustment will hear with interest any evidence that pertains to the facts of the case or how the facts relate to the provisions of the town ordinance and state zoning law.
- m. The Chairman shall present a summary setting forth the facts of the case and claims made for each side. Opportunity shall be given for correction from the floor.
- n. The hearing on the appeal shall be declared closed and the next case called up.

4. Decisions. The Board shall decide all cases within fourteen (14) days. The board will approve, approve with conditions, deny the appeal, or defer its decision. Notice of the decision or deferral will be made available for public inspection within 72 hours, as required by RSA 676:3, and will be sent to all persons notified of the public hearing. If the appeal is denied or deferred, the notice shall include the reasons therefor.

RECORDS

The records of the board shall be kept by the clerk and made available for public inspection at the Office of Selectmen in accordance with statutory requirements.

- 1. Final written decisions will be placed on file and available for public inspection within 72 hours after the decision is made. RSA 673:3.
- 2. Minutes of all meetings, including names of board members, persons appearing before the board, and a brief description of the subject matter shall be open to the public inspection within 144 hours of the public meeting. RSA 91A:211.

AMENDMENTS

These rules of procedures may be amended by a majority vote of the members of the board provided that such amendment is read at two successive meetings immediately preceding the meeting at which the vote is to be taken.

000080

JOINT MEETINGS AND HEARINGS

1. RSA 676:2 provides that the board of adjustment may hold meetings or hearings with other town "land use boards", including the planning board, the historic district commission, and building code board of appeals, and the inspector of buildings, and that each board shall have discretion as to whether or not to hold a joint meeting with any other land use board.

2. Joint business meetings with any other land use board may be held at any time when called jointly by the chairman of the two boards.

3. A public hearing on any appeal to the board of adjustment will be held jointly with another board only under the following conditions:


a. The joint public hearing must be a formal public hearing on appeals to both boards regarding the same subject matter; and

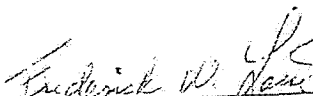
b. If the other board is the planning board, RSA 676:2 requires that the planning board chairman shall chair the joint hearing. If the other board is not the planning board then the board of adjustment chairman shall chair the joint hearing; and

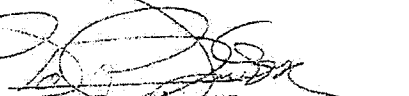
c. The provisions covering the conduct of public hearings, set forth in these rules, together with such additional provisions as may be required by the other board, shall be followed; and

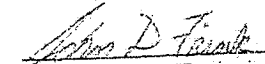
d. The other board shall concur in these conditions.

Rules and procedures adopted by the Board of Adjustment at their meeting held May 17, 1989.


Phillip E. Toomire


Frederick W. Lane

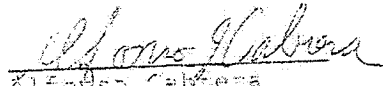

Olaf A. Grier

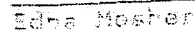

John D. Frink


David B. Russell

Alternates:


Earl B. Mott


Alfonso Cabrera


Edna Mosher

BOARD OF ADJUSTMENT

000081

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – October 30, 2014

Call to Order: Chair Matt Morton called the October 30, 2014 meeting at 6:30 PM.

Present: Matt Morton, Chair; Ted Connors; Ralph Estes; Jim Weiner; Planning Board Rep; and Jane Kendall, Recorder

Absent: John Frink and Justin Richardson

Public Guests: Attorney Walter Mitchell; City of Portsmouth Attorney Jane Ferrini; Attorney Alec McEachren; Richard DiPentimo; Jeff McEnry, Portsmouth Herald

Appeal: The City of Portsmouth's appeal of the Newington Planning Board's decision to approve the **Sea-3** site plan for property located at **190 Shattuck Way, Tax Map 20, Lot 13, and Map 14, Lot 2.**

Town Counsel, Attorney Walter Mitchell informed the Board that their task was to decide whether to grant or deny a motion for rehearing. Attorney Mitchell stated that they did not need in-depth discussion if they were inclined to grant the appeal, that they could just schedule the re-hearing and issue a notice. He said if the Board denied re-hearing, then they should adopt a written explanation, which he would provide recommendations that could be amended after they made the decision.

Board member, Ralph Estes said he read through the request looking for something new, but didn't see anything that hadn't already been said or any wrong doing on the part of the Board.

*Ted Connor moved to **deny** the City of Portsmouth's appeal of the Newington Planning Board's decision to approve the Sea-3 site plan for property located at 190 Shattuck Way, Tax Map 20, Lot 13, and Map 14, Lot 2. Jim Weiner seconded the motion.*

Chair Morton agreed with the statement that the Town had not sent out a written denial after their September 15, 2014 decision to grant a rehearing, but didn't think that had any bearing on the outcome. Attorney Mitchell passed out his written recommendations, recapping the Board's reasons for denial for a re-hearing and also addressed the oversight in issuing a letter of decision.

Board member, Jim Weiner asked Attorney Mitchell for further clarification on his letter and Attorney Mitchell said he tried to address the Board's decision on their jurisdiction and interpretation of the Ordinance. There was a question of whether or not

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – October 30, 2014

they should leave out other questions the Board considered as they would have no impact on the court's decision and Chairman Morton and Mr. Estes asked that they be left in for the record just the same.

Attorney Mitchell read the letter for the public and recommended that the motion be amended to adopt the written decision with one grammatical correction to change the word "determines" to "determined" on the last sentence of the third paragraph.

*Ted Connors moved to amend the motion to **deny** the City of Portsmouth's appeal of the Newington Planning Board's decision to approve the Sea-3 site plan for property located at 190 Shattuck Way, Tax Map 20, Lot 13, and Map 14, Lot 2 and include the Board's Decision on the Motion for Rehearing with the correction. Jim Weiner seconded the motion. Jim Weiner seconded the motion and the motion passed with all in favor.*

Adjournment: *Ted Connors motioned to adjourn, and Jim Weiner seconded. All were in favor, and the meeting adjourned at 6:50 p.m.*

Next Meeting: Monday, November 3, 2014

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

**Town of Newington
Zoning Board of Adjustment**

DECISION ON MOTION FOR REHEARING

In Re: Appeal of the City of Portsmouth, NH

The City of Portsmouth has filed a motion for rehearing of the decision this board made on September 15, 2014. At that time, this board first reviewed and made decisions on whether we had jurisdiction to hear the three questions raised in the City's appeal. We ruled this board did have jurisdiction to hear the first appeal question, but did not have jurisdiction to hear the second and third. Since the City's motion for rehearing does not mention those second and third claims, the City has apparently abandoned them, at least in the context of a ZBA appeal.

The issue that we did address on the merits was a single claim relating to the future use of the smaller existing storage tank that is bisected by the zoning line between the town's "I" zone and "W" zone. During our hearing on this issue, it became clear that in one of the 54 listed findings that are part of the planning board's May 19, 2014 decision, number 50 mistakenly described the tank, which stores LP gas, as located in a zone in which that use is "permitted." That was an error; instead the portion of that gas tank located in the "I" zone is not a permitted use under the terms of the zoning ordinance as *storage* of flammable materials is prohibited in the "I" zone (NZO Article V, Section 5,c(3)). Even the property owner does not contest that. But that determination is only part of the appellate question. It is clear that this tank has existed in this same location, and been used for the same purpose, for at least 20 years. The property owner claims that it exists as a vested grandfathered use, and Portsmouth offered no evidence to dispute that. Therefore, the ultimate question raised to this board, and decided by it, was whether the planning board's approval of this amended site plan was contrary to the terms of the zoning ordinance; i.e. would the proposed use of the land result in an enlargement or expansion of this particular nonconforming use contrary to NZO Article III, Section 1.

We carefully considered this issue, hearing input from all parties and members of the public. The nonconformity is the storage of flammable material in part of an existing tank located in the "I" zone. There will be no physical change to the tank, it will still be used for LPG storage, and the capacity of the tank is not being changed. There will be no other nonconformity created. While there appears to be varying opinions as to whether more LPG may flow through the tank on an annual basis in the future than in the past, even if that proved true this board determined that the proposed use is not an expansion or enlargement of the nonconformity, as those terms are used in the NZO.

There has been no new evidence presented that would result in a different

000084

decision in this matter, nor has the City convinced us that our original decision was in error. While this board did overlook sending out a formal notice of decision as required by our 1989 by-laws, we are correcting that failing with the content of this decision.

TOWN OF NEWINGTON
ZONING BOARD OF ADJUSTMENT

DATE: 11/7/14

Matthew A. Morton

Zoning Ordinance

ARTICLE I - *Purpose of Zoning*

An ordinance to promote the health, safety, morals, convenience and general welfare of the community by regulating the location and use of buildings, structures, land and water areas for trade, industry, residence and other purposes: The construction, height and size of buildings: The size of yards and the density of population: Creating districts for said purposes and establishing the boundaries thereof: Defining certain terms used herein: Providing for the administration, enforcement and amendments: Providing for the imposition of penalties for the violation of the provisions of this ordinance: Repealing conflicting ordinances; Providing protection from any sight, light, odor, and or dust from any development, construction or use; And other purposes.

SECTION 1 - Authority: This ordinance has been prepared in accordance with the provisions of Chapter 31:60-89, New Hampshire Revised Statutes Annotated, 1955, as amended.

SECTION 2 - Title: This ordinance and accompanying official zoning map shall be known as and may be cited as Zoning Ordinance, Town of Newington, New Hampshire.

SECTION 3 - Purposes: This ordinance is for the purpose of promoting the health, safety, morals, prosperity, convenience or general welfare, as well as efficiency and economy in the process of development of the incorporated Town of Newington, New Hampshire, by securing safety from fire, panic and other dangers, providing adequate areas between buildings and various rights of way; by preserving the rural charm now attached to our town, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements, and by other means in accordance with a Master Plan; Now, Therefore, the following ordinance is hereby enacted by the voters of the Town of Newington, New Hampshire, in official meeting convened. (Originally adopted in March 1951).

SECTION 4 - Jurisdiction: The provisions of this ordinance shall govern all structures, all land and all water areas within the boundaries of the Town of Newington.

ARTICLE II - *Definitions*

SECTION 1 - General Definitions: Except as specifically defined herein all words in this ordinance shall carry their customary dictionary meanings. For the purpose of this ordinance, certain words or terms used herein are defined as follows:

"Town" means the Town of Newington.

"Legislative Body" means an Annual or Special Town Meeting.

"Municipal Officers" means the Selectmen, Town of Newington, New Hampshire.

Words used in the present tense include future tense.

Words used in the singular include the plural, and words used in the plural include the singular.

The word **"shall"** is mandatory; the word **"may"** is permissive.

The word **"person"** includes a firm, association, organization, partnership, trust, company or corporation as well as an individual.

The word **"lot"** or **"occupied"** as applied to any land or building or water area, shall be construed to include the words, **"intended, arranged, or designed to be used or occupied"**.

SECTION 2 - List of Definitions

Abandoned Sign: Any sign which pertains to a time, event, or purpose which no longer applies, or to a business which is no longer on the premises, shall be deemed to have been abandoned.

Accessory Use or Building: A use or building customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building.

Adult Bookstore or Adult Video Store: A business that devotes more than 15% of the total display, shelf, rack, table, stand or floor area, utilized for the display, sale or rental of the following: books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, slides, tapes, records, CD-ROMs or other forms of visual or audio representations which meet the definition of "*harmful to minors*" and/or "*sexual conduct*" as set forth in NH RSA 571-B:1; or, instruments, devices, or paraphernalia which are designed for use in connection with "*sexual conduct*" as defined in NH RSA 571-B:1, other than birth control devices. An adult bookstore or adult video store does not include an establishment that sells books or periodicals as an incidental or accessory part of its principal stock and trade and does not devote more than 15% of the total floor area of the establishment to the sale of books and periodicals.

Adult Cabaret: A nightclub, bar, restaurant, or similar establishment which during a substantial portion of the total presentation time features live performances which meet the definition of "*harmful to minors*" and/or "*sexual conduct*" as set forth in NH RSA 571-B:1, and/or feature films, motion pictures, video cassettes, slides or other photographic reproductions, a substantial portion of the total presentation time of which is devoted to showing of material which meets the definition of "*harmful to minors*" and/or "*sexual conduct*" as set forth in NH RSA 571-B:1.

Adult Drive-In Theater: An open lot or part thereof, with appurtenant facilities, devoted primarily to the presentation of motion pictures, films, theatrical productions and other forms of visual productions, for any form of consideration to persons in motor vehicles or on outdoor seats, in which a substantial portion of the total presentation time being presented for observation by patrons is devoted to the showing of material which meets the definition of "*harmful to minors*" and/or "*sexual conduct*" as set forth in NH RSA 571-B:1.

Adult Motel: A motel or similar establishment offering public accommodations for any form of consideration which provides patrons with closed circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions a substantial portion of the total presentation time of which are distinguished or characterized by an emphasis upon the depiction of materials which meet the definition of "*harmful to minors*" and/or "*sexual content*" as set forth in NH RSA 571-B:1.

Adult Motion Picture Arcade: Any place to which the public is permitted or invited wherein coin or slug operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors, or other image producing devices are maintained to show images to five or fewer persons per machine at any one time, in which a substantial portion of the total presentation time of the images so displayed is devoted to the showing of material which meets the definition of "*harmful to minors*" and/or "*sexual conduct*" as set forth in NH RSA 571-B:1.

Adult Motion Picture Theater: An establishment with a capacity of five or more persons, where for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions are shown, and in which a substantial portion of the total presentation time is devoted to the showing of material which meets the definition of "*harmful to minors*" and/or "*sexual content*" as set forth in NH RSA 571-B:1, for observation by patrons. For the purposes of this ordinance, substantial portion of the total presentation time shall mean the presentation of films or shows described above for viewing on more than seven days within any 56 consecutive day period.

Adult Theater: A theater, concert hall, auditorium or similar establishment, either indoor or outdoor in nature, which for any form of consideration, regularly features live performances, a substantial portion of the total presentation time of which are distinguished or characterized by an emphasis on activities which meet the definition of "*harmful to minors*" and/or "*sexual conduct*" as set forth in NH RSA 571-B:1.

Attached Sign: A sign which is attached to a building.

Billboard: A sign which directs attention to a business, product, activity or service which is not conducted, sold or offered on the premises where such sign is located.

Boarding or Rooming House: A dwelling in which living space without kitchen facilities is rented to three or more persons with or without meals.

Building: Any structure having a roof supported by columns or by walls and intended for shelter, housing, or enclosure of persons, animals or chattels.

Building Frontage: The width of a building's primary facade, at grade level.

Business Sign: A sign which directs attention to a business, profession, service, product, activity, or entertainment sold or offered upon the premises where such sign is located.

Dwelling - Single Family: A detached building containing one dwelling unit.

Dwelling - Two-Family: A detached building containing two dwelling units.

Dwelling Unit: A house, an apartment, or other group of rooms, or a single room is regarded as a dwelling unit when it is used for the year-round occupancy as separate living quarters, that is, when the occupants do not live and eat with any other persons in the structure and there is either direct access from outside or through a common hall, or a kitchen or cooking equipment for the exclusive use of the occupants of the unit.

Family: One or more persons occupying a dwelling unit and living as a single housekeeping unit.

Free Standing Sign: A sign which is not attached to a building.

Frontage: Shall mean the width of the lot bordering on the public right-of-way. In those instances in which a property abuts multiple public ways, the Planning Board shall determine which side of the parcel is frontage.

Front Yard: An open, unoccupied space on the same lot with a principal building, extending the full width of the lot and located between the street right-of-way line and the front line of the building projected to the side lines of the lot.

Home Occupation: An occupation conducted by a town resident in his/her legally established domicile, and which employs no non-residents.

Home Business: A business owned and operated by a town resident in his/her legally established domicile. The business may employ up to a maximum of three non-residents.

Industrial Corridor Road: A roadway corridor which begins at Woodbury Avenue and runs easterly down Piscataqua Drive, thence turns and runs northward to River Road, as depicted by plans prepared by Meridian Land Services, dated February 12, 1999, Revision V.

Junk Yard: An unroofed area where waste materials are brought, stored, baled, packed, disassembled, or handled, including, but not limited to scrap iron and other metals, paper, rags and bottles.

Lot: A parcel of land occupied or capable of being occupied by one building and the accessory buildings or uses customarily incidental to it, including such open spaces as are required by this ordinance, and having frontage upon a public street.

Lot Width: The distance between the side boundaries of the lot measured at the front building line.

Major Street: A street designated as such in the Major Street Plan.

Machinery Junk Yard: Any yard or field used as a place of storage in which there is displayed to the public view junk machinery or scrap metal that occupies an area of 500 square feet.

Meteorological Tower (Met Tower). This is a temporary (3 years or less), information gathering tower. It includes the tower, base plate, anchors, guy wires and hardware, anemometers (wind speed indicators), wind direction vanes, booms to hold equipment for anemometers and vanes, data loggers, instrument wiring, and any telemetry devices that are used to monitor or transmit wind speed and wind flow characteristics over a period of time for either instantaneous wind information or to characterize the wind resource at a given location. For the purpose of this ordinance, met towers shall refer only to those whose purpose are to analyze the environmental factors needed to assess the potential to install, construct or erect a small wind energy system.

Mobile Home: A transportable dwelling unit for one or more persons, equipped with a toilet and bathtub or shower, whether on a permanent foundation or not.

Modification. Any change to the small wind energy system that materially alters the size, type or location of the small wind energy system. Like-kind replacements shall not be construed to be a modification.

Motor Vehicle Junk Yard: Any business and any place of storage or deposit, whether in connection with another business or not, which has stored or deposited two or more unregistered motor vehicles which are nor longer intended or in condition for legal use on the public highways, or used parts of motor vehicles or old iron, metal, glass, paper, cordage, or other waste or discarded or second hand material which has been a part, or intended to be a part of any motor vehicle, the sum of which parts or material shall be equal in bulk to two or more motor vehicles. Motor vehicle junk yard shall also include any place of business or storage or deposit of motor vehicles purchased for the purpose of dismantling the vehicles for parts or use of the metal for scrap and where it is intended to burn material which are parts of a motor vehicle or cut up the parts thereof.

Net Metering. The difference between the electricity supplied to a customer over the electric distribution system and the electricity generated by the customer's small wind energy system that is fed back into the electric distribution system over a billing period.

Non-conforming Lot: A lot whose area is less than the minimum dimensional requirements for the zoning district in which it is situated.

Non-conforming Use: A use of land which is not permitted by the ordinance for the zoning district in which the use occurs.

Non-conforming Structure: A structure which does not comply with the terms of the ordinance.

Nude Model Studio: A place where a person who appears in a state of nudity or displays male genitals in a state of sexual arousal and/or the vulva or more intimate parts of the female genitals, and is observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration or such display is characterized by an emphasis on activities which meet the definition of "*harmful to minors*" and/or "*sexual conduct*" as set forth in NH RSA 571-B:1.

Nursing Home: Any dwelling place licensed by the State of New Hampshire in which three or more aged, disabled or ill persons who are dependent or not capable of properly caring for themselves are housed and furnished with meals, whether served in a central dining room or otherwise, and nursing care for compensation. This includes "convalescent facilities" and "rest homes" or "elderly congregate care residential facilities" limited to persons fifty-five (55) years of age or older with a present or anticipated future need for on-site nursing care.

Off-Premise Sign: A sign which advertises or publicizes an activity not conducted on the premises upon which such sign is situated.

Power Grid. The transmission system, managed by ISO New England, created to balance the supply and demand of electricity for consumers in New England.

Rear Yard: An open space on the same lot with a principal building, unoccupied except by a permitted accessory building, or use, extending the full width of the lot and located between the rear line of the lot and the rear line of the building projected to the side lines of the lot.

Retail: A use devoted to the sale, rent or lease of merchandise directly to the consumer for use off premises. For the purposes of this ordinance, wholesale clubs shall be considered a retail use.

Right-of-Way means and includes all town, state and federal highways and the land on either side of same as covered by statutes to determine the width of right-of-way, also all private rights-of-way.

Sexual Encounter Center: A business or commercial enterprise that as one of its primary business purposes, offers for any form of consideration: physical contact in the form of wrestling or tumbling between persons of the opposite sex; or activities between male and female persons and/or persons of the same sex when one or more persons is in the state of nudity; or when the activities in sections A or B above are characterized by an emphasis on activities which meet the definition of "*harmful to minors*" and/or "*sexual conduct*" as set forth in NH RSA 571-B:1.

Sexually Oriented Business: adult bookstore, adult video store, adult motion picture theater, adult motion picture arcade, adult drive-in theater, adult cabaret, adult motel, adult theater, nude model studio, sexual encounter center, or any combination of the above.

Shopping Center: A group of retail stores, planned and developed for the site on which they are built.

Side Yard: An open, unoccupied space on the same lot with a principal building located between the side of the building and the side line of the lot and extending from the rear line of the front yard to the front line of the rear yard. On corner lots, the side yard abuts a street, and the side yard requirements shall conform to those of the front yard.

Sign: Any device, structure, banner, fixture, placard, or painted surface

A) which uses graphics, symbols, and/or written copy to advertise or identify any establishment, product, goods, service, or activity, and

B) whose surface area is two square feet or larger, and

C) is visible from the public right-of-way.

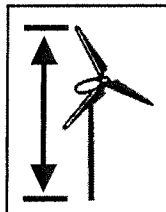
Shadow Flicker. The visible flicker effect when rotating blades of the wind generator cast shadows on the ground and nearby structures causing a repeating pattern of light and shadow.

Special Exception: A use which would not be appropriate generally or without restriction in a particular district, but which, in the opinion of the Board of Adjustment, if controlled as to number, location, relation to neighborhood, or standard of performance, would promote the public safety, health, convenience or welfare. An exception is allowed in a district only if the regulations for that district specifically permit it, subject to the approval of the Board of Adjustment and only when the Planning Board finds that such use meets all of the requirements applicable to it as specified in the ordinance.

Small Wind Energy System: A wind energy conversion system consisting of a wind generator, a tower, and associated control or conversion electronics, which has a rated capacity of 100 kilowatts or less and will be used primarily for onsite consumption.

Structure: Anything constructed or erected, the use of which requires location on the ground, or attachment to something having location on the ground. For the purposes of this ordinance, the following shall not be considered structures: docks, detached stairways, and paved driveways utilized for access to a property.

System Height: The vertical distance from ground level to the tip of the wind generator blade when it is at its highest point.

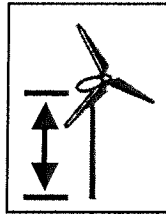


Telecommunications Facility: Any structure, antenna, tower, or other device which provides commercial mobile wireless services, unlicensed wireless services, cellular phone services, specialized mobile radio communications (SMR), personal communications service (PCS), and common carrier wireless exchange access services.

Temporary Sign: A sign announcing a new business on the premises, said sign only to be displayed while awaiting installation of a permanent sign;

Tower: The monopole, guyed monopole or lattice structure that supports a wind generator.

Tower Height: The height above grade of the fixed portion of the tower, excluding the wind generator.



Variance: A relaxation of the terms of the ordinance, consistent with NH law.

Wind Generator: The blades and associated mechanical and electrical conversion components mounted on top of the tower whose purpose is to convert kinetic energy of the wind into rotational energy used to generate electricity.

ARTICLE III - *Districts Established*

SECTION 1 - Classes of Districts: For the purpose of this ordinance, the town is hereby divided into the following classes of districts or zones:

Residential District to be known as **R Zones**

Commercial District to be known as the **C Zone**

Office District to be known as the **O Zone**

Marina District to be known as the **M Zone**

Industrial Districts to be known as **I Zones**

Waterfront Industrial Districts to be known as **W Zones**

Historic Districts to be known as **H Zones**

Scenic Roads

An *Airport District* to be known as the **A Zone**

An *Airport Industrial District* to be known as the **AI Zone**

A *Natural Resource Protection District* to be known as the **NRP Zone**

A *Light Industrial District*, to be known as the **LI Zone**

A *Mobile Home District*, to be known as the **MH Zone**

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; it shall be on file in the office of the Town Clerk.

SECTION 2 - Certification of Official Zoning Map and Changes Thereon: The official zoning map and narrative description of district boundaries are certified by the signatures of the Selectmen attested by the Town Clerk under the following words: "This is the Official Zoning Map referred to in Article III, Section 2, of the Zoning Ordinance, Town of Newington", together with the date of the adoption of the ordinance. The Official Zoning Map shall be located in the office of the Town Clerk, and shall be the final authority as to current zoning status of the Town. If changes are made in the zone boundaries or other matter portrayed on the Official Zoning Map, within 10 days after the amendment has been adopted an entry shall be made on the Official Zoning Map as follows: "On (insert date) by official action of the town following change(s) was (were) made (insert brief description of the nature of the change)." Immediately beneath the entry of the Selectmen shall affix their signatures, attested by the Town Clerk.

SECTION 3 - Rules Governing District Boundaries: Unless otherwise indicated, the district boundary lines are the nearest lot lines, the center lines of the streets or such lines extended, pier head or bulk head lines, or the town boundary lines.

ARTICLE IV - *General Provisions*

SECTION 1 - Zoning Affects All Structures, Land and Water Areas: Except as hereinafter specified, no structure, land or water area shall hereafter be used or occupied and no structure or part thereof shall hereafter 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.

SECTION 2 - Restoration of Unsafe Property: Nothing in this ordinance shall prevent the strengthening or restoring to a safe condition of any part of any building or structure declared unsafe by the Building Inspector.

SECTION 3 - Required Yard Space Shall Serve Only One Lot: No part of the off-street parking or loading spaces required about any building for the purposes of complying with the provisions of this ordinance shall be included as part of the yard, open spaces, or off-street parking or loading space similarly required for any other building.

SECTION 4 - Restrictions On Individual Mobile Homes, Trailers and Trailer Parks: One single mobile home or mobile house, so called, may be maintained upon a lot in a residential district as a residence providing that all provisions of the district regulations as applicable to single-family dwellings are complied with.

SECTION 5 - Restrictions On Removal of Sand, Gravel, Loam, Earth or Rock: No loam or gravel shall be hauled from any property within the Town of Newington unless approved by the Planning Board and Board of Selectmen. This shall not be construed as prohibiting removal of such material for purposes of landscaping or property improvements on the loam or gravel owners premises.

SECTION 6 - Setbacks: Accessory uses or buildings, including private garages, parking areas, non-commercial greenhouses and workshops, shall conform to the setbacks required for principal buildings.

SECTION 7 - Turnaround Space and Driveways: Adequate space shall be provided on each lot to prevent vehicles from backing onto a public road. Driveways shall have a minimum width of 10 feet.

SECTION 8 - Junk Yards Prohibited: Machinery junk yards, motor vehicle junk yards, and other type of junk yard and private or commercial dumps shall be prohibited within the Town.

SECTION 9 - Special Exceptions shall only be granted by the Board of Adjustment, if in the board's judgment, the proposed use **does not**:

- have an adverse effect on surrounding properties;
- cause a significant increase in motor vehicle traffic;
- emit odors, noise, dust, vibration, smoke or fumes which travel beyond the boundary lines of the subject property; or
- threaten the safety of nearby residents.

SECTION 10 - Buildings per Lot: There shall be no more than one principal building and no more than one dwelling building per lot.

ARTICLE V - *District Regulations*

SECTION 1 - Single Family Residential District "R"

A - Description and Purpose: The "R" District is established as a zone in which the principle use of the land is for single-family dwellings at low density, together with recreational, educational, and religious facilities which will encourage the development of well-rounded neighborhood living. Also included in the "R" District are open areas where similar residential growth appears likely. Any future development which does not perform a neighborhood function, or which would interfere with the growth or continuation of single-family dwellings is prohibited.

B - Uses Permitted:

- (1) Single family dwellings.
- (2) Two-family dwellings.
- (3) Accessory uses or buildings, including private garages, parking areas, non-commercial greenhouses, and workshops, providing they conform to the setbacks required for principal building.
- (4) Public facilities and grounds.
- (5) Home occupations and home businesses subject to the conditions specified in Article XVI below.
- (6) Roadside stand for the sale of produce raised within the Town of Newington provided that three off-street parking areas are provided.
- (7) Agriculture.
- (8) Bed & Breakfast Inns, providing such facilities have no more than eight lodging rooms, and that the Planning Board finds parking and septic systems to be adequate.

C - Uses Prohibited: Carnival, jamborees, rock concerts and similar large gatherings that generate noise, litter and other forms of waste or public nuisance.

SECTION 2 - Office District "O"

A - Purpose: The *Office District* is a zone in which the principal use of the land is office buildings, research & development facilities, and light manufacturing. It is the intent of the ordinance to encourage the provision of safe and convenient pedestrian access between the district's office buildings and nearby restaurants. The intent is also to encourage the development of facilities which:

- 1) provide high wage job opportunities,
- 2) demand relatively few municipal services,
- 3) provide reasonable economic returns for property owners,
- 4) maximize the size of Newington's tax base,
- 5) present an attractive, cohesive, and well landscaped appearance, thus enhancing the economic potential of the district,
- 6) are well suited for mass transit and other alternatives to single occupancy motor vehicles, so as to not unduly exacerbate Newington's air pollution, traffic congestion, and traffic safety problems.

B - Principal Uses Permitted:

- (1) offices, research & development facilities, biotech facilities, light manufacturing, warehouses, hospitals, medical clinics, nursing homes, veterinary hospitals, schools, hotels of 3 stories or higher, conference centers, and facilities to treat the developmentally disabled.
- (2) light manufacturing, providing that it does not cause excessive noise, vibrations, smoke, gas, fumes, odor, dust fire hazard, pollution, or conditions detrimental to the health, safety, or welfare of the community.

C - Accessory Uses Permitted:

- (1) Daycare facilities
- (2) Non-public dining facilities that occupy no more than 10% of the floor area of the building in which they are situated.

D - Uses Prohibited: Restaurants other than those cited in paragraph C above, motels, and all other uses not expressly permitted by this ordinance.

SECTION 3 - Commercial District "C"

A - Description and Purpose: The *Commercial District* is a mixed use zone in which the principal use of the land is retail sales, office buildings, research & development facilities, and light manufacturing. The rationale for permitting non-retail uses in this predominately retail area is to reduce the district's traffic congestion and safety problems by encouraging land uses which generate lower traffic volumes.

B - Uses Permitted: retail, offices, research & development facilities, light manufacturing, restaurants, motels, hotels, theaters, storage facilities, barber & beauty shops, laundries, repair shops, churches, indoor recreational facilities such as bowling alleys and roller skating rinks, and vehicle dealers (sale, rental, or leasing).

SECTION 4 - Marina District "M"

A - Description and Purpose: The *Marina District* is established in recognition of the historic use of property in close proximity to the environmentally sensitive area of Little Bay and a portion of Newington's residential district. A continued marina use at this site is desirable due to the somewhat seasonal nature of the business, the relatively light traffic volume that is generated, and the recreational opportunities, and the unique economic benefits offered by such a facility.

B - Uses Permitted: The repair, servicing, storage, dockage, moorage, and maintenance of vessels. The following accessory uses, *if* clearly subordinate to the principal use as a marina, are also permitted:

- (1) Sales of marine hardware and equipment;
- (2) Sales of vessels, e.g. yacht brokerage;
- (3) Restaurant/snack bar, not to exceed 75 seats;
- (4) Maritime related office use, e.g. marine surveyor;
- (5) Light manufacturing of marine related equipment, providing that it does not cause excessive noise, vibrations, smoke, gas, fumes, odor, dust, fire hazard, pollution, or conditions detrimental to the health, safety, or welfare of the community;

SECTION 5 - General Industrial "I"

A - Description and Purpose: The "I" District is established as a zone in which the principal use of the land is for industry and associated uses. Certain open areas favorably situated with respect to transportation and containing other factors conducive to industrial development are also included. This is for the purpose of reserving suitable land for the expansion of existing industry and location of new industry, and to enhance economic development and employment opportunities. Any future development which would interfere with the growth or continuation of industry is prohibited. The off-street parking and loading requirements of this ordinance shall be provided.

B - Uses Permitted:

- (1) Industries provided that they shall not produce traffic congestion, cause injurious or obnoxious noise, glare, vibration, air or water pollution, hazardous waste, sewerage problems, odor, dust, fire safety hazards or other factors detrimental to health, safety and welfare of the area. The Building Inspector shall issue a permit upon the finding by the Planning Board that the proposed location, construction and operation will not injure present and prospective industrial development in the district, or the health and welfare of residential districts in the vicinity
- (2) Businesses customarily serving such industries
- (3) Public utility, transportation or communication facilities
- (4) Business signs subject to Article IV, Section 6
- (5) Warehouses, truck terminals and storage
- (6) Bulk oil stations
- (7) Public facilities and grounds
- (8) Telecommunication facilities, subject to the provisions of Article XIV.

C - Uses Prohibited:

- (1) Any uses not listed under *Uses Permitted* are prohibited.
- (2) Residential uses are specifically excluded from the "I" (Industrial) District except for watchman, caretaker or janitor.
- (3) Storage above ground or below ground of any explosive or hazardous fluid (including waste), toxic or noxious matter, or material causing odor, dust, fire hazard, smoke, gas or fumes.

SECTION 6 - Waterfront Industrial and Commercial District "W"

A - Description and Purpose: The "W" District is established as a zone in which the principal use is for activities which depend upon the ocean for transport or resources. There is a relatively limited amount of deep water frontage in the State of New Hampshire. This prime land is recognized as an invaluable natural resource of the Town of Newington and should be reserved for optimum utilization so that the economic benefits may be realized to their fullest extent. Any installation on shore or offshore, temporary or permanent which interferes with the purposes of this district is prohibited. The "W" District extends along the Piscataqua River from the Portsmouth line to Bloody Point near the General Sullivan Bridge, except for a single-family residential district "R" bounded and described as follows:

Beginning at a point on the southerly side of Patterson Lane at the boundary line between land of McCabe and Yeaton, thence running in a southerly direction along that boundary to southeasterly direction along that boundary to the southeast corner of land of Yeaton; thence turning and running northeasterly by other land of Yeaton, land of Sherman Spinney, and land of Labrie, and by a line drawn parallel to Patterson Lane a distant of 400 feet southerly therefrom to the Piscataqua River. Also a district on the northerly side of Patterson Lane bounded as follows: Beginning on Patterson Lane at a point opposite in the McCabe-Yeaton property, thence running in northwesterly direction perpendicular to Patterson Lane for 400 feet, thence turning and running in a northeasterly direction parallel to Patterson Lane to the Piscataqua River.

B - Uses Permitted

- (1) Any Industrial or Commercial activity dependent upon the ocean for transport or resources.
- (2) Any research laboratory or testing or experimental facility related to the ocean.
- (3) Business Signs, subject to the provisions of Article IV, Section 6.
- (4) Telecommunication facilities, subject to the provisions of Article XIV.

Prior to the issuance of a building permit by the Building Inspector, the prospective user shall submit the following information:

(1) An estimate of the maximum number of employees contemplated for the proposed development and the number of shifts during which they would work.

(2) A description of the operation proposed in sufficient detail to indicate the effect of those operations in producing traffic congestion, or problems of noise, glare, sewerage, odor, air or water pollution, fire safety hazards or other factors detrimental to the health, safety and welfare of the area. Upon a finding by the Planning Board that the contemplated use will constitute a development of sustained desirability and stability, that it will be in harmony with the character of the surrounding area, and consistent with the overall long-range plans for the community, that it will not result in an over-intensive use of the land, that it will not result in undue traffic congestion or traffic hazards, that the plans indicate that it will be adequately landscaped and otherwise promote the health, safety and welfare of the community, the Building Inspector shall issue a permit for a proposed development in the "W" District.

D - Uses Prohibited

(1) Any new use of an existing building or premises without the approval of the Planning Board.

(2) Residential uses are specifically excluded from the "W" District except for watchman, caretaker or janitor.

(3) Storage and handling 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 only be allowed when the following are complied with:

(a) National Fire Protection Association (NFPA) Standards

(b) Department of Transportation (DOT) regulations and standards on shipping and handling

(c) Environmental Protection Agency (EPA) regulations relating to the storing and handling such materials.

SECTION 7 - Historic Districts "H"

A - Description and Purpose: The "H" District is established within the provisions of RSA 674:46:

- (1) For the preservation of places and structures of architectural value and the heritage of the municipality which reflects its cultural, social, economic, political and architectural history;
- (2) Conserving property values in such Districts;
- (3) Promoting the use of the Historic District for the education, pleasure and welfare of the citizens of the municipality.

B - The Designated Areas are:

- (1) Beginning with both sides of Nimble Hill Road from the Air Base Line to its junction with Little Bay Road, the area to follow existing property lines of parcels fronting on said road.
- (2) All land and buildings leased from the State of New Hampshire at Bloody Point.

C - Uses Permitted

- (1) Any use permitted in a Single Family Residential "R" District, subject to the provisions of the Newington Historic District Ordinance.

SECTION 8 - Scenic Districts "S"

A. Description and Purpose: To assure that any repair, maintenance, construction or paving on a designated "Scenic Road" shall not involve or include the cutting or removal of trees or the tearing down or destruction of stone walls, or portions thereof, except for the prior written consent of the Planning Board, after a Public Hearing duly advertised as provided within the provisions of RSA 253:17. The Designated Scenic Roads are:

- (1) All Town Roads west of the Spaulding Turnpike, and;
- (2) All Town Roads north of the Newington/Greenland town line.

SECTION 9 - Airport (A) District

A - Purpose: The Airport District is focused on Pease Air Force Base runway, and other facilities essential to the operation of an airport. The District is intended to accommodate the safe operation of cargo/freight air transportation.

B - Description: The Airport shall encompass all land covered by Pease's runway, extending 1000 feet from the centerline of said runway. This District shall also include the adjoining aircraft parking apron, control tower, crash fire station, and those portions of the USAF Approach Zone and Clear Zone which lie within the bounds of Pease AFB.

C - Uses Permitted

- (1) Cargo/Freight air transportation
- (2) Air National Guard Activities
- (3) Servicing of aircraft
- (4) Medical Emergency flights
- (5) All air traffic during national emergencies.

D - Uses Prohibited

- (1) Commercial air passenger service
- (2) Recreational air traffic.

SECTION 10 - Airport Industrial (AI) District

A - Purpose: The Airport Industrial District is established to accommodate industrial land uses that are dependent upon the adjacent airport.

B - Description: This District is bounded on the north and east by Pease AFB boundaries, on the west by the Airport (A) District and on the south by the Portsmouth city line.

C - Uses Permitted:

- (1) Aircraft hangars and repair facilities, aircraft administration buildings, and freight terminals.
- (2) Customary accessory uses incidental to cargo/freight air transportation, including parking and parking structures, support and maintenance shops, fuel storage and concessions and services located within such concessions.
- (3) Uses dependent on cargo/freight air transportation.
- (4) Research and development engineering and associated light manufacturing of electronic products and components, particularly communications equipment and data systems equipment dependent on cargo/freight air transportation.
- (5) Business offices and data processing facilities associated with cargo/freight air transportation.
- (6) Research laboratories and related facilities for research, development and testing, including proto-type production facilities or the related assembly of high technology equipment or components associated with cargo/freight air transportation, however, biological or chemical laboratories are expressly prohibited.
- (7) Underground storage tanks provided all Federal, State and Local regulations are complied with.
- (8) Warehousing and transportation operations involving non-flammable and non-hazardous materials related to cargo/freight air transportation.
- (9) Precision instrument manufacturing and research related to cargo/freight air transportation.
- (10) Aircraft and aircraft parts manufacture, air freight terminals, aircraft parts storage, and aviation research and testing laboratories.

(11) Aircraft repair shops for multi-engine aircraft with a gross take-off weight of at least 75,000 pounds.

D - Standards:

(1) Sewage discharge shall not cause the existing Pease AFB Sewage Treatment plant to exceed 90% of its rated capacity.

(2) The following restrictions shall apply to lighting:

a) Pulsating, flashing, rotating, oscillating, or other type of lighting intended as an attention getting device shall be prohibited.

b) Floodlights, spot-lights, or other lighting devices shall be arranged or shielded so as not to interfere with the safe operation of aircraft.

c) Any light which constitutes a "*misleading light*" as defined by FAA Regulations, is prohibited.

(3) The following restrictions shall apply to radio and electronic devices:

a) Radio or electronic devices shall be permitted only in conjunction with a valid license therefore or other authorization as may be issued by the Federal Communications Commission.

b) The operation of any radio or electronic device which would violate any rules or regulations of the Federal Communications Commission is prohibited.

(4) Any operation or use which emits smoke, dust, or any visible fumes or vapors into the atmosphere shall be prohibited.

(5) Noise shall be controlled so as not to be excessive due to intermittence, beat frequency, shrillness, or volume. The maximum permissible sound pressure level of any continuous, regular or frequent source of sound shall comply with all standards set forth in the Aviation Safety and Noise Abatement Act 1979, and the FAA Regs, Part 150.

(6) The Newington Design Review Regulations shall be adhered to.

SECTION 11 - Natural Resource Protection District (NRP)

A - Purpose: The NRP District is established in order to conserve natural resources, protect wildlife habitats, protect significant potable water resources, and to provide the public with opportunities for passive recreation.

B - Description: The NRP District shall encompass the Peverly Brook watershed (except that portion situated in the Airport (A) District), and all land lying between the Peverly Brook watershed and the bay. The NRP District is bounded on the east by the Airport District, on the west by the bay, and on the north and south by the boundaries of Pease AFB.

C - Permitted Uses:

- (1) Tree farms and forestry
- (2) Wildlife refuge
- (3) Nature trails
- (4) Airport navigational equipment

D - Uses Prohibited: Off-road vehicles

SECTION 12 - Light Industrial (LI) District

A - Purpose: The Light Industrial District is established to accommodate the needs of small businesses, research & development firms, and other start-up industrial operations.

B - Description: The Light Industrial District is bounded on the east by the Spaulding Turnpike, on the south by the City of Portsmouth, on the west by Franklin Street, and on the north by the NH Air National Guard, the Mobile Home District, and Portsmouth Avenue.

C - Uses Permitted:

- 1) Light Industrial operations
- 2) Research & Development firms
- 3) Offices that customarily support #'s 1 & 2 above

D - Uses Prohibited: Uses that are not expressly permitted in section C above.

E - Standards: Minimum standards are the same as Section 8E of this article.

SECTION 13 - Mobile Home (MH) District

A - Purpose: The Mobile Home District is established in order to provide home ownership opportunities for low income residents of the NH Seacoast area, thereby raising living standards while keeping labor costs at a moderate level. This, in turn, will enhance the region's prospects for attracting new businesses and industries.

B - Description: This district encompasses approximately 36 acres. The district boundaries are depicted on page 329 of the Newington Master Plan (*Revision 9/6/89*). The district is bounded on the north and west by Portsmouth Avenue, and on the south and east by the Light Industrial District.

C - Uses Permitted: Manufactured housing

D - Uses Prohibited: All uses except manufactured housing

Article VI - Dimensional Requirements

No building or structure shall be erected, enlarged or moved, nor shall any land use be authorized or extended, nor shall any existing lot be changed as to size or shape, except in accordance with Table VI - 1. In the table below, land area is expressed in thousands of square feet.

Table VI - 1

Zone	Minimum Lot Dimensions		Minimum Yard Dimensions		Maximum Building Height	Maximum Building Coverage
	Land Area	Continuous Road Frontage	Front	Side & Rear		
<i>Airport Industrial</i>	80	200'	70'	50'	#	
<i>Industrial</i>	200	100'	75'	50'	#	
<i>Light Industrial</i>	40	100'	40'	20'	30'	
<i>Marina</i>	120	300'	75'	30'	35'	30%
<i>Mobile Home</i>	12	50'	30'	10'	15'	
<i>Office</i>	120	300'	75'	30'	#	
<i>Residential</i>	80	200'	40'	15'	35'	
<i>Commercial</i>	120	300'	75'	30'	35'	30%
<i>Waterfront Industrial</i>	200	100'	75'	50'	#	

#= Height of structures in these districts are subject to Planning Board approval.

Height Limits: The above referenced height limits shall not apply to church spires, belfries, cupolas, domes, monuments, water towers, transmission towers, chimneys, conveyors, derricks, radio and television towers, and other structures not intended for human occupancy.

Article VII - ICR Overlay District

Due to the unique nature of the Industrial Corridor Road (ICR), structures which abut the ICR shall be exempt from setback requirements articulated in Article VI, and the corner lot requirements specified in Article II. In lieu of the above referenced requirements, all paved parking lots adjacent to the ICR shall be set back a minimum of fifty feet from the ICR, and all other structures adjacent to the ICR shall be set back a minimum of seventy-five feet from the ICR.

ARTICLE VIII - *Traffic Mitigation*

The development or redevelopment of any site in the Office District, Commercial District, or any of the industrial districts may be approved only after a finding by the Planning Board that the following conditions are met at the time of opening of the building and that they will continue to be met for five years from the time of building opening:

SECTION 1 - Visibility: Line of sight distance shall meet or exceed New Hampshire DOT standards for entrances and exits to commercial sites.

SECTION 2 - Access: Access to the site shall be directly from a Town road or State highway or through a private roadway built to Town standards and approved by the Planning Board.

SECTION 3 - Traffic Controls: Adequate traffic controls shall be provided to insure safe access and on-site circulation of vehicle and pedestrian traffic. If traffic signals are required, signalization shall be interconnected with other traffic signals in the Town if such interconnection is found to be appropriate by the Planning Board.

SECTION 4 - Acceleration/Deceleration Lanes or suitable alternate roadway improvements shall be provided on State and Town roads where the Planning Board finds that such lanes are necessary to provide safe site access based on sound engineering principles and practice.

SECTION 5 - Off-site Improvements: The landowner/developer shall pay the fair share of cost of all off-site highway improvements necessary to maintain stable peak hour traffic flow conditions and/or payment of landowner's fair share of the costs associated with the replacement or creation of reserve capacity in the roadways and intersections impacted within the Town by the proposed development. In evaluating the traffic impacts, the Planning Board's consideration will include, but not be limited to, the volume and nature of the traffic. In determining a landowner's "fair share" of off-site roadway improvements, the Planning Board shall be guided by the tests established by the New Hampshire Supreme Court in *Land/Vest Props, Inc. v. Town of Plainfield*, 117 N.H. 817 (1977) and *N.E. Brickmaster v. Town of Salem*, 133 N.H. 655 (1990). The Planning Board can compel a landowner to assume only that portion of the cost for off-site improvements that bear a rational nexus to the needs created by and the special benefits conferred upon the development. In making this calculation, the Board must consider the burdens that will be immediately imposed by the development and those that will be imposed in the demonstrably immediate future. Future and indirect benefits accruing to the development from the improvements can be considered since permanent improvements are not made solely with reference to present conditions. No single factor can be determinative of the appropriate mode of apportionment of improvement costs. A non exhaustive list of the factors which might be used in allocating costs include:

A - Roadway Standard: the standard to which impacted roadways and intersections are presently maintained;

B - Level of Service: the existing level of service of impacted roadways and intersections;

C - Frontage: the frontage of the proposed development on State and local roadways;

D - Potential Traffic: the potential traffic increases necessitated by the proposed development; and

E - Development Potential: the character and potential for development and redevelopment of the area served by impacted roadways.

SECTION 6 - Mitigation Funds: Funds contributed to the Town for mitigation of existing roadway/intersection infrastructure deficiencies may be used by the Town to construct improvements or to represent the Town's fair share toward construction of State improvements on roadway projects within the Business District, or may be used by the Town to develop and implement programs to reduce dependence upon automobiles at the impacted roadways and intersections within the Town. If, within sixty months of the issuance of a certificate of occupancy for which the funds were contributed, the funds have not been expended or otherwise encumbered for the purpose for which they were collected, the developer/applicant contributing the funds may request that the funds be returned. If, upon hearing, the Planning Board determines that the contributed funds are still needed and that the project(s) for which they are being held is still scheduled for implementation, the funds may continue to be held. If the purpose for which the funds were originally contributed is no longer necessary, the funds shall be returned with accrued interest. In any event, the maximum time that funds may be retained under this section shall be ten years.

SECTION 7 - Review Costs: The costs incurred by the Town in reviewing traffic studies of applicants, calculating the fair share of off-site improvements and/or in developing mitigation plans shall be borne by applicants.

SECTION 8 - Construction Standards: All improvements required by this ordinance shall be built in accordance with local, State, and ASHTO standards.

ARTICLE IX - *Air Pollution Mitigation*

SECTION 1 - Purpose: The United States Environmental Protection Agency has recently designated New Hampshire's seacoast region as a "*Serious Ozone Nonattainment Area*". Ozone is a toxic gas. It has been well established that emissions of ozone precursors such as volatile organic compounds (VOC), carbon monoxide (CO), and oxides of nitrogen (Nox) can cause a plethora of adverse health effects. The Town of Newington seeks to curb the increase of ozone precursor emissions, many of which are generated by mobile sources, i.e. motor vehicles. The Town seeks to offset the adverse impact of development which increases motor vehicle traffic by requiring air pollution mitigation improvements, an objective that is fully consistent with the spirit and intent of the federal Clean Air Act Amendments of 1991.

SECTION 2 - Air Quality Impact Analysis Required: Proposed land development requiring site plan approval that will generate in excess of 1,000 vehicle trip ends per day (*as defined by the Trip Generation Manual, 5th edition, published by the Institute of Transportation Engineers*), or will impact any intersection at a Level of Service E or lower (*hereinafter "regulated development"*), shall be subject to an air quality impact analysis (*mesoscale and/or microscale, depending on the projected traffic impact*) by Planning Board consultants, at the applicant's expense.

SECTION 3 - Air Pollution To Be Mitigated: Any regulated development shall be required to mitigate the impact of the accompanying ozone precursor and carbon monoxide emissions. This mitigation shall bear a rational nexus to the impact of the mobile source emissions generated by the development, as identified by the air quality impact analysis. The proposed mitigation shall be subject to Planning Board review and approval as part of the Site Plan Review process. In the event that the mitigation cannot offset the total impact, the developer shall be afforded the alternative of contributing to a fund maintained by the Town of Newington for the purpose of improving air quality within the town. In no event shall the contribution required under this section exceed the greater of the following:

- 1) \$.25 for every square foot of building space which is the subject of the development application; or
- 2) the total resulting from multiplying the number of vehicle trip ends per day on the busiest day of the proposed use by \$5.

Article X - *Wetlands Conservation District*

SECTION 1 - Purpose and Intent

The purpose of this article is to protect the public health, safety and general welfare, as well as, the wetland's ecological integrity and function by controlling and guiding the use of land areas which have been found to be wetlands. It is intended that this article shall:

A - Prevent development of structures and land uses on wetlands which will contribute to pollution of surface and groundwater by sewage or toxic substances or sedimentation;

B - Prevent destruction of, or significant changes to natural wetlands which provide flood protection, provide filtration of water flowing into ponds and streams, augment stream flow during dry periods, or are connected to the ground or surface water supply;

C - Protect wildlife habitats, maintain ecological balances and enhance ecological values such as those cited in RSA 483- A:1-b;

D - Protect potential water supplies and existing aquifers (water bearing stratum) and aquifer recharge areas;

E - Prevent unnecessary or excessive expense to the Town in providing or maintaining essential services and utilities which might be required as a result of misuse or abuse of wetlands;

F - Prevent damage to structures and properties caused by inappropriate development of wetlands.

SECTION 2 - Wetlands Defined

“Wetland” is an area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include, but are not limited to swamps, streams, ponds, vernal pools, marshes, bogs, tidal wetlands and similar areas. Man-made detention basins and treatment swales are not to be construed as wetlands.

“Tidal Wetlands” are defined as wetlands whose vegetation, hydrology or soils are influenced by periodic inundation of tidal waters.

“Vernal Pools” are defined as a temporary body of water providing essential breeding habitat for certain amphibians and invertebrates and that do not support fish. For reference, see *Identification and Documentation of Vernal Pools in New Hampshire, 1997*.

Delineation Requirements: The precise location of a wetland boundary in any particular case must be determined by on-site inspection of soils, vegetation, and hydrology by a New Hampshire Certified wetland scientist using the *Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, (January 1987)* and *Field Indicators for Identifying Hydric Soils in New England (Version 2, July 1998)* published by the New England Interstate Water Pollution Control Commission.

SECTION 3 - District Boundaries

The requirements of this article are applicable to the entire Town of Newington and include all jurisdictional wetlands as defined in Section 2 above, as well as, all prime wetlands shown on the most recent edition of the Town of Newington's Prime Wetland Map.

SECTION 4 - Permitted and Prohibited Land Uses in Wetlands

A - Prohibited uses include any use that alters the surface configuration of the land by the addition of fill or by dredging, except if expressly permitted in Section B below.

B - Permitted uses are as follows:

- (1) Agriculture, including grazing, crop production and the construction of fences, using *Best Management Wetlands Practices for Agriculture* (July 1993- Amended September 1998) provided that such use does not cause significant increases in surface or groundwater contamination by pesticides or other toxic or hazardous substances and that such use will not cause or contribute to soil erosion.
- (2) Forestry and tree farming using *Best Management Practices Erosion Control on Timber Harvesting Operations in New Hampshire* (April 1996). This permitted use includes the construction of an access road for said purpose.
- (3) Wildlife habitat enhancement and management.
- (4) Passive recreational uses consistent with the purpose and intent of this article as defined in Section one above.
- (5) Conservation areas and nature trails using *Best Management Practices for Erosion Control During Trail Maintenance and Construction* (1994 updated 1996).
- (6) Driveways for access to residential buildable upland lots, with proper drainage and erosion control measures.

- (7) Residential uses by Special Exception as provided for in Section 4C below.
- (8) The construction of footbridges, catwalks and wharves, provided that:
 - a) said structures are constructed on posts or pilings so as to permit unobstructed flow of water;
 - b) the natural contour of the wetland is preserved; and
 - c) the Planning Board has approved the proposed construction of the footbridges, catwalks and wharves.

C- Special Exceptions: The construction of roads, access ways, water impoundment & water supply systems, pipelines, power lines and other transmission lines in wetlands areas shall require a Special Exception from the Board of Adjustment (BOA). The Special Exception shall be granted by the BOA, after considering the Conservation Commission's recommendations, and only upon finding all of the following:

- (1) The proposed construction is essential to the productive use of non-wetland areas.
- (2) Design, construction and maintenance methods will minimize any detrimental impact upon the wetlands, and will include restoration of the site as nearly as possible to its original grade and condition.
- (3) No alternative route is feasible and reasonable.
- (4) Issuance of permits (if applicable) from the New Hampshire Wetlands Bureau and the Army Corps of Engineers. A copy of these permits shall be submitted to the Town in advance.
- (5) All Special Exception criteria specified in Article IV Section 9 of this ordinance, and
- (6) The provision of mitigation measures, in Newington, close to the affected wetland system, where appropriate.

SECTION 5 - Minimum Lot Size Requirements

Areas designated as jurisdictional wetlands may be used to fulfill no more than 50% of the minimum lot size required by the Zoning Ordinance, provided that the upland area is at least 30,000 contiguous square feet.

SECTION 6 - Wetland Buffer Provisions

The following vegetative buffers shall be observed in order to protect the integrity and functionality of the wetlands resources referenced below (Reference *Buffers for Wetlands & Surface Waters: A guidebook for New Hampshire Municipalities*, revised May 1997).

Resource	Size of Resource	Type of Buffer	Size of Buffer
All Wetlands	Greater than 5,000 square feet	No-cut and No- Disturbance	25 Feet
Vernal Pools	All Sizes	No- cut and No- Disturbance	25 Feet
Tidal & Prime Wetlands	All Sizes	Limited- Cut*	75 Feet

**"Limited- Cut" buffer cited above means a healthy, well-distributed stand of trees, saplings, shrubs and ground cover that must be maintained and which leaves an intact vegetated buffer. Tree-cutting shall be limited to 50% of the basal area of trees, and 50% of the total number of saplings over a 20- year period. Reference- New Hampshire's Comprehensive Shoreland Protection Act (RSA 483- B).

SECTION 7 - Structural Setbacks

The following setbacks to wetlands shall be observed by all structures in order to protect the integrity and functionality of the wetlands resources referenced below.

Resource	Size of Resource	Relationship to Surface Waters	Minimum Setback
All Wetlands	All Sizes	Contiguous with Surface Waters	100 Feet
All Wetlands except Prime Wetlands & Vernal Pools	Greater than 5,000 square feet	Not Contiguous with Surface Waters	50 Feet
All Wetlands except Prime Wetlands & Vernal Pools	5,000 square feet or less	-	0 Feet
Vernal Pools	All Sizes	-	50 Feet

SECTION 8 - Exemptions

Undeveloped building lots of 3 acres or less that were created prior to 2003 shall be exempt from the pond & stream buffer and pond & stream setback requirements in this article.

SECTION 9 - Violations

Any wetland (including prime wetlands and vernal pools) or its buffer altered in violation of this ordinance shall be restored at the expense of the violator(s) as provided by RSA 483-A:5 and under the direction of a New Hampshire certified wetland scientist and said restoration shall be subject to review by the Newington Conservation Commission. When appropriate, injunctive relief shall be sought by the Town as per RSA 676:15, and civil fines imposed as per RSA 676:17.

Article XI - Signs

SECTION 1 - Purpose & Intent: The purpose of this article is to permit and regulate signs in a manner that protects the public safety and enhances the economic advantages enjoyed by Newington property owners, advantages which rest to a great extent on the quality of the town's appearance.

SECTION 2 - Sign Permit Required: No sign, except those that are specifically exempted by the terms of this article, shall be erected without a *Sign Permit* issued by the Town Planner.

SECTION 3 - Dimensional Limits: All signs, except those addressed in Section 4 of this article, shall adhere to the dimensional requirements set forth in *Table XI-3*. In determining the surface area of a free standing sign, *one* side of the sign shall be measured.

Table XI-3 - *Dimensional Limits*

		Commercial Zone	Office, Airport & All Industrial Zones	All Other Zones
<i>Free Standing Signs</i>	Maximum # of signs per lot	1	1	1
	Maximum sign area, per side	100 sf*	50sf*	2sf
	Maximum aggregate sign area, all sides	200sf	100sf	4sf
	Maximum height above grade	35'	20'	6'
<i>Attached Signs</i>	Maximum aggregate area			
	On building front	**	150sf	4sf
	On building sides & rear (each side)	75sf	25sf	4sf

* 1.5 square feet of sign area allowed for every linear foot of building frontage, up to the maximum specified.

** 1 square foot of sign area allowed for every linear foot of building frontage of each individual business.

SECTION 4 - Other Permitted Signs: In addition to the signs that are permitted by Section 3 of this article, each lot shall be allowed the signs permitted by *Table XI-4*:

Table XI-4 - Other Permitted Signs

	Maximum # per lot	Maximum Area per Sign Face	Maximum Duration	Sign Permit Required
Entrance & Exit signs, no higher than 3' above grade	2 per driveway	4sf	no limit	yes
Directional Signs	no limit	4sf	no limit	yes
Signs offering the premises for sale, rent or lease	1*	16sf	no limit	no
Contractor's sign	no limit	32sf	6 months**	no
Temporary sign	1*	32sf	2 months	yes
Yard Sale sign	1*	8sf	1 week	no
Signs endorsing candidates for political office	no limit	16sf	2 months	no
Signs for agricultural products grown or produced on the premises	no limit	16sf	no limit	no
Special Event displays	1*	100sf	Discretion of Selectmen	yes
Signs installed per order of Selectmen for a public purpose	no limit	no limit	no limit	no

* 2 signs shall be permitted on corner lots, but no more than 1 shall be permitted along each street frontage.

** or the duration of the project, whichever is less.

SECTION 5 - Setbacks: All signs except *entrance & exit signs, directional signs, and yard sale signs* shall adhere to the minimum setbacks from property lines required by this ordinance of principal buildings, except that permitted signs for legal home businesses in the Residential Zone may be situated as close as twenty feet to the roadway pavement.

SECTION 6 - Prohibited Signs & Devices: The following are prohibited:

- A** - Signs that are **animated, moving, flashing**, or signs that emit **noise**.
- B** - Rotating **beacons**.
- C** - **Off-Premise** signs.
- D** - Signs **painted on** or **attached to a vehicle or trailer** parked for the purpose of advertising or directing people to a business or activity.
- E** - Signs that, in the judgment of the Selectmen, **impede the view** of traffic, traffic safety signs, or traffic signals.
- F** - Signs that contain **pornographic** words or pictures.
- G** - Signs made of highly **combustible** materials.
- H** - Free standing signs that are **not permanently anchored** to the ground.
- I** - Attached signs which extend above the building's **parapet** or **eaves**.
- J** - Any sign or any sign location that is **not specifically permitted** by this article.

SECTION 7 - Shielding: Light directed toward signs shall be shielded in such a way that the source of said light is not visible three feet above grade at the lot line.

SECTION 8 - Neon Lighting & Signs: The secondary voltage of the transformer(s) shall not exceed 7,500 volts. All exterior mounted electric-discharge tubing shall be protected from the weather.

SECTION 9 - Sign Maintenance: Every sign shall be maintained in good structural condition at all times. The Selectmen or their designee shall have the authority to order the painting, repair, alteration or removal of any sign. Upon failure to comply with an order to repair or remove said sign within 30 days, the Selectmen are hereby authorized to cause the removal of said sign. All expenses associated with any such repair or removal shall be borne by the owner of the land upon which said sign is situated.

SECTION 10 - Signs on Public Property: The Selectmen shall immediately remove from public property any unauthorized sign which does not comply with the terms of this ordinance.

SECTION 11 - Abandoned Signs: Abandoned signs are prohibited, and shall be removed by the land owner immediately. The advertisement of any subsequent business, product or service shall be restricted to signs which comply with the terms of this article.

SECTION 12 - Non-Conforming Signs: Signs installed prior to January 1, 1993 and that do not conform to the standards set forth in this ordinance shall not be altered, enlarged, moved, or replaced, except in a manner that would bring the sign into conformance with the terms of this article, provided, however, nothing herein shall prevent any change in the message portion of any non-conforming sign.

SECTION 13 - Sign Permit Expiration: If the work authorized under a sign permit has not been completed within six months after the date of issuance, said permit shall become null and void.

Article XII - *Sexually Oriented Businesses*

SECTION 1 - The Purpose & Intent of this article is:

A - to establish reasonable and uniform regulations to prevent the concentration of sexually oriented businesses;

B - to protect public health, safety and general welfare; and

C - to prevent the blight and deterioration which generally accompanies and is brought about by the concentration of sexually oriented businesses.

D - to mitigate the secondary effects of sexually oriented businesses, effects which were cited by the Newington Planning Board in its *Findings of Fact* dated August 5, 1993.

It is not the intent of this article to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market, nor is it the intent of this article to condone or legitimize the distribution of obscene material.

SECTION 2 - Zoning District: Sexually oriented businesses are only permitted in the Commercial (C) Zone.

SECTION 3 - Buffers: Sexually oriented businesses shall **not** be permitted in or within 400 feet of a church, 500 feet of a school, or 1,000 feet of a residence, another sexually oriented business, or a sexually oriented business for which a building permit has been applied for.

SECTION 4 - Other Prohibited Locations: Sexually oriented businesses shall **not** be permitted in enclosed shopping malls or any establishment patronized by minors.

SECTION 5 - The Measure of Distance between any sexually oriented business and other named point of reference shall be measured in a straight line.

SECTION 6 - Free-Standing Structures: Sexually oriented businesses shall only be permitted in single use, free-standing structures. In no instance shall sexually oriented business share premises, facilities or buildings with businesses which are not sexually oriented.

SECTION 7 - Site Plan Approval by the Newington Planning Board shall be a pre-requisite for the establishment of a sexually oriented business. The Planning Board may impose reasonable restrictions relative to buffers, outdoor lighting, signs, parking, egress and ingress, pedestrian movement, landscaping, building aesthetics, and measures to ensure that displays of merchandise conform with NH RSA 571-B.

SECTION 8 - Public Nuisances: Violation of the use provisions of this ordinance is declared to be a public nuisance per se, which shall be abated by the Town of Newington by way of civil abatement procedures.

SECTION 9 - Limiting Clause: Nothing in this ordinance is intended to authorize, legalize, or permit the establishment, operation or maintenance of any business, building or use which violates any Town of Newington ordinance or statute of the State of New Hampshire relative to public nuisances, sexual conduct, lewdness, or obscene or harmful matter or the exhibition or public display thereof.

SECTION 10 - Severability: If any section, subsection, sentence, clause, phrase or any portion of this article is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not effect the validity of the remaining portions of this ordinance. The legislative body of the Town of Newington hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

ARTICLE XIII - *Non-conforming Property*

SECTION 1 - Expansion: Non-conforming uses and non-conforming structures shall not be enlarged, expanded or extended. Conforming uses and conforming structures may be enlarged regardless of minimum lot size requirements specified in Article VI.

SECTION 2 - Cessation: If a non-conforming use ceases for a period of one year, all subsequent uses shall conform to the terms of the Zoning Ordinance.

SECTION 3 - Merger: If two or more adjacent lots in the same ownership do not meet the dimensional requirements of this ordinance, the land involved shall be considered to be an undivided parcel for the purposes of this ordinance.

ARTICLE XIV - *Telecommunication Facilities*

SECTION 1 - Signs: Telecommunication towers shall not contain signs or graphic representation of any kind.

SECTION 2 - Evidence that Co-Location is not Feasible: If a new tower is being proposed, the applicant shall submit evidence which is satisfactory to the Planning Board, that no existing structure can accommodate the applicant's antenna(s).

SECTION 3 - Cooperation: An applicant proposing to build a new tower shall submit a binding agreement which provides for the maximum allowance of antenna co-location on the new structure. This agreement shall obligate the applicant to supply antenna co-location for reasonable fees and costs to other telecommunications providers. Failure to provide an agreement that is satisfactory to the Planning Board is grounds for denial.

SECTION 4 - A Bond shall be submitted by the applicant to cover the costs of tower removal in the case of abandonment. The applicant shall submit a written agreement, the terms of which are to be satisfactory to the Planning Board, which governs the bond.

SECTION 5 - Abandoned Telecommunications Facilities are those which have not operated for a period of twelve consecutive months. In such a case, the Town shall be authorized to execute the security, and cause the tower to be removed.

ARTICLE XV – Trailers & Mobile Storage Containers

The following conditions must be met for trailers, mobile storage containers, and mobile towers in the Office and Commercial Zones:

SECTION 1 – Permit Required: The property owner shall obtain a permit for all trailers, mobile storage containers or mobile towers on-site longer than ten business days. The permit must be posted in plain view on the trailer/container/tower. In the case of a Town/State declared emergency, a tower permit is required no later than two days after the erection of the tower.

SECTION 2 – Application: Property owners shall apply to the Building Inspector for a permit. Owners must attach the appropriate fee and a sketch or plan showing the proposed location with respect to setbacks, easements, roads, and parking areas. The Building Inspector will coordinate a review by the Fire Chief.

SECTION 3 – Duration: The use of storage trailers/containers/towers will be permitted on a temporary basis limited to no more than 90 days. Trailers/storage containers/towers will be removed once the permit expires.

EXEMPTIONS: (subject to Planning Board approval)

- A. The use of trailers for storage or temporary office space may be permitted for the duration of the construction, expansion, or repair of a permanent business.
- B. The use of trailers/containers to store *recycled* materials (i.e. tires, pallets, etc) may be permitted on renewable basis.

SECTION 4 – Number & Location: No more than two (2) trailers/containers/towers may be placed on a lot unless approved by the Planning Board. No trailer /container/tower shall be situated in such a way as to obstruct safe sight distance, fire lanes, or setbacks.

SECTION 5 – Limitation on Occupancy: Occupancy of trailers for temporary office space is limited to businesses undergoing initial construction, expansion, or repair of a permanent place of business. The Building Inspector shall approve all temporary utility connections to occupied trailers.

SECTION 6 – Storage of Material: Storage trailers/containers/towers shall be locked at all times when an attendant is not present. The outside storage of materials beneath, above, or around a trailer/container/tower is prohibited.

Article XVI – *Home Occupations & Home Businesses*

The intent of this article is to permit home occupations and home businesses to function in a manner that has no noticeable impact on the quality and character of Newington’s residential district.

SECTION 1 - Home Occupations may be permitted in the Residential Zone only if they meet all of the following conditions:

- A) Home occupations shall be performed only by the resident(s) of the domicile. There shall be no outside employees.
- B) Home occupations shall have no impact on the surrounding residential neighborhood.
- C) A home occupation may only be conducted within a residence or pre-existing accessory building.
- D) There shall be no display of goods, wares or storage of materials visible from any public way, shoreline or abutting residences.
- E) Signs shall meet the requirements of the Newington Zoning Ordinance.
- F) No commercial vehicles related to said home occupation shall be stored on the premises.
- G) Parking generated by the home occupation shall be located off the street, and the vehicles shall be subject to the zoning setbacks for structures.
- H) The building or premises containing the home occupation shall not be detrimental to the residential character of the neighborhood due to its exterior appearance. There shall be no emission of odor, smoke, dust, vibration, noise or detectable tones.
- I) No equipment or process shall be used that creates visual or audible interference in any cell phone, wireless LAN, radio or television receiver off the premises, or causes fluctuations in line voltage off the premises.
- J) Bandwidth consumption or denial of service to the publicly accessed information infrastructure (coaxial, fiber, wired or wireless) must not be perceptible at the lot line at a higher level than is customary in a residential neighborhood.
- K) Water consumption shall be no more than is normal in a residential neighborhood.
- L) On-site storage of hazardous materials other than small quantities of products that are intended for normal household use shall be subject to approval by the Newington Fire Chief.

SECTION 2 - Permitted Home Occupations: The following are permitted, subject to the conditions specified in Section 1 above: engineer, consultant, advisor, surveyor, sales representative, programmer, systems analyst, computer operator, artist, illustrator, graphic artist, draftsman, photographer, writer, architect, seamstress, decorator, insurance agent, real estate agent, and any similar use, provided that the Planning Board, after a public hearing, finds that all of the conditions in Section 1 are satisfied.

SECTION 3 - Home Businesses may be permitted in the Residential Zone only if they meet all of the following conditions:

- A) Home businesses shall have no impact on the surrounding residential neighborhood
- B) Prior to the commencement of operations, home businesses must receive a Conditional Use Permit and Site Plan approval from the Planning Board.
- C) Before granting a Conditional Use Permit, the Planning Board must determine that the proposed structure(s), location, and size of the parcel are of a suitable scale, appearance, and character that are compatible with the surrounding neighborhood. The structure(s) must maintain the appearance of a residence.
- D) The principal operator must reside on the premises.
- E) No more than one (1) home business may be established on a property.
- F) No more than fifty percent (50%) of floor space of buildings on the premises can be devoted to such use.
- G) The home business may be conducted in a pre-existing accessory building which may utilize up to one hundred percent (100%) of said building's floor area.
- H) There shall be no display of goods, wares, or storage of materials visible from the public way or shoreline or abutting residences. Outdoor storage of materials or equipment is not permitted unless specifically approved by the Planning Board. Outdoor storage:
 - a. Shall be at least fifty (50) feet from all lot lines
 - b. Shall be screened with fencing or a vegetative buffer.
- I) Signs shall meet the requirements of the Newington Zoning Ordinance.
- J) A limited number of commercial vehicles related to the home business may be stored on the premises. The number and size of the commercial vehicles is subject to approval by the Planning Board.

- K) Customer parking generated by the home business shall be off the street, and the vehicles shall be subject to the zoning setbacks for structures. A total of 4 customer parking spaces are permitted on conforming lots. The number of parking spaces for non-conforming lots shall be determined by the Planning Board.
- L) The building or premises containing the home business shall not be detrimental to the residential character of the neighborhood due to its exterior appearance. There shall be no emission of odor, smoke, dust, vibration, noise or detectable tones.
- M) No equipment or process shall be used that creates visual or audible interference in any cell phone, wireless LAN, radio or television receiver off the premises, or causes fluctuations in line voltage off the premises.
- N) Bandwidth consumption or denial of service to the publicly accessed information infrastructure (coaxial, fiber, wired or wireless) must not be perceptible at the lot line at a higher level than is customary in a residential neighborhood.
- O) Water consumption shall be no more than is normal in a residential neighborhood.
- P) On-site storage of hazardous materials other than small quantities of products that are intended for normal household use shall be subject to approval by the Newington Fire Chief.
- Q) A certificate of occupancy is required prior to the commencement of business operations.

SECTION 4 - Permitted Home Businesses: The following are permitted subject to the conditions specified in Section 3 above: light distribution, painter, architect, plumber, carpenter, electrician, building contractor, hair dresser, landscaper, all home occupations listed in Section 2 above, and any similar use, provided that the Planning Board, after a public hearing, finds that all of the conditions in Section 3 are satisfied.

Article XVII - *Lighting & Illumination*

SECTION 1 – Purpose: This article is intended to eliminate problems of glare, minimize light trespass and obtrusive light created by improperly designed and installed outdoor lighting. Further purposes are to enhance and protect the quality of the New Hampshire night sky, Newington’s rural character, and conserve energy and resources. These concerns are balanced while maintaining safety, security and productivity by establishing limits for the area that certain kinds of outdoor-lighting fixtures can illuminate and by limiting the total allowable illumination in the Town of Newington.

SECTION 2 – Prohibitions: This section applies to all lighting within the Town of Newington on any site except for legal non-conforming uses and temporary or emergency lighting.

A - Mercury Vapor Lamps Fixtures and Lamps. The installation of any mercury vapor fixture or lamp for use as outdoor lighting is prohibited.

B - Laser Source Light. The use of laser source light or any similar high intensity light for outdoor advertising or entertainment is prohibited.

C - Searchlights. The operation of searchlights for advertising purposes is prohibited.

D - Neon or Tubular Gas. Neon or tubular gas lighting shall be limited to signage use and must be located within the exterior dimension of the sign as approved under Article XI of this ordinance. Neon or tubular gas lighting as architectural accents is prohibited.

E - Pulsating, flashing, rotating, oscillating, or attention getting lights. Pulsating, flashing, rotating, oscillating, or other type of lighting intended as an attention getting device shall be prohibited. Oscillating lighting is lighting that changes intensity or color in less than 30 seconds.

SECTION 3 - Residential Lighting: These provisions are intended to prevent private and public nuisances and protect property values. This section applies to existing and proposed single-family and duplex residential uses.

A - Spot lights, floodlights and other bright security lighting shall be limited in such a fashion as to not direct light onto neighboring property.

B - Accent lighting, low wattage seasonal lighting and other fixtures commonly associated with residential uses are not intended to be prohibited by this ordinance.

SECTION 4 - Non-residential: These provisions are intended to provide for more comprehensive lighting regulations due to potential negative impact on a greater number of residents and the public from inappropriate lighting installation or fixtures. In addition, it is the intent of these restrictions to prevent lighting conflicts and competing lighting installations - particularly in the commercial, office and industrial districts of the Town of Newington. This section applies to non-residential uses. The Planning Board shall adopt regulations as part of the Site Plan Review Regulations that implement the purpose and intent of this ordinance.

A - A Building Permit shall be required prior to the installation of any new fixtures on existing non-residential uses. If the original Site Plan Approval granted by the Planning Board specified, in detail, the type and nature of lighting, any increase or change in lighting that may have an increased impact on the site shall be referred to the Planning Board for Site Plan Review. The Building Official shall approve a permit for other installations upon a finding that the fixtures comply with the following general lighting requirements.

B - Spotlights, flood lights, and other bright security lighting shall be limited in such a fashion as to not direct light onto neighboring property. Security lighting using motion detection switches are encouraged, but continual lighting must be angled or shielded in such a fashion as to not produce glare onto neighboring property, particularly dwelling units.

C - General Lighting Requirements:

- (1) All lighting in the Town of Newington is required to have full-cutoff shielding, except for that portion of lighting installation that is consistent with the Historic District.
- (2) The new installation of up-lighting, by any method, is limited to the use of upward landscape or flagpole lighting, provided the lighting does not interfere with the safe operation of aircraft or spill onto neighboring properties or public ways.
- (3) Non-cutoff wallpack type fixtures are prohibited.
- (4) Existing lighting sources that do not present a health and safety issue with respect to glare on public ways or nuisance as a result of off-site illumination shall be exempt from the provisions of this ordinance.

D - New fixtures accompanying establishment of new uses or change of use that requires Site Plan Review shall have lighting plans approved as part of the Site Plan Review process.

SECTION 5 - Grandfathering of Non-conforming Lighting: Any lighting that replaces a grandfathered lighting, or that is moved, must meet the standards of this ordinance. Non-conforming lighting for advertising signs or architectural accents is grandfathered only for a period of ten years and no later than January 1, 2017. Grandfathered lighting that directs light toward streets or parking lots that cause disability glare to motorists or cyclists shall be either shielded or re-directed within 90-days of notification so that the lighting does not cause a potential hazard to motorists or cyclists.

SECTION 6 – Exceptions: All temporary lighting required for construction projects, related to road construction and repair, installation of sewer and water facilities, and other public infrastructure, all temporary emergency lighting needed by the police and fire departments or other emergency services, as well as vehicular luminaries, all hazard warning lights required by Federal regulatory agencies, and seasonal and decorative lighting displays using multiple low wattage bulbs.

Article XVIII - Small Wind Energy Systems

SECTION 1 – Purpose: This small wind energy systems ordinance is enacted in accordance with RSA 674:62-66, and the purposes outlined in RSA 672:1-III-a. The purpose of this ordinance is to accommodate small wind energy systems in appropriate locations, while protecting the public’s health, safety and welfare. In addition, this ordinance provides a permitting process for small wind energy systems to ensure compliance with the provisions of the requirements and standards established herein.

SECTION 2 – Procedure for Review:

A - Location: Small wind energy systems and met towers are an accessory use that is permitted in all zoning districts.

B - Building Permit: No small wind energy system shall be erected, constructed, or installed without first receiving a building permit from the building inspector. A building permit shall be required for any physical modification to an existing small wind energy system. Meteorological (Met) towers that receive a building permit shall be permitted on a temporary basis not to exceed 3 years from the date the building permit was issued.

C - Application: Applications submitted to the building inspector shall contain a site plan with the following information:

- i) Property lines and physical dimensions of the applicant’s property.
- ii) Location, dimensions, and types of existing major structures on the property.
- iii) Location of the proposed small wind energy system, foundations, guy anchors and associated equipment.
- iv) Tower foundation blueprints or drawings.
- v) Tower blueprints or drawings.
- vi) Setback requirements as outlined in this ordinance.
- vii) The right-of-way of any public road that is contiguous with the property.
- viii) Any overhead utility lines.
- ix) Small wind energy system specifications, including manufacturer, model, rotor diameter, tower height, tower type, nameplate generation capacity.

- x) Small wind energy systems that will be connected to the power grid shall include a copy of the application for interconnection with their electric utility provider.
- xi) Sound level analysis prepared by the wind generator manufacturer or qualified engineer.
- xii) Electrical components in sufficient detail to allow for a determination that the manner of installation conforms to the NH State Building Code.
- xiii) Evidence of compliance or non-applicability with Federal Aviation Administration requirements.
- xiv) List of abutters to the applicant's property.

D - Abutter and Regional Notification: In accordance with RSA 674:66, the building inspector shall notify all abutters and the local governing body by certified mail upon application for a building permit to construct a small wind energy system. The public will be afforded 30 days to submit comments to the building inspector prior to the issuance of the building permit. The building inspector shall review the application for regional impacts per RSA 36:55. If the proposal is determined to have potential regional impacts, the building inspector shall follow the procedures set forth in RSA 36:57, IV.

SECTION 3 – Standards: The building inspector shall evaluate the application for compliance with the following standards;

A - Setbacks: The setback shall be calculated by multiplying the minimum setback requirement number by the system height and measured from the center of the tower base to property line, public roads, or nearest point on the foundation of an occupied building.

- i) Small wind energy systems must meet all setbacks for principal structures for the zoning district in which the system is located.
- ii) Guy wires used to support the tower are exempt from the small wind energy system setback requirements.

Minimum Setback Requirements Indicated as a % of Tower Height			
Occupied Buildings on Participating Landowner Property	Occupied Buildings on Abutting Property	Property Lines of Abutting Property and Utility Lines	Public Roads
0	150%	110%	150%

B - Tower: The maximum tower height shall be restricted to 35 feet above the tree canopy within 300 feet of the small wind energy system. In no situation shall the tower height exceed 150 feet.

C – The Sound Level of the small wind energy system shall not be discernible at the property line.

D - Shadow Flicker: Small wind energy systems shall be sited in a manner that does not result in significant shadow flicker impacts. Significant shadow flicker is defined as more than 30 hours per year on abutting occupied buildings. The applicant has the burden of proving that the shadow flicker will not have significant adverse impact on neighboring or adjacent uses. Potential shadow flicker will be addressed either through siting or mitigation measures.

E - Signs: All signs including flags streamers and decorative items, both temporary and permanent, are prohibited on the small wind energy system, except for manufacturer identification or appropriate warning signs.

F - Code Compliance: The small wind energy system shall comply with all applicable sections of the New Hampshire State Building Code.

G - Aviation: The small wind energy system shall be built to comply with all applicable Federal Aviation Administration regulations including but not limited to 14 C.F.R. part 77, subpart B regarding installations close to airports, and the New Hampshire Aviation regulations, including but not limited to RSA 422-b and RSA 424.

H - Visual Impacts: It is inherent that small wind energy systems may pose some visual impacts due to the tower height needed to access wind resources. The purpose of this section is to reduce the visual impacts, without restricting the owner's access to the optimal wind resources on the property.

- i) The applicant shall demonstrate through project site planning and proposed mitigation that the small wind energy system's visual impacts will be minimized for surrounding neighbors and the community. This may include, but not be limited to information regarding site selection, wind generator design or appearance, buffering, and screening of ground mounted electrical and control equipment. All electrical conduits shall be underground.
- ii) The color of the small wind energy system shall either be the stock color from the manufacturer or painted with a non-reflective, unobtrusive color that blends in with the surrounding environment.

- iii) A small wind energy system shall not be artificially lit unless such lighting is required by the Federal Aviation Administration (FAA). If lighting is required, the applicant shall provide a copy of the FAA determination to establish the required markings and/or lights for the small wind energy system.

I - Approved Wind Generators: The manufacturer and model of the wind generator to be used in the proposed small wind energy system must have been approved by the California Energy Commission or the New York State Energy Research and Development Authority, or a similar list approved by the state of New Hampshire, if available.

J - Utility Connection: If the proposed small wind energy system is to be connected to the power grid through net metering, it shall adhere to RSA 362-A:9.

K - Access: The tower shall be designed and installed so as not to provide step bolts or a ladder readily accessible to the public for a minimum height of 8 feet above the ground. All ground-mounted electrical and control equipment shall be labeled and secured to prevent unauthorized access.

L - Clearing: Clearing of natural vegetation shall be limited to that which is necessary for the construction, operation and maintenance of the small wind energy system and as otherwise prescribed by applicable laws, regulations, and ordinances.

M - Impact on Wildlife: Only wind energy system models that have a minimal negative impact on birds, said impact as determined by the Newington Planning Board, shall be permitted.

SECTION 4 – Abandonment:

A – Notification: At such time that a small wind energy system is scheduled to be abandoned or discontinued, the applicant will notify the building inspector by certified U.S. mail of the proposed date of abandonment or discontinuation of operations.

B – Removal: Upon abandonment or discontinuation of use, the owner shall physically remove the small wind energy system within 90 days from the date of abandonment or discontinuation of use. This period may be extended at the request of the owner and at the discretion of the building inspector. “Physically remove” shall include, but not be limited to:

- i) Removal of the wind generator and tower and related above-grade structures.
- ii) Restoration of the location of the small wind energy system to its natural condition, except that any landscaping, grading or below-grade foundation may remain in its same condition at initiation of abandonment.

C – Failure to Notify: In the event that an applicant fails to give such notice, the system shall be considered abandoned or discontinued if the system is out-of-service for a continuous 12-month period. After the 12 months of inoperability, the building inspector may issue a Notice of Abandonment to the owner of the small wind energy system. The owner shall have the right to respond to the Notice of Abandonment within 30 days from Notice receipt date. After review of the information provided by the owner, the building inspector shall determine if the small wind energy system has been abandoned. If it is determined that the small wind energy system has not been abandoned, the building inspector shall withdraw the Notice of Abandonment and notify the owner of the withdrawal.

D – Legal Action: If the owner fails to respond to the Notice of Abandonment or if, after review by the building inspector, it is determined that the small wind energy system has been abandoned or discontinued, the owner of the small wind energy system shall remove the wind generator and tower at the owner's sole expense within 3 months of receipt of the Notice of Abandonment. If the owner fails to physically remove the small wind energy system after the Notice of Abandonment procedure, the building inspector may pursue legal action to have the small wind energy system removed at the owner's expense.

SECTION 5 – Violation: It is unlawful for any person to construct, install, or operate a small wind energy system that is not in compliance with this ordinance. Small wind energy systems installed prior to the adoption of this ordinance are exempt from this ordinance except when modifications are proposed to the small wind energy system.

SECTION 6 – Penalties: Any person who fails to comply with any provision of this ordinance or a building permit issued pursuant to this ordinance shall be subject to enforcement and penalties as allowed by NH Revised Statutes Annotated Chapter 676:17.

ARTICLE XIX - *Administration*

SECTION 1 - Zoning Enforcement: The provisions of this ordinance shall be administered by the Building Inspector. Such Inspector is the administrative officer specified in New Hampshire Revised Statutes Annotated, 1955, Chapter 36, Section 35. Enforcement shall be carried out by the Board of Selectmen.

SECTION 2 - Building Permit Required: No building or structure shall be erected, added to, or moved, until a permit has been issued by the Building Inspector.

SECTION 3 - Application for Building Permit: The applicant for a Building Permit shall submit accurate construction plans at a suitable scale. Industrial plans shall be drawn by a professional architect or professional engineer, and shall include:

- A - The shape, size and location of the lot to be built upon; and
- B - The shape, size, height and location upon the lot of the buildings to be erected, altered or removed; and
- C - Any building already on the lot; and
- D - Setback lines of buildings on adjoining lots; and
- E - Any other information needed by the Building Inspector or Board of Select-men to determine whether the provisions of this ordinance are being observed.

If the application conforms with the provisions of this ordinance, the building codes, and other ordinances of the municipality, the permit shall be issued upon payment of the required fee. If not, the building permit shall be refused by the Building Inspector stating such refusal in writing with the cause. The issuance or refusal of a permit shall be within 15 days of the submission of the application with all necessary information to the Building Inspector.

No permit shall be issued for construction of storage facilities for any petroleum products unless such construction complies with the Rules and Regulations of the State Board of Fire Control. The Newington Fire Chief and/or State Fire Marshall shall inspect such construction to determine that said regulations are being adhered to.

If no substantial progress of construction has been made in six months beginning with the date the permit is issued, the permit becomes invalid. The Building Inspector may renew the permit. A renewal fee in the amount of the original fee is required to be paid by the applicant before the permit is renewed.

SECTION 4 - Penalties for Violation: Any person violating any provision of this ordinance shall upon conviction, be fined not less than \$20, nor more than \$100, for such offense. Each offense shall constitute a separate offense for each day the violation occurs.

SECTION 5 - Repeal of conflicting ordinances: Any existing zoning ordinances or such parts thereof as may be inconsistent herewith are repealed.

SECTION 6 - Validity: Should any section or part of a section or any provision of this ordinance be declared by the courts to be unconstitutional or invalid, such declaration shall not affect the validity of the ordinance as a whole or any part thereof other than the part so declared to be unconstitutional or invalid.

SECTION 7 - Effective Date: This Ordinance shall take effect upon its passage.

3/15/14

Z-54

000139

ARTICLE XX - *Floodplain Management*

This ordinance, adopted pursuant to the authority of RSA 674:16, shall be known as the Town of Newington Floodplain Management Ordinance. The regulations in this ordinance shall overlay and supplement the regulations in the Town of Newington Zoning Ordinance, and shall be considered part of the Zoning Ordinance for purposes of administration and appeals under state law. If any provision of this ordinance differs or appears to conflict with any provision of the Zoning Ordinance or other ordinance or regulation, the provision imposing the greater restriction or more stringent standard shall be controlling.

The following regulations in this ordinance shall apply to all lands designated as special flood hazard areas by the Federal Emergency Management Agency (FEMA) in its "Flood Insurance Study for the County of Rockingham, N.H." dated May 17, 2005, together with the associated Flood Insurance Rate Maps dated May 17, 2005, which are declared to be a part of this ordinance and are hereby incorporated by reference, and any subsequent revisions thereto.

Item I - Definition of Terms: The following definitions shall apply only to this Floodplain Management Ordinance, and shall not be affected by the provisions of any other ordinance of the Town of Newington.

1. "Area of Shallow Flooding" means a designated A0, AH, or V0 zone on the Flood Insurance Rate Map (FIRM) with a one-percent or greater annual possibility of flooding to an average depth of one to three feet where a clearly defined channel does not exist, where the path of flooding is unpredictable and where velocity flow may be evident. Such flooding is characterized by ponding or sheet-flow.
2. "Area of Special Flood Hazard" is the land in the floodplain within the Town of Newington subject to a one-percent or greater possibility of flooding in any given year. The area is designated as **zone A on the FHBM and is designated on the FIRM as zone AE.**
3. "Base Flood" means the flood having a one-percent possibility of being equaled or exceeded in any given year.
4. "Basement" means any area of a building having its floor subgrade on all sides.
5. "Building" - see "structure".
6. "Breakaway wall" means a wall that is not part of the structural support of the building and is intended through its design and construction to collapse under specific lateral loading forces without causing damage to the elevated portion of the building or supporting foundation.
7. "Development" means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading,

paving, excavation, or drilling operation.

8. "FEMA " means the Federal Emergency Management Agency.

9. "Flood" or "Flooding" means a general and temporary condition of partial or complete inundation of normally dry land areas from:

A - the overflow of inland or tidal waters, or

B - the unusual and rapid accumulation or runoff of surface waters from any source.

10. **"Flood Boundary and Floodway Map" (Floodway Map) is the official map of the Town of Newington, on which FEMA has delineated the "Regulatory Floodway". This map should not be used to determine the correct flood hazard zone or base flood elevation, the Flood Insurance Rate Map (FIRM) will be used to make determinations of flood hazard zones and base flood elevations.**

11. "Flood Elevation Study" means an examination, evaluation, and determination of flood hazards and if appropriate, corresponding water surface elevations, or an examination and determination of mudslide or flood - related erosion hazards.

12. "Flood Insurance Rate Map" (FIRM) means the official map incorporated with this ordinance, on which FEMA has delineated both the special flood hazard areas and the risk premium zones applicable to the Town of Newington.

13. Flood Insurance Study" - see "Flood elevation study".

14. "Floodplain" or "Flood-prone area" means any land area susceptible to being inundated by water from any source (see definition of "Flooding").

15. "Flood proofing" means any combination of structural and non-structural additions, changes, or adjustments to structures that reduce or eliminate flood damage to real estate or improved real property, water and sanitation facilities, structures and their contents.

16. **"Floodway" - see "Regulatory Floodway".**

17. "Functionally dependent use" means a use that cannot perform its intended purpose unless it is located or carried out in close proximity to water. The term includes only docking and port facilities that are necessary for the loading/unloading of cargo or passengers, and ship building/repair facilities but does not include long-term storage or related manufacturing facilities.

18. "Highest adjacent grade" means the highest natural elevation of the ground surface prior to construction next to the proposed walls of a structure.

19. "Historic Structure" means any structure that is:
- j. listed individually in the National Register of Historic Places (a listing maintained by the Department of Interior) or preliminarily determined by the Secretary of the Interior as meeting the requirements for individual listing on the National Register;
 - k. certified or preliminarily determined by the Secretary of the Interior as contributing to the historical significance of a registered historic district or a district preliminarily determined by the Secretary to qualify as a registered historic district;
 - l. individually listed on a state inventory of historic places in states with historic preservation programs which have been approved by the Secretary of the Interior; or
 - m. individually listed on a local inventory of historic places in communities with historic preservation programs that have been certified either:
 - i) by an approved state program as determined by the Secretary of the Interior, or
 - ii) directly by the Secretary of the Interior in states without approved programs.
20. "Lowest Floor" means the lowest floor of the lowest enclosed area (including basement). An unfinished or flood resistant enclosure, usable solely for parking of vehicles, building access or storage in an area other than a basement area is not considered a building's lowest floor; provided, that such an enclosure is not built so as to render the structure in violation of the applicable non-elevation design requirements of this ordinance.
21. "Manufactured Home" means a structure, transportable in one or more sections, which is built on a permanent chassis and is designed for use with or without a permanent foundation when connected to the required utilities. For floodplain management purposes the term "manufactured home" includes park trailers, travel trailers, and other similar vehicles placed on site for greater than 180 days.
22. "Mean sea level" means the National Geodetic Vertical Datum (NGVD) of 1929 or other datum, to which base flood elevations shown on a community's Flood Insurance Rate Map are referenced.
23. "New construction" means, for the purposes of determining insurance rates, structures for which the start of construction@ commenced on or after the effective date of an initial FIRM or after December 31, 1974, whichever is later, and includes any subsequent improvements to such structures. For floodplain management purposes, *new construction* means structures for which the *start of construction* commenced on or after the effective date of a floodplain management regulation adopted by a community and includes any

subsequent improvements to such structures.

24. "100-year flood" - see "base flood"
25. "Recreational Vehicle" is defined as:
 - i) built on a single chassis;
 - ii) 400 square feet or less when measured at the largest horizontal projection;
 - iii) designed to be self-propelled or permanently towable by a light duty truck; and
 - iv) designed primarily **not** for use as a permanent dwelling but as temporary living quarters for recreational, camping, travel or seasonal use.
26. **"Regulatory floodway" means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without increasing the water surface elevation. These areas are designated as floodways on the Flood Boundary and Floodway Map.**
27. "Special flood hazard area" means an area having flood, mudslide, and/or flood-related erosion hazards, and shown on **an FHBM or FIRM as zone A, A0, AI-30, AE, A99, AH, V0, VI-30, VE, V, M, or E.** (See "Area of Special Flood Hazard")
28. "Structure" means for floodplain management purposes, a walled and roofed building, including a gas or liquid storage tank that is principally above ground, as well as a manufactured home.
29. "Start of Construction" includes substantial improvements, and means the date the building permit was issued, provided the actual start of construction, repair, reconstruction, placement, or other improvement was within 180 days of the permit date. The actual start means either the first placement of permanent construction of a structure on site, such as the pouring of slab or footings, the installation of piles, the construction of columns, or any work beyond the stage of excavation; or the placement of a manufactured home on a foundation. Permanent construction does not include land preparation, such as clearing, grading and filling; nor does it include the installation of streets and/or walkways; nor does it include excavation for a basement, footings, piers, or foundations or the erection of temporary forms; nor does it include the installation on the property of accessory buildings, such as garages or sheds not occupied as dwelling units or part of the main structure.
30. "Substantial damage" means damage of any origin sustained by a structure whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

31 "Substantial Improvement" means any combination of repairs, reconstruction, alteration, or improvements to a structure in which the cumulative cost equals or exceeds fifty percent of the market value of the structure. The market value of the structure should equal:

1. the appraised value prior to the start of the initial repair or improvement, or
2. in the case of damage, the value of the structure prior to the damage occurring.

For the purposes of this definition, "substantial improvement" is considered to occur when the first alteration of any wall, ceiling, floor, or other structural part of the building commences, whether or not that alteration affects the external dimensions of the structure. This term includes structures that have incurred substantial damage, regardless of actual repair work performed. The term does not, however, include any project for improvement of a structure required to comply with existing health, sanitary, or safety code specifications which are solely necessary to assure safe living conditions or any alteration of a "historic structure", provided that the alteration will not preclude the structure's continued designation as a "historic structure".

32 "Water surface elevation" means the height, in relation to the National Geodetic Vertical Datum (NGVD) of 1929, (or other datum, where specified) of floods of various magnitudes and frequencies in the floodplains.

Item II- Permits:

All proposed development in any special flood hazard areas shall require a permit.

Item III - Construction Requirements:

The building inspector shall review all building permit applications for new construction or substantial improvements to determine whether proposed building sites will be reasonably safe from flooding. If a proposed building site is located in a special flood hazard area, all new construction or substantial improvements shall:

- a. be designed (or modified) and adequately anchored to prevent floatation, collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy,

- b. be constructed with materials resistant to flood damage,
- c. be constructed by methods and practices that minimize flood damages,
- d. be constructed with electrical, heating, ventilation, plumbing, and air conditioning equipment, and other service facilities that are designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

Item IV - Water and Sewer Systems:

Where new or replacement water and sewer systems (including on-site systems) are proposed in a special flood hazard area the applicant shall provide the Building Inspector with assurance that these systems will be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters, and on-site waste disposal systems will be located to avoid impairment to them or contamination from them during periods of flooding.

Item V - Certification:

For all new or substantially improved structures located in **Zones A, A1-30, AE, A0 or AH**, the applicant shall furnish the following information to the building inspector:

- a. the as-built elevation (in relation to NGVD) of the lowest floor (including basement) and include whether or not such structures contain a basement.
- b. if the structure has been floodproofed, the as-built elevation (in relation to NGVD) to which the structure was floodproofed.
- c. any certification of floodproofing.

For all new construction or substantially improved buildings located in **Zones VE or V1-30** the applicant shall furnish the building inspector records indicating the as-built elevation of the bottom of the lowest horizontal structural member of the lowest floor (excluding pilings or columns) in relation to NGVD and whether or not the structure contains a basement.

The Building Inspector shall maintain the aforementioned information for public inspection, and shall furnish such information upon request.

Item VI - Other Permits:

The Building Inspector shall not grant a building permit until the applicant certifies that all necessary permits have been received from those governmental agencies from which approval is required by federal or state law, including Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U. S. C. 1334.

Item VII - Watercourses:

1. In riverine situations, prior to the alteration or relocation of a watercourse the applicant for such authorization shall notify the Wetlands Bureau of the New Hampshire Environmental Services Department and submit copies of such notification to the Building Inspector, in addition to the copies required by the RSA 482-A: 3. Further, the applicant shall be required to submit copies of said notification to those adjacent communities as determined by the Building Inspector, including notice of all scheduled hearings before the Wetlands Bureau.
2. The applicant shall submit to the Building Inspector, certification provided by a registered professional engineer, assuring that the flood carrying capacity of an altered or relocated watercourse can and will be maintained.
3. The Building Inspector shall obtain, review, and reasonably utilize any floodway data available from Federal, State, or other sources as criteria for requiring that all development located in Zone A meet the following floodway requirement:

"No encroachments, including fill, new construction, substantial improvements, and other development are allowed within the floodway that would result in any increase in flood levels within the community during the base flood discharge."

4. Along watercourses that have not had a Regulatory Floodway designated, no new construction, substantial improvements, or other development (including fill) shall be permitted within zones **AI-30 and AE on the FIRM**, unless it is demonstrated by the applicant that the cumulative effect of the proposed development, when combined with all existing and anticipated development, will not increase the water surface elevation of the base flood more than one foot at any point within the community.
5. Along watercourses with a designated Regulatory Floodway no encroachments, including fill, new construction, substantial improvements, and other development are allowed within the floodway unless it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practices that the proposed encroachment would not result in any increase in flood levels within the community during the base flood discharge.

Item VIII- Special Flood Hazard Areas:

1. In special flood hazard areas the Building Inspector shall determine the 100-year flood elevation in the following order of precedence according to the data available:
 - a. in zones **AI-30, AH, AE, VI-30, and VE** refer to the elevation data provided in the community's Flood Insurance Study and accompanying **FIRM or FIBM**.
 - b. in unnumbered A zones the Building Inspector shall obtain, review, and reasonably

utilize any 100-year flood elevation data available from any federal, state or other source including data submitted for development proposals submitted to the community (i.e. subdivisions, site approvals).

- c. **in zone A0 the flood elevation is determined by adding the elevation of the highest adjacent grade to the depth number specified on the FIRM or if no depth number is specified on the FIRM at least 2 feet.**
2. The Building Inspector's 100 year flood elevation determination will be used as criteria for requiring in zones **A, A1-30, AE, V1-30, and VE** that:
 - a. All new construction or substantial improvement of residential structures have the lowest floor (including basement) elevated to or above the 100 year flood elevation.
 - b. All new construction or substantial improvements of non-residential structures have the lowest floor (including basement) elevated to or above the 100-year flood level; or together with attendant utility and sanitary facilities, shall:
 - (I) be floodproofed so that below the 100-year flood elevation the structure is watertight with walls substantially impermeable to the passage of water;
 - (ii) have structural components capable of resisting hydrostatic and hydrodynamic loads and the effects of buoyancy; and
 - (iii) be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice for meeting the provisions of this section.
 - c. All manufactured homes to be placed or substantially improved within special flood hazard areas shall be elevated on a permanent foundation such that the lowest floor of the manufactured home is at or above the base flood level; and be securely anchored to resist floatation, collapse, or lateral movement. Methods of anchoring may include, but are not limited to, use of over-the-top or frame ties to ground anchors.
 - d. All recreational vehicles placed on sites within **Zones A1-30, AH, AE, V, V1-30, and VE** shall either:
 - (I) be on the site for fewer than 180 consecutive days;
 - (ii) be fully licensed and ready for highway use; or
 - (iii) meet all standards of Section 60.3 (b) (1) of the National Flood Insurance Program Regulations and the elevation and anchoring requirements for

"manufactured homes" in Paragraph 8 (6) of Section 60.3.

- e. For all new construction and substantial improvements, fully enclosed areas below the lowest floor that are subject to flooding are permitted provided they meet the following requirements:
 - (i) the enclosed area is unfinished or flood resistant, usable solely for the parking of vehicles, building access or storage;
 - (ii) the area is not a basement;
 - (iii) shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwater. Designs for meeting this requirement must either be certified by a registered professional engineer or architect or must meet or exceed the following minimum criteria: A minimum of two openings having a total net area of not less than one square inch for every square foot of enclosed area subject to flooding shall be provided. The bottom of all openings shall be no higher than one foot above grade. Openings may be equipped with screens, louvers, or other coverings or devices provided that they permit the automatic entry and exit of floodwater.
- f. Proposed structures to be located on slopes in special flood hazard areas, zones AH and A0 shall include adequate drainage paths to guide floodwaters around and away from the proposed structures.

Item IX - Variances and Appeals:

1. Any order, requirement, decision or determination of the building inspector made under this ordinance may be appealed to the Zoning Board of Adjustment as set forth in RSA 676:5.
2. If the applicant, upon appeal, requests a variance as authorized by RSA 674:33, I (b), the applicant shall have the burden of showing in addition to the usual variance standards under state law that:
 - a. the variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense.
 - b. if the requested variance is for activity within a designated regulatory floodway, no increase in flood levels during the base flood discharge will result.
 - c. the variance is the minimum necessary, considering the flood hazard, to afford relief.
3. The Zoning Board of Adjustment shall notify the applicant in writing that:

(iv) the issuance of a variance to construct below the base flood level will result in increased premium rates for flood insurance up to amounts as high as \$25 for \$100 of insurance coverage; and

b. such construction below the base flood level increases risks to life and property.

Such notification shall be maintained with a record of all variance actions.

4. The community shall:

a. maintain a record of all variance actions, including their justification for their issuance, and

b. report such variances issued in its annual or biennial report submitted to FEMA's Federal Insurance Administrator.