

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, May 5, 2014

Call to Order: Chair Denis Hebert called the May 5, 2014 meeting to order at 6:30 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; 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; Peter Britz, Environmental and Sustainability Planner for Portsmouth; Jeff Barnum, Great Bay Water Keeper; Portsmouth Residents: Catherine DiPentima; Pat Ford; Bob Gibbons; Jane and John Sutherland; Newington Resident: Paul Reardon; Portsmouth Herald Reporter, Crystal Weyers

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.

Chair Hebert announced that the public hearing was complete and opened deliberations on the information received over the last seven months.

Board member, Jack Pare said he spent a lot of time reading the Massachusetts Department of Transportation's railroad impact study. He said it was an unusual study because special legislation was passed to withhold the permit before the study was done. The study reiterated that they were not able to do anything that would pre-empt Federal law. The study went on to inventory accidents, laws and safety plans. He said the report was concluded with a list of recommendations under "shoulds", but there were no follow up plans or "shalls" that carried any weight.

Mr. Pare said he didn't see that there would be any gain from requesting a safety study for the Sea-3 site review, but he wondered if they might come up with some safety action items that would be beneficial

Ms. Lamson said a group of women had started a group of concerned citizens to stop an oil refinery near the Sprague site along the Piscataqua forty years ago, and they were successful. She said she took her responsibility as a member of the Planning Board seriously and as a subdivision of the State they had to follow their RSA's and Town ordinances. She said she felt there was a responsibility to look at the site review procedures, and consider the health, safety and environment of the community

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Board member, Justin Richardson said he wondered if a study would be helpful to accomplish the goals of the zoning ordinance and site plan regulations. He said he had trouble finding an appropriate role for a study. He said the public hearing already reviewed studies and it didn't seem like another study would be helpful and it would only be kicking the can further down the road.

Mr. Richardson read through "Uses Allowed" in the zoning ordinances and said a question of whether the use would create an over intensification of the area might be made in regards to the rails, but they would then be stepping outside of their jurisdiction. Mr. Richardson said the Board had been told the rail standards would be upgraded, and they could accept that finding to satisfy the criteria, or request a study to prove it, but there would need to be a determination first.

Town Planner, Tom Morgan said he started out asking the same questions. He said in November 2013 the Board determined if the project would have a regional impact. Mr. Morgan said he thought a study could help determine what that impact might be and to come up with some non-binding recommendations that would assist the communities that would be impacted. Mr. Richardson said he heard statements on the costs of upgrading crossings in surrounding communities, but he wasn't sure how the cost of the upgrades could be attributed to the Sea-3 project. Mr. Morgan said that was all the more reason to have a professional review. Chairman Hebert said a DOT and FRA representative had come before the Board to discuss their inspection process. He said the Federal government had set up a process so that towns could apply to the State and they would determine how to apportion a fair share of the cost. Mr. Richardson said there might be a need for a study, but it was challenging to define. Chairman Hebert said he didn't think the Board had the authority to ask the State to do a study on a crossing in another town. He said it was also a duplication of effort and cost to require a study that the State already did for free.

Mr. Pare said it might be useful as a part of their findings to include a copy of the RSA: 373 procedures that the town had to follow. He said they had heard from some towns, but not all, including Newfields. He said a letter to those towns that provided information and links to websites would be helpful to them.

Ms. Lamson said she thought an independent safety study was important for the regional impact consideration. Mr. Pare said something more than a paper study such as having the Rockingham Planning Commission or the UNH Complex Systems Group use their GIS capabilities and create a mapping system that would be available online to the surrounding fire departments for common coordinates would be more useful. He said right now they had text and he didn't think it would cost much for the applicant. Mr. Morgan said the study he envisioned would be broader than investigating rail crossings. He said he asked the director of the Rockingham Planning Commission if he would have any interest in administering such a study and was told he would need something specific. He said the Rockingham Planning Commission would be an appropriate agency to look at matters of concern outside of Newington.

Board member, Bernie Christopher said studies would be good except that the studies they already had were only political and didn't have any teeth to add more safety or anything. He said they were told that only the DOT and the FRA had authority

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over the rails and the Board only had authority over the Sea-3 site. So he wondered what purpose a study would have.

Board member, Christopher Cross said the Sea-3 site had been reviewed and approved when it came to the area nearly forty years ago. He said there was a significant safety study at the time. He said it was an LPG transfer station that used cooling to maintain control of the product and it was never a refinery that used heat to break it the product apart and add other components, which was more volatile and dangerous. He said there was another expansion fifteen years ago that also went under another safety study as well.

Mr. Cross said Sea-3 had operated safely for thirty-five years distributing propane. He said Newington played a role in keeping the waterfront working to provide propane so NH residents wouldn't be completely dependent on ports in Boston and Portland for propane, which would add to the costs.

Mr. Cross said the public hearing for the change of use, increase of rail cars and the condition of the rails needed to be looked at. He said Federal and State studies had been done and he wasn't sure that an additional study would tell them anything new for the regional impact. He said the authorities were full aware of the major change to the rails and their testimony was on record.

Ms. Lamson they would need a new study for the changes and not rely on a study that was done forty years ago. She said she would also like to respect the concerns expressed by abutting communities.

Mr. Richardson said when it was designated as a regional project, they thought they might be able to do something to improve the condition of the rails. He said the Legislature gave the adjacent municipalities status in a regional impact project. He said the legislature also gave boards the authority to review and approve projects of regional impact and they also gave them authority to impose conditions.

Mr. Richardson said the ordinance said boards were supposed to consider the health, safety and welfare of the community, which could be identified as the waterfront from along the Piscataqua. He said they might be able to do something, but the question was where would they have an authority look and whom would they give the study to fix the problem, otherwise they would be speculating. He said they might be able to ask the applicant to pay a share of fixing the problem, but again, how would they determine what that share was. He said they were grasping to identify the problems and grasping to find a manner to address it.

Chairman Hebert said the testimony from the fire chief indicated that they worked together regionally, and that they wanted to work with Pan Am Railways for additional training and to upgrade any equipment that might be needed. He wondered what more the Board could do to question their authority and expertise if they testified that they were doing what needed to be done.

Mr. Richardson said one use of a study might be to identify emergency response deficiencies, but it was his understanding that the local fire chief and the State Fire Marshall had the authority to enforce the fire code on the facility and the railroad. Chairman Hebert asked what would then be gained from a study and Mr. Morgan said it would identify deficiencies, and he didn't see any harm in a third party review.

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Mr. Pare said rather than doing a study, he thought identifying deficiencies, enhancing a mutual aid pool and augmenting the existing incident response with an aerial photo map showing public buildings within 1,000 foot buffer of the facility, a coordinate system of the tracks would be more useful. He said the action of getting the information would be the same as a study, but it would be available to the response team rather than sitting in a municipal file in a vault.

Chairman Hebert said he wasn't sure what value that would have for the fire department. Mr. Pare said it had more to do with people who were not familiar with other territory. Chairman Hebert said he thought they probably already had that information and the towns would be in contact with one another on the road, but he agreed that if they did a study, they would want something that had some teeth to it.

Mr. Christopher said the Coast Guard reviewed Homeland Security on the site and all the fire departments looked at it. He said if they just looked at the railroad as he did when he walked the tracks, it was scary, but they didn't have any authority to do anything. Chairman Hebert said there was one study by Sea-3 that was going to be done on the upgrade.

Chairman Hebert said Sea-3 was an ongoing use for some time, bringing propane in by ship and railroad, and now they were proposing an expansion of rail tanks, storage tanks and refrigeration tanks. He said they had DOT and the FRA come in and they contacted members of Congress to see if they could do anything. He said he couldn't see doing a study like the one done in Massachusetts because this was not owned by the State, but a privately owned track. He also wondered how they would apportion the cost of a study, and make sure it was something they could work with rather than put on a shelf. He said they were at a point where they needed to make a motion whether they were going to do a study or not and then they needed to review the rest of the Sea-3 application.

Mr. Richardson said the application before them was Sea-3 under an ordinance that gave them the authority to decide if the project met the criteria for approval. He said if they determined there was a deficiency during their deliberations, they could address it through a condition for approval.

Justin Richardson moved that the Board not do a general study similar to the Massachusetts DOT study. Mike Marconi seconded.

Mr. Richardson clarified that his motion was not suggesting that they not address particular impacts, he was suggesting that they not do a study that was not articulated in the ordinances or site plan regulations without a need to address a particular impact.

Vice-Chair Marconi said everyone made good points, but in regards to the railroad they had no jurisdiction. In regards to safety he said he made the original motion that the project be considered as a regional impact. He said they heard a lot of testimony and he felt they followed due diligence. He said he understood safety concerns, but he didn't see that there was anything they could do and the operation was ongoing with tankers on the rails already.

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Chairman Hebert said he wanted to be sure they did due diligence in regards to reviewing the safety of the project. He said they looked at the Jones act that prevented domestic LPG deliveries by ships and they looked at fire safety. He said one the positive outcomes of the project was that Pan Am Railways said they would upgrade the rails and make them safer as a result of this project. He said right now they were able to run five cars at five miles an hour on rails that were excepted, below Class I standards and he felt that was more dangerous than sixteen cars on an upgraded Class II railway line. He said the rail was not within their jurisdiction, but they spent more time looking at the railway operations than Sea-3's operation. He believed they did their due diligence and he didn't see any benefit of another study.

Ms. Lamson said she did her due diligence reading through all the materials. She said she hadn't misplaced Sea-3, but the rail was in their backyard and she still thought they needed an environmental and safety study because it was a regional impact. Ms. Lamson was not eligible to vote as an alternate member, but asked that the record show that she would have voted against the motion not to do a safety study.

The motion passed with all members in favor.

Mr. Richardson reviewed the criteria for approval in the zoning ordinance on page Z18. He said one of the most important decisions was that the Board would find that the project would promote the health, safety and welfare of the community. He said he believed that the Legislature meant for them to look beyond their borders regarding projects of regional impact and as their zoning ordinance intended, knowing that the layout of the waterfront district was what it was. He said the evidence presented by abutters and the surrounding communities made a credible case that there was concern regarding rail accidents, especially on excepted tracks that were defective. He suggested that their determination be based on the removal of excepted tracks that admittedly didn't meet the Federal standard and could only handle five rail cars at a time. He said it would also be undesirable to have tank cars stuck in queue waiting for the passing of five at a time, despite the management practice of leaving them at Rockingham Junction or somewhere else.

Mr. Richardson went on to say that it would be horrible to have a rail line accident with the Schiller station in Portsmouth, two power plants, and a nuclear manufacturing facility, all nearby and containing hazardous chemicals. Mr. Richardson said perhaps there could be a condition to alert the fire chief if any portion of the tracks were found to be in excepted condition so that operations would cease until they were repaired. Chairman Hebert said the Town could not have direct contact with Pan Am Rails, but they could contact the FRA or State authorities. He added that the FRA representative stated that he was aware of the proposed operation and they would be doing an inspection for that purpose. Mr. Richardson said he agreed with the letter that the Town of Greenland wrote that said Federal pre-emption was beside the point because the Board had the authority approve the project so long as they determined that the project promoted the health, safety and welfare of the community, which they could do so long as the excepted track was eliminated. Mr. Christopher said his only concern was in

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speaking outside of their jurisdiction for other towns. Mr. Richardson said the Legislature gave the surrounding towns abutter status with their regional impact designation, which included the right to appeal, though he agreed that surrounding towns could not make requirements of the applicant. Attorney Ratigan said the sole purpose listed in the regional impact statute was to give notice and allow comment from abutting communities and he was not convinced that there was any other standing to other communities.

Vice-Chair Marconi noted that a former fire chief had written a letter requiring all trucks coming out of the facility to travel down Shattuck Way to Exit 4 on the Spaulding Turnpike to alleviate traffic congestion on Woodbury Avenue and Gosling Road. He said he also observed trucks parked along the side of the road and that shouldn't be allowed.

Ms. Lamson asked former Fire Chief, Larry Wahl if the turning onto Exit 4 was being enforced at present. Chairman Hebert said the letter written represented the position and was still enforceable. Mr. Wahl shook his head that it was not. Chairman Hebert said the public hearing had been closed for public comment, but he recalled that agreement was in place when Shattuck Way was developed, though he couldn't say if the Board of Selectmen had made any changes.

Mr. Pare said the applicant should post signs as well. Chairman Hebert said he didn't know if they had been taken down, but there were signs there at one time.

Chairman Hebert asked for a show of hands if Board members thought that the proposal would bring about fire and rail safety improvements. Ms. Lamson said she saw site improvements, but she was still concerned with the regional impact.

Mr. Richardson said in regards to improving the public welfare of the community, one of the letters received said the project would only improve Newington's tax base, but would be of no benefit to the surrounding communities. He pointed out that the DRA education tax funding for 2013 was over 1.5 million dollars. He said the assessed value of Sea-3 compared to other properties in Newington worked out to \$30,000 to \$60,000 paid to the state wide education tax funding, yet Newington received no funding from the state except \$250 for subsidized school lunches. He said it was also important to keep in mind that the facility provided heating fuel, competition in the market place and contributed to education in surrounding towns and school districts, which was a contribution to the community welfare in an economic sense. Vice-Chair Marconi said he was on the Budget Committee and agreed that the town only received \$250 in education tax funding.

Chairman Hebert said another thing to consider was that the New England area had been dependent on foreign oil for heating fuel for a long time and many people were converting to other cleaner and safer alternatives like LPG, which was important in keeping people warm during the winter.

Mr. Richardson continued to read from page Z18 of the zoning ordinance on items that had not been previously discussed such as whether the project was in harmony with the character of the surrounding area and the long range plans of the community. He said they heard many residents talk about the rails not being in conformity with their vision of the community, but on the other hand there was the industrial zone and the Sea-3 site was in an appropriate location. He said he didn't think they could change the

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existence of the rail lines, and if they agreed that the Sea-3 site was in the interest of serving the area, then they had to accept that the rail lines were there.

Mr. Pare said one of the reasons for creating the industrial zone was to encourage deep-water trade, and that was also one of the reasons for accepting the operation in the first place.

Mr. Richardson said they needed to determine whether it was a permitted use as outlined in the zoning ordinance and then they could look at the site review. Ms. Lamson asked if he was addressing the questions posed by the Greenland selectmen. Chairman Hebert said he was going through the criteria. Mr. Richardson said it was an important project and he didn't want it to go through the court system and have the court say they didn't go through the zoning ordinance.

Mr. Cross said it was an upgrade to an existing use and it had not been declared a non-conforming use in the last forty years. He said they needed to look at the upgrade and not the overall situation. Mr. Richardson said that was a good point, but it was an expansion and they needed to determine if it was conforming. He said they needed to determine how the expansion would change the site and the rails.

Mr. Richardson said they also needed to determine if the proposal would not result in an over intensive use of the land. Mr. Pare said he was impressed with the NFPA walk through. He said the buffer zones and setbacks that were tighter than anything in the Town's zoning, which also prevented the applicant from expanding the site and increasing the intensity more than they proposed. Mr. Richardson agreed and said they could make a stipulation that they would maintain the buffer, but it was a highly disturbed industrial site so the setbacks were appropriately designed.

Mr. Richardson said the rail capacity was currently for five cars, but the upgrade would allow sixteen cars to come and go in a single pass and he knew the rails were a concern to the public that spoke at the public hearing. Chairman Hebert said there had been a lot of public comment, and they had testimony from Federal and State officials, but he wasn't sure what else the Board could do. Mr. Richardson said the last thing they had to do was to find that the project and the subsequent increase in rail traffic was not an over intensive use of the land, which again went back to the railway to remove the excepted track to allow the rails to come in and depart all at once instead of willy-nilly, five at a time.

Mr. Richardson said the last criteria addressed the intensity of traffic. Vice-Chair Marconi said the applicant stated that they could only do ten trucks an hour, which they had already been approved for. Chairman Hebert said that was based on the number of loading station. Mr. Pare said it had been stated that the trucks would enter and exit onto Shattuck away, keeping the traffic patterns away from the shopping centers and apartments on Gosling Road.

Chairman Hebert said one of the criteria was landscaping and he hadn't heard anything about it, though it was an industrial zone with gravel. Mr. Pare said the proposal was consistent with the landscaping in an industrial zone. Mr. Richardson said the waterfront was something that was worth maintaining because there was a view from the river as well as Eliot, Maine so it would be important to maintain the buffer. He said in addition to that the Conservation Commission had guidelines for planting, though

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he wouldn't suggest it would be appropriate to plant trees near a propane storage and distribution site, but he thought trash storage might be appropriate as a condition. Mr. Cross said it would be a three-man operation that had operated for nearly forty years and he didn't think there would be any changes in trash. He noted that Sea-3 had done an excellent job in landscaping with gravel that helped water conservation and prevented silt wind blow. Ms. Lamson said she still thought it should be looked at. Mr. Pare said the preservation of the waterfront buffer did need to be reviewed and maintained.

Mr. Richardson said Section 6 required that they determine the use, which was an industrial use dependent on the waterfront. He said it had been stated that they might send out an occasional shipment that came in on rail, but they still might receive an occasional shipment from overseas so that would continue.

Chairman Hebert asked for a raise of hands that the Board had reviewed the ordinances and found that the proposal was a permitted use. All members raised their hands except alternate member, Peggy Lamson.

Chairman Hebert said he also wanted to go through the site review. He suggested taking a straw vote to determine if the Board needed to determine conditions for approval or if they needed to discuss reasons for denial. Vice-Chair Marconi said he thought they should do the conditions first. Discussion ensued and the Board identified the following conditions:

- That the applicant shall restrict the queuing of trucks along the road sides entering the site
- The applicant shall only receive 16 propane tank cars at the Sea-3 sight by rail.
- The applicant shall post directional signs that all propane trucks shall enter and exit from and to the Spaulding Turnpike Exit 4 to avoid Gosling Drive
- The Woodbury Avenue and applicant shall improve the berm barrier to mitigate noise from idling trucks to residential areas near the site
- That the applicant and Pan Am Rails shall coordinate adequate training and safety procedures for the local emergency and fire departments
- The applicant shall remove all structures and equipment from Pan Am Railways property when the lease is terminated
- That the applicant notify the Board of any deficiencies in the rail equipment and tracks used for their operation that falls below Class II standards, including "excepted" track conditions.

Chairman Hebert asked for a straw vote to determine which direction the Board leaned on approving or denying the application at this time. All Board members raised their hands that they were in favor, except for alternate Board member, Peggy Lamson who was not eligible to vote and said she would still like the record to show that she would not vote in favor of the application if she could vote. Chairman Hebert said they would need to work on the wording of the conditions for the next meeting. Mr. Richardson said the raise of hands should not be considered a vote, but that it would give legal counsel and the town planner direction to form the wording for the motion.

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Chairman Hebert said the Board voted to identify the project as having a regional impact and they invited the public to speak. He said they thought they might have authority to set stipulations that involved the railroad before they granted approval, but they found out that they could not. He said he thought some of the railroad regulations needed to be rewritten from how they were written in the 1700 and 1800's to take current circumstances into account and he thought Congress was starting to look at that. He said he didn't know what else they could do, but they heard there would be safety improvements on the tracks and on the site. Mr. Pare suggested they communicate to the State to consider alternate routing of the railroad to go over the improved Route 16 and onto Pease to rejoin the main line toward Rockingham junction, avoiding downtown Portsmouth and the south side of Great Bay. Chairman Hebert said they already sent a letter to the PDA requesting a discussion with local communities and Pan Am Railways for that purpose, but that would be a long-term project. Ms. Lamson said it was a good suggestion, but working with the State would take a long time, recalling that the State railroad inspector said he had been occupied with the Down Easter Amtrak line and this section of rails had been neglected for a long time. Mr. Richardson said the Board had followed the process and incorporated the information that had been provided. Chairman Hebert said the Board and the public had all worked hard on the process.

Chairman Hebert announced that the Sea-3 deliberations would be continued to Monday, May 19, 2014.

Alternate Board member, Peggy Lamson announced a meeting on Thursday, May 8, 2014 at 6:30 p.m. at the Pease International Board Office, 55 International Drive regarding noise control.

Adjournment: *Mike Marconi motioned to adjourn. Bernie Christopher seconded, and all were in favor. The meeting adjourned at 8:49 p.m.*

Next Meeting: Monday, May 12, 2014, 6 p.m. site walk, 6:30 p.m. meeting;
Monday, May 19, 2014, 6:30 p.m. Sea-3 Deliberations

Respectfully

Submitted by: Jane K. Kendall, Recording Secretary