

To: The City of Hudson Zoning Board of Appeals
From: The South Bay Task Force
Subject: South Bay Zoning Determination
Date: March 20, 2018

I. Introduction p. 1

II. Zoning and Context p. 3

 1. The Width of the District is the Width of the Road p. 5

 2. Road-building in the R-C District p. 5

 3. City of Hudson Zoning Map p. 6

 4. Two-way use of the existing road was a design feature p. 7

 5. City-and-Town Boundary dispute p. 8

III. MAPPING BY P. PRENDERGAST FOR A. COLARUSSO & SON, INC. p. 9

 1. Inconsistencies in the landowner's Site Plan p. 9

 2. Site Plan Measurements p. 10

 3. Conveyor System plan from 2007 p. 11

To the ZBA members,

It's important to emphasize that the ZBA is under no pressure to resolve the following issues, all of which were years in the making. Because two lawsuits must be resolved before the proposal which occasioned the determination can move forward, the time needed to fully understand these issues will not inconvenience the landowner/Plaintiff.

I. INTRODUCTION

Between the initial proposal in 2009 to rezone the entire South Bay as a continuous expanse of Recreational Conservation District (R-C), and the ultimate zoning amendments of November 2011 which struck a compromise with the former landowner, the rezoning of the South Bay was nearly an obsession among City officials, city and county residents, and conservation organizations such as Scenic Hudson.

This history was ably conveyed by Barton & Loguidice (B&L) in its letter to the ZBA dated November 10, 2017, “C-R Zoning District Boundary Determination.”

Aside from the singular oddity of a Zoning Map where one district erratically crosses the rail lines (B&L attributes this to “error”), the aim of the B&L letter was to convey the context in which the 2011 zoning amendments were created. After a close study of the

related documents, B&L highlighted the legislators' intent from first to last.

In the first map presented in the letter's highlighted section, the B&L authors drew a red circle to emphasize that the “causeway [was initially] not within the C-R zone.”¹

On the page that followed, B&L highlighted the phrase “the City intends to rezone the South Bay to R-C to protect the sensitive nature of the natural resources,”² by which the drafters meant a continuous expanse of R-C protection.

To complete this background, B&L highlighted the following on their next page (our own emphasis is added):

“The City supports re-routing O&G's dump truck traffic over the South Bay causeway with appropriate mitigation measures to avoid any adverse impacts to the South Bay habitat to the maximum extent practicable ...”

Despite the subsequent revisions to the draft law, the intent and purpose of re-zoning South Bay was always to protect its unique habitat “to the maximum extent practicable.”

Though it was neither practicable nor lawful to prevent the landowner from transporting its products to the river, thanks to the personal guidance of William Sharp, the Principal Attorney of the NYS Department of State, the City would develop specific criteria in the Core Riverfront District (C-R) to avoid future negative impacts to the bay.

Between the practicable and the merely desired, however, it cannot be overemphasized that all parties were forced to compromise something in the end,³ while all parties continued to press their every advantage.

If the owner chose to rush the completion of its private causeway before the City had a chance to establish its long-sought protections, as happened in June 2011, then by November the City would maximize those protections in Code drafted for the occasion.

The City's response to the owner's unannounced road-building action featured a new fixed width for the road which the City doubly enforced using its zoning tools.

1. City of Hudson Draft LWRP/GEIS

2. City of Hudson Draft LWRP/GEIS

3. E.g., the eccentrically shaped C-R District was the stated desire of Holcim US and O&G Industries in their 11/12/09 comments on the City's Draft GEIS (p. 2, Fig. 2-7): http://www.cityofhudson.org/document_center/Waterfront/545.pdf

First, as co-terminous with the width of the C-R District itself – as befitting the maximum protections sought by the City – the road could not be expanded into the R-C District without a variance. Fourteen months after the current owner purchased the property in 2014, we witnessed just such an encroachment into the R-C District east of Rte. 9-G, one which the City lacked the wherewithal to enforce.⁴

(A careful study of the landowner's current site plan shows that, even according to its own District boundary claims, the proposed road must enter the R-C District as it nears State Rte. 9-G from the west; see p. 5 below, and Fig. 6.)

Second, as a nonconforming use the owner would still, ultimately, find itself before the ZBA if it wished to expand or enlarge the road. This point was summed up nicely by William Sharp (NYS DOS) when he addressed the Common Council on September 26, 2011:

"If indeed they [landowners] are lawful under the existing [old] zoning, they would become a lawful nonconforming use [under the new zoning]. They would not be able to enlarge or expand under the City's zoning. The existing zoning that you have does not permit expansions of nonconforming uses – my guess is unless there is perhaps a variance granted by the Zoning Board of Appeals.⁵

Here it's worth noting that in the year following the City's Zoning Code amendments, the owner and its tenant used their new road in both directions of travel (see p. 7 below).⁶

II. ZONING AND CONTEXT

Despite the successful and hard-driven compromises which resulted in the amended Code, the official Zoning Map amended with the zoning text remained "on order" with a planning firm for the next 16 months.

During that time, and without a sufficient map, residents and officials alike relied on the amended zoning language to define the width of the C-R District in South Bay.

While we waited for the map to be produced, we found in case law NY State's *only*

4. <https://www.youtube.com/watch?v=brfHSK4y-vg>

5. After downloading the audio file, hear Wm. Sharp in his own words at 1:08:02, at <https://wavefarm.org/archive/x14rqr>

6. <https://www.youtube.com/watch?v=TJHq9K63DS0>

definition for the word "causeway," which is a synonym for "road." Neither word refers to the earthwork which provides their means of elevation over wet surroundings. (See *Ocean Causeway of Lawrence v. Gilbert*, Sup. Ct. 54 App. Div. 118, which remains current.) Today, the South Bay earthwork is generally referred to as "the berm."

We also recalled the discussions we attended, and the context out of which the C-R District was born. The most important of these are still available online as audio files:

1. The July 12, 2010 Meeting of the City of Hudson Common Council.⁷
2. The September 26, 2011, a Special Meeting of the City of Hudson Common Council.⁸

It was at the latter meeting that the Common Council expressed a particular concern about the potential for an intensification of industrial operations. Because the City had been down this road before, what recourse did we have to regulate runaway growth?

Addressing these concerns, attorney Sharp (NYSDOS) explained that the C-R District was contrived to place a *physical* constraint on expansion, thus avoiding the litigation which would surely follow any direct attempt to regulate truck- and business-volume.

Although changes of use are often subject to regulation, proving that an intensification of a use is tantamount to a change of that use is equally tricky. As an alternative, Sharp explained the advantage of the proposed zoning which set limits instead on the structural uses of the operation. If the City is barred from limiting the number of trucks used by the business, then the proposed District may still limit the way they reach their destination.

Moreover, the structural use in question – the landowner's three-month old road – would be a temporary use, as explained in the SEQR Findings Statement for the amended Zoning Code (the landowner's aims notwithstanding). One purpose of the new C-R District was to allow the continued use of the industrial "private causeway or a private road" (synonyms!), but only as a "temporary alternative" in a two-phased plan.⁹

The temporary nature of this single use as accommodated by the eccentric dimensions of the Zoning District was further underscored by the adopted provision that all "dock operations" would henceforth continue as nonconforming uses. The City was always committed to the "gradual elimination of nonconforming uses" (§325-1.A(5)), and the new road was deemed nonconforming in the C-R District (see footnote #4 above).

7. http://archive.free103point9.org/2010/07/HudsonCommonCouncilmtg_071310.mp3

8. <https://wavefarm.org/archive/x14rqr>

9. [See page 11:] http://www.cityofhudson.org/document_center/Waterfront/821.pdf

1. The Width of the District is the Width of the Road

For those of us who attended every public discussion, submitted numerous comments in defense of the South Bay ecosystem, and wholly supported the initial plan to re-zone the bay as a continuous Recreational Conservation District,¹⁰ the following rhetorical questions follow from our intimate understanding of the advantages and flaws of the eventual and eccentrically-shaped C-R District.

- How would an expanded C-R District through the South Bay advance the City's stated purpose to protect the habitat “to the maximum extent practicable”?
- Why would the City only accept the road as a "temporary" use, and one slated for eventual elimination as a nonconforming use, while in the same action provide an ample district into which the road/use may expand?
- Why would the Common Council provide an extra-wide Zoning District for the three-month-old road, and at the same time discuss and explore every option to limit the owner's potential expansion?

It is more reasonable to conclude that the dimensions of the use itself sufficiently dictated the dimensions of the Zoning District. The C-R District was shaped exclusively for the temporary use of the particular “dock operation” in question.

2. Road-building in the R-C District

Referring to the former landowner's 2009 site plan, the width of the “road” at that time – in places a two-rutted track – was 16 feet. Despite the proper road which replaced the track in June 2011, and the incremental expansions of the successive owners, today the road has largely maintained its original width west of Rte. 9-G.

In 2010, the NYS Department of Transportation approved the owner's crossing plans where the private road meets State Rte. 9-G. Since then, however, NYSDOT required a perpendicular crossing at Rte. 9-G.

Today, even if the dimensions of the C-R District were expanded to 60 feet in width, as the new landowner prefers (though elsewhere they seem to argue for 120 feet in width; see below, pp. 10,11), a perpendicular crossing would force any road proposal to enter

10. “LWRP [South Bay] Task Force” comments on the 2009 DGEIS 3/14/10:
http://www.cityofhudson.org/document_center/Waterfront/559.pdf

the R-C District as the road approaches Rte. 9-G. To appreciate this fact, please refer to the owner's 2017 Site Plan at p. 8, and measure south from the edge of the existing road's "old gate." The north end of the gate guarding the existing road is arguably within the intended C-R District (see Fig. 1 below).

Due to the circumstances introduced by NYSDOT, even if the C-R District were 60 feet in width the current landowner's proposal will require a variance in the R-C District.

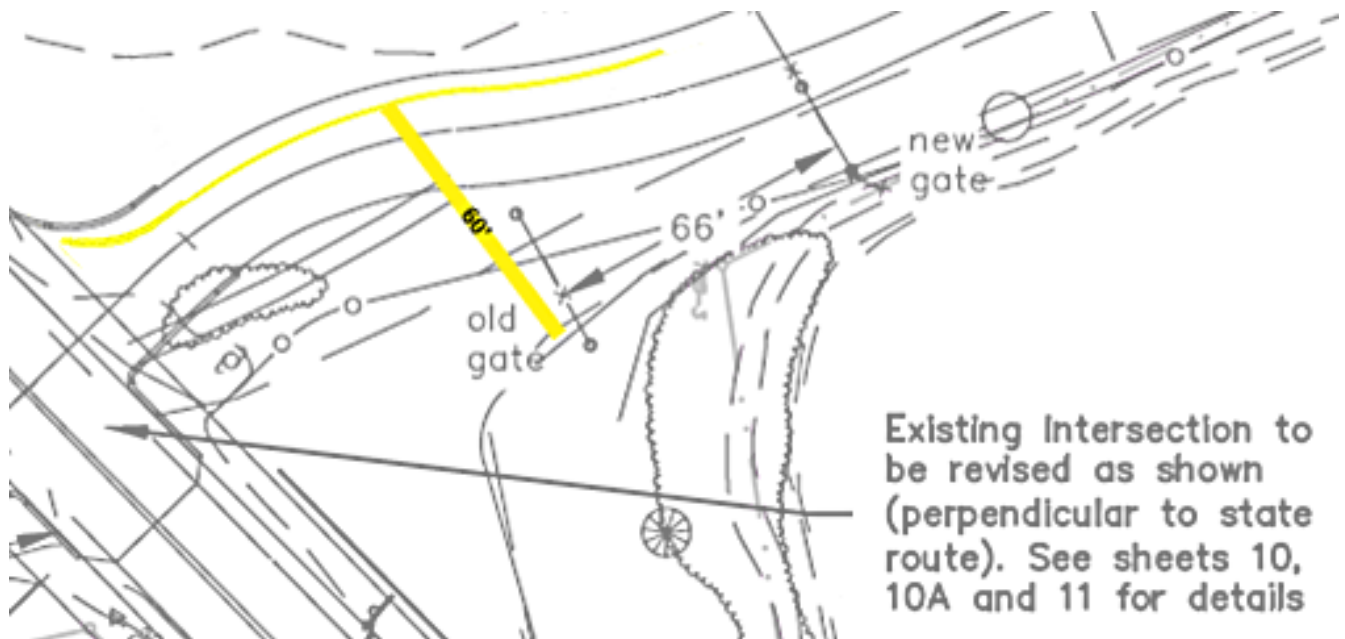


Fig. 1. The landowner's current site plan showing modifications to meet NYSDOT requirements.

3. City of Hudson Zoning Map

When the City's official Zoning Map was finally published in 2013, it was little improved over the primitive map found in the City's draft waterfront program.

To our utter dismay, the C-R District's width through the South Bay was everywhere wider than the actual road, and despite the Common Council's deliberate, stated intention to constrain the road/use along with the other "dock operations."

To take the Zoning Map literally (see attachment #2), by superimposing its crude outlines on a measurable GoogleEarth satellite photo the width of the C-R District on the Zoning Map ranges between 50 feet (nearest to the CSX tracks) to 42 feet (nearest to

Rte 9-G). Along most of its length, however, the Zoning Map presents a C-R District approximately 48 feet in width.

In our view, this was not what the legislation intended. There was no indication either before or after the zoning was amended that the landowner would enjoy a right to expand its road short of acquiring a variance. Indeed, in the context of the assured habitat protections (“to the maximum extent practicable”) and the road's intentionally “temporary” use, every discussion of the Common Council argued against such an interpretation as can be heard in the online audios cited above (c.f. footnotes 7 and 8).

We the undersigned always understood that any proposal to expand the private road *beyond its width when the zoning was amended* would ultimately be a matter for the ZBA to adjudicate.

4. Two-way use of the existing road was a design feature

The circumstances would be very different, and so would the landowner's arguments, if the two-way use of the existing one-lane road were actually prohibited in the Code.

In its 2017 Project Narrative, the new landowner who bought into the zoning in 2014 totally misunderstood the City's strategy from 2011.

By insisting that it had a "right to use and develop the haul road along the causeway [sic] as a two-way road,” and by pointing out the obvious that the “road is specifically zoned for two-way traffic to the dock,”¹¹ a strawman argument made a deliberate design feature appear as an obstacle to the company's alleged right to expand.

The *single-lane* private road was deliberately zoned for two-way use, but it doesn't follow that a new landowner may thereby develop a *two-lane* road.

The alleged "right to develop" is no more than the owner's natural bias against using the existing road in two directions of travel, whereas that exact use was the purposive meaning of the C-R District Zoning Code. Drafted nearly three years before the current owners purchased the property, they cannot claim a “hardship” on account of the Code.

While multiple requests submitted to different levels of NYSDOT have gone unanswered in our effort to learn the status of trucks entering and exiting Rte. 9-G from

11. 3.11 “Zoning,” p. 13

the private road, in fact successive landowners have always used their one-lane road in two directions of travel. This includes the present owners, too, engaging in a use intended in the drafting of the C-R District.

This point is apparent in the language of the C-R District, and also in the City's 2011 Generic Environmental Impact Statement and GEIS Findings Statement both of which studied the road and its several alternatives in depth.

Note that the terms "ingress" and "egress" were intentionally inserted at §325-17.1.D(2):

"A private causeway or private road that provides ingress to or egress from the property upon which a commercial dock operation is conducted ..."

More evident in the GEIS, it was the *existing* road which was to provide a two-way alternative to the Applicant's use of City streets. When the SEQR review for the zoning was completed in 2011, the sanctioned alternative remained unfinished between Routes 9-G in Hudson and 9 in Greenport. That is no longer the case, however, and as soon as the planned crossings are installed at the two State routes any and all obstacles to the landowner's full use of its private road will be entirely self-imposed. Indeed, an argument can be made that the landowner's only remaining obstacles are self-made.

As mentioned above, ingress and egress at the causeway is an ongoing practice which currently requires turning off of, and onto, Rte. 9-G (see footnote 6 above).

5. City-and-Town Boundary dispute

In Mayor Hamilton's request "that the ZBA issue a determination of the exact location of the boundaries between the (C-R) District and the (R-C) District," it is arguable that where the two districts together meet the municipal boundary with Greenport, the ZBA should seek to resolve conflicts there too.

Now or later, it's a matter for the ZBA alone to make a determination on the actual location of the municipal boundary in relation to both Zoning Districts, and to the landowner's private road.

In attachment #3, we analyze contradictions found in the landowner's Site Plan, and consider the benefits which accrue to the landowner by mistaking the municipal limit.

III. MAPPING BY P. PRENDERGAST FOR A. COLARUSSO & SON, INC.

Any effort to locate the boundaries of the C-R and R-C Districts can begin with the landowner's recent Site Plan. In August 2016 the project engineer claimed to have added the zoning boundaries in his latest revisions, as announced in a letter to the City of Hudson Planning Board on August 23, 2016 (found in the 2016 Colarusso Project Narrative).

However, even without this dubious claim the landmarks given in the Site Plan make for a serviceable, detailed, and scale guide to the City's South Bay.

The following section describes two Site Plan details from May and November 2016, each of which contains multiple registered layers in single documents available to users of Photoshop on request. Their large size would be prohibitive as attachments to this paper, but compressed excerpts from the files are presented below.

Absolutely no information has been added to the Site Plan maps, although color enhancement is necessary for clarity's sake, and a wide range of measurements extrapolated from the plan's 24-foot measure and subsequently corroborated are presented as a separate layer.

We submit that there's no other way to fully comprehend the landowner's claims and elisions in the otherwise useful maps than to compare their precise details in Photoshop overlays.

To consider only the Applicant's property within the City's Zoning Districts (pp. 8 & 9 of the Site Plan), we began by interrogating the marks and symbols from one page to the next looking for inconsistencies. In fact, the pages do not agree.

The myriad challenges to understanding this map are made more difficult by the project engineer's failure to update the plan's "revisions" panels.

In the following discussion, the Colarusso Site Plan is oriented with west to the right, the top of the map to the south, north at bottom, and so on.

1. Inconsistencies in the landowner's Site Plan

Information given in the landowner's May 2016 Site Plan is necessary for locating new and unidentified information in the Site Plan's subsequent revisions.

For example, in May a continuous line punctuated by small circles was identified as a "temporary silt fence," beginning near the west entrance of the causeway on Site Plan page 9. In the November Site Plan, this same line is also identified as a "temporary silt fence," though now it bears large, interspersed circles (see Fig. 2 below, p. 11).

Again in November, this line with large circles continues on page 8 where it is no longer identified, while *a different line* on page 8 bearing small circles is identified as the "temporary silt fence."

Complimenting and paralleling the large-circled line, and lying to the south of the road, a new line appears in the November Site Plan bearing the same large circles identified as a "silt fence" on page 9. However, the line is not identified on page 8.

Also introduced in November, a pair of outer lines bearing smaller circles is seen running parallel to the causeway. Neither of these two small-circled lines appeared in the May 2016 Site Plan, prior to when the project engineer claimed to have added the Zoning Districts (see Fig. 2 below).

The northern line of the pair (at bottom) bears the smaller circles discussed earlier as the "temporary silt fence," on Site Plan page 8. The corresponding line on p. 9 is not identified, nor is its southern counterpart. On p. 9, this pair of small-circled lines flares outwards, creating a funnel-shape at the terminus where they meet the CSX rail lines.

Because neither pair of circled lines are properly identified, it's possible that either represents the Applicant's assertion that the "zoning districts are now shown on the [Site Plan] map" (quoted in context on the next page).

Because a wider C-R District benefits the Applicant, it's also possible that both sets of lines represent more and less favorable boundary possibilities for the Applicant.

To the east of Rte. 9-G (Site Plan p. 8), only one of the circled lines extends from its counterpart on the west causeway. This line soon trails off, while no other district boundaries are even possible east of Rte. 9-G, despite the landowner's claim that the "zoning districts are now shown."

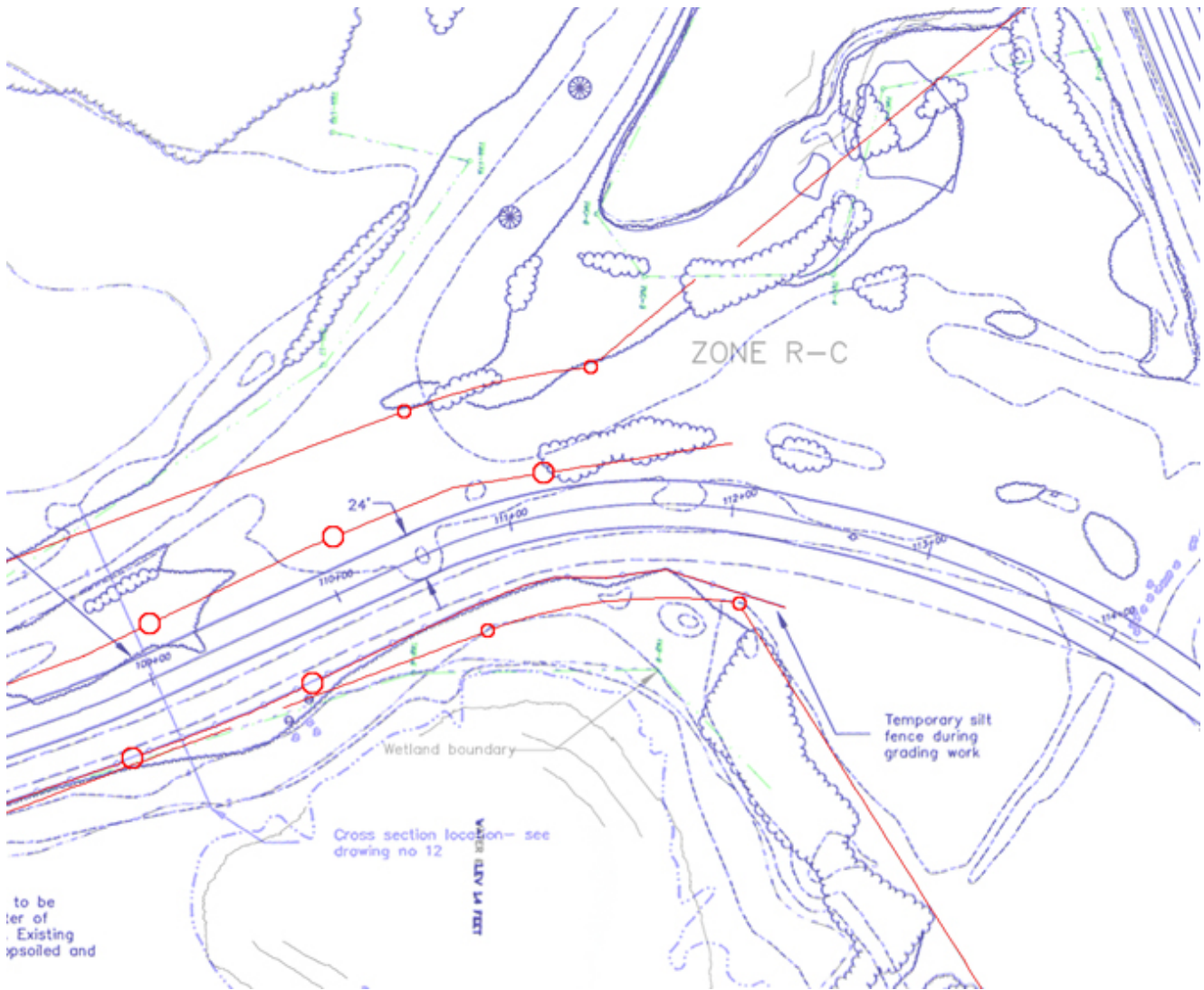


Fig. 2. Color-enhanced Site Plan (2017) depicting a confusing array of lines ostensibly meant to define respective South Bay Zoning Districts (see P. Prendergast to City Planning Board, 8/23/16.

2. Site Plan Measurements

Using the 24-foot road measurement provided with the Site Plan (pp. 8, 9), greater measurements were extrapolated and then confirmed using GoogleEarth. The distance between the pair of large-circled lines is 60 feet.

The distance between the smaller-circled lines is 120 feet.

One of these line pairings ostensibly represents the Zoning District boundaries as depicted by the project engineer, but which one?

In a letter dated August 23, 2016, and reproduced in the Applicant's December 2016 "Project Narrative," project engineer Patrick Prendergast informed the City's Planning Board Chairman about recent changes to the Site Plan:

"The zoning districts are now shown on the map. The causeway is zoned C-R (Core Riverfront) and the remainder of the area is zoned R-C (Recreational Conservation District). The C-R zone is not dimensioned, but I was informed by the publishers of the map, BFJ Planning, that it is 'representational' of the causeway. The causeway averages about 120 feet wide; at the culvert, it narrows to 85 feet wide. ... The overall survey map was prepared by Col-East via flyover. Map details and boundaries were by Jeff Plass, PLS."

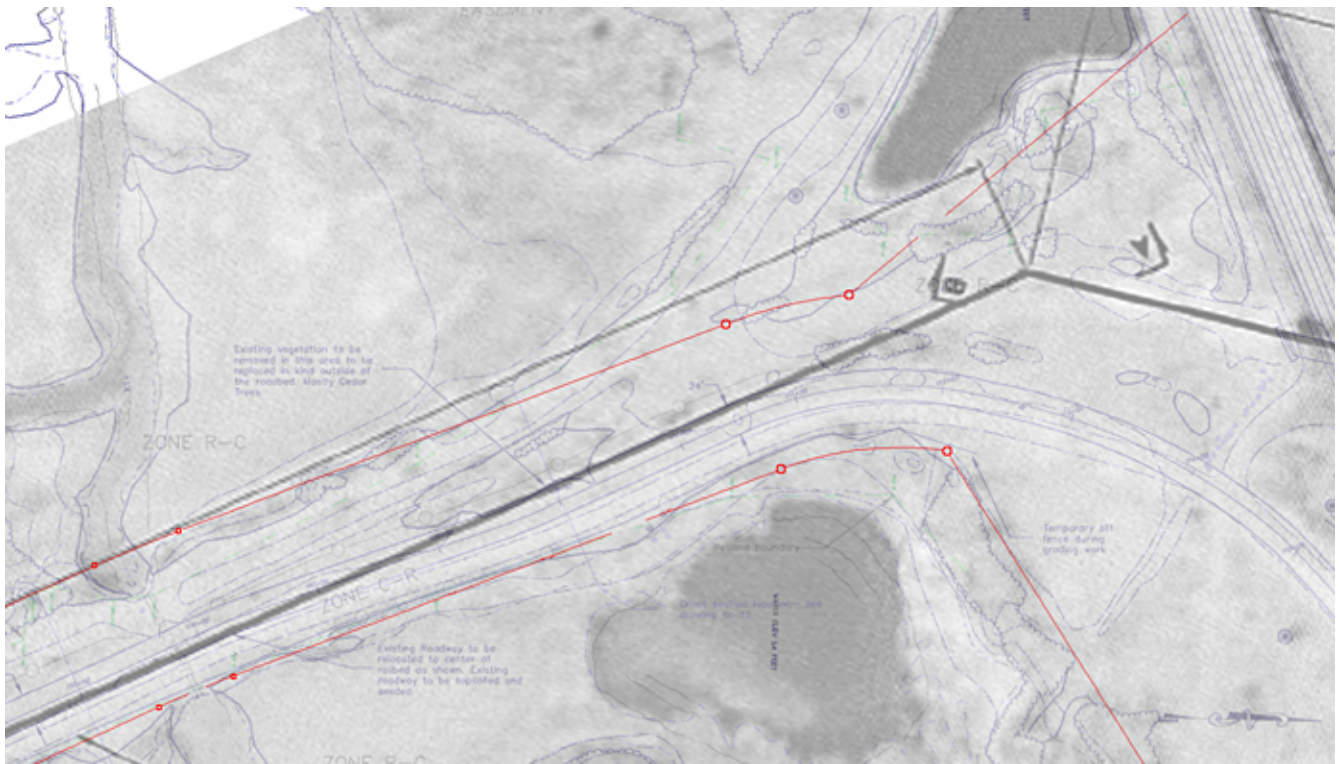
This was the same planning firm which had produced the erroneous Zoning Map (Barton & Loguidice, 11/10/17 to ZBA).

Of the two sets of potential candidates for the district boundaries reportedly added to the Site Plan in August 2016, both are identified as "Temporary silt fence during grading work" on pages nine and eight respectively.

3. Conveyor System plan from 2007

As shown in Fig. 2 (below, p. 13), the 2007 conveyor plan by a previous owner, St. Lawrence Cement, presents that project's parameters as coinciding with the current Site Plan's wider pair of unidentified lines (overlaid in red).

Where the current landowner's newer set of lines is roughly parallel, running east towards Rte 9-G, their average width apart is 120 feet on the ground.



Thank you.

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