



Via Email

March 24, 2021

Town of Hudson Planning Board
Brian Groth, Town Planner
bgroth@hudsonnh.gov
planning@hudsonnh.gov

RE: Hudson Logistics Center: Site Plan SP# 04-20, Conditional Use Permit CU# 02-20, Lot Line Relocation SB# 01-21

Dear Chair Malley and Members of the Planning Board,

As you know, I represent more than fifty households in Hudson who continue to oppose the applications for Site Plan, Conditional Use Permit, and Lot Line Relocation (“Applications”) submitted by Hillwood Enterprises, L.P. (“Applicant”) to redevelop the golf course, property identified as Town Tax Map 234, Lot 5 and Tax Map 239, Lot 1 (“Property”), into the proposed Hudson Logistics Center (“Proposed Project”). Please make this letter and its enclosure a part of your record in these matters.

I enclose a second letter from Marc Jacobs, CWS, CSS, CPESC. Since Mr. Jacob’s first letter, the Applicant has revised the Proposed Project. Accordingly, Mr. Jacob’s second letter addresses the Proposed Project as the Applicant has now revised it.

In Mr. Jacob’s expert opinion, the Proposed Project does not satisfy legal requirements with respect to impacts to wetlands and wetland buffers, especially with respect to the requirement to avoid and minimize such impacts.

Mr. Jacob’s primary point is that most wetland impacts arise because of the size of the proposed buildings, not because of the configuration of the cul-de-sac or accessways. The configuration of the cul-de-sac and accessways are driven almost exclusively by the size of the buildings. Accordingly, the Applicant’s choice to create such large buildings is the ultimate driver of much of the impacts, not the purpose of the project.

Thank you in advance for your consideration of Mr. Jacob’s opinion.

Very truly yours,

Amy Manzelli, Esq.
Licensed in New Hampshire
(603) 225-2585
manzelli@nhlandlaw.com

Cc: Clients



Via Email to manzelli@nhlandlaw.com

March 24, 2021

Amy Manzelli, Esq.
BCM Environmental & Land Law, PLLC
3 Maple Street
Concord, NH 03301

RE: Hudson Logistics Center
Assessors Map 234 / Lots 5, 34 & 35 and Map 239 / Lot 1
Lowell and Steele Roads
Hudson, NH

Dear Ms. Manzelli,

At your request, I have reviewed the materials submitted in support of the Conditional Use Permit (CUP), and Site Plan and state Wetlands applications of Hillwood Enterprises, L.P., for the above-referenced project since my letter of November 13, 2020 and offer the following information for your consideration in determining compliance with applicable local, state and federal laws and regulations. For the purposes of this letter, the terms applicant and applicant's representative(s) are used interchangeably.

My review primarily included the following documents:

- Letter prepared by Justin L. Pasay of Donahue, Tucker & Ciandella, PLLC and John T. Smolak, of Smolak & Vaughan, dated January 18, 2021
- Letter prepared by Brendan Quigley of Gove Environmental Services, Inc. dated January 18, 2021
- Site plans prepared by Langan Engineering, dated February 24, 2021
- Comments and documents previously identified in my letter dated November 13, 2020 are also included herein by reference.

Executive Summary

In the remarks that follow I will discuss how the project design submitted by the applicant, which proposes impacts to wetlands and surface waters, does not comport with local, state and federal laws regulating impacts to these important natural resources, especially rules regarding avoidance and minimization. I will review how the wetland impacts associated with the project constitute lot development impacts and not access impacts. I will explain how the applicant is confounding the proposed project footprint and the purported project purpose. Whereas there is virtually no difference between the Donahue, Tucker & Ciandella, PLLC letter and the Gove Environmental Services, Inc. letter, I will hereafter refer to them both as the “DTC letter”.

Site Plans

My review of the current site plans for the project indicate that discretionary wetland impacts associated with both “site access” and lot development remain. The proposed cul-de-sac, Green Meadow Drive, has been relocated slightly since the original filing but not in recent iterations of the site plans and does not meet the N.H. Department of Environmental Services (NHDES) avoidance and minimization rule, Env-Wt 313.03. I will discuss this “access impact” in more detail below.

A review of the current site plans indicates that five (5) areas of discretionary direct wetland impact remain for lot development. These are indicated on the plans as areas 2, 3, 5, 7 and 8 and cannot be defended with respect to the NHDES avoidance and minimization rule, Env-Wt 313.03. The project proponents are describing these discretionary lot development impacts as access impacts, which I will discuss in more detail below.

Additionally, two other discretionary direct wetland impact areas for lot development previously identified as impact areas 4 and 6 are no longer identified as impact areas on the current version of the site plans. I understand that the Town of Hudson has established that these areas are not jurisdictional pursuant to the Wetland Conservation Overlay Zone. I respectfully disagree with this finding for the reasons I describe in my letter on November 13, 2020 however, I note that these impact areas remain jurisdictional under state law and regulations as described in my letter of November 13, 2020.

January 18, 2020 letter from Donahue, Tucker and Ciandella, PLLC

In the executive summary and elsewhere, the letter from Donahue, Tucker and Ciandella, PLLC (“the DTC letter”) claims that “there are no alternate layouts that would further reduce impacts...in light of the project purpose” and “All of the District impacts are Access Impacts necessitated by the characteristics of the Property...”. However, elsewhere in the DTC letter it describes District impacts which may be interpreted as being associated with lot development.

None of the impacts which are discussed in the DTC letter or in my November 13, 2020 letter are access impacts nor are they all necessitated by the characteristics of the property. The proposed terminus of the cul-de-sac, Green Meadow Drive, is discretionary. While the general route taken by Green Meadow Drive between Lowell Drive and “the large contiguous area of uplands” generally minimizes direct wetland impacts associated with access, the cul-de-sac could be relocated further west to avoid wetland impacts. As such, the impacts associated with the Green Meadow Drive cul-de-sac can no longer be considered access impacts and must be considered impact for lot development. The avoidance and minimization standards for access impacts are viewed differently than those for lot development. At the point where Green Meadow Drive crosses the wetland at impact area ‘H’, the length of the cul-de-sac ceases to be dictated by the “characteristics of the property” or the configuration of the wetlands and is dictated by

other factors which include the expansive size of the proposed buildings, which is entirely discretionary and which we will discuss in greater detail below.

Additionally, other impacts being described as access impacts by the DTC letter are also associated with lot development. The project design camouflages direct wetland impacts 2,3,5,7 and 8 as impacts for access by associating them with the relocation of Steele Road. The DTC letter conflates the relocation of Steele Road and the associated impacts as being necessitated by the relocation when, in reality, the current relocation of Steele Road and the associated impacts are necessitated by the expansive size of the proposed buildings, which are discretionary. The DTC letter describes how the relocation of Steele Road will permit future access to the Merrimack River for the Hudson Fire Department for fire safety and other public purposes yet to be determined. Fire safety is a worthy objective, and may be considered indirectly as part of the project purpose, but this underlies the fact that the location of Steele Road and the associated impacts are being driven by the expansive size of the proposed buildings and therefore constitute lot development impacts, not access impacts. However, these wetland impacts, regardless of whether they are classified as being for access or lot development, represent a distraction from the actual issue, which is, how do the Hudson Conservation Commission, Hudson Planning Board and the New Hampshire Wetlands Bureau confirm that the buildings need to be as large as currently proposed, so that they can then confirm that the avoidance and minimization standard is being properly applied?

The DTC letter describes the project purpose, on page 2, as follows: “the Project purpose is to utilize the large contiguous area of uplands on the central and western portions of the site to accommodate the HLC, which will consist of approximately 2.6 million square feet of fulfillment center....” The letter goes on to say that all three proposed buildings constitute core components of the HLC proposal which collectively make the project feasible. The letter repeatedly emphasizes the project purpose as the justification for proposed wetland impacts. However, the letter mistakenly conflates the size of the proposed buildings with the project purpose. If the size of buildings was a suitable criterion for justifying impacts, project proponents would consistently overstate their project needs and building sizes in order to justify otherwise discretionary wetland impacts. As stated in the DTC letter, “the project purpose is to “utilize the large contiguous area of uplands” and this project purpose will still be realized if the buildings are reconfigured or the sizes reduced, and the cul-de-sac is adjusted so as to eliminate the discretionary impacts currently being contemplated by the application.

The DTC letter devotes several pages to the discussion regarding the need for the three types of facilities to be housed by the various buildings, as well as the case for the size of the buildings, especially Building C. The letter states on page 1 that “there are no alternate layouts that would further reduce impacts” and on page 2 that “there is very little flexibility for further modification to the design”. The letter repeatedly states in various ways that “avoidance and minimization of (wetland) impacts have been carried out to the maximum extent practicable”. The letter states that “all of the buildings and site improvements have been designed to minimize footprint to the greatest extent possible while still fulfilling the project purpose.”

The letter discusses at length why the buildings must be the sizes that are being proposed. The applicants are asking those that are reviewing the application to accept as fact that no changes can be made to the buildings. Has this information been independently reviewed? The DTC letter invokes “industry standards”, many of which, according to the letter, are dictated by Amazon, the end user, as justification for the building sizes. The DTC letter talks about a “global design for the site”. Global design hardly sounds like a project design that has thoughtfully considered the inherent constraints of this particular site. The discussion in the DTC letter suggests a predetermined design template which requires that sites be manipulated as needed to accommodate the template.

The DTC letter states that the HLC will fill a critical need in the greater New England market for logistics centers. Is this and other inflexible design parameters to suggest that this will be the last logistics center

to be built in northern New England or that this center will accommodate the needs of the region in perpetuity, thus justifying wetland impacts for lot development? If not, then other logistics centers built in the future will accommodate the needs of Amazon if buildings designed to work more in harmony with this particular site do not meet Amazon's typical footprint.

On Page 6, when rationalizing the sizes of the proposed buildings, the DTC letter references a document, Rules of Thumb for Distribution/Warehouse Facility Design, Second Edition, 2020, published by NAIOP, the Commercial Real Estate Development Association. The title of the document, "Rules of Thumb..." is noteworthy. In the introduction, the document indicates that Chapter 1 discusses site-planning aspects. The introduction mentions balancing building functionality desired by operators with the **return on investment** desired by real estate developers several times. A review of the document indicates that Chapter 1 does not discuss limitations on development associated with characteristics of land under consideration. This chapter does include the following paragraph however: "One primary objective is in **maximizing coverage**, or the amount of rentable area yielded in a site plan. But at the same time, **providing functionality** for the tenant is also a priority. **Municipal regulations**, such as setbacks, landscape percentages and parking ratios, **must be followed.**" I note that the document, although published in 2020, never references the term cross-dock logistics (Building C) even as it discusses e-commerce. The document focuses on interior design characteristics such as "column grids", "clear height", several types of "racking systems" as well as "aisle widths", all of which ostensibly influence the size and configurations of buildings. Since this document has been referenced by the applicants and these design characteristics are influencing the size of the buildings, which are then being used to justify discretionary wetland impacts, have these building design parameters been peer reviewed by qualified individuals in the context of the project purpose as it relates to avoidance and minimization? Have these design parameters been peer reviewed to confirm that statements made in the DTC letter that "there is very little flexibility for further modification to the design" or that "Building C is designed to meet only the bare minimum dimensional standards" are accurate?

The DTC letter claims that no additional changes can be made to the project to comply with the District or with the state wetland law or regulations. This claim has been made repeatedly by the applicant's representatives during the application review process yet numerous changes, albeit mostly minor, have been made to the project during the intervening months since the original application was filed with the town. What is different about the current design proposal that conclusively demonstrates that no additional changes can be made? After repeatedly making the claim that the project cannot support any design changes, how are project reviewers to believe that all design alternatives have now been exhausted?

The DTC letter states on page 4 that, referring to Buildings A and B, "even minor changes to those designs and configurations could compromise the overall design and operation". Making minor changes that could compromise the design hardly sounds conclusive. The applicant has made changes to the project since the application was originally filed and still is not clear whether the buildings will meet their desired needs.

Regarding Building C, the January 18, 2021 letter refers to this as a **multi-tenant building and makes other references to tenants** (emphasis added). This strongly implies that the "minimum" building footprint being proposed is more about maximizing the number of tenants than it is about the minimum footprint needed to make the building or project feasible. How many tenants is Building C designed for?

In the final analysis, whether one feels that the project has avoided and minimized wetland impacts to the maximum extent practicable and therefore complied with the District and state regulations, comes down to whether one accepts the premise presented by the applicant that the project purpose, "to utilize the large contiguous area of uplands", and the building sizes, are interchangeable or, as the DTC letter states

more transparently on page 8, that “the **size of the buildings**, and the impervious area of their corresponding site improvements, **cannot be further reduced without eliminating the project purpose**”. While I respectfully reject that premise as misconstruing the intent of the law and regulations, if that premise is accepted by the Town of Hudson or the NH Wetlands Bureau, the justification for the “minimum” building sizes needs to be thoroughly and independently reviewed by qualified personnel to ascertain whether the project purpose is being eliminated, or even adversely impacted, if the proposed building sizes are further reduced or reconfigured in order to properly avoid and minimize wetland impacts as required under the law and regulations.

Starting on page 12, the DTC letter provides four alternative cul-de-sac designs with a list of reasons as to why none of the alternatives can work. Unfortunately, as described above, it is the proposed building sizes that are driving the location of all the cul-de-sac alternatives, not the other way around, so it not surprising that none of the alternatives is feasible.

The DTC letter, on page 16, attempts to justify avoidable impacts with the following statements: “The proposed Lot Development will not significantly interfere with the wetland functions and values of the wetland involved. At Impact Area 2, grading will impact the tip of a narrow finger of wetland and associated forested buffer extending from the main body of the wetland. The functions and values associated with this wetland are overwhelmingly supported in the main body of the wetland and its wooded buffer will otherwise remain intact in this area.” The DTC letter appears to promote these thoughts as some form of impact minimization, which they are most certainly not. Wetland ecosystems are dynamic systems and may not provide functions equally across the entirety of the habitat or wetland ecotype. However, if the logic utilized by the DTC letter were applied to impact analysis, there would be no wetland buffer zones and the margins of most wetlands would get filled and covered with impervious surfaces, leaving only the main body of wetlands. It was this type of thinking that generally resulted in the adoption of buffer zones to wetlands in the first instance. The letter goes on to say that the proposed grading impact will be restored, replanted and allowed to naturalize. Filling a wetland and replanting the fill does not constitute wetland restoration and does not replace wetland functions.

On page 23, the DTC letter threatens that “If the buildings and other site elements were reconfigured in an attempt to avoid the proposed impacts, impacts would be incurred elsewhere and to more valuable wetlands associated with Limit Brook, The Merrimack River, or their associated buffers. Alternate layouts cannot be used to further reduce impacts at the site.” The applicant should be required to design and prepare drawings of the alternative layouts, similar to the four cul-de-sac alternatives previously presented, that would result in impacts to more valuable wetlands and, more importantly, present written arguments as to how and why impacts to more valuable wetlands should be permitted. The arguments for filling more valuable wetlands would be indefensible but would undoubtedly hinge on the false premise that the stated project purpose, “to utilize the large contiguous area of uplands”, cannot be fulfilled if the building sizes are reconfigured. The arguments would also undoubtedly continue to wrongly conflate the project purpose and the size of the buildings as being one and the same.

Also on page 23, the DTC letter states that “the proposed project was designed with the adjacent resources in mind with guidance from the *Best Management Practices for Avoidance and Minimization* manual prepared by the US Environmental Protection Agency and the NHDES. I have reviewed the manual, especially Chapter 4 regarding Commercial and Industrial Development, and note that the very first example of guidance for commercial and industrial projects under Site Layout and Design is to “Minimize wetland encroachment as much as possible by reducing the size or scope of the project.” I also note the graphic example which is provided on page 19 of the manual. The “before” example identifies a project with a direct wetland crossing to an otherwise buildable area and other encroachments. The “after” example identifies that the crossing and some structures have been removed and other

encroachments have been eased by the relocation of other structures. Refer to Figures 1 and 2 below.
(The figures are identified as 4.1a and 4.1b in the manual.)

Figure 1 (Before)

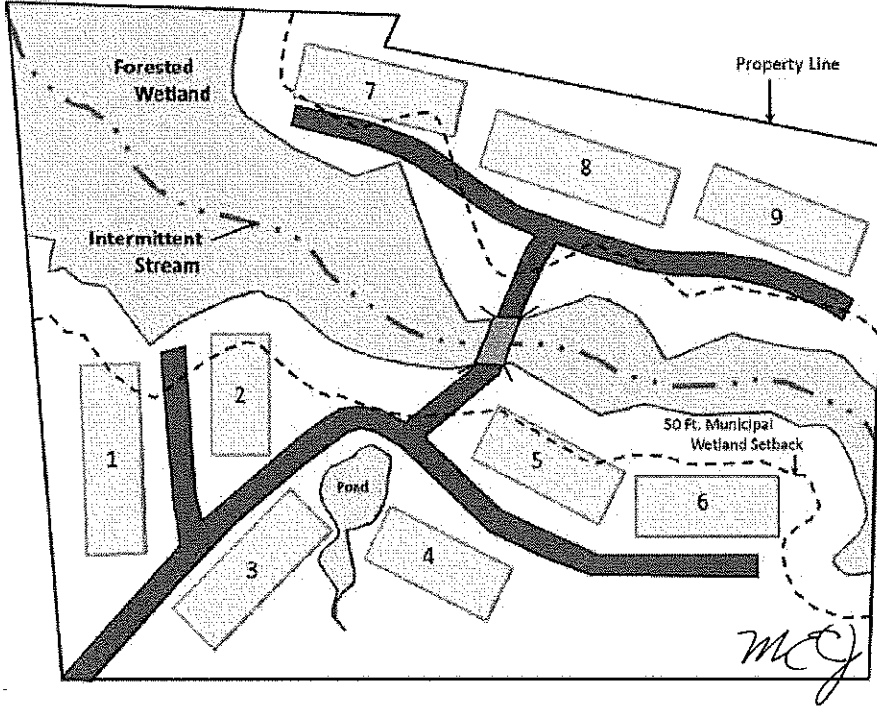
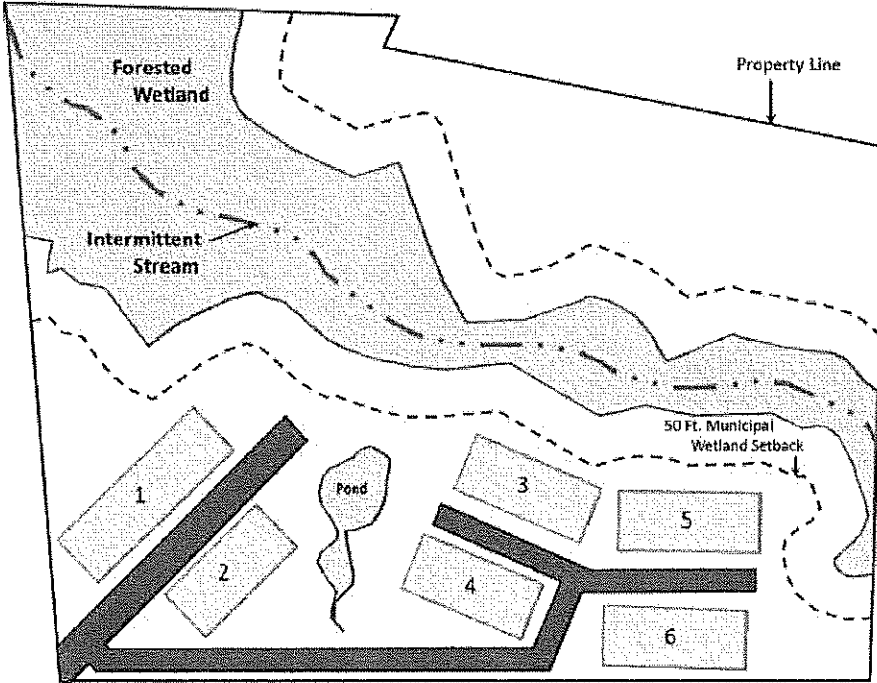


Figure 2 (After)



The examples in Figures 1 and 2 are oversimplified but note that, although the wetland crossing proposed in the before example involves access **to otherwise buildable property**, the crossing has been removed from the after example. Additionally, structures on the access side of the former crossing have been relocated. The important point here is that, although the wetland crossing proposed in the before example could be justified under the rules regulating wetland impacts, it is removed in the after example and other structures on the non-crossing side of the project are relocated. It is easier to justify a proposed crossing of wetlands to gain access to otherwise buildable land, yet the crossing and buildings have been removed, and buildings on the access side of the project have been relocated in the example. However, the Hudson Logistics Center proponents want us to believe that, because they have a pre-determined building footprint in mind, lot development impacts for their proposed project, which are being dictated by the expansive buildings being proposed, are somehow justified or that they meet the avoidance and minimization standard. This logic is especially difficult to comprehend when you consider that they have more than 300 acres of contiguous upland at their disposal.

On Page 24, the DTC letter erroneously states that, in my November 2020 letter, I repeatedly suggest that Hillwood is required to remove Building C from its proposal. I suggested, in one location, that removal **or reconfiguration** of the building, is an alternative that needs to be considered to bring the project into compliance with the zoning regulations and the state law and regulations. This suggestion was made based upon the admission by the applicant during the review process that they had no tenant for the building. The applicant was therefore asking for approval to fill wetlands based on speculative development.

The DTC letter goes on to repeatedly say how my insistence that the project comply with the avoidance and minimization rules would “obviate” the project purpose. Once again the applicant is tying the project purpose to the size of the buildings, which represents a distortion of the intent of the rules and implies that if three large buildings of a specific size cannot be constructed that the land is somehow being confiscated. The project purpose, “to utilize the large contiguous area of uplands”, can easily be fulfilled with two buildings or four buildings, or reconfigured buildings, or any number of development scenarios, all of which would require wetland impacts for access to an otherwise buildable area but not for lot development due to the size of the proposed buildings. The applicant therefore cannot demonstrate that the land is being expropriated, or constitutes a regulatory taking, if that is what is being implied by use of the term obviate.

A brief review of the term “regulatory taking” is warranted here. A regulatory taking is a situation in which a government regulation limits the uses of private property to such a degree that the regulation effectively deprives the property owners of any economically reasonable use or value of their property to such an extent that it deprives them of utility or value of that property, even though the regulation does not formally divest them of title to it.

A review of NHDDES avoidance and minimization rule and the term “practicable” is also warranted here. The avoidance and minimization rule, Env-Wt 313.03, states that the department **shall not** approve **any** alteration of **any** jurisdictional area unless the applicant demonstrates that the potential impacts have been avoided to the maximum extent practicable. (Note that the rule does not mention the function and value of the jurisdictional area proposed for impact. Note also that the rule says potential impacts and not just anticipated and direct impacts.) Practicable, as it appears in Env-Wt 313.03, means “available and capable of being done in light of the **overall** project purposes”. What the definition does not say is important. The definition of practicable does not say “in light of explicit project purposes”, such as precise building sizes. Therefore, linking precise building sizes, as the applicant is attempting to do, to overall project purposes, is inappropriate.

Amy Manzelli, Esq.
Hudson Logistics Center
March 24, 2021

I have demonstrated how the project design submitted by the applicant, which proposes impacts to wetlands and surface waters which are jurisdictional, does not comport with local, state and federal laws regulating impacts, especially avoidance and minimization. I have described how the wetland impacts associated with the project constitute lot development impacts and not access impacts. Finally, I have explained how the applicant is confounding the proposed project footprint and the purported project purpose and cannot demonstrate compliance with the avoidance and minimization rule. For these reasons the NHDES and the Hudson Planning Board must deny the Hudson Logistics Center wetland and CUP applications.

Please do not hesitate to contact me with any questions regarding the information above.

Sincerely,

Marc Jacobs

