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July 27, 2022

Zoning Board of Appeals  
Town of Penfield  
3100 Atlantic Avenue  
Penfield, NY 14526

Re: Appeal of Determination of the Authorized Official- PathStone MUD project  
**LETTER OF INTENT**

Dear Board Members:

This office represents PathStone Development Corporation in connection with its proposed development of property in the Town of Penfield Mixed Use District (MUD). PathStone has been in the approval process since the Spring of 2021. This letter is submitted to appeal a recent Determination of the Authorized Official (the "Determination") generated with respect to the PathStone project, and to request that the Zoning Board of Appeals issue a favorable determination recognizing the inclusion of the proposed dog park, hard-court flex area, and pedestrian spine as contributing to the 20% non-residential space listed in Table 6.1 of the MUD Manual.

We are in receipt of the Determination, recently provided in connection with the PathStone project, which states that "...the Town determines that...public space, open space, and active or passive recreation space ....are not included among the permitted commercial uses or conditionally permitted uses. Consequently, they cannot be classified as principal uses for purposes of satisfying the minimum percentage of non-residential uses set forth in Table 6.1 of the Manual for Zone A...."

The PathStone project includes a dog park, hard-court flex area, and a pedestrian spine (being the areas addressed in question in the Determination). While the 5 page Determination cites and "reads into" a wide variety of Code and MUD manual provisions, the Determination is based on inferences and loose interpretations of those Code and MUD manual sections—not on any clear or definite language that supports the Determination. Rather than "getting caught up in the weeds," we will focus on the clear language in the Code and Manual, and applicable law.

**COANNED**



Any Code interpretation must be made in compliance with applicable law. The law governing interpretation of Codes is well settled. The general rule is that "[T]he plain meaning of the statutory phrasing must be honored by the agency, and by the courts." *Vink v. N.Y. State Div. of Hous. & Cmty. Renewal*, 285 A.D.2d 203, 209 (1<sup>st</sup> Dept. 2001). In the event of an ambiguity, "[a]ny ambiguity in the language used in ... (zoning) regulations must be resolved in favor of the property owner." *DeTroia v. Schweitzer* 87 N. Y. 2d 338 at 342, 342-43 (1996).

Starting with Section 5.12(E) of the Code, the Zoning Code lists the permitted uses in the MUD. Section (a) lists permitted residential uses and section (b) provides "Permitted commercial uses shall include the following:...[20] Civic uses, such as churches, schools, community centers, and other public-oriented uses." The "plain meaning" of the language includes the proposed dog park, hard-court flex area, and pedestrian spine—these are destinations for the public to use and gather—they are civic public oriented uses. The Code does not provide a definition of the use. The inclusion of the term "other public oriented uses" as a permitted use is unqualified. Reading the plain language in the Code, as required by applicable law, the uses in question are clearly permitted uses.

Even if the term "civic ...other public-oriented uses" were to be deemed ambiguous, the law applicable to Code interpretation requires that the Code be construed in favor of the property owner and against the municipality. "Since zoning regulations are in derogation of the common law, they must be strictly construed against the municipality which has enacted and seeks to enforce them." *Allen v. Adami*, 39 N.Y.2d 275 (1976). As such, "any ambiguity in the language used in such regulations must be resolved in favor of the property owner." *Id.* For example, in *Incorporated Vil. Of Saltaire v. Feustel*, 40 A.D.3d 586 (2<sup>nd</sup> Dept. 2007), where the terms "ordinary" and "structural" were undefined and ambiguous, the terms were construed in favor of the property owner and the property owner's construction work was found not to have violated the zoning code. Furthermore, where "the ordinance restricts the manner in which real property may be used, its provisions are not to be extended by implication". *Incorporated Village of Old Field v. Hickey*, 225 A.D.2d 666, 669 (2<sup>nd</sup> Dept. 1996). The Town cannot simply read the language to be more restrictive than it actually is.

Table 6.1 is a Summary of District Requirements. The table lists the "uses" for Zone A with the following in one of the squares of the table:

"-Mix of commercial/retail. Office, and residential" followed by a separate statement-  
"-20% Minimum of non-residential" in the same square on the table.

As stated above, the "...other public-oriented uses" in question are commercial uses by definition, by virtue of being listed in item 20 of the list of permitted commercial uses in the Code.

The term "non-residential" used in Table 6.1 of the Manual is not used in the Code nor defined (nor is the manner of calculating the 20%). The "plain meaning" of "non-residential" is simply the uses that are not residential. Non-residential clearly includes but is not limited to



permitted commercial uses (such as "...other public-oriented uses" as proposed by the dog park, flex court and pedestrian spine uses). It is notable that the Code does not provide that uses are mutually exclusive—there is no reason that the use could not be both a civic publicly oriented use and public open space. The table notably also does not limit the 20% to principal uses. The fact that the Table 6.1 includes "20% Minimum non-residential" as a second and separate statement cannot be ignored or read more restrictively than its "plain meaning" as written. Furthermore, even if ambiguous, applicable case law requires the language to be read in favor of the property owner.

The Determination makes an unsubstantiated conclusory statement that "To the extent that the hard-court flex area, dog park and pedestrian spine could be considered accessory uses, they are incidental and subordinate to the permitted/principal residential uses. None of these proposed uses are incidental and subordinate to any proposed commercial permitted or conditionally permitted principal use." The public uses in question are proposed as open to the public, serving both the residential and commercial aspects of the project, as well as the broader community.

The Determination also creates its own double standard—including areas serving commercial uses that are closed off to the public in the commercial area, but counting the uses wide open to the public- including to the commercial uses- as residential.

The fact that this Determination was issued in June 2022 for a project initiated in early 2021 is also absurd. PathStone filed a Sketch Plan application as required by Code before filing any formal application. The Planning Board conducted its review of the Sketch Plan, vetting the project, and issuing its review letter dated May 13, 2021 stating the Board's support for the filing of a formal application and outlining the Board's concerns. Nowhere in its comments does the Board take issue with the amount of commercial or non-residential space, a major component of the project. The issue was only raised in recent months, resulting in the Determination.

The Town has notably been inconsistent and arbitrary in its review and decisions regarding the MUD projects it has reviewed over the past couple of years, and more specifically in its determination of what uses it recognizes as satisfying the "20% non-residential."

In a denial resolution for the Penfield Heights project in August 2021, the Planning Board stated that the Common House pool, gym, office and community space which were to be open to the public for a fee were considered to be residential uses and not deemed to be contributing to the non-residential minimum. In the subsequent approval of the Penfield Heights in July 2022, the Town decided to include some of these public areas as non-residential. The treatment of certain parking also changed.

The Penfield Square project was approved and is largely constructed. The approved plans indicate inclusion of 13.4% non-residential space including patios and terraces, counting spaces apparently not counted in either Penfield Heights or this project. The Town did not define the 20% non-residential in approving the project. Non-residential areas appear to have included a



residential community room and outdoor terrace, dining room serving residents and guests, and future commercial building and patio spaces. More recently, the Town made a determination which allowed an increase in the percentage of residential and reduction of non-residential by allowing additional residential units above the approved and subdivided retail beyond what was initially approved for the project.

PathStone has been diligent in following the Town Code and process required for development in the MUD, and has been responding to the comments from the Town boards, staff and consultants throughout the process. There is no reasonable explanation for the sudden decision to apply the Code more restrictively than written or more restrictively than applied to other similar recent development projects. The clear language in the Code cannot simply be ignored or reinterpreted to justify and achieve a desired interpretation for a particular project.

Based on the actual language in the Code and MUD Manual, and applicable law, we respectfully request that the Zoning Board of Appeals reject the Determination and make its own determination that the proposed dog park, flex-court and pedestrian spine qualify as non-residential uses for purposes of the "20% non-residential requirement".

We look forward to presenting this appeal to you and answering any questions at a meeting date to be determined. If you have any questions or require additional information, please do not hesitate to let us know.

Very truly yours,

WOODS OVIATT GILMAN, LLP

A handwritten signature in black ink that reads "Betsy D. Brugg".

Betsy D. Brugg

*Please direct responses to Rochester Office*

222-0048



# TOWN OF PENFIELD

3100 Atlantic Avenue, Penfield, NY 14526-9798

## Determination of the Authorized Official

### Issue/Question Raised

Can public open space be used to satisfy the non-residential requirements set forth in the Mixed Use Manual at Table 6.1?

### Background

Section 250-5.12 of the Town of Penfield Zoning Code outlines the requirements for the Mixed Use zoning district (“the Code”). These regulations apply to any new or modified development of properties occurring within that zoning district. The Code regulations for the Mixed Use District stipulate that the Mixed Use Development Manual (the “Manual”) provides both general guidance and site- and zone-specific bulk and use requirements.

As is pertinent to this analysis, Chapter 5 of the Manual provides general design guidelines and Chapter 6 provides specific guidelines and requirements for the Mixed Use District that was created along the Route 250 Corridor.<sup>1</sup> Section 6.1.5 of the Manual, entitled “Summary of District Requirements,” consists of Table 6.1, which provides a breakdown of requirements for the three “zones” of mixed use within the defined Mixed Use District. This review and determination are specific to the requirements of “Zone A.”

Section 6.1.1 of the Manual provides that Zone A is considered “High Density Core Mixed Use.” This area is intended to be “the most dense portions of the district with a mix of commercial/retail, office, civic, and compact residential uses.” Moreover, “[t]he percentage of residential is lowest compared to other uses within Zone A.” [Manual §6.1.1]. Section 6.1.2 of the Manual includes guidelines for the Route 250 Corridor. The first item includes a directive to design a mixed use development that “provides supporting commercial/retail.” [Manual §6.1.2(1)(d)].

### Differentiation between Mix of Uses and Public Open Space

The Code and Manual clearly distinguish and separately define “mix of uses” and “public space” as items that need to be addressed in proposed developments.

Section 250-5.12(D) of the Code establishes the need for a mix of uses and refers to Table 6.1 in the Manual. Section 250-5.12(L) of the Code outlines the requirements for public open space. Section 250-5.12(L)(1) defines public space:

<sup>1</sup> Although more than one Mixed Use District was originally contemplated, only the Route 250 Corridor was ultimately rezoned. Chapter 5 of the Manual, titled “Town of Penfield Planning Design Standards,” provide general guidance regarding the elements required for successful mixed use development projects, not site- or zone-specific design criteria. Site- and zone-specific design criteria is set forth in Chapter 6 of the Manual, including Table 6.1, outlines the specific elements and design requirements applicable for the new Mixed Use District established along the Route 250 corridor.

SCANNED



*In reference to open space, "public" refers to those areas within a mixed-use development that shall be available for use by local residents and the general public. These spaces may be owned, operated, and maintained by an association, organization, agency, or municipality. Public open space can take the form of active and passive recreation areas, public courtyards, town square, and other areas that are be used for public gatherings.*

Section 250-5.12(L)(1)(e) further clarifies that “private and semiprivate outdoor spaces (decks, patios, front, and back yards, etc.) are encouraged, but are not considered public open space.”

In the Manual, Section 5.1 provides an overview of the various design elements universally comprising mixed use development. “Mix of use” is listed as item (2) and “public space” is listed as item (8). These separate categories are defined by separate requirements and considerations as they relate to any proposed development. Similarly, the Code includes both mixture of uses and open space among the ten principles of mixed use development with which all projects in the district must comply. [See Code §250-5.12(C)(1)(a) (mixture of complementary land uses to create economic and social vitality) and (i) (open space preservation)].

Public Space is defined under subsection A of Section 5.1.8 of the Manual as “*designated community gathering place for active and passive recreation use by the general public.*”

It is also significant to this analysis that Table 6.1 treats mix of uses and public open spaces separately. The table includes a separate row for mixture of uses and another row for minimum public open spaces. There is also a separate row defining the types of mixed use required for each zone.

**Permitted and Conditionally Permitted Uses**

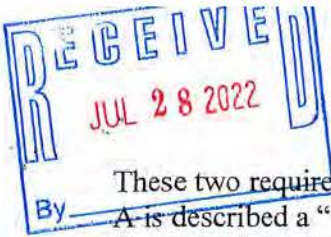
Section 250-5.12(E)(1) of the Code prescribes the permitted uses broken down into two subcategories, (a) residential uses, and (b) commercial uses. Section 250-5.12(F) prescribes the conditionally permitted uses, which are subject to a conditional use permit through the board of jurisdiction.

The primary requirements for “Permitted Uses per the Mixed Use Zoning Ordinance” in Zone A – Core Mixed Use is set forth in the Manual at Table 6.1. The relevant portion of the table is excerpted below:

Permitted Uses per Penfield Mixed Use Zoning Ordinance	- Mix of commercial/retail, Office, and residential - 20% Minimum of non-residential
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Table 6.1, under “Permitted Uses per Penfield Mixed Use Zoning Ordinance,” lists two requirements for permitted uses within Zone A:

1. Mix of commercial/retail, office, and residential; and
2. 20% minimum of non-residential (expressed in terms of *the minimum percentage of each use in square footage* per §250-5.12(D) of the Code).



These two requirements provide a context for what is intended within this zone. As noted above, Zone A is described a “Core Mixed Use” with a “mix of commercial/retail, office, and residential uses.” Section 6.1.1 of the Manual entitled “Development Zones and Types of Uses” describes Zone A as follows:

*Areas identified as Zone A are intended to be most dense portions of the district with a mix of commercial/retail, office, civic, and compact residential uses. The percentage of residential is lowest compared to other uses within Zone A.*

*Permitted Uses: Emphasis is on vertical mixed use, with commercial/retail/office on lower levels, and residential/office on upper levels.*

Table 6.1 also includes a row specifying the types of mixed uses permitted in each zone. For Zone A, Table 6.1 requires “[m]ixed use emphasizing vertical mixed use, with commercial/retail on lower floor and residential/office on upper floors.”

The foregoing demonstrates that the principal non-residential uses should be located within buildings and/or structures.

Public space, open space, and active or passive recreation do not satisfy the non-residential requirement of the Manual as these uses are neither permitted commercial uses under §250-5.12(E)(1)(b) nor conditionally permitted uses under §250-5.12(F) of the Code. Such uses also fail to achieve the goal of providing “supporting commercial/retail.” [Manual §6.1.2(1)(d)].

In examining the proposal to include *accessory* uses in the calculation of non-residential land use requirements in the district, the definitions and requirements for accessory uses provided in the Code and Manual must be reviewed and considered.

Section 250-5.12(G) of the Code states:

*Uses that are accessory to an integral part of and used solely by the permitted or conditionally permitted use and determined appropriate by the authorized official or the board having jurisdiction, as the case may be. Types of accessory uses include, but are not limited to, parks and recreation facilities, private and public active and passive recreational uses, and multiuse trail systems.*

Accessory use as defined within the terms defined section of the Code (§250-2.2), as:

*A use customarily incidental and subordinate to the principal use, where the principal use is lawful, where there is unity of ownership between the principal and accessory use, and where the principal and accessory uses are located on the same lot.*

An accessory use is intended to supplement a principal permitted use and cannot be considered independently. While public space, open space, and active or passive recreation space may qualify as accessory uses, and are directly referenced, the inclusion of public space, open space, and active or passive recreation space is not intended to supplant the requirements of the mixture of uses in Table 6.1 or the requirements of §250-5.12(E) or (F). Their inclusion as accessory uses must be to support another use listed in §250-5.12(E) or (F).



While parks and recreation facilities, private, and public active and recreational uses, are defined under §250-5.12(G) as accessory uses, their role must be to support the corresponding principal uses within the development. By definition, these uses must be incidental and subordinate to the principal use. Section 5.1.8 of the Manual also specifies that “[p]ublic open space shall be available to all dwelling units within mixed use developments.” This supports a conclusion that open space and recreational uses are associated with the residential uses in a development, not the non-residential uses.

The extent to which an outdoor area is designed and located to support a specific non-residential use within the development will determine the amount of outdoor square footage, if any, that can be included in the non-residential calculation. For example, a covered patio designated as seating area for a restaurant use could be considered part of the non-residential restaurant use (which is a conditionally permitted use under Code §250-5.12(F)(1)(a)). However, the outdoor space should be covered, gated, and/or otherwise designed to be functionally part of the restaurant use.

Table 6.1 of the Manual provides a row designating the requirements for “Minimum Public Open Space.” Within Zone A of the Mixed Use District, 20% open space is recommended. The recommendation for 20% public open space is separate and distinct from the required 20% minimum non-residential set forth elsewhere in a separate row of the table.

### **Determination**

Based on the foregoing, the Town determines that although public space, open space, and active or passive recreation spaces are considered an integral component of a successful mixed use district development, they are not included among the permitted commercial uses or conditionally permitted uses. Consequently, they cannot be classified as principal uses for the purpose of satisfying the minimum percentage of non-residential uses set forth in Table 6.1 of the Manual for Zone A – Core Mixed Use projects located in the Mixed Use District created along the Route 250 Corridor.

If accessory patio or deck areas are located immediately adjacent to commercial permitted and/or conditionally permitted uses, and are designed to support the principal non-residential function(s), those limited and clearly delineated areas could be used in the calculation of non-residential square footage. Such accessory areas must be incidental and subordinate to the principal use. Such areas must also be covered, gated and/or otherwise designed to be functionally part of the non-residential use (e.g., covered, gated seating area immediately adjacent to a restaurant). However, if such areas are intended as public gathering areas and do not directly support a principal non-residential use, they cannot be included in the calculation of non-residential space.

As presently proposed for Application #21P-0020, the hard-court flex area, dog park and pedestrian spine do not qualify as non-residential uses for the purpose of meeting the requirements of Table 6.1. None of these public open space/recreational uses are listed among the permitted commercial uses or conditionally permitted uses in the Code. These uses are also not listed among the mix of uses identified for Zone A in the third and fourth rows of Table 6.1.

To the extent the hard-court flex area, dog park and pedestrian spine could be considered accessory uses, they are incidental and subordinate to the permitted/principal *residential* uses. None of these proposed uses are incidental and subordinate to any proposed commercial permitted or conditionally permitted principal use.





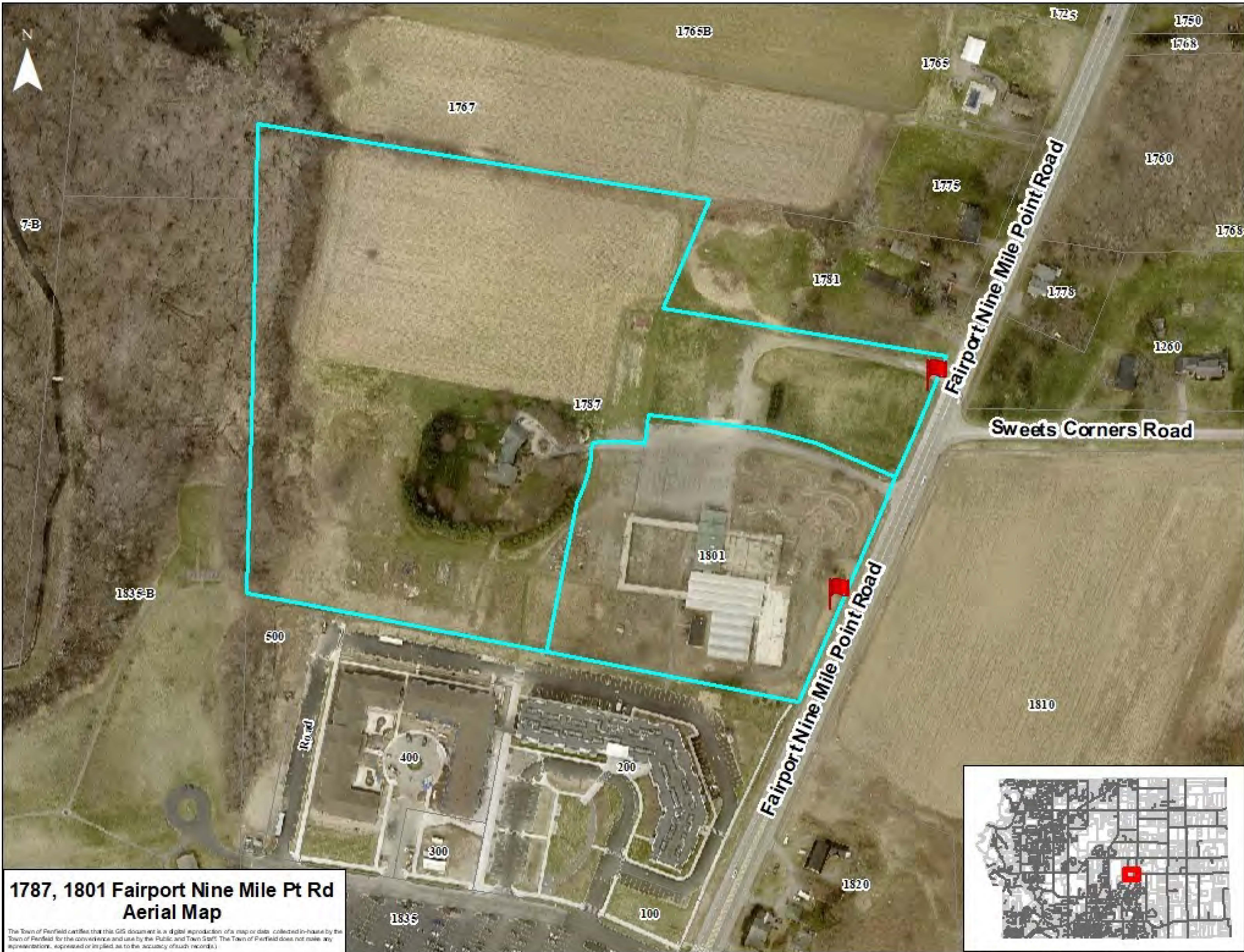


For the Planning Department,

Douglas Sangster  
Town Planner

Under the guidance of  
Mark Valentine  
Director of Planning & Engineering

FILED  
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AMY M. STEKLOF  
TOWN CLERK



**1787, 1801 Fairport Nine Mile Pt Rd  
Aerial Map**

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