

Pease Development Authority

Residential Housing Study Committee Final Report

December 11, 2019

I. Summary of Committee's Work

The Residential Housing Study Committee was formed by vote of the Pease Development Authority on August 18, 2018. Such vote followed the unanimous vote of the Portsmouth City Council in support of the formation of such a study committee, as housing is an urgent issue addressed extensively in Portsmouth's current Master Plan.

The Residential Housing Study Committee was charged by such vote with "identification of a parcel of property at Pease on which housing is, in the Study Committee's opinion, appropriate for rezoning. For purposes of any following phase of investigation, the parcel identification should list required approvals or modifications or waivers to existing federal, state or PDA statutes, rules and regulations." In addition, the Committee was charged with "[t]he identification of the type of housing recommended for the identified parcel, to include size, affordability, density, ownership restrictions. In the event the parcel identified is leased to a third-party PDA tenant, identification of the proposed relationship of the PDA tenant to its residential subtenants," and "[t]he identification of environmental concerns to include review and analysis of future information or studies to assess the requirements of the Federal Facilities Agreement by and between the Air Force, EPA and NHDES; Deed Restrictions and Institutional Controls; community concerns with respect to emerging contaminants; concerns with respect to the current clean up standard and open restoration sites; traffic; noise; required transportation improvements, etc., and the recommendations for any additional study." Originally, the Committee was charged to return with a report partway through its work, and request a budget for further work. Due to the discovery of certain legal and regulatory barriers, such report and budget request were not completed.

The first meeting was held January 19, 2019 at which the Committee reviewed its charge, scope and schedule of work. PDA staff presented a plan showing properties that were not yet under lease. The Committee chose to limit the scope of its inquiry to the Business & Commercial Zone of the Tradeport, as shown on the PDA zoning map¹ (or areas H & I on the

¹ See Zoning Ordinance, Pease Development Authority, October 18, 2013 (<https://peasedev.org/wp-content/uploads/2018/12/LandUseControlsDecember2013.pdf>), p. 94.

EPA Institutional Controls Map²). Such limitation, by design, excluded any area within the boundaries of the Town of Newington, and focused the Committee's work exclusively on land within the City of Portsmouth. At the February meeting, the Residential Housing Study Committee hosted guest speakers from the Bureau of Economic Affairs, New Hampshire Housing Finance Authority, and the Portsmouth Collaborative Chamber of Commerce. These guests told the Committee that housing was critical to the future of the workforce at Pease. They also discussed the type of zoning which would be appropriate at the Tradeport if residential was allowed, which included mixed use zoning and a denser "downtown" area at the intersection of Corporate and International Drive.

At the April meeting, the Committee hosted several developers to discuss whether they would be interested in building at Pease if the legal and regulatory environments allowed it. There were some concerns expressed, including those about whether retail and other amenities would be permitted in order to support a residential mixed-use environment on the Tradeport. Overall, the developers said they would need to conduct a more detailed feasibility study, but they would be interested in doing so if it were permitted.

At the May meeting, the Committee toured the Tradeport for a view of what the current layout and properties were that were available and how the setbacks and zoning affected such properties. The Committee asked questions about the scope of the Committee's inquiry and its structure going forward.

At the July meeting, the Committee reviewed a matrix and legal and regulatory challenges for residential zoning, which shall be further addressed in the next section.

II. Existing Conditions – Residential Zoning

The United States government's decision to close Pease Air Force Base in 1989 triggered a lengthy review process involving the Air Force, the Federal Aviation Administration (FAA), the Environmental Protection Administration, the State of New Hampshire, the City of Portsmouth (the "City"), the Town of Newington (the "Town" or "Newington") and other stakeholders. Over the next 16 years, these parties studied (Bechtel Report), reported and decided (Airport Layout Plan and Record of Decision), and negotiated what should and would become of the former Base. One of the principal concerns during the first several years of study, reporting and initial decision-making was to stimulate job creation at the Tradeport. Lack of housing was not an urgent concern then as it is now, as identified in numerous local planning documents, including Portsmouth's 2017 Master Plan.

² See Zone 3, Record of Decision Amendment, December 2003 (<https://semspub.epa.gov/work/01/200654.pdf>), p. 163.

Ultimately, the United States government transferred the fee simple title of the property to the PDA via a public benefit transfer. As a result, PDA has an obligation to use the property exclusively for "airport uses"; that commitment is captured in the three applicable deeds, transferring the property from the Air Force to PDA. Covenants in the deeds require that the land at Pease may not be "used, leased, sold, salvaged, or disposed of by [PDA] for [any use] other than the public airport purposes without written consent of the Administrator of the FAA." The deeds provide that approval may only be granted if the new use does not "materially and adversely affect the development, improvement, operation, or maintenance of the Airport." The FAA is responsible for determining which uses fall under this definition of airport uses. The current layout/plan of use was approved by the FAA in [1990] as supporting the "airport use" because of its revenue generation. Any change to such plan could be approved by the FAA if it was determined to support the airport use by the FAA itself. See Quitclaim Deed from United States Air Force to PDA, dated Nov. 18, 1999 at page 4; Quitclaim Deed from United States Air Force to PDA, dated Oct. 15, 2003 at page 6; Quitclaim Deed from United States Air Force to PDA, dated Sept. 13, 2005 at page 6.

In addition, because Pease was transferred via the public benefit transfer, PDA receives federal funding to support the public airport. As a result, the airport is subject to the provisions of 49 U.S.C. 47107(a)(10). This statute requires recipients of federal funding like PDA to take affirmative steps to "restrict the use of land next to or near the airport to uses that are compatible with normal airport operation."

Should PDA fail to abide by any of the restriction within the deeds, or any statutory obligations, the remedy is severe. Within the deeds, the Air Force reserved a right of re-entry.

The FAA has taken the position that residential housing is always incompatible with the operation of a public airport. See for example Order 5190.6B, the FAA Airport Compliance Manual, that provides guidance to public airports seeking to comply with FAA regulations. This order affirms that any housing near an airfield is inconsistent with, and a threat to, the long-term sustainability of public airports. Noise and night-time operations pose the most critical inconsistencies with these two uses of land, because these uses of an airport have the potential to disrupt the right to quiet enjoyment residents may expect in their homes under certain circumstances.

In addition to the Airport related obstacles and drivers, the deeds conveying the property identify certain parcels that are subject to institutional controls due to historical environmental contamination. Portions of the Tradeport are part of active remediation efforts and a number of parcels have monitoring requirements and/or limits or special requirements

relative to the treatment of groundwater and the movement of soils. Parcels impacted by institutional controls were not considered for residential purposes by the Committee.

The discovery of per- and polyfluoroalkyl substances (PFAS) contamination in 2014 has complicated development at the Tradeport. These emerging contaminants have been the subject of much local public discussion and increased regulation at the State level. As further investigation and regulation in this area evolves, the extent to which this new environmental concern impacts, or not, housing options will be better understood.

In addition to the airport related restrictions, any significant change of use of the land at Pease, would likely require review under the National Environmental Protection Act (NEPA) to ensure such a change would not result in a significant impact to the environment. Oversight by the EPA is triggered by any proposal including residential housing because PDA receives federal funds to operate a public airport. Relevantly, NEPA review is triggered when the use of federal land, or the use of land which received federal funding and has federal oversight, changes. When the Air Force sought to close the Air Force Base and use it for other purposes in the early 1990s, that action triggered NEPA review, and the Air Force published a Final Environmental Impact Statement (FEIS) analyzing the impacts the proposed use and alternative uses would have on the environment. If PDA considers changing the use of the Tradeport to include some housing, this would also trigger NEPA review. Although NEPA prescribes varying levels of scrutiny, it is the position of PDA counsel that the change of the use of land at Pease to include housing would likely require a full Environmental Impact Study (EIS). The Air Force published the Final Environmental Impact Statement for the Disposal and Reuse of Pease Air Force Base (FEIS) in 1991. The Air Force produced this document to comply with NEPA, thereby providing an environmental analysis of the proposed reuses of the Base. This document considered four alternative uses of Pease, including various housing options at the base. The report considered, in the alternative, reusing existing housing for the homeless under the McKinney Act, a medium density housing proposal, five-acre residential housing, and retaining the existing mobile home park. At the time, the only environmental hazards the EPA considered as obstacles to housing were lead paint and asbestos within existing buildings. The EPA concluded these housing proposals would have no significant impact on the environment. Although the FEIS concluded that residential housing at Pease would have no significant impact on the environment, any change in the current use of land would still likely trigger a new EIS. Ultimately, housing was not included in the reuse of Pease Air Force Base, thus any inclusion of housing at this point would likely be a different use.

The zoning ordinance of the Pease Development Authority does not permit residential zoning. The zoning map on the last page of the ordinance shows the permitted uses by zone, and residential is not included. In the ordinance, there are several dimensional requirements, such as setbacks, minimum lot size, and parking requirements, which restrict

how each parcel can be utilized, and several use restrictions, including limitations on retail and signage. Such restrictions would require revisiting in order to meaningfully permit residential zoning.

In short, to change the underlying legal and administrative restrictions affecting residential zoning, a revisiting of the underlying assumptions and plans would have to be taken along with special attention to the consequences of the public benefit transfer and the airport-related restrictions both in the deeds and in FAA federal regulations. Sustained political will at all levels of government – federal, state, and local - could be used to effect such change.

In light of the legal and administrative challenges to open up the Tradeport to traditional residential zoning and housing options, an avenue that the Committee explored was an “accessory use” within the existing PDA zoning structure. See the discussion below in Section III.. Certain businesses might have particular, limited, residential needs that could be accomplished as part of an accessory use to the permitted commercial or industrial use. By exploiting the accessory use definition, the FAA objection might be minimized and extended processes avoided.

III. Accessory Uses

Accessory uses of a residential character would possibly be permitted under the existing PDA zoning ordinance. Specifically, the current PDA zoning ordinance provides the following definition for Accessory Building or Use, “a building or use which is customarily subordinate or incidental to the principal use or building on a lot.” This is a fairly common form of definition of accessory use.

The Committee explored which accessory uses would be attractive to tenants, and also what would be permitted. Such accessory uses included long-term corporate housing, dormitories for students at the GBCC, barracks for members of the Air National Guard, and employee housing for employees of tenants on the Tradeport. Over the course of several meetings, members of the committee considered whether dormitory housing to support the needs of Great Bay Community College might be an appropriate housing component for the committee to explore and support. A dormitory would arguably be an accessory use to a college. Great Bay Community College has communicated, however, that it has no interest in building housing itself at this time.

The committee discussed further whether there were other types of types of housing, such as for temporary or relocating employees of Tradeport tenants that might generate a need for

some form of accessory residential use. There is currently an extended stay facility at the Tradeport and that permitted commercial use is likely satisfying some of the existing need.

IV. Conclusions

The Committee concludes that the following options exist with respect to residential use at the Pease International Tradeport.

A. Residential as a Primary Use

The documents governing the use of land at Pease International Tradeport do not expressly prohibit residential housing at Pease. Nevertheless, there are still significant obstacles to developing housing at the Tradeport.

The primary challenge is posed by the public benefit transfer, which put certain restrictions on use in place to protect the continued viability of the public airport. The FAA is responsible for determining which uses fall under this definition. The deeds provide that approval may only be granted if the new use does not "materially and adversely affect the development, improvement, operation, or maintenance of the Airport." See *Deeds*, referenced above. 49 U.S.C. 47107(a)(10) requires recipients of federal funding like PDA to take affirmative steps to "restrict the use of land next to or near the airport to uses that are compatible with normal airport operation.

The above restrictions do not, on their face, prohibit housing at Pease. However, the FAA has taken the position that residential housing is always incompatible with the operation of a public airport. The FAA has published an extensive order, Order 5190.6B, detailing housing's impact on public airports. Order 5190.6B at 20-10. The conclusions and the recommendation by the FAA clearly indicate that any request for housing at Pease International Tradeport would be met with opposition by the FAA.

Upon a change of use of the land at Pease, PDA is obligated under the National Environmental Protection Act (NEPA) to ensure such a change would not result in a significant impact to the environment pursuant to Environmental Protection Administration (EPA) regulations. The environmental factors and considerations at Pease have changed drastically since 1991, thus the analysis contained in the previously conducted FEIS is dated and in need of review if any change in use is proposed. This is typically a fairly lengthy and expensive process.

The zoning ordinance of the Pease Development Authority does not permit residential zoning. Use and dimensional restrictions contained in the ordinance would require revisiting in order to meaningfully permit residential development on the Tradeport.

Should residential zoning ever be permitted as a primary use on land within the Town of Newington, the Municipal Services Agreement would have to be considered. This tri-party agreement governs the collection and allocation of property taxes in return for services provided by the City of Portsmouth on behalf of the PDA.

Lastly, there are market concerns which should be considered in considering residential as a primary use. Several developers visited the Committee with mixed feedback. Redevelopment of older properties, as opposed to development of vacant properties, was primarily considered, with Manchester Square and the surrounding area as a potential "downtown". Market barriers that were mentioned included a need for larger lots and a certain minimum density to make the economics of developing housing work, a want for mixed-use zoning, and a challenge to know which lots would allow for the proper site development. In addition, feasibility studies would be required to know whether such sites would be attractive to potential residential tenants. Supporting amenities, such as retail in mixed-use zoning and improved sidewalks and bike lanes, were also mentioned as a need to make the Tradeport attractive for residents. However, all such feedback included the caveat that until there was a regulatory change to allow such development, it would be difficult to definitively determine residential feasibility, as such questions require investment of time and resources surrounding a specific project, and none would rule out the possibility that such development could be attractive.

B. Residential as an Accessory Use

The Committee concluded that as an accessory use, residential zoning faced less restrictions, but still required revisions to the PDA zoning. PDA zoning is a permissive ordinance so unless a use is specifically permitted, it is not allowed. The FAA has approved accessory uses, which means that review by both the EPA pursuant to a NEPA review and review by the DOD (with FAA as the interpreting agency) can be avoided. Since the FAA has approved such a use, residential would be permitted if it was currently "customary" as an accessory use on the Tradeport. Such "customary" uses include dormitories as an accessory use to Great Bay Community College or long-term stay hotels, the latter of which exist today on the Tradeport. As discussed, the College is not interested in pursuing such a use at this time. Long-term stay hotels would be permitted to expand, as long as they continued to offer a program that was "customary" and used similar pricing programs to those that exist today. The accessory uses that are permitted raise one additional drafting issue in the zoning ordinance, which is that

such uses must be permitted on contiguous or adjacent lots, as current zoning would not allow further buildout on occupied lots to accommodate the new use.

New accessory uses would require revisions to the PDA zoning ordinance, as well as NEPA review and potential DOD review (through FAA interpretation), similar to residential as a primary use. One new use is unique and an exception to this rule, which is military barracks if built on federal land. PDA zoning does not apply to federal land, which allows the federal government to pursue this use if it wishes on land where it has [site control / ownership].