

McLane

McLane, Graf,
Raulerson &
Middleton

Professional Association

NINE HUNDRED ELM STREET • P.O. BOX 326 • MANCHESTER, NH 03105-0326
TELEPHONE (603) 625-6464 • FACSIMILE (603) 625-5650

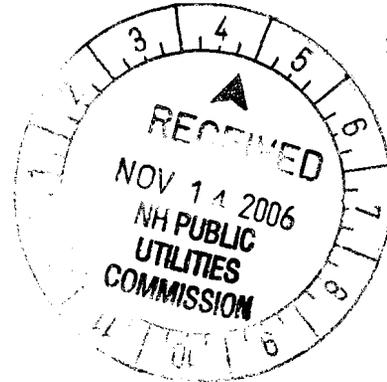
THOMAS J. DONOVAN
(603) 628-1337
tdonovan@mcclane.com

OFFICES IN:
MANCHESTER
CONCORD
PORTSMOUTH

November 14, 2006

Via Hand Delivery

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301



Re: DW 04-048; City of Nashua—Taking of Pennichuck Water Works, Inc.

Dear Ms. Howland:

Enclosed for filing with the Commission are an original and six copies of Pennichuck's Memorandum Concerning View.

I have provided an electronic copy of the filing to the PUC librarian and the parties. In addition, I have sent hard copies of the filing to all parties on the Commission's service list.

Thank you for your assistance with this matter. Please feel free to call me if you have any questions.

Very truly yours,

Thomas J. Donovan

TJD/dap
Enclosures

cc: Service List
Duane C. Montopoli, CEO and President, Pennichuck Corporation
Donald Ware, President, Pennichuck Water Works, Inc.

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

City of Nashua: Taking Of Pennichuck Water Works, Inc.

Docket No. DW 04-048

PENNICHUCK'S MEMORANDUM CONCERNING VIEW

Pennichuck Water Works, Inc. ("PWW" or "Pennichuck") presents this memorandum in response to the Executive Director's letter request for comments dated November 1, 2006.

Introduction

At the Commission's direction, Pennichuck is providing its comments regarding the conduct of a view. However, Pennichuck notes that it had been encouraged by the Commission's General Counsel to compromise with the petitioner, the City of Nashua ("Nashua"), on the procedure and logistics for a view, so as to avoid the need for the Commission to interject itself into the minutiae of this process. Pennichuck and Nashua spent many hours negotiating concerning the view, and the result of that negotiation and compromise is the Stipulation filed with the Commission on October 23, 2006.

Commission's Procedure

The Commission adopted the parties' agreed-upon procedural schedule in this docket on April 22, 2005 by its Order No. 24,457. That order called for a view to take place in September, 2006, with a hearing scheduled for that same month. The Commission amended that procedural schedule, with the parties' agreement, by secretarial letter order on October 3, 2005. That amendment pushed back the view to December, 2006, with a hearing in January, 2007. There have been subsequent amendments to the schedule since that time, none of which has changed the timing or substance of a view.

Views are specifically contemplated in the Commission's procedural rules. Puc 203.28

states:

The commission shall take a view or conduct an inspection of any property which is the subject of a hearing before the commission if requested by a party, or on its own motion, if the commission shall have determined that the view or inspection will assist the commission in reaching a determination in the hearing.

The clause beginning "if the commission shall have determined..." must modify the second option for a view, i.e. those based "on its [Commission's] own motion", since the first option, i.e. those based upon a party's request, is preceded by the mandatory verb form "shall take a view..." As such, a party to a contested matter before the Commission has a right to a view. Nashua and the other parties consented to the motions which established the initial and revised procedural schedule, both of which contemplated a view. Pennichuck has relied upon the schedule in submitting its testimony in this case, always contemplating that the Commissioners would view the assets sought to be condemned. Had Pennichuck thought that the Commissioners would not conduct a view, it likely would have submitted additional prefiled testimony, including the use of substantial video documentation of its assets. Having not done so, and having relied upon its regulatory and procedural right to a view, Pennichuck would be unduly prejudiced at this late date were a view not to take place.

Importance of a View

Aside from Pennichuck's procedural rights, a view is important to the Commissioners' understanding of the assets Nashua seeks to condemn and related public interest issues. This is the largest condemnation case in the history of the State of New Hampshire. It involves the vast majority of the assets of a publicly traded water company. It involves a chain of riverine ponds and adjacent watershed, the stewardship of which has become a public interest issue in this case. It involves a large water treatment plant in Nashua, now undergoing a massive upgrade which

has significant consequences to asset valuation as well as future rate projections. It involves a complex urban water system in Nashua with multiple water tanks, booster stations, hydrants, and support facilities. It also involves a number of smaller community water systems relying upon wells and pumping stations using different types of water treatment.

The Commissioners no doubt have considerable expertise with the regulatory and financial performance of water companies. However, the Commissioners may not have any experience in observing the workings of a water utility, including the interdependence of various assets and the engineering configuration of a water system.

The typical Commission hearing involves a review of prefiled testimony, which may contain financial information or policy arguments. That is supplemented by live cross examination of those witnesses. Testimony is only one means for the Commissioners, or for any judicial finders of fact, to learn about the facts of a case. Where tangible assets are involved, particularly in a condemnation case, there is no substitute for seeing the assets, and the relationships among them. Any well-informed decision maker should take advantage of viewing the assets in a condemnation case, as is typically the case in proceedings before the Board of Tax and Land Appeals, and eminent domain cases heard in Superior Court.

Commentary on the Value of Views

Views in condemnation cases are the rule, not the exception. As a leading commentator put it: “A view of the subject property from which a taking has occurred is often essential for a thorough understanding of the case by the fact-finding body responsible for making the final award of compensation due to the owner.” 5-18 Nichols on Eminent Domain § 18.08. Traditional oral testimony in particular falls short where real estate and fixtures are involved, since auditory learning has its limits. “Most people of college age and older are visual learners.”

Richard M. Felder & Linda K. Silverman, *Learning and Teaching Styles in Engineering Education*, *Engr. Education*, 78(7), 674–681 (1988) (citing Richardson, J., *Working With People*, Associate Management Inst., San Francisco, Calif., (1984)).

The New Hampshire Supreme Court has recognized that in an eminent domain proceeding the knowledge and information gained by a jury in viewing the premises in question is proper evidence in arriving at the amount of damages. O.K. Fairbanks v. State, 108 N.H. 248, 251-52 (1967). While views in superior court are matters of discretion, RSA 519:21, courts will conduct a view if it appears that it will assist the fact finder in arriving at a just verdict. 5 Wiebusch, New Hampshire Practice: Civil Practice and Procedure § 47.20.

View Contents and Logistics

The stipulation between Pennichuck and Nashua contemplates that the Commissioners could take a view in a single day, beginning at 9 AM. Using the model of the Board of Tax and Land Appeals, the stipulation contemplates that the Commissioners, and perhaps a staff advisor, drive together in a single vehicle. The BTLA uses a Chevrolet Suburban or similar vehicle for this purpose. Other staff and each interested party would drive in separate vehicles. The parties have agreed in advance upon the locations to be viewed, and all would drive from place to place, stopping at each predetermined site.

The parties have stipulated that at each set location along the view, Nashua and Pennichuck would have an opportunity to state in a non-adversarial way what it is the Commissioners are viewing, and what they should pay attention to with respect to that location. Those statements serve as offers of proof, and not as testimony. The Commissioners could ask limited questions designed to assist them with understanding the location or asset, but not intended to evoke debate among the parties. While juries are typically not allowed to ask

questions during a view, a judge (or BTLA member) sometimes asks open ended questions during a view. The Commissioners may take notes for their own use. As is the case with superior court or BTLA views, there is no need for the Commission to make a recording, since there is no testimony. Cf., RSA 541-A:31. Moreover, there is no need for other parties to make statements during the view. This is a condemnation case, and a view is one part of the presentation of evidence. Nashua, as the petitioner, and Pennichuck as the condemnee, have stipulated to the presentation of evidence in this fashion. Other parties who have submitted testimony in this case may submit evidence at the hearing in January, 2007.

After much negotiation, Pennichuck and Nashua compromised on a series of sites for the view. The stipulation contemplates that those parties would conduct a pre-view practice run-through, in which they could work out specific timing issues. Pennichuck believes that the following draft schedule is reasonable and achievable, subject to verification during the pre-view. However, in deference to the request made in the Executive Director's letter, the following is a preliminary timetable, with pinpoint and line references on the attached maps to the stipulated view sites and suggested route:

- Nashua treatment plant (9:00 – 9:35) #1
- Nashua Harris Pond at intake area (9:40 - 9:50) #2
- Nashua Sanderson Farm via Manchester Street and Tinker Road (10:00 – 10:25) #3
- Pennichuck Brook from Amherst St. CVS/Wendy's Parking Lot and Pennichuck Square (10:35 - 11:00) #4,5
- Amherst/Milford distribution pipe and pumping station (11:05 - 11:25) #6
- Nashua Shakespeare tanks and pumping station (11:50 – 12:15) #7
- Nashua Will Street operations/maintenance center (12:25 – 12:50) #8

- Pre-arranged Luncheon (1:00 – 1:45)
- Derry Glen Ridge and Drew Ridge community systems and pumping stations (2:30 – 3:00) #9,10

WHEREFORE, PWW respectfully requests that the Commission:

A. Schedule a view as soon as possible in accordance with the procedural schedule during December, 2006; and

B. Grant such other relief that the Commission deems just and reasonable.

Respectfully submitted,

Pennichuck Water Works, Inc.

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: November 14, 2006

By:  _____

Thomas J. Donovan
Steven V. Camerino
Sarah B. Knowlton
Bicentennial Square
Fifteen North Main Street
Concord, NH 03301
Telephone (603) 226-0400

Joe A. Conner, Esquire
Baker Donelson Bearman
Caldwell & Berkowitz, P.C.
1800 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450

Certificate of Service

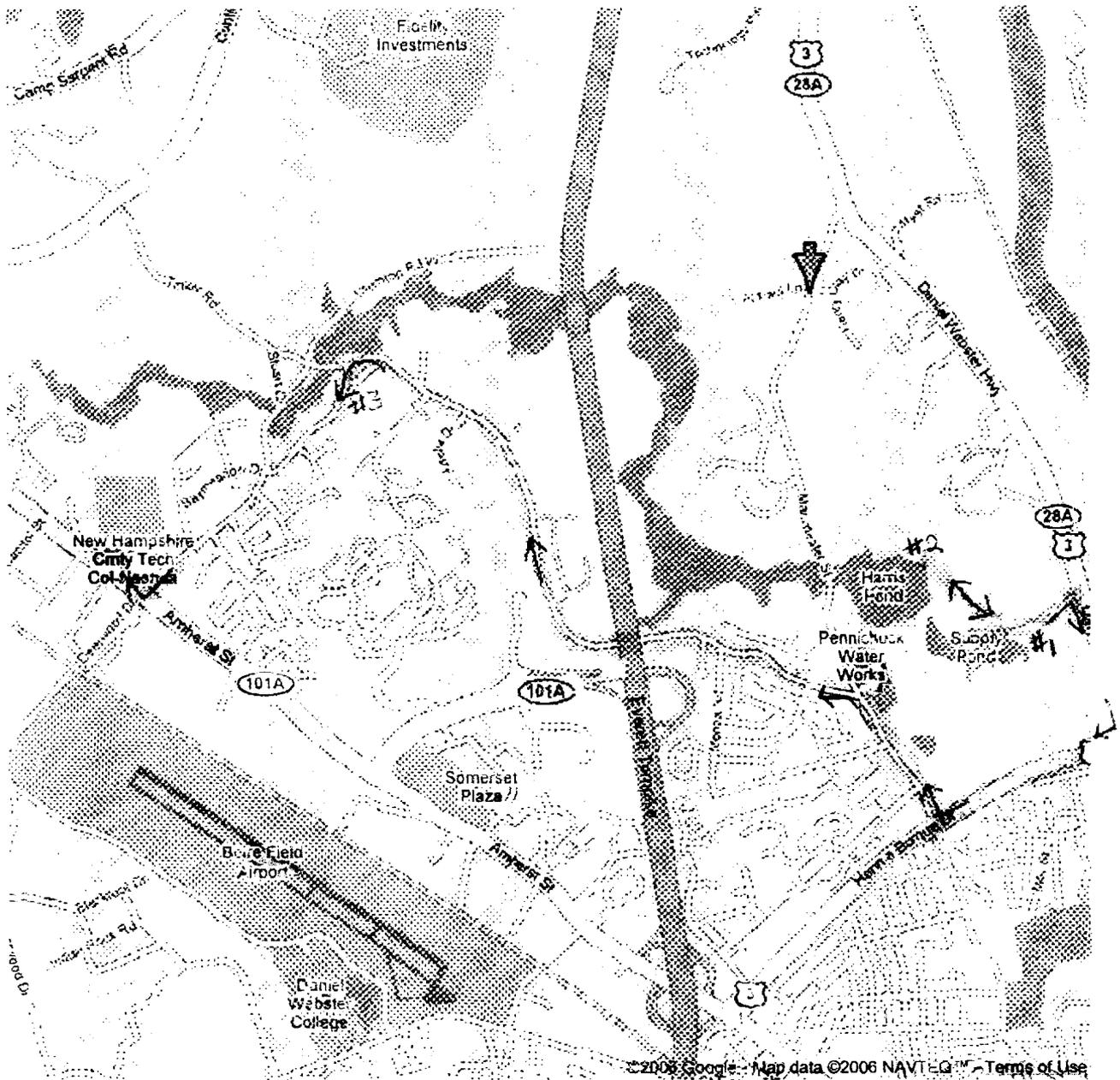
I hereby certify that on this 14th day of November, 2006, a copy of Pennichuck's Memorandum Concerning View has been forwarded to the parties listed on the Commission's service list in this docket.



Thomas J. Donovan



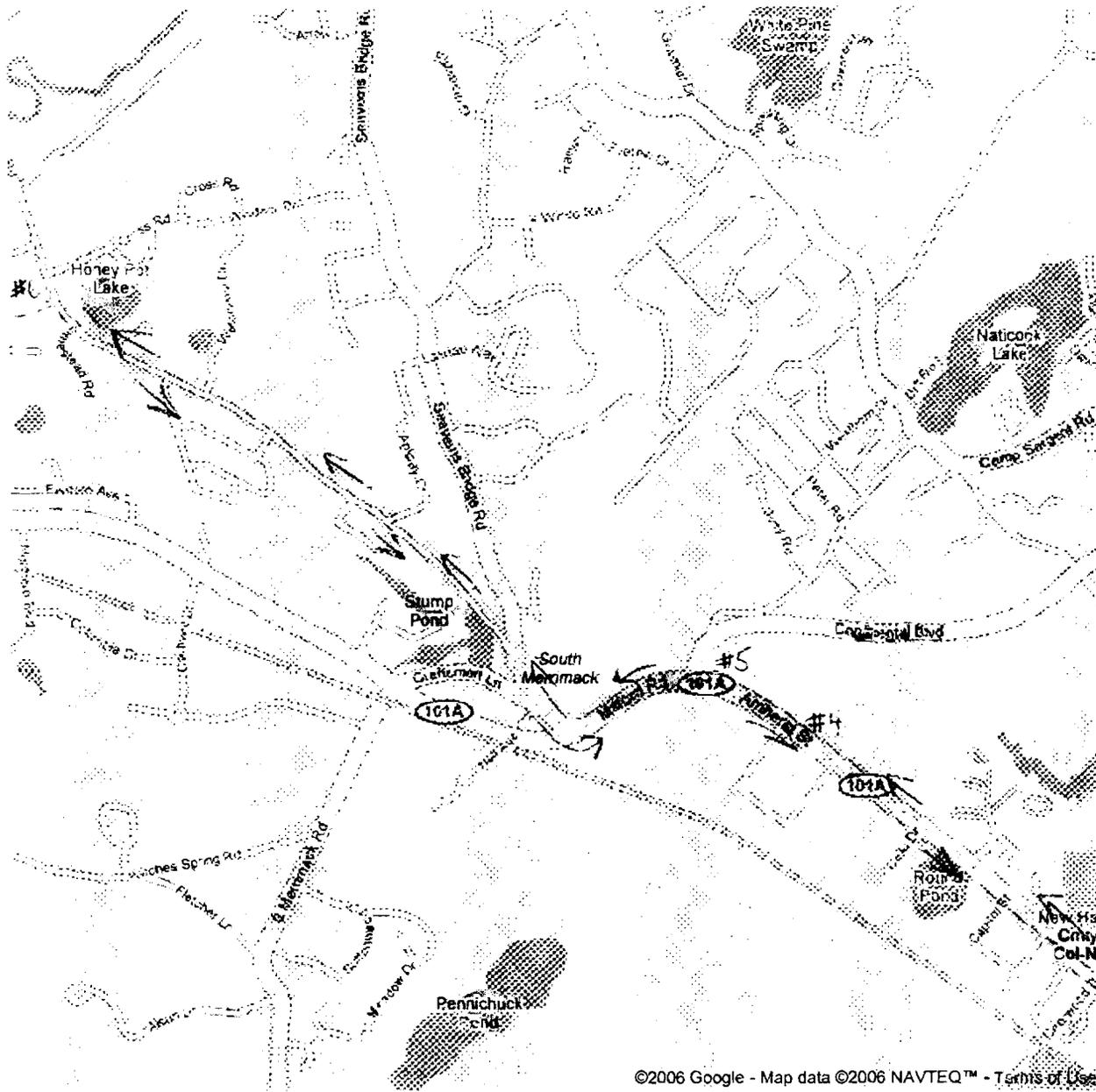
Address 10 Manchester St
Merrimack, NH 03054



© 2006 Google - Map data © 2006 NAVTEQ™ - Terms of Use



Address 10 Manchester St
Merrimack, NH 03054



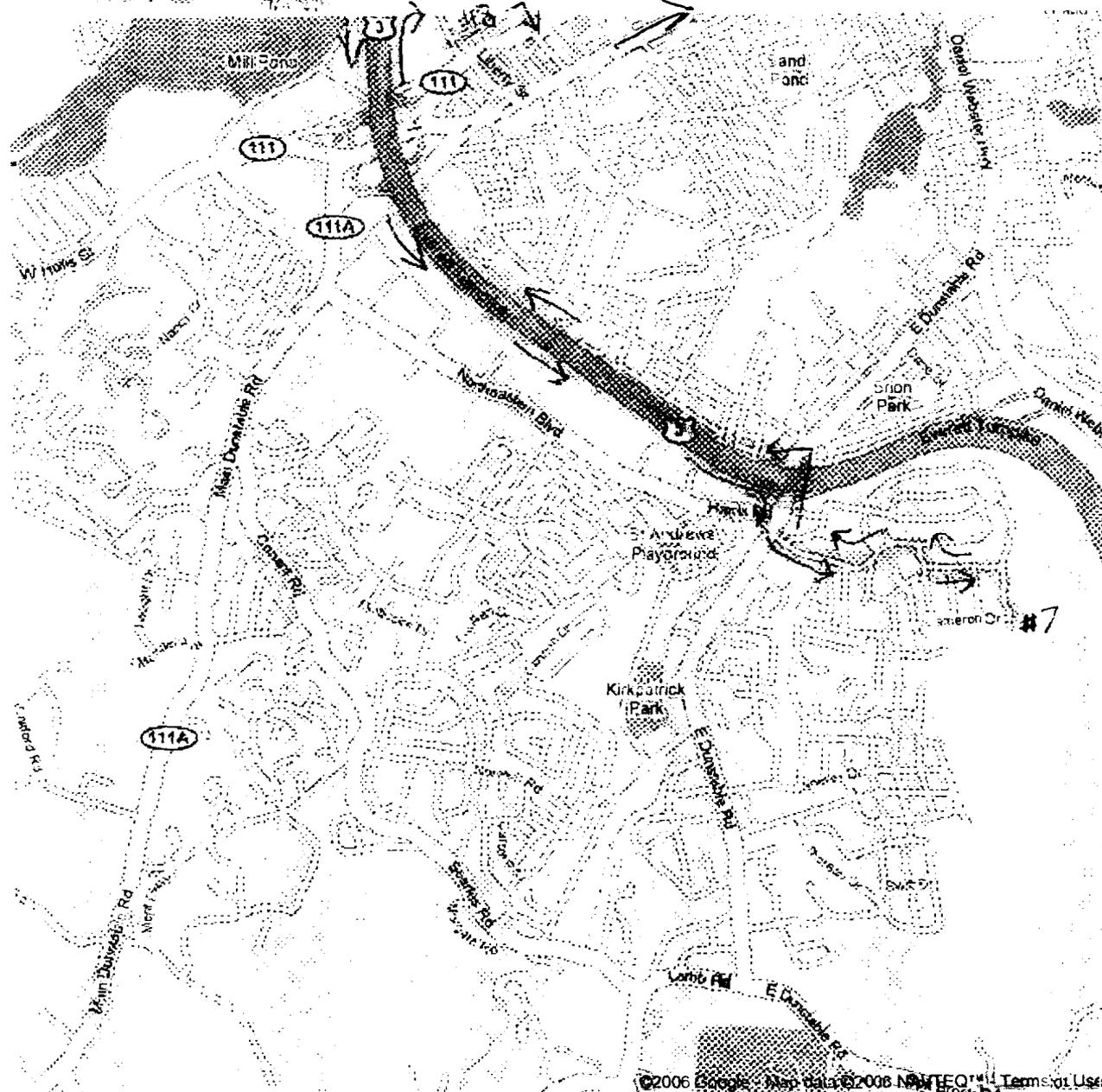
©2006 Google - Map data ©2006 NAVTEQ™ - Terms of Use

Handwritten note: 101A
Forks

Google

Address 10 Manchester St
Merrimack, NH 03054

to Derry





Address 400 Amherst St
Nashua, NH 03063



©2006 Google - Map data ©2006 NAVTEQ™ Terms of Use