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To All of the Above Via Email

Re: Planning Board Membership & Appointment processes

Dear Ladies and Gentlemen:

Background

In light of Attorney Loughlin's (Peter's) letter of February 23, I felt a need to respond in some detail, but this response has been delayed by client and other matters.

As Peter rightly stated in his letter, he and I were at that time unconvinced of the other's positions on this matter, and that remains the case.

I will note at the outset that I was under the impression, which I confirmed with an email on 2/14, that we as a group (that did not include the Manager) had: decided to focus on the underlying matter as one of public policy; and, we had also agreed to recommend that the Governance Committee consider a revision to the City Code to address this in more detail. How a draft of such a Code revision might be presented to the Governance Committee had not been decided.

Not a Personal or Personnel Matter

I have noted this previously, but it is so important I feel compelled to restate it here: I raise these questions **not** as a personal matter or as one related to any individual or group of individuals or to the adequate performance of his or her duties.

Rather, I feel the questions discussed here are public policy matters with public policy ramifications, and as matters of law. Actual people, of course, fill positions discussed

below but that is a necessary incidental part of the underlying structural composition of, in this instance, the Planning Board, which is a public body charged with public, not personal, matters.

General Questions

This matter, which first relates to Section 1.303 of the City's Code (Figure 1), came to my attention last year around the same time as the Thanksgiving Holiday. The general question, as those addressed herein well know, is whether the City Manager (effectively the City employer) can **both** sit as a member of the Planning Board **and** also appoint a City employee as an ex-officio member to sit on the same Board at the same time.

Section 1.303: PLANNING BOARD

A. Membership: The Planning Board of the City shall consist of nine (9) members and two (2) alternate members, specifically; (Adopted 1/23/95)

1. The City Manager, or the designee of the City Manager with the approval of the City Council, who shall be an ex-officio member;

2. An administrative official of the City selected by the City Manager who shall be an ex-officio member;

3. A member of the City Council selected by the Mayor with the approval of the Council, who shall be an ex-officio member;

4. Six residents of the City appointed by the Mayor with the approval of the City Council.

5. Two (2) alternates who shall be residents of the City appointed by the Mayor with the approval of the City Council. (Adopted 1/23/95)

Figure 1: Section 1.303 of Portsmouth City Code

The corollary question not touched on in Peter's letter is whether, even if somehow allowed by statute(s), such a situation **should** be allowed as a matter of public policy.

As I will explain below, I do not feel this is a situation that is or should be allowed by several different restrictions that have been placed on Planning Board members, their appointment processes and their participatory requirements. The statutory disagreement will be discussed further below.

I have accordingly divided my analysis into two parts below: the first part addresses the public policy level issues surrounding the planning board membership matter. This may also be considered the "should this be allowed?" discussion.

The second part is an analysis of the current statute in conjunction with the current city code. The second part aligns more with Peter's letter, my disagreements with his analysis and may be considered as the "is this allowed?" part of the discussion.

Part One: Discussion of Public Policy Matters

Planning Board Responsibilities and the Juror Standard

In a broad sense, the Planning Board's duties may be characterized as those that are: 1) administrative or legislative; and, 2) quasi-judicial. The former apply to certain matters not pertinent to this discussion, while the latter, quasi-judicial actions of the Board are of critical importance, where very high standards of impartiality are required of Planning Board members.

Much has been written about the quasi-judicial actions of a Planning Board, but here I will distill the description of those actions by noting quasi-judicial actions occur whenever the Board: notifies parties of a hearing to receive evidence and testimony; thereafter weighs that evidence and testimony; and, finally makes a decision. Clearly, these quasi-judicial functions and resulting actions of the Board occur at all, or nearly all, regular meetings of the Board.

In NH, the Supreme Court enumerated the quasi-judicial standard at least as early as 1851 in a case far from a Planning Board matter: a boundary dispute.[1]

In that early case, Fence Viewers were called upon to, as their title suggests, provide notice, view a fence, and take evidence to see if the fence conformed with the "true line" of a boundary. Unfortunately, one of the Fence Viewers was an uncle of one of the parties. The Court determined that the actions of the Fence Viewers in that instance were judicial in nature and decided that, as a family member, the uncle was disqualified to act, and the results were declared void.

In that case, the Court cited back to "Lord Coke" who stated that "the law presumes, that one kinsman doth favor another before a stranger".[2] This is an example of appearance or presumption of bias.

Since that early decision, the Court and the legislature have further defined the importance of the quasi-judicial nature of many matters, and with respect to Planning Boards in particular the current law states (RSA 673:14 **Disqualification of Member**):

> **No member of a** zoning board of adjustment, building code board of appeals, **planning board**, heritage commission, historic district commission, agricultural commission, or housing commission **shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity** if that member has a direct personal or

[1] *Sanborn v. Fellows* 22 NH 473.

[2] *Sanborn v. Fellows* 22 NH 473 at 482.

> pecuniary interest in the outcome which differs from the interest of other citizens, or **if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law** (emphasis added).

Causes for disqualification, or being "set aside" for acting as a juror are set forth in RSA 500-A:12 **Examination**:

> I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:
> (a) Expects to gain or lose upon the disposition of the case;
> (b) Is related to either party;
> (c) Has advised or assisted either party;
> (d) Has directly or indirectly given his opinion or has formed an opinion;
> (e) Is employed by or employs any party in the case;
> (f) Is prejudiced to any degree regarding the case; or
> (g) Employs any of the counsel appearing in the case in any action then pending in the court.
>
> II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

Note that of the specifically enumerated reasons, most relate to a prior disposition in the matter at trial, indicating the appearance, or actual lack, of the independent thought and action to be expected from a juror. Additionally, (b) proscribes a related interest, while (e) and (g) proscribe certain employment arrangements. All of these relate to relationships or situations that again could lead to the appearance, or the actual lack, of independent thought and/or indifference regarding the matter at hand.

Importantly, paragraph II may be considered as the more encompassing reason why the enumerated and other situations can require a "juror", in this case a Planning Board member, to be "set aside" for the appearance of being "not indifferent".

As one example that has been clearly set forth in the case law, a Planning Board member who is an abutter to a proposal must be disqualified from voting thereon. In Totty v. Grantham Planning Board (120 NH 390) the Court stated that since abutters receive notice of, and are provided the opportunities to participate in, hearings before a Planning Board they "are in effect made necessary parties to the proceedings" and "the fact of being an abutter is sufficient to disqualify a board member from voting **without a showing of actual prejudice** (emphasis added)".

In other words, no matter how otherwise independent a Planning Board member may be, if that member is simply an abutter, that relationship alone is sufficient for disqualification, whether or not any actual prejudice exists.

The appearance of potential partiality or of possibly not being indifferent actually rises to

a constitutional matter in New Hampshire. In Winslow v. Holderness Planning Board the Court stated as much noting that:

> "[o]ur State Constitution demands that all judges be '**as impartial as the lot of humanity will admit**' (my emphasis);
> and that
> "[t]his applies similarly to members of boards acting in a quasi-judicial capacity".

This brings me back to the question of whether an employer and employee can serve together on a Planning Board on quasi-judicial matters, while also:

- ✓ adhering to the constitutional standard of being "as impartial as the lot of humanity will admit";
- ✓ not being prejudiced or giving the appearance of being prejudiced to any degree; and,
- ✓ not being or giving the appearance of not being indifferent to the matter(s) at hand.

The US Supreme Court set forth some helpful analysis and rationale on a closely-related matter in Crawford v. United States (212 US 183).

In that case, one of the potential jurors was an employee in a drugstore that had a "subpostal station" where he was also the clerk in charge, sometimes selling postage stamps. This juror, during *voir dire*,[3] had stated he did not know the defendant and had no opinion about the case. Over the challenge of defense counsel, the Court allowed this person to sit as a juror. This was determined to be error on appeal.

That case resulted in the establishment of what became NH's RSA 500-A:12 (e) standard for disqualification for an employment relationship of a juror, above. What is relevant to this discussion is some of the Court's rationale in reaching its conclusions in the Crawford case, as follows:

> "Modern methods of doing business and modern complications resulting therefrom **have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side** (my emphasis added)."

Further:

> "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly

[3] The process of seating potential jurors.

> able to decide the question wholly uninfluenced by anything but the evidence. **The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given** (emphasis added)."

The Crawford case therefore established the standard that bias is implied in the relationship between employer and employee and actual evidence thereof is not necessary.

In. light of the above, I remain troubled by the City's current Code and its interpretation for the Manager and a Manager's appointed employee (as an "extra ex-officio" member) to serve together on the Planning Board. As I wrote recently, but I believe now with more background support:

> Under the current makeup of the Portsmouth Planning Board, one member (the "extra ex-officio member") is appointed by, and reports to another member who is that member's employer or supervisor (the Manager).
>
> I think it impossible to contemplate and satisfactorily reconcile all of the possible problems such a situation can present under the current regulatory frameworks.
>
> The pressure on the employee to agree with their employer/supervisor is one obvious possibility. However, what if -for example- the employee happens to speak first during deliberations, could that result in an undue influence on the Manager simply because of the employer/employee relationship that exists outside the Board?

As noted by no less an authority than the US Supreme Court in Crawford, above, there is a "general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them".

Further quoting Crawford, the Court stated that "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence" even in the mind of one "who was quite positive he had no bias". Wise public policy requires this implied bias be recognized and eliminated.

This general tendency to look more favorably upon the side of the employer is more of a concern in a planning board setting where discussion is open, and voting is not by secret ballot. It is usually apparent where board members are leaning in their decision-making prior to a vote and it is all too easy for a disposition to be telegraphed, even unconsciously,

in a way that restricts or precludes independent action by the employee, the employer or even both.

I allege no specific bias, but I think we cannot and should not fail to note the obvious-even if "unconscious" - bias that is **inherent** in any employer/employee relationship in such a situation. That bias must, in my opinion, fail to meet the juror standard required of Planning Board members for their quasi-judicial actions, which are a very large part of what the Planning Board acts upon.

To satisfy the juror standard, one or the other of the two City employees could recuse themselves from all quasi-judicial matters[4], but since that would need to happen repeatedly at every meeting, the better, and I will submit obvious, solution is to not have the conflict exist in the first place.

This better solution may easily be accomplished by having **either**: the Manager/employer; **or** a City employee serving on the Planning Board. This also happens to be exactly what I believe is contemplated and allowed by the statute, as discussed below in Part Two.

In summary of Part One, I agree there is no explicit language in the statutes proscribing two people in a master/servant[5] or employer/employee relationship from serving on a Planning Board together,[6] but related case law seems to support the proposition that such a situation should not be allowed. Allowing such a relationship to continue strikes me as completely at odds with the juror standard imposed on all Planning Board members in all quasi-judicial matters.

If not as a matter of explicit law, but one of good public policy, it seems clear that the public's interests are not best served by continuing the current arrangement where the appearance of a conflict is clear and apparent. Again, and in the words of the US Supreme Court, "bias is implied, and evidence of its actual existence need not be given".[7]

I will note the additional obvious point that the planning board's quasi-judicial actions directly address the constitutional property and other rights of the applicants, abutters and others regularly coming before it many types of applications. I believe the board owes all parties as fair and impartial a decision, based solely on the evidence presented in the public forum, as is possible.

While of lesser import, it also seems to me that continuing the current practice invites litigation that can easily be avoided.

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[4] See discussion of alternates at the end of this letter.

[5] "master-servant" is an archaic term of art that may still be found in many historic references to this and related topics. I have included it, and the more current "employer/employee" term for past reference and more current context.

[6] However, as addressed in Part Two, such a situation is also likely not contemplated and possibly not even permitted by the current statutory scheme.

[7] Crawford v. United States 212 US 183 at 196

Part Two: Discussion of Statute and City Code

As a preface to this section, I am compelled to note that it is with some trepidation that I present my disagreements with Peter and his interpretations, despite my deep respect for his body of work. Given the gravitas he brings to any such matter, I submit this based on my own much more limited experience but with the best of intentions in seeking to ensure a full and fair discussion of the important underlying topics.

While it would be considerably simpler for me to accept the status quo, I still feel a fiduciary responsibility to raise these matters in my role as Chair of the Board since I continue to believe some changes are required in the public's interests.

RSA 673:2

The current statute I will insert here for easy reference:

Appointment and Terms of Local Land Use Board Members
Section 673:2

673:2 Planning Board.

I. (a) In cities, the planning board shall consist of 9 members:
(1) The mayor of the city, or with the approval of the local legislative body the mayor's designee, who shall be an ex officio member;
(2) An administrative official of the city selected by the mayor, who shall be an ex officio member;
(3) A member of the city council selected by the council, who shall be an ex officio member; and
(4) Six persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.
(b) Alternatively, the local legislative body in a city with a city council-city manager form of government may establish a planning board with membership as provided in paragraph I-a.
I-a. In cities with a city council-city manager form of government, the planning board may consist of the following 9 members:
(a) The city manager, or with the approval of the local legislative body the city manager's designee, who shall be an ex officio member;
(b) A member of the city council selected by the council, who shall be an ex officio member; and
(c) Seven persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.

While the paragraph numbering/labeling is somewhat awkward, it is clear that the current statute contemplates two possible scenarios for how a planning board may be

established. Peter and I agree in this point, but it is from there that we diverge in interpretation of this current statute.

I understand Peter's rational, but I think it is a too-strained reading of the statutes.

It important to simply read what is written first in the statute and, as the NH Supreme Court has said, "[w]hen the language of a statute is plain and unambiguous, we need not look beyond the statute itself for further indication of legislative intent".[8]

Proceeding with that direction, and looking at 673:2 from beginning to end results in the following (I have substituted "council" for "local legislative body" as this discussion applies specifically to Portsmouth[9]); for convenience, I have also divided the statute into its two sections, labeling them the "First" and "Second" Methods of establishing a planning board:

673:2 I. (a) plainly states that in **cities the planning board shall consist of 9 members**. This applies in both cases.

First Method of Establishing Planning Board

The first of the two methods that follow is detailed in the provisions of (1) through (4), inclusive, that follow 673:2 I. (a) which establishes those 9 members as:

First member*: The Mayor or, with council approval, the Mayor's designee;
Second member*: An administrative official of the city selected by the Mayor;
Third member*: A member of the council, selected by the council; and,
Fourth through ninth members: 6 persons appointed by an elected Mayor.
* Represents ex officio members, three in all.

There is no mention of a city manager in any part of 673:2 I. (a), the first method of establishing a planning board in a city.

Note that in this first method, the statute allows the Mayor to select an administrative official but that even the Mayor's designee, if one is desired, must be approved by the council.

Second Method of Establishing Planning Board

Paragraph 673:2 I a. I-a explicitly provides the second option for "cities with a council-city manager form of government". This is the first use of the term "city manager" in the statute.

The second of these two methods to establish a planning board in a city with a council-city manager form of government is then detailed in the provisions of (a) through (c), inclusive, that follow as:

[8] State v. Hill, 146 NH 568

[9] RSA 672:8.

First member*: The city manager or, with council approval, the manager's designee;
Second member*: A member of the council, selected by the council; and,
Third through ninth members: 7 persons appointed by an elected Mayor.
* Represents ex officio members, two in all.

Note here that this section of the statute, that is the only section directed to cities with a council-city manager form of government, again requires council approval if the manager desires a designee in place of the manager.

This section for cities with the council-city manager form of government only provides for 2 ex officio members and does not provide for the manager independently appointing a city official or anyone else to the planning board.

Peter's argument is founded in RSA 672:9 which allows the chief executive officer of a city to allow the terms "Mayor" and "city or town manager" to have equivalent meanings. By this interpretation, and using the legislative authority to establish a planning board by the "First Method" above, he simply substitutes "City Manager" for "Mayor".[10]

In my opinion, there are several problems with this approach. First, looking at the plain language of RSA 673:2 itself, it is clear that the legislature set forth two options for establishing a planning board and what is described above as the First Method (that, again, Peter selects using the substitution of manager for mayor), does not mention the city manager at all, while the second part of the statute explicitly does.

However, explicitly omitting the term manager in the first part of 673:2 is not oversight, as not all cities in New Hampshire have city managers, with Manchester and Nashua being notable examples. Thus, substitution of terms is not required, and doing so actually changes the meaning of the statute when read in its entirety.

Since some cities do not have managers, it is clear that there needs to be a legislative provision for those cities to establish a planning board, and that precisely what described in the First Method. For those cities, the Mayor is described as the appointing official, and for those cities it cannot be a city manager as the appointing official, because there is obviously no city manager in a city without one.

The conclusion seems clear: under the current statute, the First Method is not directed to cities who choose to give city managers an appointing authority, since the Second Method explicitly does apply to those cities who choose to do so.

[10] RSA 672:9 describes the term "Mayor" to mean the chief executive officer of the municipality, whether "…mayor, city or town manager, the board of selectmen of a town, …commissioners…or any other title or any official designated in the municipal charter to perform the duties of 'mayor' ". This definition is extraordinarily inclusive and seems better suited to allowing the substitution for the term Mayor to apply in instances where such substitution is required to fit the circumstances, and not where such a substitution changes the plain language of a statute. A portion of the history of this definition is discussed further below.

However, it is noteworthy that the First Method can still function for cities with a city manager, just leaving the same mechanisms in place by still having the Mayor as the appointing authority just as occurs in any city without a manager.

Recognizing that some cities do have a manager, the optional part of the statute is the Second Method has been added and this section of the statute is explicitly directed to "cities with a city council-manager form of government". Under this option, the manager or manager's designee with council approval can be a member of the planning board. There is no provision for the manager to independently appoint another member.

Again, simply looking at the plain language of the statute and following the Second Method that is explicitly directed to "cities with a city council-manager form of government", the manager is here allowed one seat on the planning board- either the manager or the manager's designee if approved by council. The council selects another member from the council itself and the Mayor selects the remaining seven members.

Under this analysis, it is clear that the current statute explicitly allows two broad methods for establishing a planning board in a city in New Hampshire: the First Method applies to all cities with no manager involvement in membership and the Second Method, as an option, applies to cities with city manager involvement in a limited manner, choosing or nominating one planning board seat. The First Method allows all cities, with or without a manager to establish a planning board with the Mayor as the appointing official.

It seems that the city's current code allowing the manager to independently appoint an extra ex-officio member to the planning board exceeds the authority granted by the legislature in the current statute, and that of course is not permitted in our State.

Before I return to how this relates to the public policy matters discussed above in Part One, I think it is useful to touch on some of the history mentioned in Peter's recent letters.

Looking at the most recent history, the language in the legislative history comports with the above analysis. Specifically, the explanatory language in the House Journal of March 9, 2000 states in its introduction to the proposed amendment that added the Second Method to the statute:

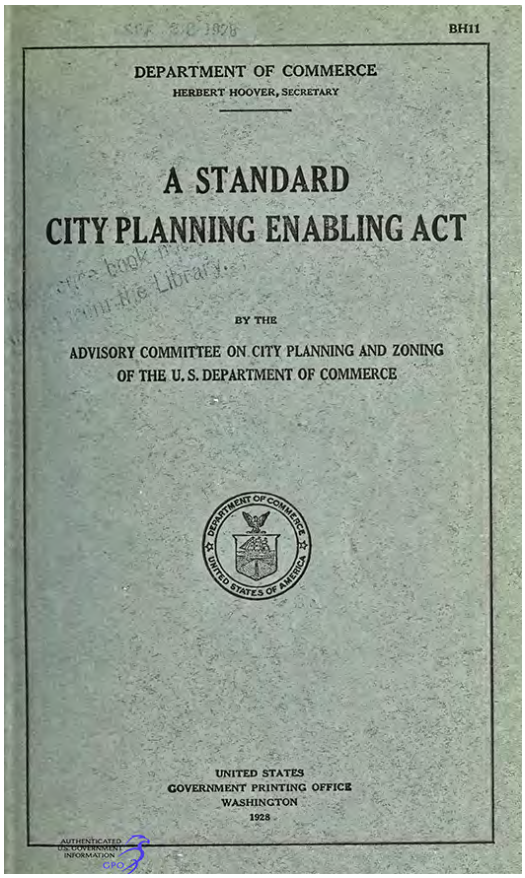
> "City administrative officials work directly with the applicant preparing and reviewing submittals to the planning board...they may still attend meetings when they decide it's necessary" and "…it is not necessary to require them to become a regular member of the board."

Further, the same House Journal explanation states:

> "This bill changes the composition of planning boards in cities with a city council-manager form of government by eliminating the inclusion

of an administrative official and increasing the number of non-ex officio members from 6 to 7" and that the then-proposed "amendment allows this change to be optional".

I have both professional avocational interests in history and am familiar with the 1928 enabling act (the Act) and some of its august authors.



The Act remains foundational to many current statutes, but many of its provisions have been modified over time to fit current practices. However, some of its heavily footnoted text is prescient of some of the current and evolving practices.

One example is the Act's definition of "Mayor". After noting that definitions "are generally a source of danger"[11] the Act defines, with a footnote attached, Mayor as meaning the chief executive, whether "mayor, city manager, or otherwise".[12]

While that definition is in some respects similar to the current language of RSA 672:9, the footnote attached to that definition notes in part that the "word 'mayor' is adopted as a convenient method of indicating the official intended" but "[t]he **consequences of and the problems raised by this in its effects upon the personnel of the commission** are discussed in the notes under section 3 (my emphasis added)".[13]

In the referenced section 3 of the Act, which discusses the expansive use of the term "mayor", the Act notes "there is a decided difference of opinion". The Act goes on to describe the city manager as, in some instances, being the person to fulfill the role of "mayor" on the planning commission, while in others, the actual elective mayor is the better person for that position.[14]

The discussion in the Act summarizes the difference of opinions on mayor or manager by noting that the text does not present "the sole correct solution of this problem" and that if the legislature "decides not to include the mayor as a member of the commission, a modification …can easily be made by omitting the reference to him, [and] by changing six

[11] A Standard City Planning Enabling Act, United States Department of Commerce, Washington DC, 1928 p. 3.

[12] A Standard City Planning Enabling Act, Ibid p. 5.

[13] A Standard City Planning Enabling Act, Ibid p. 6, footnote 3. As Peter has noted, "planning commission" now means planning board for our purposes.

[14] A Standard City Planning Enabling Act, Ibid p. 9, footnote 13.

to seven and making the necessary adjustments in the terms of the appointive members of the commission".[15]

Note that the Second Method of the current NH statute does exactly this by removing the mayor as a member of the board, adding the manager, and increasing the appointive members to seven- exactly as described as an option in 1928 in the Act. This is an example of the prescience touched on above, with the legislature essentially "deciding" in 2000 to do exactly as was described in 1928.

Finally, the Act also states that with respect to the planning commission's makeup "[w]hat is advisable is to be sure that a substantial majority or two-thirds of the commission is composed of members who are not regular officials".[16]

Alternates

In the course of reviewing all of this, I have noticed that another simpler change needs to occur to the current city code, and that is in respect to alternates.

The current city code provides for two alternates, and there are presently two alternates on the board. However, this limited number is problematic due to some of the statutory limitations placed on the types of alternates.

RSA 673:6 I.(a) allows up to five alternate members to "any appointed land use board". RSA 673:6 III applies to alternates for city councilors and others that is different from other alternates. Further, RSA 673:11 restricts the city council alternate so that "only the alternate designated for the city or town council…shall serve in place of that member".

In addition, 673:12 III is addressed to filling board vacancies, but it clearly states that "[i]f the vacancy is for an ex officio member, the chairperson may only designate the person who has been appointed to serve as the alternate for the ex officio member". If faced with the need, it is my intent to follow this direction.

By implication, then the alternate restriction applies to more than the council member's alternate. It therefore seems to me that the board needs: regular alternates; a council alternate; and, at least one ex-officio alternate if there is more than one (council) ex-officio member. This interpretation seems common in an online search of the topic.[17] It therefore seems desirable to have the code revised to allow additional, and designated alternates.

Summary and Recommendations

My work is more analytical in nature than that of an advocate, even though I know I have

[15] A Standard City Planning Enabling Act, Ibid p. 9, footnote 13.

[16] A Standard City Planning Enabling Act, Ibid p. 9, footnote 14.

[17] See, for example, Basics of PB and ZBA Members NH OEP Annual Planning & Zoning Conference, June 11, 2011 by Michael L. Donovan, Esq.

partially strayed into that world with this letter. Peter's position is obviously one option, but on balance, I suggest returning to the position he first had after we first discussed this, where we agreed that the current city code is "out of synch" with the current statute.[18] I submit my Part Two analysis above in support of his original opinion and my current one.

However, without even becoming further involved with the mental gymnastics and logistical origami required to substitute officials as desired to achieve the result of "no change required", or to engage in further debate on that point, I refer back to what is described above under the Part One discussion. If we can simply agree that the better public policy decision is to have a planning board without **any** employer/employee relationships, then the juror standard and the simple standard of independence may both be more easily assured.

I will remind everyone that we had agreed when we last met that this was a matter that should be addressed as one of public policy. I remain of that opinion and suggest that the need for what I believe in fact is better public policy should help to inform and guide any "close call" in interpreting the statutes to consider changes to the city's code.

As I have described above, I think there is ample support for this in the current and historic legislative history and statutes.

Until now, I had not researched this matter to the degree I now have. For that reason, I now understand that my prior writings have clearly not been effective in communicating the underlying matters. Now, based on this additional research, I am more convinced than before that this is a matter that needs attention, and my previous rationale is now augmented by this additional research.

Peter's additional input has also aided me in bolstering my understanding of these matters from what I think is a new perspective.

On reflection, I also believe it is even more important for all of us to think carefully about how the City may proceed with this matter, and whether-as I believe is the case- changes to the City's Code are advisable for the interlocking host of reasons described above.

In fact, the goal of good public policy in my opinion alone compels that we do so as soon as possible.

Examples

I hesitate to use other municipalities as examples, because errors are often found in many places and jurisdictions.[19] However, I found the city of Concord to be a useful example

[18] As a reminder, the NH Municipal Association attorney I spoke with last year when this matter first arose also agreed the city code needed to be changed to be in conformance with the current statute.

[19] As an example, without proper background, Portsmouth's current code itself could be cited as an existing example of what I feel is now an incorrect way to appoint planning board members as discussed in this letter.

since that city's recent legislative history on this topic is available online.
In the attachments that follow, and which will require turning the pages (or flipping the image on your screens), it may be seen that in 1980, Concord had almost exactly the same text as is in the current Portsmouth code (**Attachment 1**).

In 2001- just after the legislature adopted the changes discussed above in Part Two, Concord changed to the Second Method described above (**Attachment 2**).

Concord's 2021 code reflects almost the same text as is proposed in the attached draft amendment, with its addition of a council alternate member (**Attachment 3**).

In other words, the city of Concord has, by its actions of adoption, followed the same rationale outlined above and is recommended in the attached draft code revision.

To further my own education, I quickly looked at a few other cities and none of those have the manager as an appointing authority, except one that has conflicting information on the topic.[20]

Solutions

In an attempt to keep the issues discussed in this letter advancing, and to assist with that last note, I have prepared a proposed amended Code section 1.303 that is attached (**Attachment 4**). As drafted, this proposed code comports with the current statutes as I have tried to describe them above, both regarding regular and alternate members.

The draft also contains a new prohibition of members being in the same employ at the same time (City or otherwise), as discussed throughout this letter.

The draft also has only four of the "not more than 5" alternates allowed by statute, keeping the existing two and adding one each for the Council and Manager ex-officio members as discussed. The draft also specifies that the manager select the manager's alternate, to be approved by Council, just as the manager's designee might be in accordance with the legislative authority.

I have also attached statutory references regarding alternates for convenience (**Attachment 5**).

It is my earnest hope that we can agree that the public interest is best served by having a planning board membership that is independent and can fulfill the goal and requirement of being "as impartial as the lot of humanity will admit".

Portsmouth has a robust planning staff and a fully formed Technical Advisory Committee

[20] These are Derry, Rochester, and Keene. Laconia may or may not be included as it is noted in one part of its online description it does and in another that it does not give appointing authority to the manager.

(TAC) made up of many city officials. The input from the staff and TAC is a well-established and important part of the review of planning applications by all of these good people employed by the city.

The planning board review is another type of review using many independent volunteer resident citizens. The board having a Councilor and **either** the manager **or** another administrative official, will continue to ensure that the city review process can be technically sound and in conformance with good public policy.

I have little doubt that Peter and I could continue to debate the finer points of all of this for much longer than any audience may desire. We could also look further into what Concord or other cities may have done. We could discuss even more of the historic background and underpinnings of current policies and legislation. In the end, however, it may be more direct and certainly much simpler to rely on the common-sense notion that in order to have the board's makeup as an independent body, the code should be changed so there will no longer be any employer/employee members.

Peter and I agree that the city can, of course, make this change to its current code; he feels that is unnecessary, while I feel it is vital. In any event, such change is supported by the history, by other examples and by the enabling legislation. While this all of that should be helpful in guiding the city in what to do about this matter, and at the risk of being too bold, I will most simply characterize and summarize the attached proposed change as being: <u>the right thing to do</u>.

Before we commit further endeavors to writing, I would like to suggest that another meeting would be useful, in the interests of the public and, I trust, productively dispositive.

For these, and any related matters, I remain

Respectfully Yours,

Rick Chellman

Email only copies to:
Synthia Ravell (to print for Bob)
Trevor McCourt, Esq.

City of Concord
1980

The City of Concord ordains as follows:

Section One: Amend Section 32.6 of the Municipal Code of Ordinances, Administrative Code, Planning Board by striking the whole thereof and substituting in its place the following new section:

32.6 Planning Board. The Planning Board shall consist of nine members, namely, the City Manager, one of the administrative officials of the city who shall be selected by the manager, and a member of the council who shall be selected by it, as members ex officio, and six (6) persons to be appointed by the Mayor, subject to confirmation by the City Council. The Mayor shall also appoint, subject to confirmation by the City Council, three (3) alternate members. Whenever a regular member shall be absent the chairman shall designate an alternate if an alternate is present to act in the absent member's place.

City of Portsmouth
2022

Section 1.303: PLANNING BOARD

A. Membership: The Planning Board of the City shall consist of nine (9) members and two (2) alternate members, specifically; (Adopted 1/23/95)

1. The City Manager, or the designee of the City Manager with the approval of the City Council, who shall be an ex-officio member;

2. An administrative official of the City selected by the City Manager who shall be an ex-officio member;

3. A member of the City Council selected by the Mayor with the approval of the Council, who shall be an ex-officio member;

4. Six residents of the City appointed by the Mayor with the approval of the City Council.

5. Two (2) alternates who shall be residents of the City appointed by the Mayor with the approval of the City Council. (Adopted 1/23/95)

Attachment 1

City of Concord 2001

The City of Concord ordains as follows:

SECTION I: Amend the CODE OF ORDINANCES, Title V, Administrative Code, Chapter 30, Administrative Code, Article 30-3, Boards and Commissions, by deleting in its entirety Section 30-3-6, Planning Board, and replacing with the following new section:

30-3-6 Planning Board.

(a) The Planning Board shall consist of nine (9) members: the City Manager, or with the approval of the City Council the City Manager's designee, who shall be an *ex officio* member; a member of the City Council selected by the Council, who shall be an *ex officio* member; and seven (7) persons appointed by the Mayor subject to confirmation by the City Council. The Mayor shall also appoint, subject to confirmation by the City Council, two (2) alternate members.

City of Portsmouth 2022

Section 1.303: PLANNING BOARD

A. Membership: The Planning Board of the City shall consist of nine (9) members and two (2) alternate members, specifically; (Adopted 1/23/95)

1. The City Manager, or the designee of the City Manager with the approval of the City Council, who shall be an ex-officio member;

2. An administrative official of the City selected by the City Manager who shall be an ex-officio member;

3. A member of the City Council selected by the Mayor with the approval of the Council, who shall be an ex-officio member;

4. Six residents of the City appointed by the Mayor with the approval of the City Council.

5. Two (2) alternates who shall be residents of the City appointed by the Mayor with the approval of the City Council. (Adopted 1/23/95)

Attachment 2

City of Concord 2021

The City of Concord ordains as follows:

SECTION I: Amend the CODE OF ORDINANCES, Title V, Administrative Code; Chapter 30, Administrative Code, Article 30-3, Boards and Commissions, by amending Section 30-3-6, Planning Board, as follows:

30-3-6 - Planning Board.

(a) The Planning Board shall consist of nine (9) members: the City Manager, or with the approval of the City Council the City Manager's designee, who shall be an ex officio member; a member of the City Council selected by the Council, who shall be an ex officio member; and seven (7) persons appointed by the Mayor subject to confirmation by the City Council. The Mayor shall also appoint, subject to confirmation by the City Council, two (2) alternate members ***and one (1) City Council alternate member***.

place.

City of Portsmouth Proposed 2022 Amendment

Section 1.303: PLANNING BOARD

A. **Membership**: The Planning Board of the City shall consist of nine (9) members, and four (4) alternate members, specifically as follows:

1. The City Manager, or with the approval of the City Council, the City Manager's designee, who shall be an ex-officio member;
2. A member of the City Council, selected by the Council, who shall be an ex-officio member;
3. Seven (7) residents of Portsmouth selected by the Mayor with the approval of the City Council who shall serve as regular members;
4. Two (2) residents of Portsmouth selected by the Mayor with the approval of the City Council, who shall serve as regular alternates;
5. One (1) resident of Portsmouth, selected by the City Council, who shall serve as an ex-officio alternate for the Council member; and,
6. One (1) resident of Portsmouth, designated by the Manager with the approval of the City Council, shall serve as an ex-officio alternate for the Manager or Manger's designee.

Attachment 3

Proposed Revised Section 1.303 of
City Of Portsmouth Code
ATTACHMENT 4

Section 1.303: PLANNING BOARD

A. **Membership**: The Planning Board of the City shall consist of nine (9) members, and four (4) alternate members, specifically as follows:

1. The City Manager, or with the approval of the City Council, the City Manager's designee, who shall be an ex-officio member;
2. A member of the City Council, selected by the Council, who shall be an ex-officio member;
3. Seven (7) residents of Portsmouth selected by the Mayor with the approval of the City Council who shall serve as regular members;
4. Two (2) residents of Portsmouth selected by the Mayor with the approval of the City Council, who shall serve as regular alternates;
5. One (1) resident of Portsmouth, selected by the City Council, who shall serve as an ex-officio alternate for the Council member; and,
6. One (1) resident of Portsmouth, designated by the Manager with the approval of the City Council, shall serve as an ex-officio alternate for the Manager or Manger's designee.

B. **Compensation**: All Planning Board members and alternates shall serve as such without compensation.

C. **Service on Other Boards**: Any two (2) appointed or elected members of the planning board may also serve together on any other municipal board or commission, except that no more than one appointed or elected member of the planning board shall serve on the conservation commission, the City Council, or a local land use board as defined in RSA 672:7.

D. **Employment**: Planning Board members in the same employ, whether for the City or otherwise, shall not serve at the same time on the Planning Board.

E. **Term and Vacancies**:

1. Term: The term of each appointed member shall be three (3) years.

2. Vacancies: The Mayor may appoint up to three (3) regular members and up to another three (3) alternate members in any calendar year.

3. Additional Vacancies: Appointments in excess of those described above must first are ratified by the City Council as necessary.

Statutes Relating to Alternate Members

Section 673:6

673:6 Appointment, Number and Terms of Alternate Members. –
I. (a) The local legislative body may provide for the appointment of not more than 5 alternate members to any appointed local land use board, who shall be appointed by the appointing authority. The terms of alternate members shall be 3 years.
(b) In a town which votes to elect its planning board members on a staggered basis according to the provisions of RSA 673:2, II(b)(2), alternate members of the planning board shall continue to be appointed according to the provisions of this paragraph until each member of the board is an elected member. Thereafter, the alternate planning board members shall be appointed according to the provisions of paragraph II.
II. An elected planning board may appoint 5 alternate members for a term of 3 years each, which shall be staggered in the same manner as elected members pursuant to RSA 673:5, II.
II-a. An elected zoning board of adjustment may appoint 5 alternate members for a term of 3 years each, which shall be staggered in the same manner as elected members pursuant to RSA 673:5, II.
III. The alternate for a city or town council member, selectman, or village district commission member shall be appointed by the respective council, board, or commission in the same manner and subject to the same qualifications as the city or town council member, selectman, or village district commission member under RSA 673:2. The terms of alternate members shall be the same as those of the respective members and may be in addition to the alternates provided for in paragraph I.
IV. Every alternate member appointed to a planning board under this section shall comply with the multiple membership requirements of RSA 673:7, I.
V. An alternate member of a local land use board may participate in meetings of the board as a nonvoting member pursuant to rules adopted under RSA 676:1.

Source. 1983, 447:1. 1986, 29:1. 1987, 197:1. 1991, 176:1. 1993, 69:2. 1996, 217:1. 2010, 270:1, eff. July 6, 2010. 2017, 143:1, eff. Aug. 15, 2017. 2019, 105:1, eff. Aug. 20, 2019.

Section 673:11

673:11 Designation of Alternate Members. – Whenever a regular member of a local land use board is absent or whenever a regular member disqualifies himself or herself, the chairperson shall designate an alternate, if one is present, to act in the absent member's place; except that only the alternate designated for the city or town council, board of selectmen, or village district commission member shall serve in place of that member.

Source. 1983, 447:1. 1996, 42:10, eff. June 23, 1996.

Section 673:12

673:12 Filling Vacancies in Membership. –
Vacancies in the membership of a local land use board occurring other than through the expiration of a term of office shall be filled as follows:
I. For an elected member, by appointment by the remaining board members until the next regular municipal election at which time a successor shall be elected to either fill the unexpired term or start a new term, as appropriate.
II. For an appointed, ex officio, or alternate member, by the original appointing or designating authority, for the unexpired term.
III. The chairperson of the local land use board may designate an alternate member of the board to fill the vacancy temporarily until the vacancy is filled in the manner set forth in paragraph I or II. If the vacancy is for an ex officio member, the chairperson may only designate the person who has been appointed to serve as the alternate for the ex officio member.

Source. 1983, 447:1. 2009, 114:1, eff. Aug. 21, 2009.

Attachment 5