

**THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD
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**CASE NAME: Iron Horse Properties, LLC v. City of Portsmouth
CASE No.: ZBA-2021-21**

ORDER

The matter under review by the Housing Appeals Board is an appeal by Iron Horse Properties, LLC (the “Applicant”) of a decision by the City of Portsmouth (the “City”) Zoning Board of Adjustment (“ZBA”) reversing the Applicant’s Planning Board approval of its development plan for Bartlett Street in Portsmouth, New Hampshire.

FACTS:

The Applicant owns a parcel of real property known as Map 164, Lot 4-2, located at 105 Bartlett Street in Portsmouth, New Hampshire. On 15 April 2021, the City of Portsmouth Planning Board granted the Applicant approvals for:

- 1) A wetland Conditional Use Permit (“CUP”);
- 2) A CUP for shared parking on separate lots;
- 3) Site plan approval for the demolition and relocation of existing structures for the construction of 152 units in three (3) buildings; and
- 4) Subdivision approval for a lot line relocation.

On 14 May 2021, the Intervenors filed an administrative appeal with the ZBA requesting review of the following Planning Board decisions in conjunction with the Applicant’s site plan approval:

- 1) The site plan approval was not in compliance with the City Zoning Ordinance, Section 10.5A41.10B which limits the maximum allowable building length to 200 feet;
- 2) The Planning Board improperly granted a CUP that allows the Applicant to block the Dover Street view corridor;
- 3) The Planning Board's site plan approval contradicts a prior decision of the ZBA issued at a meeting on 22 January 2020;
- 4) The Planning Board erred in granting a wetlands CUP because the application did not meet the second and fifth criteria in the City Zoning Ordinance, Section 10.1017.50;
- 5) The Planning Board erred in granting the CUP for shared parking, claiming "There were less intrusive designs...which could have avoided encroachment into the 100' wetland buffer;"
- 6) The Conservation Commission never "considered or made specific findings concerning the six criteria delineated in 10.1017.50...;"
- 7) The approved site plan violates the 50-foot height limit in Sections 10.5A43.31 and 10.5A46.10 of the City Zoning Ordinance;
- 8) The site was unlawfully spot-zoned for the purpose of approving the Applicant's project;
- 9) The CUPs granted by the Planning Board were not related to innovative land use controls and therefore were not authorized by the enabling statute RSA 674:21.

At the 20 July 2021 meeting, the ZBA voted to grant the appeal of the Intervenors. On 28 July 2021, the Applicants filed a motion for rehearing with the ZBA. On 17 August 2021, the ZBA denied the Applicant's motion. On 15 September 2021, the Applicant filed this appeal with the Housing Appeals Board.

LEGAL STANDARDS:

The Housing Appeals Board review of any Zoning Board of Adjustment decision is limited. It will consider the Zoning Board's factual findings prima facie, lawful, and reasonable. Those findings will not be set aside unless, by a balance of the probabilities upon the evidence

before it, the Housing Appeals Board finds that the Zoning Board decision was unlawful or unreasonable. See, RSA 679:9. See also, *Lone Pine Hunters Club v. Town of Hollis*, 149 N.H. 668 (2003) and *Saturley v. Town of Hollis Zoning Board of Adjustment*, 129 N.H. 757 (1987). The party seeking to set aside a Zoning Board decision bears the burden of proof to show that the order or decision was unlawful or unreasonable. RSA 677:6.

DISCUSSION:

As the “Facts” reveal, on 15 April 2021, the City of Portsmouth Planning Board granted site plan approval for the Applicant’s residential development located at 105 Bartlett Street. As part of that approval, two (2) CUPs were granted by the Planning Board in conjunction with the Applicant’s proposal. Specifically, one was a wetlands CUP (Count 4 of the Intervenors’ appeal) and the second was a shared parking CUP (Count 5 of the Intervenors’ appeal).

The Housing Appeals Board will first address the issue of the validity of an appeal of a Planning Board’s CUP decisions to the City of Portsmouth Zoning Board of Adjustment, since any appeal of an innovative land use control decision made by the Planning Board must be filed directly with the Superior Court or the Housing Appeals Board under RSA 676:5, III.¹

Specifically, if the RSA 676:5, III, procedure had been followed, both CUPs would have been appealed directly to the Superior Court or the Housing Appeals Board, and, in that instance, the burden of proof would have rested with the Intervenors. Including the CUP issues within the Intervenors’ 9-count zoning board administrative appeal, thus placing the burden of proof upon the Applicant on all nine (9) counts, may not be reasonable nor consistent with the statutory framework previously referenced.

Depending on the state of the evidence, this may be important since RSA 677:6 entitled “Burden of Proof” places the burden “...upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show

¹ The language is specific in RSA 676:5, III. It states: “...the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.” That statute contains the procedure for appeal to the Superior Court or the Housing Appeals Board.

that the order or decision is unlawful or unreasonable.”² Because the Applicant believes the burden of proof on Counts 4 and 5 would be unfairly shifted by including those in the Intervenor’s appeal, the Applicant has requested the Housing Appeals Board place the burden of proof on the Intervenor as to the CUP determinations.³

The underpinning of the CUP burden of proof issue (Intervenor’s zoning appeal, Counts 4 & 5) has its genesis under RSA 674:21, the “Innovative Land Use Controls” statute.⁴ Under Section I, a list of these “controls” is provided, but the list is not inclusive; it clearly states:

I. Innovative land use controls may include, but are not limited to:

- (a) Timing incentives.
- (b) Phased development.
- (c) Intensity and use incentive.
- (d) Transfer of density and development rights.
- (e) Planned unit development.
- (f) Cluster development.
- (g) Impact zoning.
- (h) Performance standards.
- (i) Flexible and discretionary zoning.
- (j) Environmental characteristics zoning.
- (k) Inclusionary zoning.
- (l) Impact fees.
- (m) Village plan alternative subdivision.
- (n) Integrated land development permit option. *Id.*

² Both parties acknowledge that the CUP dispute could have ended up before either the Superior Court or the Housing Appeals Board by: 1) a direct appeal filed after the Planning Board’s grant of either or both CUPs; or 2) an indirect appeal of the Planning Board’s grant of either or both CUPs by filing a petition with the ZBA and an appeal to the Superior Court or Housing Appeals Board at the conclusion of any ZBA action. As noted, in either case it could have ended up before the Housing Appeals Board.

³ To shift the burden of proof to the Applicant after a finding that proper procedure was not followed by the Intervenor is inconsistent with the statutory framework. The Housing Appeals Board notes that neither party has requested that the matter be dismissed without prejudice so that a direct appeal can be filed with either the Housing Appeals Board or the Superior Court.

⁴ The second request for relief in the Intervenor’s administrative appeal (Count 2) states that the Planning Board improperly granted a CUP allowing the Applicant to “block the Dover Street view corridor.” This is factually incorrect. As a condition of site plan approval, the Planning Board imposed a condition requiring the Applicant to conform to Section 10.5A42.40 of the Zoning Ordinance, in order to: “...provide a public view from Dover Street with a terminal vista of the North Mill Pond...” (CR at Vol. 1, Tab 9, Condition 11). Based on the foregoing, Count 2 is dismissed. Likewise, Count 3 of the appeal is not supported. The purpose of the prior variance request was not to interfere or block the Dover Street view corridor. After variance denial, (CR at Tab 22), the Applicant complied with the decision. A review of the site plan shows no realignment of the referenced view corridor. Because of the foregoing, Count 3 of the appeal is dismissed.

When RSA 674:21 controls are adopted and placed in the zoning ordinance (see, RSA 675:1, II) they are administered as provided in the ordinance. In this case, Section 10.1017, wetlands CUP, and Section 10.1112.14, shared parking CUP, can be waived by the Planning Board if the stated CUP requirements are met. This allowance was approved by the local legislative body and became part of the Portsmouth zoning scheme.⁵ See, RSA 675:2.

The Intervenors argue that both the wetlands and shared parking CUPs are not “innovative land use controls,” thus, they do not require a direct appeal from the Planning Board’s decisions. Because RSA 674:21, I is not limited, and since innovative land use controls are Planning related, the wetlands and shared parking CUPs fall squarely within the statutory guidance of RSA 674:21, I, as evidenced by the allowed Planning Board waiver procedure contained in the Zoning Ordinance.⁶ Planning Board intrusion into zoning provisions is not to be taken lightly, since, apart from this limited power, only the ZBA is granted that right.⁷

Turning to the specific complaints made by the Intervenors, the Housing Appeals Board turns first to the wetlands CUP. The Certified Record contains the specific factors evaluated by the Planning Board in making its wetland buffer CUP decision. It also gained input from the

⁵ The Zoning Ordinance in Section 10.242.10 clearly grants the Planning Board the power to issue CUPs for the two granted CUPs. It states:

The Planning Board...may grant a conditional use permit if the application is found to be in compliance with the general approval criteria in Section 10.243 or, if applicable, the specific standards or criteria as set forth in this Ordinance for the particular use or activity. The Planning Board...shall make findings of fact, based on the evidence presented by the applicant, City staff, and the public, respecting whether conditional use is or is not in compliance with the approval criteria of Section 10.243.

⁶ The Housing Appeals Board agrees with the Applicant that there is no clear statutory provision in New Hampshire Law allowing a Planning Board to waive zoning provisions by granting CUPs except as an “innovative land use control.” This concept is encapsulated in advice provided by the New Hampshire Municipal Association. It advises its members that a CUP is a device to implement “innovative land use controls.” Continuing with that advice, the New Hampshire Municipal Association published *Look Before You Leap: Understanding Conditional Use Permits*, which expressly cites: “Conditional use permits might be used appropriately in connection with: construction or filling in wetlands, wetland buffers, or aquifer protection district...” C. Christine Fillmore, Esq., *Look Before You Leap: Understanding Conditional Use Permits* (Jan. 2006).

⁷ Review of the Planning Board’s CUP decisions by the City of Portsmouth Zoning Board of Adjustment will be decided by the Housing Appeals Board “as if it were a direct appeal of the Planning Board’s grant of the conditional use permits.”

City's environmental planner, Peter Britz, as well as the City's Conservation Commission.⁸ All recommended approval of the CUP. While the Intervenor suggests that there was an alternative location for the proposed development with less adverse impact, based upon the final design of the project including underground parking and relocating the footprint of any structures away from North Mill Pond, the final design is not unreasonable based on the facts considered by the Planning Board.

The Intervenor would like the Housing Appeals Board to focus on the idea that a smaller project could be built as a basis for reversal of the Planning Board's approval of the wetlands buffer and shared parking CUPs. The Certified Record reflects adjustments made by the Applicant to the plan, but, more importantly, this "desire" by the ZBA does not mandate a wholesale reduction in project size. *See, Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007). The Housing Appeals Board does not believe that the Planning Board acted illegally or unreasonably in making its wetlands CUP decision, thus, the ZBA decision reversing the Planning Board's grant of the wetland buffer CUP was unreasonable.⁹

The other CUP referenced in Count 5 of the Intervenor's appeal is approval of shared parking. Again, the Intervenor alleges that there could have been less intrusive designs or other changes to the plan. In this instance, the Housing Appeals Board believes that the Planning Board properly and fairly reviewed the CUP criteria in granting the shared parking CUP in this location. As a result, the ZBA's reversal of the Planning Board's granting of the shared parking CUP was unreasonable.¹⁰

⁸ The sixth item of the Intervenor's ZBA appeal (Count 6) suggests that the Conservation Commission never "...considered or made specific findings concerning the six CUP criteria referenced in Section 10.1017.59..." of the ordinance. The Conservation Commission provides review and/or comment and, in this case, did so. There is no ordinance provision requiring a review of the six wetland buffer CUP criteria by the Conservation Commission. The Certified Record demonstrates a full review by the Conservation Commission with an approval recommendation to the Planning Board. (CR at Vol. II, Tab 5).

⁹ To the extent further comment is needed regarding the City of Portsmouth Zoning Board of Adjustment decision regarding the CUP determinations made by that board, the Housing Appeals Board finds that the Zoning Board of Adjustment was confused by the advice given to it by planning staff. (CR at Vol. I, Tabs 17 and 18). Essentially, the ZBA expected a court appeal and acted as if their decisions were inconsequential since the matter would be decided by a court or the Housing Appeals Board.

¹⁰ Review of the Certified Record discloses that the City Zoning Board of Adjustment spent little time reviewing this particular matter. Like Count 4 of the Intervenor's appeal, the ZBA felt other designs could have been considered. (CR at Vol. I, Tab 22).

Count 1 of the Intervenor's administrative appeal of the referenced Planning Board decision states that the Applicant's site plan included a structure more than 200 feet in length which is in violation of Section 10.5A41.10B of the ordinance.

At the outset, the Certified Record does not show that the Intervenor's presented this argument to the Planning Board allowing the Planning Board to consider the possible zoning violation.¹¹ That said, a review of the Certified Record shows that the longest building façade is 185 feet—well short of the 200-foot maximum. (See, Building B on the site plan C-102.2 and Section 10.1530A, Figure 10.5A41.10B of the Zoning Ordinance.) (CR at Vol. II, Tab 2). Based upon the facts before the Planning Board, the reversal of the Planning Board's decision by the ZBA regarding "building length" was unreasonable.¹²

We next turn to Count 7 of the Intervenor's appeal. It alleges that the Planning Board acted illegally in interpreting the ordinance height restriction in the CD-W Zoning District. Specifically, Map 10.5A21B, Section 10.5A43.30, defines building height as: "...the height measured from the grade plane to the top of the proposed building." While the actual height of the building is not in significant dispute, the Intervenor claims that the Applicant should have used the original grade plane that existed when taking the measurement.

If that had been the case, there may have been a building height violation. However, the measurement used by the Applicant and the Planning Board was measured from the regraded

¹¹ A party must raise any issue to be litigated before a tribunal in order to have the issue heard on appeal. See, *Blagbrough Family Realty Trust v. Town of Wilton*, 153 N.H. 234 (2006). However, it is always presumed the tribunal will follow the law—in this case, the duly enacted City of Portsmouth Zoning Ordinance. Therefore, the issue will be considered by the Housing Appeals Board.

¹² The Planning Board and its staff reviewed the Applicant's plans in detail. It is clear from the record that each side conducted their own review of the ordinance. What is revealing is the comment of ZBA member Ms. Beth Margeson:

...she remarked that there were two ways of calculating building length in the ordinance, the regular zoning ordinance and the character-based zoning, and that was the maximum building block length. Because the way the definition was worked in the character-based zoning, she thought it would seem to be the appropriate calculation for the building. (CR at Vol. I, Tab 22).

There was little other ZBA discussion regarding Count 1 of the Intervenor's appeal. See, Zoning Ordinance Section 10.1530A and Figure 10.5A41.10B.

surface, bringing it within the 50-foot limitation.¹³ The Certified Record and information provided by the Parties shows that this appears to be the methodology previously used by the City of Portsmouth in determining building height. The Applicant points out in its materials that the property at 145 Brewery Lane and another at 77 Hanover Street included regrading the property to raise the grade plane elevation.¹⁴ Apparently, no abutters or interested parties raised concerns over that methodology in regard to these properties. The Housing Appeals Board finds that, to the extent that there is any confusion, “administrative gloss” will be applied to this particular issue. Specifically in interpreting the building height ordinance, the City has used the average grade plane and not the original grade. This will be the standard applied to the Applicant’s application.¹⁵

Based upon the foregoing, the Housing Appeal Board finds that the City of Portsmouth Zoning Board of Adjustment was unreasonable in reversing the Planning Board’s height decision in conjunction with the Applicant’s planning approval.

In Count 8 of the Intervenors’ appeal, a challenge is being made to alleged “spot zoning” of the Applicant’s property. (CR at Vol. I, Tab 2, Page 10). The Housing Appeals Board notes that on 20 August 2018, the City Council of the City of Portsmouth rezoned the subject property and made additional changes to the CD4-W District. Under RSA 677:2, the

¹³ The CD4-W zoning district imposes a 50-foot building height limit. Map 10.5A21.B, Section 10.5A43.30. This is measured from the “grade plane” to the top of the building. See, Zoning Ordinance at Section 10.1530. While the Applicant proposed some regrading to accommodate parking under the structure, the “grade plane” exhibit (see, Applicant’s Ex. D, Page 6), shows the building within the height limits. See, Ex. I. Importantly, building height is measured from the “average grade plane”—not from the original grade. See, Section 10.1530 of the Zoning Ordinance.

¹⁴ See, ¶ 116 of Applicant’s *Appeal from Decision of the Portsmouth Zoning Board of Adjustment Pursuant to RSA 679:5*.

¹⁵ To the extent there is any vagueness in interpreting this ordinance provision, “administrative gloss” controls. In *Harborside Assoc., L.P. v. City of Portsmouth*, 163 N.H. 439 (2012), the Supreme Court stated:

As a rule of statutory construction, an administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference.

The Supreme Court in *Hansel v. City of Keene*, 138 N.H. 99, 104 (1993) further stated on this matter: “...the municipality may not change such a de facto policy, in the absence of legislative action, because to do so would presumably violate legislative intent.”

Intervenors had 30 days from the City Council's 2018 decision to request a rehearing on this issue. RSA 677:2 states:

Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion.¹⁶

Based upon the time that has passed since the zoning decision was made, the Housing Appeals Board does not find that this issue has merit. Thus, Count 8 is dismissed.

Turning to Count 9 of the Intervenors' appeal; it suggests that the City's CUPs are facially invalid because they are not authorized by RSA 674:21. As previously discussed, the City's Zoning Ordinance provides for CUPs regarding wetlands and the shared parking. However, the appropriate agency to administer and provide the actual permit is the Planning Board. The only mechanism under current New Hampshire law to allow the waiver of a zoning ordinance by the Planning Board is when the subject of the ordinance falls under the Innovative Land Use Controls authorized under RSA 674:21.¹⁷

¹⁶ RSA 672:8 states: "'Local legislative body' means one of the following basic forms of government utilized by a municipality: I. Council, whether city or town...." See also, *Portsmouth Advocates, Inc. v. City of Portsmouth*, 133 N.H. 876 (1991), which outlines the process for challenging a decision of a city council.

¹⁷ A CUP review by a Planning Board can only occur if the area in question is under an Innovative Land Use Control. This procedure was adopted and confirmed by the local legislative body when the Portsmouth City Zoning Ordinance was approved. Ordinarily, the only body authorized to waive the provisions of the Zoning Ordinance is the Zoning Board of Adjustment; however, as noted, if the provision is part of an Innovative Land Use Control, then the local legislative body can authorize the Planning Board to act as the waiver authority. This is the case with the two CUPs issued in the matter before the Housing Appeals Board. See, Peter Loughlin, *New Hampshire Practice Series: Land Use Planning and Zoning*, Vol. 15, Section 15.07 (2020).

Based upon the foregoing, the findings of the City of Portsmouth ZBA as to Counts 1, 4, 5, 6, 7, and 9 are REVERSED; Counts 2, 3, and 8 are DISMISSED.^{18,19}

**HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:**

Elizabeth Menard

Elizabeth Menard, Clerk

Date: January 26, 2022

¹⁸ In reviewing the Certified Record, in particular: Tab 22, the ZBA summarily reversed the Planning Board's decisions (Counts 1-9) without significant discussion. Likely, this resulted, in part, from some bias toward the Applicant's project unrelated to the appeal requests. At the 20 July 2021 ZBA hearing, Mr. David MacDonald opined:

...he would support the appeal, noting that the City in the last decade had gone through a surge of developing buildings that the City didn't really need and that consumed services and generated costs for the citizens. He asked how much better off Portsmouth would be if the proposal was approved. He said there were enough places to live for residents that people who didn't live in Portsmouth but wanted to see [sic] a shortage of housing. He said there was a shortage of natural waterfront and wild species and that the City didn't have to approve giant residential buildings or corrupt shorelines and estuaries to make the planet a better place to live."
(CR at Vol., I, Tab 22).

In addition, Mr. James Lee said: "...the Board should just consider the totality of the appeal and say yes or no." (CR at Vol. I, Tab 22). The Housing Appeals Board finds this method of deciding the numerous appeal counts to be suspect, since the focus of the ZBA was on the project itself and not each individual appeal request.

¹⁹ After a full review of the Certified Record, the Housing Appeals Board has found, by a balance of the probabilities, that the ZBA erred in its findings and that the Planning Board's decisions, including the CUPs, were appropriate. (See, RSA 679:9). This is so regardless of which side had the "burden of proof" on Counts 4 and 5 of the zoning petition discussed at Pages 5-8, *supra*. Thus, though the "burden of proof" issue was raised at the request of the Applicant, the Housing Appeals Board finds, in this case, that issue to be moot.