

CITY OF PORTSMOUTH

LEGAL DEPARTMENT

MEMORANDUM

DATE: OCTOBER 24, 2022

TO: PETER STITH, AICP PRINCIPAL PLANNER

FROM: TREVOR P. MCCOURT, ASSISTANT CITY ATTORNEY *TPM*

RE: 53 GREEN STREET REHEARING
APPEAL OF A DECISION OF THE PLANNING BOARD

This memorandum is provided in order to offer a procedural and legal framework as the Zoning Board of Adjustment takes up a rehearing of a decision on an appeal from a Planning Board decision. Through this memorandum, I seek to present relevant statutes and case law and to present a suggested path as the Board works through the various issues presented. This memo does not provide any suggested outcomes, and acts to supplement the background information contained in your staff memorandum to the Board of Adjustment.

The three issues addressed in this memo are as follows: (1) suggested procedure to be followed by the Board; (2) the legal standard for standing; and, (3) the jurisdiction of the Board of Adjustment.

I. Rehearing Procedure

The purpose of a rehearing before the Board of Adjustment is to provide the Board with the opportunity to correct its own errors prior to an appeal to Superior Court. Bourassa v. Keene, 108 N.H. 261, 234 (1967). Although the party seeking a rehearing must follow certain procedures and meet certain criteria in the motion for rehearing, the appealing party may not limit the scope of the rehearing and the Board may correct any error it may have made in rendering its first decision.

The Board is required to make specific findings of facts supporting its decision. RSA 676:3 (1). Therefore, factual and legal reasoning behind each decision of the Board is required.

With this context in mind, I recommend the Board first address the procedural questions raised by Attorney Ramsdell who represents the applicant:

1. Determine if the appellants have standing to appeal the Planning Board's decision (see section II below for legal background on standing). If the Board finds none of the appellants have standing, then there is no need to proceed to any other issue. If any appellant has standing, then proceed.

2. Determine if the Board has jurisdiction over any, all, or none of the questions raised on appeal (see section III below on the subject of jurisdiction). The Board need only proceed to address those questions, if any, it determines it has jurisdiction over.

Next, if any appellant has standing, address those questions raised by Attorney MacCallum, who represents the appellants, over which you determine you have jurisdiction:

1. Should the Planning Board have required the Applicant to obtain a conditional use permit for building footprint pursuant to Zoning Ordinance Section 10.5A43.43?
2. Was the Planning Board's grant of a wetlands conditional use permit lawful?
3. Did the Planning Board correctly permit the Applicant to include a three story building within 100' of the North Mill Pond water line, and outside of the North End Incentive Overlay District, where the rest of the lot is within the incentive overlay district?

I then recommend that the Board provide factual and legal findings supporting each of the decisions it makes. The remainder of this memo provides statutes and case law you may find instructive.

II. Standing

The Applicant claims that the appealing parties do not have standing to appeal the underlying Planning Board decision. Standing is a factual issue for the Board to decide on a case-by-case basis.

RSA 676:5 states that "[a]ppeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any **person aggrieved** . . . by any decision of the" Planning Board. (Emphasis added). The New Hampshire Supreme Court provides that a person is "aggrieved" if that person has "some direct, definite interest in the outcome of the action or proceeding". Weeks Restaurant Corp v. Dover, 119 N.H. 541 (1979). The Court further advised that the Board of Adjustment weigh the following, nonexclusive factors when considering if a party is "aggrieved":

1. The proximity of the appealing party's property to the property for which approval is sought;
2. The type of change proposed;
3. The immediacy of the injury claimed; and,
4. The appealing party's participation before the Planning Board.

Further, *New Hampshire Practice: Land Use Planning and Zoning* provides the following guidance:

The term aggrieved is not easily defined. It does not mean all persons in the community who might feel that they are hurt by a particular decision. Whether a party has sufficient interest to have standing is a factual determination in each case.

Therefore, the question of whether the petitioners have standing is a question properly resolved by the Board of Adjustment based upon the facts before it, using the legal considerations presented above.

III. Jurisdiction

The jurisdiction of the Board of Adjustment is provided by RSA 676:5, III, which states as follows:

If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then 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.

In any question involving the construction, interpretation, or application of the zoning ordinance, the Board of Adjustment steps into the shoes of the Planning Board, and can make any decision the Planning Board could have lawfully made. The Board of Adjustment may not alter or overturn any decision of the Planning Board did not involve the construction, interpretation or application of the zoning ordinance.

cc: Susan G. Morrell, City Attorney
Beverly Mesa Zendt, Planning Director