

CITY OF PORTSMOUTH

LEGAL DEPARTMENT

MEMORANDUM

DATE: FEBRUARY 11, 2022

TO: BEVERLY MESA-ZENDT, PLANNING DIRECTOR

FROM: TREVOR P. MCCOURT, STAFF ATTORNEY *TPM*

RE: IRON HORSE PROPERTIES LLC v. CITY OF PORTSMOUTH
DECISION OF THE HOUSING APPEALS BOARD

By Order dated January 26, 2022, ("HAB Order"), the Housing Appeals Board ("HAB") found that the Board of Adjustment ("BOA") acted unreasonably and unlawfully when it overturned the decision of the Planning Board granting site plan approvals to Iron Horse Properties, LLC for property located at 105 Bartlett Street. Although this decision is still subject to appeal to the New Hampshire Supreme Court and is therefore not a final decision, the Planning Director has requested a summary of the findings of the HAB be provided to the BOA members. For convenience, the full decision of the HAB is attached.

Background of Appeal

On April 15, 2021 the Planning Board voted to grant site plan approval and two Conditional Use Permits (CUPs) to Iron Horse Properties, LLC (Iron Horse). Iron Horse proposed constructing a residential development at 105 Bartlett Street. Thereafter, several residents represented by Attorney Duncan MacCallum (the "Residents") appealed the Planning Board approval to the BOA. The Residents argued the BOA had erred in nine different ways, and the BOA agreed with the Residents, overturning the decision of the Planning Board on all nine counts.

Iron Horse appealed this decision to the HAB. The HAB held a hearing via zoom, and found the BOA had acted unlawfully and unreasonably in overturning the Planning Board, and the HAB therefore reinstated the original approvals granted by the Planning Board.

Legal Findings

Although there were nine grounds upon which the BOA overturned the Planning Board's decision, the reasons the HAB found the BOA was incorrect in its conclusions can be fairly divided into three categories: lack of jurisdiction, plain error, and that the zoning ordinance was correctly interpreted by the Planning Board.

However, prior to discussing these grounds individually, it is worth noting that the HAB, at the end of its Order, admonishes the BOA for its lack of significant discussion on the individual grounds for overturning the Planning Board. HAB Order at 10, Fn 18. In the absence of specific findings by the BOA, the HAB is left to conclude the BOA decision resulting from “bias towards the Applicant’s project unrelated to the appeal requests”. HAB Order Page 10, Fn 18. It is my recommendation that, in future applications to the BOA, members carefully discuss grounds for their decision to avoid the appearance of bias regarding any application.

Jurisdiction

The HAB found that the BOA lacked jurisdiction to overturn the Planning Board on several grounds. In an appeal from a decision of the Planning Board, the BOA’s jurisdiction is limited to the extent that decision is “based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance”. RSA 676:5, III. Excepted from this standard are “innovative land use controls adopted pursuant to RSA 674:21”. Id.

The HAB found that the BOA lacked jurisdiction to opine on counts 2, 4, 5, 6, and 9, as each of these counts challenged the Planning Board’s findings relating to CUPs. The HAB found the provisions of the Zoning Ordinance permitting CUPs are enabled by RSA 674:21. HAB Order at 5, Fn 5-7.¹

The HAB also found the BOA lacks jurisdiction to decide whether an ordinance is facially valid. HAB Order at 8-9. Such was the BOA’s finding when it approved count 8, a challenge to the Zoning Ordinance as “spot zoning” as applied to this property. Id.

Plain Error

The HAB also found the BOA committed plain error when it overturned the Planning Board on Counts 3 and 6. In count 3, the BOA found the “Planning Board’s site plan approval contradicts a prior decision of the [BOA] issued at a meeting on 22 January 2020”. HAB Order at 2. Upon review of the record before it, the HAB found otherwise, indicating “the purpose of the prior variance request was not to interfere or block the Dover Street view corridor. After variance denial, the Applicant complied with the decision. A review of the site plan shows no realignment of the referenced view corridor.” HAB Order at 4, Fn 4.

The HAB found the BOA committed plain error when, in count 6, the BOA ruled that the “Conservation Commission never considered or made specific findings concerning the six criteria delineated in 10.1017.50”. HAB Order at 2. Upon review of the record, the HAB found that the Conservation Commission had made specific recommendations to the Planning Board, as prescribed by ordinance, and that its recommendations did not need to address the six criteria contained within Section 10.1017.50 because nothing in the ordinance requires the Conservation Commission to do so. HAB Order at 6, Fn 8.

Misinterpretation of the Ordinance

¹ The HAB did extensively discuss the merits of the CUPs granted by the Planning Board, but it did so “as if it were a direct appeal of the Planning Board’s grant of the conditional use permits”. HAB Order at 5, Fn 7.

The BOA found that the “approved site plan violates the 50-foot height limit in Sections 10.5A43.31. HAB Order at 2. The HAB found that this ordinance is vague, as it was not clear whether a measurement from “grade plane” should be measured from average grade plane or from the original grade. HAB at 8, Fn 15. The HAB found that the City has consistently applied this ordinance to mean measurement from average grade, and therefore to the extent the Zoning Ordinance is vague, the doctrine of administrative gloss applies, and mandates the City continue to apply the average grade measurement. Id.

Therefore although count seven was within the BOA’s jurisdiction, as it involved the interpretation of the Zoning Ordinance, the HAB found that the BOA had failed to consider past application of the Zoning Ordinance by the City, and had committed legal error.

Attachment

RPS/smr

Attachment

cc: ***