

STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS SUPERIOR COURT

North Mill Pond Holdings LLC
One Raynes Ave LLC
1359 Hooksett Rd.
Hooksett, NH 03106

v.

CITY OF PORTSMOUTH, NH
1 Junkins Avenue
Portsmouth, NH 03801

Case No. 218-2022-CV-00093

**VERIFIED APPEAL FROM DECISION OF PLANNING BOARD
AND PETITION FOR DECLARATORY RELIEF**

Petitioners North Mill Pond Holdings LLC and One Raynes Ave LLC (collectively “One Raynes”), appeal a January 27, 2022 decision of the City of Portsmouth Planning Board pursuant to RSA 677:15 and petitions for declaratory relief pursuant to RSA 491:22 as follows:

INTRODUCTION

This appeal involves numerous errors of law committed by the City of Portsmouth Planning Board, including: (1) asserting jurisdiction over a motion for rehearing after the Board’s decision had been appealed to the Zoning Board of Adjustment; (2) granting a rehearing more than 30 days after the initial decision; (3) allowing Board members who were not members of the Board when the previously constituted Board voted to approve One Raynes’ applications to vote on the motion for rehearing without any demonstration that they had familiarized themselves with the record of the prior proceeding; and (4) granting a rehearing without finding an error in the initial decision. Additionally, a new Planning Board member, James Hewitt, who voted with the majority in a 5-4 vote should have been disqualified for bias because he is a named Appellant and alleged expert in two cases involving a nearby proposed development the focus of which involves application of the same Wetlands Conditional Use Permit at issue in the

instant matter. One of the cases being pursued by Hewitt is against at least one of the same developers as One Raynes, meaning that Hewitt is in active litigation against the principals of One Raynes.

One Raynes appeals the Planning Board's decision to grant a rehearing pursuant to RSA 677:15. One Raynes also seeks declaratory relief to correct the Planning Board's numerous errors of law. Finally, One Raynes seeks recovery of its attorneys' fees for having to bring this action to address the Planning Board's vexatious and unreasonable conduct.

THE PARTIES

1. North Mill Pond Holdings LLC and One Raynes Ave LLC (collectively "One Raynes") are New Hampshire limited liability companies with a principal office located at 1359 Hooksett Rd., Hooksett, NH 03106. North Mill Pond Holdings is the applicant for the proposed development. One Raynes Ave LLC owns real property located at 1 Raynes Avenue, which along with real properties located at 31 Raynes Avenue and 203 Maplewood Avenue constitute the site of the proposed development. Pursuant to RSA 677:15, they are "person[s] aggrieved" by the Planning Board decision that is the subject of the instant appeal.

2. The City of Portsmouth ("the City") is a municipal corporation with a principal office located at 1 Junkins Avenue, Portsmouth, New Hampshire. At all relevant times, the City acted through its Planning Board.

JURISDICTION AND VENUE

3. The superior court has jurisdiction over One Raynes' claims pursuant to RSA 677:15 and RSA 491:22. Venue is appropriate in Rockingham County because the City and the property at issue are located in Rockingham County.

FACTS

One Raynes' Proposed Development

4. In 2016, Portsmouth adopted a new Master Plan, entitled “Portsmouth 2025.” A central feature of the Master Plan is to create a multi-use path along the shore of North Mill Pond by offering developer incentives for the dedication of community space. *Portsmouth 2025*, available at <https://view.publitas.com/city-of-portsmouth/portsmouth-master-plan-adopted-2-16-2017/page/1>, pp. 19, 25. In addition to a bicycle and pedestrian network, the Master Plan envisions a boat launch for small vessels to create public access onto the pond for recreational enjoyment. Other initiatives of the Master Plan include, reinvestment of underutilized buildings, creation of open-air community space, promotion of smaller housing units for moderate income residents, and enhanced storm water management systems in wetlands areas. *Id.*

5. The Master Plan reimagines what is currently a one-dimensional—and in some cases blighted—area along North Mill Pond, filled with vacant or underutilized buildings, as an attractive and bustling hub of residences, offices, open space, pedestrian access, and green space. The Master Plan calls for climate change minded, mixed-use development that either creates or augments stormwater management for the neighborhoods along North Mill Pond.

6. The proposed development is an integral part of Portsmouth’s Master Plan that has been years in the making. The property, approximately 2.539 acres of real estate, located at 1 Raynes Ave., 31 Raynes Ave., and 203 Maplewood Ave., has been highly disturbed and historically occupied for industrial uses. It currently hosts three underutilized buildings: the former Cindy Ann Cleaners building, a vacant office building, and the Vanguard Gym. The buildings are supported by paved parking lots which drain untreated stormwater directly into North Mill Pond. There also are patches of vegetation consisting mostly of invasive species.

7. The property abuts North Mill Pond. It is part of Portsmouth's long planned improvements to the shoreline of North Mill Pond, including those initiatives developed through the Master Plan. The property was included in the Portsmouth Bicycle and Pedestrian Plan in 2014 and the North End Vision Plan in 2015. Many of the Master Plan's stated goals, including stabilization of the wetlands and bringing civic vibrancy to the North End, necessitate development of the Property through significant collaboration with the City. One Raynes' development plan for the property meets or exceeds those goals.

8. The Final Report on the North Mill Pond Greenway and Community Park, published in 2019, contemplated further development of the property. The Final Plan calls for "a linear greenway and community park along the North Mill Pond which will create a new north-south pedestrian and bicycle connection from Bartlett Street to Market Street. This multi-use public path with civic amenities is envisioned to be constructed along the southeast shoreline of the pond, will include wetland restoration and pond edge stabilization and is anticipated and constructed through a series of public-private partnerships with private landowners."

9. Through public process, the City amended the Zoning Ordinance in 2016 to create the North End Incentive Overlay District ("Overlay District") specifically to allow for the development of the property in the manner envisioned by the Master Plan. In the North End Incentive Overlay District, developers are provided incentives, such as the construction of taller buildings, in an exchange for the dedication of public space.

10. One Raynes started the process for developing the property in partnership with the City in December 2020. During the past year, One Raynes worked collaboratively with the City's planning departments, including the Planning Board, Technical Advisory Committee, Conservation Commission, and the Historic District Commission to create a feasible

development plan through an iterative design process that complies with all zoning requirements of the City, and fulfills many of the initiatives of the Master Plan.

11. The proposed development, as submitted to the Planning Board on November 24, 2021 for final site plan approval, includes two 5-story buildings. The first is a mixed-use residential building that has a first-floor residential lobby, two commercial spaces, and 32 residential units situated on the corner of Raynes Ave. and Vaughan St. The second building is an adjacent 124-room hotel. The proposed development includes associated improvements to the property, including pedestrian and bicycle enhancements, emergency access, lighting, creative parking systems to avoid extensive paved parking lots, a sophisticated storm water treatment system, and extensive landscaping.

12. The proposed development provides for the contribution of 34,427 square feet of land to community spaces, including 27,352 square feet of Greenway Community Space allocated along North Mill Pond. The proposed development also provides the City with 2,920 square feet of wide sidewalk community space and 4,155 square feet of greenway connection community space. One Raynes' development provides 35% open space on the property, when only 10% is required by zoning, and provides 31.2% of community space, when only 20% is required to receive the benefits provided by the North End Incentive Overlay District. Part of the contributed community space will include a kayak, canoe, or small vessel launch, a viewing deck, and a number of other physical improvements for the public to access North Mill Pond.

13. The proposed development will also introduce storm water treatment to the property. Existing site conditions do not provide any stormwater treatment, which enables the flow of debris, sediment, and pollutants into North Mill Pond at unmitigated rates. One Raynes will remediate the harm caused to North Mill Pond by installing water quality units to improve

the water quality of the runoff not only from the Property but also from the surrounding Vaughan Street neighborhood. One Raynes additionally will install underground detention systems to regulate the temperature of runoff and to reduce peak rates of runoff into North Mill Pond.

Planning Board Proceedings

14. On December 16, 2021, the Planning Board held a public hearing on its consideration of One Raynes' applications for a Wetland Conditional Use Permit, a Conditional Use Permit regarding parking, and Site Plan Review Approval. The Planning Board granted the Wetland Conditional Use Permit as presented. It also granted the Conditional Use Permit regarding parking and the Site Plan Review Approval with conditions.¹ A copy of the Planning Board's written decisions dated December 20, 2021 are submitted as Exhibit 1 to this pleading.

15. On or about January 14, 2022, a group of Portsmouth residents ("Intervenors") filed a Motion for Rehearing/Reconsideration with the Planning Board.² The motion requests that the Planning Board "reconsider its decision, vacate and reverse its grant of site plan approval and its grant of the wetlands conditional use permit, rehear the developers' application anew, and ultimately disapprove the applicants' site plan." Exhibit 2, p. 1.

16. The Intervenors contemporaneously filed an "Appeal of Decision of Portsmouth Planning Board" ("Appeal") with the City Zoning Board of Adjustment ("ZBA").³ The Appeal requests that the ZBA "reverse the Planning Board's decision, rescind the wetlands conditional use permit which had been granted, and enter a new decision disapproving the applicants' site plan." Exhibit 3, pp. 1-2.

¹ While other matters on the Planning Board's December 16 agenda were continued and concluded on December 30, 2021, the Planning Board's consideration of One Raynes' applications was concluded on December 16.

² A copy of the motion is submitted as Exhibit 2 to this pleading.

³ A copy of the Appeal is submitted as Exhibit 3 to this pleading.

17. On January 21, 2022, the City advised One Raynes that the Planning Board would consider the motion for rehearing on January 27, 2022. Also on January 21, 2002, the City Planning Director wrote a memorandum to the Planning Board members advising them that, after consultation with the City Attorney, she recommends that the Board deny the motion for rehearing, and a motion for rehearing in another matter.⁴ The memorandum expressly advises the Planning Board that the Intervenors “have filed a separate and parallel petition with the Board of Adjustment on January 14, 2022” and that their claims of alleged error would be heard on appeal. Exhibit 4, p. 1.

18. On January 26, 2022, One Raynes submitted a written objection to the motion in which it advised the Planning Board that: (a) the Board was divested of jurisdiction pursuant to RSA 676:6 because the Intervenors had appealed the Board’s decisions to the ZBA; (2) the Board could not reconsider its decision because more than 30 days had passed since the original decision; and (3) new Planning Board member James Hewitt must disqualify himself from consideration of the motion because he is a named party in one case and an expert witness in another case involving two nearby proposed developments in which the Planning Board’s grant of the same Wetlands CUP that is at issue in One Raynes’ matter is a central issue.

19. On January 27, 2022, the Planning Board commenced its meeting with three new members, James Hewitt, Jane Begala, and Greg Mahanna.⁵ Early in the meeting the Planning Board voted to accept the minutes of its December 16 and 30 meetings. ZBA members Hewitt and Begala abstained from voting on the motion, presumably because they had not been present

⁴ A copy of the memorandum is submitted as Exhibit 4 to this pleading.

⁵ A recording of the January 27, 2022 meeting may be found at <https://www.cityofportsmouth.com/planportsmouth/planning-board>.

for the December meetings or sufficiently familiarized themselves with the record of the December hearings.

20. When the Board commenced its consideration of the motion for rehearing, which it did in a public meeting thereby avoiding participation from One Raynes, Hewitt did not disqualify himself. None of the other Planning Board members inquired about Hewitt participating in the decision on the motion for rehearing. None of Hewitt, Begala, and Mahanna abstained from participating in the discussion of, or voting on, the motion. None of Hewitt, Begala, and Mahanna stated that (s)he had reviewed the record of the earlier proceedings, including the recording of the December 16 hearing.

21. At no time did any member of the Planning Board acknowledge One Raynes' objection to the motion. There was no discussion, or even mention, of the Planning Board having been divested of jurisdiction by the Intervenors filing an appeal with the ZBA.

22. Regarding the timing of the Planning Board's consideration of the motion, Planning Board member Chellman stated that he had spoken with the New Hampshire Municipal Association and that based on his conversation, he believes that the Board could grant a rehearing "within 30 days of its original decision." Planning Board member Begala expressed that the timing was a critical issue for her and specifically asked whether the Planning Board's original decision had been made at the December 16 or December 30. Another member incorrectly advised Begala that the decision was made on December 30. No one appeared to have consulted the minutes from December 16 or December 30, which had been approved earlier in that same meeting. The approvals actually were granted on December 16, some 41 days before the Board's consideration of the motion for rehearing.

23. Planning Board member Peter Harris made a “motion to accept request for rehearing.” Harris did not identify an error previously made by the Planning Board. Instead, Harris offered that he was attempting “to prevent further movement into the courts.” With no further explanation, Harris added the conclusory opinion that he was “not comfortable with the vote in December [and] to reconsider might [be] better for the City.”

24. Begala and Hewitt seconded the motion. Although other Board members stated that there was no error to correct and that there is another avenue for appeal, no one mentioned that the Intervenors already had appealed the Planning Board’s decision to the ZBA.

25. Planning Board member Mahanna offered that the Intervenors’ motion for reconsideration alleged “legal errors, 13 points” and that “some have validity.” Mahanna did not identify a single actual error, however. When Mahanna asked the City Attorney whether there was “any risk” in the Board granting a rehearing, the City Attorney advised the Board that that there was no “monetary risk,” but the Board’s decision could be reversed.

26. During a discussion about the Planning Board lacking rules or procedures outlining what it may properly consider in deciding the motion for rehearing, the City Attorney advised the Board to “look at the motion and nothing else.”

27. Moreau stated that the Intervenors should have appealed the approvals to the ZBA. Again, there was no mention of the Intervenors having filed an appeal with the ZBA almost two weeks before the Planning Board’s consideration of the motion for rehearing. Chellman responded that a proper appeal would be to the superior court or the Housing Appeals Board because of the Wetlands CUP. He also offered that the Board may reconsider its approvals “just in case an error or some new information comes before [us] within 30 days.” Begala offered that there should be a rehearing “because of a question of legality.”

28. The Planning Board passed Harris' "motion to accept request for rehearing" by a 5-4 vote. All three new Planning Board members, Hewitt, Begala, and Mahanna, voted in favor of the motion.

29. On January 29, 2022, the Intervenors sent a letter to the City Planner Director and the ZBA advising it that the Planning Board had granted a rehearing and requesting that the ZBA "postpone any action on our appeal until after the Planning Board has conducted its rehearing."⁶ Legal notice recently was published that a rehearing is scheduled for February 17, 2022, the date of the next Planning Board meeting. On February 4, 2022, the Intervenors sent a letter to the City's Principal Planner stating that they would not withdraw the ZBA appeal and reiterating their request that the ZBA postpone its action on the appeal until after the Planning Board's meeting scheduled for February 17, 2022.⁷ Thereafter, the ZBA scheduled its consideration of the Intervenors' request to postpone the rehearing for February 23, 2022.

CAUSES OF ACTION

Count I – Appeal of Planning Board's Decision on Motion for Rehearing

30. One Raynes realleges paragraphs 1-29 above as if reasserted in paragraph 30.

31. RSA 677:15, I states in pertinent part that: "[a]ny persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable." Such petition shall be filed within 30 days of the decision complained of unless circumstances not relevant here are present. *Id.* RSA 677:15, I does not apply to appeals of Planning Board decisions that are filed with a zoning board of adjustment. *Id.*

⁶ A copy of the letter is submitted as Exhibit 5 to this pleading.

⁷ A copy of the letter is submitted as Exhibit 6 to this pleading.

32. RSA 677:15, I-a(a) addresses appeals of Planning Board decisions filed with a zoning board of adjustment. It states in pertinent part that: “[i]f an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section.” *Id.*

33. RSA 676:6 addresses appeals to the ZBA and is entitled “Effect of Appeal to the Board.” The first sentence states: “[t]he effect of an appeal to the board shall be to maintain the status quo.” *Id.* Thereafter, the statute states: “[a]n appeal of any order or other enforcement action **shall stay all proceedings under the action appealed** from unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal shall have been filed with such officer, that, by reason of facts stated in the certificate, a stay would, in the officer's opinion, cause imminent peril to life, health, safety, property, or the environment.” *Id.*

34. On January 14, 2022, when the Intervenor filed an appeal of the Planning Board's approvals with the ZBA, jurisdiction over the matter vested with the ZBA.⁸ *See Route 12 Books & Video v. Town of Troy*, 149 N.H. 569, 577 (2003); RSA 676:6. The appeal filed with the ZBA divested the Planning Board of jurisdiction. *See* RSA 676:6; *Route 12 Books & Video*, 149 N.H. at 577; *Rautenberg v. Munnis*, 107 N.H. 446, 447 (1966). Accordingly, the Planning Board erred by asserting jurisdiction over the motion for rehearing after the Intervenor had already filed an appeal to the ZBA.

⁸ Unlike an appeal of a Planning Board decision to the superior court, which must be filed within 30 days, an appeal to the ZBA may be filed within a “reasonable time.” Compare RSA 677:15, I with RSA 676:5, I. Accordingly, since the Intervenor chose to file an appeal with the ZBA, it was not required to be filed contemporaneously with the motion for rehearing filed with the Planning Board. If, however, the Intervenor's appeal should have been filed with the superior court, the deadline for filing such appeal was January 14, 2021. *See* RSA 677:15, I. Regardless of where the appeal was filed, its filing divested the Planning Board of jurisdiction. *See* RSA 676:6; *Route 12 Books & Video*, 149 N.H. at 577; *Rautenberg v. Munnis*, 107 N.H. 446, 447 (1966).

35. The Planning Board's error was compounded by the fact that its authority to reconsider its approvals of planning matters terminated at the 30-day deadline for the filing of an appeal. *See 74 Cox Street, LLC v. City of Nashua*, 156 N.H. 228, 231 (2007) (land use board has inherent authority to reconsider its decision "during the time period allotted by statute for parties to appeal those same decisions"). After 30 days the Planning Board's decision is final, subject only to the provisions in RSA 674:39 (establishing the vesting of planning board decisions).

36. Additionally, the participation of three Board members constituted reversible error. New Planning Board member James Hewitt has a known bias against development along North Mill Pond, is partial to the Intervenors' attorney, and has joined lawsuits, as both a party and alleged expert, seeking to overturn the Planning Board's prior grants of approval at 105 Bartlett St. and 53 Green St. One of the lawsuits involves at least one of the same developers as the developers for this project, which means that Mr. Hewitt is in active litigation against One Raynes. Counsel for the Intervenors, Attorney Duncan MacCallum, is Hewitt's counsel in the 105 Bartlett St. and 53 Green St. litigations. Hewitt works closely with Attorney MacCallum on those cases, acting as both a principal party and an alleged expert. He has made arguments against the One Raynes developer before the Planning Board and the ZBA.

37. In sum, Hewitt is not "indifferent" to One Raynes' development and the Planning Board's prior approvals. Accordingly, Hewitt's participation in the vote on the motion for rehearing violates New Hampshire Constitution Part I, Article 35 and RSA 673:14.

38. Hewitt's participation, as well as the participation of Begala and Mahanna, was error for an independent reason. None of these three new Planning Board members were on the Board when it approved One Raynes' proposed development. All three new Board members participated in the Board's consideration of the motion for rehearing and voted in favor of

rehearing. None of the three new Board members stated that (s)he had reviewed the record of the prior hearing, including the recording and minutes. In fact, Hewitt and Begala abstained from voting on the motion to accept the minutes of the December Planning Board meetings, presumably because they had not been present for the December meetings or sufficiently familiarized themselves with the record of the December hearings.

39. Unless witness credibility is at issue, a Planning Board member who was not present for the hearing at which the challenged decision was made is eligible if the member has familiarized himself with the record of the hearing that is under consideration for rehearing. *See Auger v. Town of Strafford*, 156 N.H. 64, 68-69 (2007); *Petition of Grimm*, 138 N.H. 42, 46-47 (1993); *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 716 (1984). Thus, the paramount consideration is plain and unambiguous—has the Planning Board member who was not present for the hearing at which the decision was made familiarized himself with the record so as to understand the issues.

40. This minimal threshold not only is common sense, but also is required by the due process clauses of Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. *See Petition of Grimm*, 138 N.H. at 46. Here, none of Hewitt, Begala, and Mahanna stated or otherwise gave any indication that (s)he had familiarized himself or herself with the record of the previous hearing, including the recording and the Planning Board minutes. Absent such a showing, participation of the three new Board members on the motion for rehearing was unlawful and unreasonable.

41. When the Planning Board voted to grant a rehearing, it did so without finding an error in the prior decisions. Not a single Board member identified or articulated a basis to conclude that the previously constituted Planning Board had erred. The motion that granted a

rehearing stated as a “motion to accept request for rehearing.” The Planning Board’s conduct was unlawful and unreasonable when it granted the rehearing without a finding of error.

42. In a recent case involving the Portsmouth ZBA, the Housing Appeals Board (“HAB”) rejected such vague summary treatment rather than identifying an error. *Iron Horse Properties, LLC v. City of Portsmouth*, Case No. ZBA-2021-21.⁹ The HAB termed the practice “suspect” and found that such treatment “likely resulted” in bias against the applicant unrelated to issues raised in the appeal itself. *Id.* at 10 fn 18.

43. One Raynes appeals the Planning Board’s grant of a rehearing. One Raynes requests that the court reverse the Planning Board’s decision granting the rehearing as unlawful and unreasonable, and thereby rendering any decision by the Planning Board upon rehearing void.

44. One Raynes also requests that the Court award it its attorneys’ fees and costs because the Planning Board acted in bad faith, or with malice or gross negligence in granting the rehearing.

Count II – Request for Declaratory Rulings

45. One Raynes realleges paragraphs 1-44 above as if reasserted in paragraph 45.

46. A petitioner is entitled to bring a declaratory judgment action challenging the decisions of a municipal board when the action involves a question better suited for judicial consideration than administrative action. *McNamara v. Hersh*, 157 N.H. 72, 75 (2008); *Blue Jay Realty Trust v. City of Franklin*, 132 N.H. 502, 509 (1989); *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 141-42 (1988). A matter favors judicial review if requested rulings are beyond a municipal board’s “ordinary competence.” *Blue Jay Realty Trust*, 132 N.H. at 509.

⁹ A copy of the HAB’s Order is submitted as Exhibit 7 to this pleading.

47. Here, One Raynes seeks declaratory rulings on matters of law that are well-suited for judicial rulings, and that the Planning Board has demonstrated are beyond its ordinary competence.

48. One Raynes seeks a declaratory ruling that the Planning Board was divested of jurisdiction over the motion for rehearing once the Intervenors appealed the Planning Board's approvals to the ZBA. *See* RSA 676:6; *Route 12 Books & Video*, 149 N.H. at 577; *Rautenberg*, 107 N.H. at 447.

49. One Raynes seeks a declaratory ruling that the Planning Board's ability to reconsider its approvals of planning matters terminated at the 30-day deadline for the filing of an appeal, which under RSA 677:15 is 30-days from the "date upon which the Board voted to approve or disapprove the application." *Id.*; *See 74 Cox Street, LLC*, 156 N.H. at 231 (land use board has inherent authority to reconsider its decision "during the time period allotted by statute for parties to appeal those same decisions"). The Planning Board voted to approve One Raynes' application on December 16, 2021.

50. One Raynes seeks a declaratory ruling that Planning Board member Hewitt was disqualified from participating in the motion for rehearing due to his bias from: (a) serving as an expert witness in two matters opposing the Planning Board's grant of the same Wetlands CUP at issue in this matter; (b) his status as a named party in two matters opposing the Planning Board's grant of the same Wetlands CUP at issue in this matter; and (c) his status as client of the Intervenors' counsel in two matters opposing the Planning Board's grant of the same Wetlands CUP at issue in this matter. In one of the matters, 105 Bartlett St., Hewitt is directly opposed to at least one of the developers for the project at issue in this Appeal.

51. One Raynes seeks a declaratory ruling that Planning Board members Hewitt, Begala, and Mahanna were disqualified from participation in the motion for rehearing because none of the three new Board members stated or otherwise indicated that (s)he had reviewed the record of the prior hearing, including the recording and minutes. In fact, Hewitt and Begala abstained from voting on the motion to accept the minutes of the December Planning Board meetings, presumably because they had not been present for the December meetings or sufficiently familiarized themselves with the record of the December hearings.

52. One Raynes seeks a declaratory ruling that the participation of Hewitt, Begala, and Mahanna in the motion for rehearing violated One Raynes' right to an informed decision-maker pursuant to the due process clauses of Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

53. One Raynes seeks a declaratory ruling that it was unlawful and unreasonable for the Planning Board to grant a rehearing without finding an error in the prior decisions.

54. One Raynes respectfully requests a declaratory ruling that the Planning Board's decision granting the Intervenor's motion for rehearing was unlawful and unreasonable, thereby rendering void any decision by the Planning Board upon rehearing.

Count III – Award of Attorneys' Fees

55. One Raynes realleges paragraphs 1-54 above as if reasserted in paragraph 55.

56. In New Hampshire, parties generally bear their own attorneys' fees because "no person should be penalized for merely defending or prosecuting a lawsuit." *Harkeem v. Adams*, 117 N.H. 687, 690 (1977). However, a prevailing party may be awarded fees pursuant to an established judicial exception to that general rule. *See In the Matter of Mason & Mason*, 164 N.H. 391, 398 (2012).

57. Exceptions include when a party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons, where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action.” *Harkeem*, 117 N.H. at 691 (quotation and citations omitted). Additional exceptions include “where an individual is forced to seek judicial assistance to secure a clearly defined and established right if bad faith can be established; where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct; as compensation for those who are forced to litigate in order to enjoy what a court has already decreed; and [as compensation] for those who are forced to litigate against an opponent whose position is patently unreasonable.” *In the Matter of Mason & Mason*, 164 N.H. at 399.

58. Here, at least one Planning Board member’s conduct has been vexatious, oppressive, unreasonably obdurate or obstinate, and One Raynes should not have been required to bring this action. *See Harkeem*, 117 N.H. at 691. Additionally, One Raynes has been forced to seek judicial assistance to secure a clearly defined and established right because of at least one Planning Board member’s bad faith. It has been forced to litigate to obtain what a court already has decreed can be established and because the Planning Board position is patently unreasonable. *In the Matter of Mason & Mason*, 164 N.H. at 399.

59. The most obvious example of the Planning Board’s sanctionable conduct is Planning Board member Hewitt’s participation in the vote on the Intervenors’ motion for rehearing. A child would understand that One Raynes has a right to a fair and impartial decision-maker and that a Planning Board member who currently is represented by opposing counsel in a similar matter, and who is both a named party and an expert witness in matters involving some of the same issues as One Raynes’ development is not “indifferent” to One Raynes or its project.

60. Other decisions of the Planning Board also warrant an award of attorneys' fees. It is axiomatic that due process prohibits one unfamiliar with the original proceeding to participate in deciding a motion for rehearing when the standard for rehearing requires a finding of error. It always has been the law that a grant of a rehearing can only be premised on a finding of error. By statute, the Planning Board was divested of jurisdiction over the matter when the Intervenors filed an appeal with the ZBA.

61. It is solely because of at least one Planning Board member's unreasonably obdurate conduct and a majority of the Planning Board's disregard for the law that One Raynes was forced to litigate this action to secure well-known rights. Similarly, it is the Planning Board's bad faith that likely will require One Raynes to participate in an unlawful rehearing in February 2022.

62. This is not the first time that a Portsmouth land use board has acted in bad faith against at least one of these developers. In another case involving a development along North Mill Pond at 105 Bartlett St., the ZBA overturned four grants of approval from the Planning Board because it found that the requirements of the Wetlands CUP had not been satisfied. Putting aside the unorthodox repudiations of all of the approvals granted, the ZBA never had jurisdiction over the Wetlands CUP issue because those issues are appealable only to the superior court or the HAB. RSA 676:5,III. The City Attorney nevertheless advised the ZBA to assume that it had jurisdiction over appeals of conditional use permits and that the legal question of jurisdiction would be sorted-out on appeal.

63. The HAB reversed the ZBA without remanding a single issue. In its Order, the HAB admonishes the City of Portsmouth for the unorthodox and bad faith conduct of certain ZBA members, going so far as to comment that the "bias" of at least one ZBA member against

projects that provide housing in Portsmouth likely hijacked the proceedings and resulted in grave procedural errors. Exhibit 6, p. 10, fn. 18.

64. Recent additions to the City's Planning Board, including and especially Hewitt who acted as a party and expert in the matter reversed by the HAB, have brought the same mindset for malice and disregard for the law seen at the ZBA to the Planning Board.

65. The ZBA and now the Planning Board have demonstrated a pattern of members acting in bad faith by quashing projects they dislike, not through any legitimate means like amending the Portsmouth Zoning Ordinance, but through the power of their positions on these boards and their willingness to disregard their quasi-judicial responsibilities.

66. One Raynes respectfully requests that the Court award One Raynes its attorneys' fees and costs for being forced to litigate this case and to participate in a rehearing.

WHEREFORE, North Mill Pond Holdings LLC and One Raynes Ave LLC respectfully request that the Court:

A. Pursuant to RSA 677:15, reverse the Portsmouth Planning Board's decision granting the Intervenors' Motion for Rehearing as illegal and unreasonable;

B. Award North Mill Pond Holdings LLC and One Raynes Ave LLC their attorneys' fees in costs because the Planning Board acted in bad faith, or with malice or gross negligence in granting the motion for rehearing;

C. Issue an Order setting forth the declaratory rulings requested by North Mill Pond Holdings LLC and One Raynes Ave LLC in paragraphs 48-54 of the instant Petition for Declaratory Relief;

D. Award North Mill Pond Holdings LLC and One Raynes Ave LLC their attorneys' fees and costs because: (1) the Planning Board's conduct was vexatious, oppressive,

unreasonably obdurate or obstinate; (2) North Mill Pond Holdings LLC and One Raynes Ave LLC should not have been required to bring this action; (3) North Mill Pond Holdings LLC and One Raynes Ave LLC have been forced to seek judicial assistance to secure a clearly defined and established right because of the Planning Board's bad faith; (4) North Mill Pond Holdings LLC and One Raynes Ave LLC have been forced to litigate to obtain what a court already has decreed can be established; and (5) the Planning Board's position is patently unreasonable; and

E. Grant such additional relief as justice requires.

Respectfully submitted,
North Mill Pond Holdings LLC and
One Raynes Ave LLC
By their counsel,

Dated: February 9, 2022

By /s/ Michael D. Ramsdell
Michael D. Ramsdell (Bar No. 2096)
Brian J. Bouchard (Bar No. No. 20913)
Sheehan Phinney Bass & Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 627-8117; (603) 627-8118
mramsdell@sheehan.com
bbouchard@sheehan.com

VERIFICATION

I, Eben Tormey, principal of North Mill Pond Holdings LLC and One Raynes Ave LLC, declare, under penalty of perjury under the laws of the State of New Hampshire, that I have reviewed the foregoing Verified Appeal from Decision of Planning Board and Petition for Declaratory Relief and all the factual allegations therein are true to the best of my knowledge, information, and belief.

Dated: February 9, 2022

By: /s/ Eben Tormey
Eben Tormey

STATE OF NEW HAMPSHIRE
ROCKINGHAM COUNTY

Signed and sworn to before me on this 9th day of February 2022 by Eben Tormey.

 /s/Suzanne M. Hoffman
Notary Public
My Commission Expires:
08/28/2024

EXHIBIT 1



CITY OF PORTSMOUTH

Planning Department
1 Junkins Avenue
Portsmouth, New
Hampshire 03801
(603) 610-7216

PLANNING BOARD

December 20, 2021

Eben Tormey
One Raynes Ave LLC
1359 Hooksett Rd
Hooksett, NH 03106

RE: Site Plan Review Approval for Property Located at 1 Raynes Ave, 31 Raynes Ave, 203 Maplewood Ave (LU-21-54)

Dear Mr. Tormey:

The Planning Board, at its regularly scheduled meeting of **Thursday, December 16, 2021**, considered your application for Site Plan Review approval for the demolition of three existing buildings and construction of the following: 1) a 5-story mixed use building with 66,676 gross floor area and 16,629 sq. ft. building footprint including 7,720 sq. ft. of commercial use on the ground story and 32 residential units on the upper stories; 2) a 5-story 124-room hotel with 65,980 gross floor area and 14,622 sq. ft. of building footprint; 3) 34,427 sq. ft. of community space as well as associated paving, lighting, utilities, landscaping and other site improvements Said property is shown on Assessor Map 123 Lot 14, Map 123 Lot 13, Map 123 Lot 12, Map 123 Lot 10 and lies within the Character District 4 (CD4) District, Downtown Overlay District (DOD), Historic District, and the North End Incentive Overlay District. As a result of said consideration, the Board voted grant Site Plan approval with the following stipulations:

Conditions Precedent

1. The site plan and any easement plans and deeds shall be recorded at the Registry of Deeds by the City or as deemed appropriate by the Planning Department.
2. The applicant shall record a notice of voluntary lot merger.
3. Any easement plans and deeds for which the City is a grantor or grantee shall be reviewed and approved by the Planning and Legal Departments prior to acceptance by City Council.
4. The applicant shall prepare a Construction Management and Mitigation Plan (CMMP) for review and approval by the City's Legal and Planning Departments.
5. The applicant shall agree to pay for the services of an oversight engineer, to be selected by the City, to monitor the demolition and construction of improvements within the public rights-of-way and on site.
6. Owner shall provide an access easement to the City for water valve access and leak detection. The easement shall be reviewed and approved by the Planning and Legal Departments prior to acceptance by the City Council.
7. The Applicant or its engineer shall submit a copy of a completed Land Use Development Tracking Form using the Pollutant Tracking and Accounting Program (PTAP) online portal currently managed by the UNH Stormwater Center or similar form approved by the City.
8. Grease traps will be designed to meet code requirements.
9. Sewer connection permit will be obtained from DES.
10. Applicant and City will enter into a Community Space Agreement which will specify the

- owner as the responsible party to maintain all the greenway/community space.
11. Fertilizing within the buffer zone will follow City guidance and Northeast Organic Farming Association (NOFA) standards.
 12. Exposed parking shall be screened from view.

Conditions Subsequent:

13. The Engineer of Record shall submit a written report (with photographs and engineer stamp) certifying that the stormwater infrastructure was constructed to the approved plans and specifications and will meet the design performance.
14. A stormwater inspection and maintenance report shall be completed annually and copies shall be submitted to the City's Planning and Public Works Departments.

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

This site plan approval shall not be effective until a site plan agreement has been signed satisfying the requirements of Section 2.12 of the City's Site Review Approval Regulations.

Unless otherwise indicated above, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

The Planning Director must certify that all stipulations of approval have been completed prior to issuance of a building permit unless otherwise indicated above.

This site plan approval shall expire unless a building permit is issued within a period of one (1) year from the date granted by the Planning Board unless an extension is granted by the Planning Board in accordance with Section 2.14 of the Site Review Regulations.

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,



Dexter R. Legg, Chairman of the Planning Board

cc: Paul Garand, Interim Chief Building Inspector
Rosann Maurice-Lentz, City Assessor

Peter H. Rice, Director of Public Works

31 Raynes Ave, LLC
203 Maplewood Ave, LLC
Patrick Crimmins, Tighe & Bond



CITY OF PORTSMOUTH

Planning Department
1 Junkins Avenue
Portsmouth, New
Hampshire 03801
(603) 610-7216

PLANNING BOARD

December 20, 2021

Eben Tormey
One Raynes Ave LLC
1359 Hooksett Rd
Hooksett, NH 03106

RE: Conditional Use Permit Application for Property Located at 1 Raynes Ave, 31 Raynes Ave, 203 Maplewood Ave (LU-21-54)

Dear Mr. Tormey:

The Planning Board, at its regularly scheduled meeting of Thursday, December 16, 2021, considered your application for Conditional Use Permit as permitted by Section 10.1112.62 of the Zoning Ordinance and according to the requirements of Section 10.1112.14 to allow 113 off-street parking spaces including 18 reserved spaces to be provided on-site and 25 spaces to be provided on a separate lot where a total of 138 are required. Said property is shown on Assessor Map 123 Lot 14, Map 123 Lot 13, Map 123 Lot 12, Map 123 Lot 10 and lies within the Character District 4 (CD4) District, Downtown Overlay District (DOD), Historic District, and the North End Incentive Overlay District. As a result of said consideration, the Board voted to grant the Conditional Use permit with the following stipulation:

1. Construction of reserve parking will be subject to usage reports submitted to the City demonstrating additional parking is needed only after alternative options to construction of reserve spaces have been considered and reviewed by the City. If City staff determines further review is needed applicant will be referred to Planning board for further review.

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

Unless otherwise indicated above, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work. All stipulations of approval must be completed prior to issuance of a building permit unless otherwise indicated above.

This approval shall expire unless a building permit is obtained within a period of one year from the date granted, unless otherwise stated in the conditions of approval. The Planning Board may, for good cause shown, extend such period by as much as one year if such extension is requested and acted upon prior to the expiration date. No other extensions may be requested.

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dexter R. Legg". The signature is written in a cursive style with a large initial "D".

Dexter R. Legg, Chairman of the Planning Board

cc: Paul Garand, Interim Chief Building Inspector
Rosann Maurice-Lentz, City Assessor

31 Raynes Ave, LLC
203 Maplewood Ave, LLC
Patrick Crimmins, Tighe & Bond



CITY OF PORTSMOUTH

Planning Department
1 Junkins Avenue
Portsmouth, New
Hampshire 03801
(603) 610-7216

PLANNING BOARD

December 20, 2021

Eben Tormey
One Raynes Ave LLC
1359 Hooksett Rd
Hooksett, NH 03106

RE: Wetland Conditional Use Permit Application for Property Located at 1 Raynes Ave, 31 Raynes Ave, 203 Maplewood Ave (LU-21-54)

Dear Mr. Tormey:

The Planning Board, at its regularly scheduled meeting of **Thursday, December 16, 2021**, considered your application for Wetland Conditional Use Permit under section 10.1017 to construct two buildings 1) a 5 story mixed use commercial and residential building and 2) a five story hotel building with 124 rooms. The project has removed all of the impervious surface from the 25' tidal buffer, proposes 67 square feet of impervious surface in the 25-50' tidal buffer and 21,190 square feet of impervious in the 50-100' tidal buffer. Overall the project is able to demonstrate a reduction of 7,070 square feet of impervious surface in the tidal wetland buffer from the existing condition or a reduction of 10,107 square feet if the reserve parking is not constructed. Said property is shown on Assessor Map 123 Lot 14, Map 123 Lot 13, Map 123 Lot 12, Map 123 Lot 10 and lies within the Character District 4 (CD4) District, Downtown Overlay District (DOD), Historic District, and the North End Incentive Overlay District. As a result of said consideration, the Board voted grant the Wetland Conditional Use permit as presented.

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

Unless otherwise indicated, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work. All stipulations of approval must be completed prior to issuance of a building permit unless otherwise indicated.

This approval shall expire one year after the date of approval by the Planning Board unless a building permit is issued prior to that date. The Planning Board may grant a one-year extension of a conditional use permit if the applicant submits a written request to the Planning Board prior to the expiration date.

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dexter R. Legg". The signature is written in a cursive, slightly slanted style.

Dexter R. Legg, Chairman of the Planning Board

cc: Paul Garand, Interim Chief Building Inspector
Rosann Maurice-Lentz, City Assessor

31 Raynes Ave, LLC
203 Maplewood Ave, LLC
Patrick Crimmins, Tighe & Bond

EXHIBIT 2

THE STATE OF NEW HAMPSHIRE

PLANNING BOARD
OF THE CITY OF PORTSMOUTH

**In re Application of North Mill Pond Holdings, LLC,
One Raynes Ave, LLC, 31 Raynes Ave, LLC, and
203 Maplewood Ave, LLC, regarding the properties
located at 1 Raynes Avenue, 203 Maplewood Avenue,
and 31 Raynes Avenue, and known familiarly as**

The Raynes Avenue Project

MOTION FOR REHEARING/RECONSIDERATION

James A. Beal, Fintan (“Finn”) Connell, Joseph R. Famularo, Jr., Philippe Favet, Charlotte Gindele, Julia Gindele, Linda Griebisch, Catherine L. (“Kate”) Harris, Roy W. Helsel, Elizabeth Jefferson, and Donna Pantelakos, all of whom are citizens, residents and/or property owners in the City of Portsmouth, respectfully move this Planning Board to reconsider its decision of December 16, 2021, in which it granted site plan approval to the applicants’ project, granted a wetlands conditional use permit, and granted various other approvals to the project. The movants ask that the Planning Board reconsider its decision, vacate and reverse its grant of site plan approval and its grant of the wetlands conditional use permit, rehear the developers’ application anew, and ultimately disapprove the applicants’ site plan. As grounds in support of their motion, the movants state the following:

1. An ineligible member of the Planning Board, who was improperly appointed to that Board, participated in consideration of the applicants’ site plan review and joined in the vote to

grant site plan approval. Therefore, under the teachings of the New Hampshire Supreme Court's decision in Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984), the Planning Board's decision granting site plan approval, issuing a wetlands conditional use permit, and granting other approvals is absolutely void. In the Winslow case, the court ruled that the participation of a single ineligible member in a land use board's decision invalidates the entire decision because "it [is] impossible to estimate the influence one member might have on his associates". 125 N.H. at 268, 480 A.2d at 117.

2. Planning Board member Raymond Pezzullo was and is ineligible to sit on the Planning Board because he was improperly appointed pursuant to a provision in Portsmouth's local Administrative Code which directly conflicts with a New Hampshire state statute. Therefore, the local Administrative Code provision is void.

3. More specifically, RSA 673: 2 provides that in cities having a city manager form of local government, the planning board is to consist of nine members, two of whom are to be ex officio members and the other seven of whom are to be appointed by the mayor and confirmed by the city council. Of the two ex officio members, one is to be the city manager or someone whom he or she appoints to serve in his or her place, and the other is to be a member of the city council, selected by the city council itself. By contrast, section 1.303 of Portsmouth's local Administrative Code, pursuant to which Mr. Pezzullo was ostensibly appointed, conflicts with this statutory scheme, in that it purports to authorize the city manager to appoint a third Planning Board member, selected from the City administrative staff, as an ex officio member, increasing the number of ex officio members from two to three and decreasing the number of Planning Board members appointed by the mayor and confirmed by the City Council from seven to six. RSA 673:2 neither provides for nor permits the appointment of a third ex officio member. Therefore, section 1.303

of the City's Administrative Code is in direct conflict with state law, and therefore void, and Mr. Pezzullo's appointment to the Planning Board was unlawful. (The conflict between state law and the local Administrative Code is explained more fully in a letter dated December 1, 2021 from Planning Board member Rick Chellman to City Attorney Robert P. Sullivan, a copy of which is appended hereto as Attachment A, and in a subsequent letter dated December 29, 2021 from the movants' undersigned counsel to former Planning Board Chairman Dexter Legg, a copy of which is appended hereto as Attachment B.)

4. Mr. Pezzullo's participation in the December 16, 2021 decision was especially egregious, for his lack of eligibility to sit on this Board was timely called to the Board's attention by another member of the Planning Board itself, Rick Chellman, at the start of the meeting. Mr. Chellman had previously written a letter to City Attorney Bob Sullivan on December 1, 2021, raising the issue and explaining why Mr. Pezzullo's appointment violated the state's statutory scheme (see Attachment A hereto), and he re-raised it verbally with the chairman and the other Planning Board members at the start of the December 16, 2021 meeting.

5. In addition to violating state law, Portsmouth's method of selecting a third ex officio member also creates an obvious conflict of interest on the part of the appointee. As noted above, section 1.303 of Portsmouth's Administrative Code provides that the third ex officio member is appointed by the city manager and selected from the City's administrative staff. As a member of the city administration, the appointee is a city employee and thus is beholden to the city manager for his job; she has the power of hiring and firing over the former. Under such circumstances, the appointee will be loath to publicly express an opinion that is contrary to the opinion, stance, or wishes of the city manager, and he is not likely to vote against an application or measure that she supports. Almost invariably, he will vote in favor of whatever she votes for, and he will vote

against whatever she votes against. In this situation, there is no chance that the appointee in question will ever exercise independent judgment. The practical effect of section 1.303 is that the city manager gets two votes on the Planning Board--her own, and the vote of the ex officio member whom she has appointed from the City's administrative staff--whereas the regular members appointed by the mayor and confirmed by the City Council get only one.

6. Finally, Mr. Pezzullo's purported membership on the Planning Board did not even comply with the Administrative Code itself, for as an ex officio member his term of office was to have expired at the time of the retirement of the appointing authority who had placed him in that office, which was former City Manager John Bohenko. Following City Manager Bohenko's retirement two years ago, Mr. Pezzullo was never reappointed by the current city manager nor confirmed by the City Council. (For further discussion, see Attachments A and B hereto.) Under any scenario, therefore, he has been sitting on the Planning Board unlawfully.

7. For all of the foregoing reasons, Mr. Pezzullo was ineligible to sit on the Planning Board; he was appointed to that Board unlawfully; and under the teachings of Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984), the Planning Board's decision of December 16, 2021 was absolutely void. For that reason, this Board should reconsider its decision and conduct a full rehearing on the developers' application.

8. Several of the members of the Planning Board who voted to grant site plan approval and, in particular, who voted to grant a wetlands conditional use permit employed palpably erroneous legal reasoning and committed clear legal error in applying section 10.1017.50 of the Zoning Ordinance, which sets forth the six criteria for the granting of wetlands conditional use permits. These six criteria are mandatory, yet four of the members of this Board, including its then-chairman, openly expressed the view that these six criteria were merely "factors" to be

weighed against one another and that the criteria were “negotiable” and subject to broad interpretation. The vice-chairwoman flatly--and totally erroneously--stated that an applicant does not necessarily have to meet all of the six criteria in order to qualify for a wetlands conditional use permit. The chairman at one point opined that the six criteria are “open to interpretation”. Two other members of the Board made similar comments, evincing a very cavalier attitude toward the six criteria.

9. All of this constituted clear and obvious legal error. The criteria for granting a conditional use permit--allowing a developer to erect a building or install a paved roadway within the 100' wetlands buffer--are indeed mandatory, and the applicants' proposal did not satisfy at least two of these criteria. Section 10.1017.50 of the Zoning Ordinance sets forth the six criteria which must be met in order for a wetlands conditional use permit to be issued. They are:

(1) The land is reasonably suited to the **use**, activity or **alteration**.

(2) There is no alternative location outside the **wetland buffer** that is feasible and reasonable for the proposed **use**, activity or **alteration**.

(3) There will be no adverse impact on the **wetland** functional values of the site or surrounding properties;

(4) **Alteration** of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals; and

(5) The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this Section.

(6) Any area within the **vegetated buffer strip** will be returned to a natural state to the extent feasible.

(Boldfacing in original.) Section 10.1017.41 of the Zoning Ordinance makes clear that these criteria are mandatory and that all six must be satisfied in order for a wetlands conditional use permit to be issued. That section states:

The Planning Board shall grant a conditional use permit provided that it finds that all other restrictions of this Ordinance are met and that **proposed development meets all the criteria set forth in section 10.1017.50 or 10.1017.60, as applicable.**¹

(Boldfacing in original; other emphasis added.)

10. The above-quoted sections of the Zoning Ordinance make clear that these criteria are not merely “factors” to be taken into consideration and to be weighed against one another in deciding whether to issue a permit, nor that an exceptionally strong showing of compliance with one of these criteria may be used to offset or excuse compliance with another. Four members of this Planning Board erred in so regarding them. There is no question but that the applicants’ proposal fails to meet subsections (2) and (5) of section 10.1017.50: It would be “feasible and reasonable” for the developers to erect a building and paved driveway within the site yet outside the 100’ wetlands buffer, simply by reducing the size of the proposed building, § 10.1017.50(2), and therefore the developers’ proposal is not the alternative with “the least adverse impact to” the wetlands buffer, the North Mill Pond, and its surroundings. § 10.1017.50(5). Four members of this Board committed clear and obvious error by averring that these six criteria were “open to interpretation” and using like observations as the basis for voting to grant site plan approval and issue a wetlands conditional use permit.

1. Section 10.1017.60, mentioned in the quoted section above, is inapplicable here, inasmuch as it pertains to public and private utilities and rights-of-way in wetlands and wetlands buffers. There are no public or private utilities at issue here.

11. In addition to misinterpreting the criteria for the wetlands conditional use permit, this Board also made other, unrelated errors during the course of ultimately granting site plan approval. For one thing, the Board acted prematurely and committed error in refusing to wait until after the Historic District Commission had acted on the application that was before it, relating to the same project. The Planning Board should have waited to see what the developers' plan was going to look like after having been vetted by the HDC. More generally, there were many other unanswered questions which came to light during the December 16, 2021 hearing, and this Board should have waited until they were resolved. For example, it was never settled who was going to be responsible for paying for valet parking in perpetuity and who was going to be responsible for enforcing the stipulation that such valet parking be provided, as the existing on-site parking provided-for by the developers' plan was and is admittedly inadequate.

12. As part of his remarks in support of the project during the Board's deliberations, the chairman totally misquoted a member of the Conservation Law Foundation who had spoken before the Planning Board previously at its April 15, 2021 meeting, and he claimed that she had said that "this project [is] going to improve the quality of North Mill Pond water." In reality, she had said just the opposite. Attached hereto as Attachment C is a copy of a letter issued by the Conservation Law Foundation and dated December 23, 2021, in which the CLF, in reaction to the events which transpired at this Board's December 16, 2021 meeting, took issue with the chairman's misuse of its representative's words. While praising the developers' stormwater run-off treatment program, the CLF representative had condemned the project in general because of the intrusion into the wetlands buffer zone. (See Attachment C.)

13. Finally, the Planning Board erred in failing to adopt the recommendation of the Conservation Commission, which had disapproved the project in question. At the proceedings before the Planning Board, the developers boasted that they had worked closely with the Conservation Commission and that they had had five meetings with the latter in which they had modified their project in order to respond to the comments, criticisms, and feedback which the Commission had given. Yet, after five meetings the Conservation Commission was still dissatisfied with the applicants' project and issued a negative recommendation concerning same. The Planning Board should have heeded the Conservation Commission's recommendation and denied site plan approval.

For all of the foregoing reasons, the Planning Board should reconsider, vacate, and reverse its decision of December 16, 2021 granting site plan approval, a wetlands conditional use permit, and other approvals to the above-referenced project, and the Board should conduct a de novo rehearing of the developers' application without the participation of ineligible Planning Board member Raymond Pezzullo.

/s/ Duncan J. MacCallum

Duncan J. MacCallum

NHBA #1576

536 State Street

Portsmouth, New Hampshire 03801

(603) 431-1230

madbarrister@aol.com

Attorney for Moving Parties

CERTIFICATE OF SERVICE

The undersigned, Duncan J. MacCallum, Attorney for Movants in the within proceeding, hereby certifies that on this 14th day of January, 2022, true and correct copies of the foregoing Motion for Rehearing/Reconsideration were served upon the applicants both via e-mail and by first class mail, postage prepaid, to each of the following counsel of record:

Michael D. Ramsdell, Esquire
Brian J. Bouchard, Esquire
Sheehan Phinney Bass & Green, P.A.
1000 Elm Street, 17th Floor
Manchester, New Hampshire 03101

Robert A. Previti, Esquire
Stebbins, Lazos & Van Der Beken, LLC
889 Elm Street, 6th Floor
Manchester, New Hampshire 03101

/s/ Duncan J. MacCallum
Duncan J. MacCallum

EXHIBIT 3

THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

**In re Application of North Mill Pond Holdings, LLC,
One Raynes Ave, LLC, 31 Raynes Ave, LLC, and
203 Maplewood Ave, LLC, regarding the properties
located at 1 Raynes Avenue, 203 Maplewood Avenue,
and 31 Raynes Avenue, and known familiarly as**

The Raynes Avenue Project

APPEAL OF DECISION OF
PORTSMOUTH PLANNING BOARD

Pursuant to RSA 676:5, III, James A. Beal, Fintan (“Finn”) Connell, Joseph R. Famularo, Jr., Philippe Favet, Charlotte Gindele, Julia Gindele, Linda Griebisch, Catherine L. (“Kate”) Harris, Roy W. Helsel, Elizabeth Jefferson, and Donna Pantelakos (collectively referred-to hereinafter as “the appellants”), all of whom are citizens, residents and/or property owners in the City of Portsmouth, hereby appeal the December 16, 2021 decision of the Portsmouth Planning Board, in which said Board (a) granted site plan approval to the owner-applicants’ above-referenced project, which is proposed to be prosecuted at their adjoining properties located at 1 Raynes Avenue, 31 Raynes Avenue, and 203 Maplewood Avenue; (b) granted a wetlands conditional use permit to the owner-applicants for that purpose; and (c) granted certain other, miscellaneous approvals, including an approval relating to valet parking. The movants ask that the Zoning Board of Adjustment reverse the Planning Board’s decision, rescind the wetlands

conditional use permit which has been granted, and enter a new decision disapproving the applicants' site plan.

STANDARD OF REVIEW OF PLANNING BOARD DECISIONS

The legal standard for review of Planning Board decisions by the Zoning Board of Adjustment is de novo. Ouellette v. Town of Kingston, 157 N.H. 604, 608-12, 956 A.2d 286, 290-93 (2008); 15 Peter J. Loughlin, New Hampshire Practice: Land Use Planning & Zoning § 33.02 n.10 (4th ed. 2010 & Supp. 2020). This Zoning Board of Adjustment is required to consider the applicants' petitions anew, and the ZBA is not required to give any deference to any of the findings and conclusions reached by the Planning Board. Id. In fact, this Board (viz., the ZBA) may substitute its own judgment in toto for that of the Planning Board, if it is so inclined. Id.

GROUND FOR APPEAL

The appellants assign the following, specific grounds for their appeal, consisting of ways in which the Planning Board misconstrued, misinterpreted, misapplied, or, in some instances, altogether failed to observe and follow the provisions of the Portsmouth Zoning Ordinance:

1. An ineligible member of the Planning Board, who was improperly appointed to that Board, participated in consideration of the applicants' site plan review and voted to approve it. Therefore, under the teachings of the New Hampshire Supreme Court's decision in Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984), the Planning Board's decision granting site plan approval, issuing a wetlands conditional use permit, and granting other approvals is absolutely void. In the Winslow case, the court ruled that the participation of a single ineligible member in a land use board's decision invalidates the entire decision because "it

[is] impossible to estimate the influence one member might have on his associates”. 125 N.H. at 268, 480 A.2d at 117. More particularly:

2. Planning Board member Raymond Pezzullo was and is ineligible to sit on the Planning Board because he was improperly appointed pursuant to a provision in Portsmouth’s local Administrative Code which directly conflicts with a New Hampshire state statute. Therefore, the local Administrative Code provision is void.

3. More specifically, RSA 673: 2 provides that in cities having a city manager form of local government, the planning board is to consist of nine members, two of whom are to be ex officio members and the other seven of whom are to be appointed by the mayor and confirmed by the city council. Of the two ex officio members, one is to be the city manager or someone whom he or she chooses to appoint to serve in his or her place, and the other is to be a member of the city council, selected by the city council itself. By contrast, section 1.303 of Portsmouth’s local Administrative Code, pursuant to which Mr. Pezzullo was ostensibly appointed, conflicts with this statutory scheme, in that it purports to authorize the city manager to appoint a third Planning Board member, selected from the City administrative staff, as an ex officio member, increasing the number of ex officio members from two to three and decreasing the number of Planning Board members appointed by the mayor and confirmed by the City Council from seven to six. RSA 673:2 neither provides for nor permits the appointment of a third ex officio member. Therefore, section 1.303 of the City’s Administrative Code is in direct conflict with statutory scheme established by RSA 673:2 and is therefore void, and Mr. Pezzullo’s appointment to the Planning Board was unlawful. (The conflict between the state statute and local Administrative Code is explained more fully in a letter dated December 1, 2021 from Planning Board member Rick Chellman to City Attorney Robert P. Sullivan, a copy of which is appended hereto as

Attachment A, and in a subsequent letter dated December 29, 2021 from the movants' under-
signed counsel to former Planning Board Chairman Dexter Legg, a copy of which is appended
hereto as Attachment B.)

4. Mr. Pezzullo's participation in the December 16, 2021 decision was especially egre-
gious, for his lack of eligibility to sit on the Planning Board was timely called to the Board's
attention by another member of the Planning Board itself, Rick Chellman, at the start of the
meeting on that date. Mr. Chellman had previously written a letter to City Attorney Bob Sullivan
on December 1, 2021, raising the issue and explaining why Mr. Pezzullo's appointment violated
state law (see Attachment A hereto), and he re-raised it verbally with the chairman and the other
Planning Board members at the start of the December 16, 2021 meeting. However, his protests
were ignored.

5. In addition to violating state law, Portsmouth's method of selecting a third ex officio
member also creates an obvious conflict of interest on the part of the appointee. As noted above,
section 1.303 of Portsmouth's Administrative Code provides that the third ex officio member is
appointed by the city manager and selected from the City's administrative staff. As a member of
the city administration, the appointee is a city employee and thus is beholden to the city manager
for his job; she has the power of hiring and firing over the former. Under such circumstances,
the appointee will be loath to publicly express an opinion that is contrary to the opinion, stance,
or wishes of the city manager, and he is not likely to vote against an application or measure that
she supports. Almost invariably, he will vote in favor of whatever she votes for, and he will vote
against whatever she votes against. In this situation, there is no chance that the appointee in
question will ever exercise independent judgment. The practical effect of section 1.303 is that
the city manager gets two votes on the Planning Board--her own, and the vote of the ex officio

member whom she has appointed from the City's administrative staff--whereas the regular members appointed by the mayor and confirmed by the City Council get only one.

6. Finally, Mr. Pezzullo's purported membership on the Planning Board did not even comply with the Administrative Code itself, for as an ex officio member his term of office was to have expired at the time of the retirement of the appointing authority who had appointed him, which was former City Manager John Bohenko. Following City Manager Bohenko's retirement two years ago, Mr. Pezzullo was never reappointed by the current city manager nor confirmed by the City Council. (For further discussion, see Attachments A and B hereto.) He has simply continued to sit after his term of office as an ex officio member had ended. Under any scenario, therefore, he has been sitting on the Planning Board unlawfully.

7. For all of the foregoing reasons, Mr. Pezzullo was ineligible to sit on the Planning Board; he was appointed to that Board unlawfully; and under the teachings of Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984), the Planning Board's decision of December 16, 2021 was absolutely void. For that reason, this Board should reconsider its decision and conduct a full rehearing on the developers' application.

8. Several of the members of the Planning Board who voted to grant site plan approval and, in particular, who voted to grant a wetlands conditional use permit employed palpably erroneous legal reasoning and committed clear legal error in applying section 10.1017.50 of the Zoning Ordinance, which sets forth the six criteria for the granting of wetlands conditional use permits. These six criteria are mandatory, yet four of the members of the Planning Board, including its chairman, openly expressed the view that these six criteria were merely "factors" to be weighed against one another and that the criteria were "negotiable". The vice-chairwoman flatly--and totally erroneously--stated that an applicant does not necessarily have to meet all six

of the criteria in order to qualify for a wetlands conditional use permit. The chairman at one point opined that the six criteria are “open to interpretation”. Two other members made similar comments evincing an extremely cavalier attitude toward the six criteria.

9. All of this constituted clear and obvious legal error. The criteria for the granting of a conditional use permit are indeed mandatory, and the applicants’ proposal did not satisfy at least two of those criteria. Section 10.1017.50 of the Zoning Ordinance sets forth the six criteria which must be met in order for a wetlands conditional use permit to be issued. They are:

(1) The land is reasonably suited to the **use**, activity or **alteration**.

(2) There is no alternative location outside the **wetland buffer** that is feasible and reasonable for the proposed **use**, activity or **alteration**.

(3) There will be no adverse impact on the **wetland** functional values of the site or surrounding properties;

(4) **Alteration** of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals; and

(5) The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this Section.

(6) Any area within the **vegetated buffer strip** will be returned to a natural state to the extent feasible.

(Boldfacing in original.) Section 10.1017.41 of the Zoning Ordinance makes clear that these criteria are mandatory and that all six must be satisfied in order for a wetlands conditional use permit to be issued. That section states:

The Planning Board shall grant a conditional use permit provided that it finds that all other restrictions of this Ordinance are

met and that proposed **development** meets all the criteria set forth in section 10.1017.50 or 10.1017.60, as applicable.¹

(Boldfacing in original; other emphasis added.)

10. The above-quoted sections of the Zoning Ordinance make clear that these criteria are not merely “factors” to be taken into consideration and to be weighed against one another in deciding whether to issue a permit, nor that an exceptionally strong showing of compliance with one of these criteria may be used to offset or excuse noncompliance with another. Four members of this Planning Board erred in so regarding them. There is no question but that the applicants’ pro-posal fails to meet subsections (2) and (5) of section 10.1017.50: It would have been “feasible and reasonable” for the developers to erect a building and paved driveway within the site yet outside the 100' wetlands buffer, § 10.1017.50(2), simply by reducing the size of the proposed building; and therefore the developers’ proposal is not the alternative with “the least adverse impact to” the wetlands buffer, the North Mill Pond, and its surroundings. Zoning Ordinance § 10.1017.50(5). Four members of this Board committed clear error by averring that these six criteria were nonbinding, “open to interpretation,” and the like, and by using such observations as a basis for granting site plan approval.

11. In addition to misinterpreting the criteria for the issuance of wetlands conditional use permits, the Planning Board also made other, unrelated errors in ultimately granting site plan approval. For one thing, that Board acted prematurely and committed error in refusing to wait until after the Historic District Commission had acted on the application that was before it, re-

1. Section 10.1017.60, mentioned in the quoted section above, is inapplicable here, inasmuch as it pertains to public and private utilities and rights-of-way in wetlands and wetlands buffers. There are no public or private utilities at issue here.

lating to the same project. The Planning Board should have waited to see what the developers' plan was going to look like after having been vetted by the HDC. More generally, there were many other unanswered questions which came to light during the December 16, 2021 hearing, and the Planning Board should have waited until they were resolved. For example, it was never settled who was going to be responsible for paying for valet parking in perpetuity and who was going to be responsible for enforcing the stipulation that such valet parking be provided, as the existing on-site parking provided-for by the developers' plan was and is admittedly inadequate.

12. As part of his remarks in support of the project during the Board's deliberations, the chairman totally misquoted a member of the Conservation Law Foundation who had spoken before the Planning Board previously at its April 15, 2021 meeting, and he claimed that she had said that "this project [is] going to improve the quality of North Mill Pond water." In reality, she had said just the opposite. Attached hereto as Attachment C is a copy of a letter issued by the Conservation Law Foundation and dated December 23, 2021, in which the CLF, having learned what had transpired at the Planning Board's December 16, 2021 meeting, took issue with the chairman's misuse of its representative's words. While praising the developers' stormwater run-off treatment program, the CLF representative had condemned the project in general because of the intrusion into the wetlands buffer zone. (See Attachment C.)

13. Finally, the Planning Board erred in failing to adopt the recommendation of the Conservation Commission, which had disapproved the project in question. At the proceedings before the Planning Board, the developers boasted that they had worked closely with the Conservation Commission and that they had had five meetings with the latter in which they had modified their project in order to respond to the comments, criticisms, and feedback which the Commission had

given. Yet, after five meetings the Conservation Commission was still dissatisfied with the applicants' project and issued a negative recommendation concerning same. The Planning Board should have heeded the Conservation Commission's recommendation and denied site plan approval.

CONCLUSION

For all of the foregoing reasons, the Planning Board's decision of December 16, 2021 should be reversed, the conditional use permit should be rescinded, and this Zoning Board of Adjustment should enter a directive that the applicants' site plan is disapproved.

/s/ Duncan J. MacCallum

Duncan J. MacCallum

NHBA #1576

536 State Street

Portsmouth, New Hampshire 03801

(603) 431-1230

madbarrister@aol.com

Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned, Duncan J. MacCallum, Attorney for Appellants in the within proceeding, hereby certifies that on this 14th day of January, 2022, true and correct copies of the foregoing Appeal of Decision of Portsmouth Planning Board were served upon the applicants both via e-mail and by forwarding same by first class mail, postage prepaid, to each of the following counsel of record:

Michael D. Ramsdell, Esquire
Brian J. Bouchard, Esquire
Sheehan Phinney Bass & Green, P.A.
1000 Elm Street, 17th Floor
Manchester, New Hampshire 03101

Robert A. Previti, Esquire
Stebbins, Lazos & Van Der Beken, LLC
889 Elm Street, 6th Floor
Manchester, New Hampshire 03101

/s/ Duncan J. MacCallum
Duncan J. MacCallum

EXHIBIT 4



City of Portsmouth
Planning Department
1 Junkins Ave, 3rd Floor
Portsmouth, NH
(603)610-7216

Memorandum

To: Planning Board
From: Beverly Mesa-Zendt, Incoming Planning Director
Date: January 21, 2022
Re: Motions for Planning Board Reconsideration

Background

The following motions for reconsideration are before the Planning Board.

1. Approved December 16, 2021 – Site Plan Application for 1 Raynes Avenue, 203 Maplewood Avenue, and 31 Raynes Avenue
2. Approved December 30, 2021 – Site Plan Application for 99 Bow Street

There is no statute that either requires or authorizes a planning board to conduct a rehearing once a decision has been rendered. Similarly, there is no statute prohibiting a planning board from conducting such a rehearing. A review of prior court decisions suggests that the planning board can consider such requests, however, the planning board is never *required* to grant the request as a matter of law. This lack of state statutory guidance creates an ambiguity for a planning board in determining its authority with respect to rehearing requests. It also creates a void of criteria to apply in determining whether or not to hold such hearings or how to conduct such hearings.

The New Hampshire Municipal Association provides the following:

Whether the board should consider a rehearing depends in part upon the procedural status of the application, and what type of decision the planning board actually reached in the matter.

<https://www.nhmunicipal.org/town-city-article/rehearings-planning-board>

Staff Recommendation

Staff has consulted with and been advised by the City Attorney's office and recommends that the Planning Board **deny** both reconsideration requests.

There are many factors to consider when determining whether or not to grant a rehearing and the decision making criteria and procedural requirements should be firmly grounded in state statute, prior court decisions (case law), and local ordinance. However, as noted above, state law is ambiguous with regard to these matters. Nonetheless, state law has provided an appeal mechanism for aggrieved participants including the right to appeal to superior court, to the Housing Appeals Board, or to the Board of Adjustment (if the issue involves an interpretation of the Zoning Ordinance).

The applicants are requesting a rehearing for the decision on 1 Raynes Avenue, 203 Maplewood Avenue, and 31 Raynes Avenue and have filed a separate and parallel petition with the Board of Adjustment on January 14, 2022.

If the Board of Adjustment finds that an error has been made in the interpretation of the zoning ordinance, the Board of Adjustment may provide necessary zoning relief.

Alternatively, the Applicant may also appeal the decision to superior court under the provisions of RSA 677:15 or the Housing Appeals Board pursuant to RSA 679.

Regulating Rules and Future Requests

It is the recommendation of both the City's Planning and Legal Departments that the Planning Board consider adopting its own rules regulating whether or not rehearing requests will be considered and, if so, the process and criteria which will be applicable to those requests. If the Planning Board accepts this recommendation, staff will place this item on a future Planning Board agenda and will seek guidance from both the Planning Board and the City Attorney's office in developing policies and standards that will facilitate the review of such requests in compliance with both the intent and letter of state statutes and with due consideration to the rights of applicants, abutters, and other participants.

EXHIBIT 5

DUNCAN J. MACCALLUM

ATTORNEY AT LAW

**536 STATE STREET
PORTSMOUTH, NEW HAMPSHIRE 03801-4327
(603) 431-1230
TELECOPIER: (603) 431-1308**

ALSO ADMITTED IN NY, PA, OHIO & MA

January 29, 2022

Beverly Mesa Zendt, Planning Director
City of Portsmouth
One Junkins Avenue
Portsmouth, New Hampshire 03801

Arthur Parrott, Chairman
Zoning Board of Adjustment
City of Portsmouth
One Junkins Avenue
Portsmouth, New Hampshire 03801

Re: Raynes Avenue Project

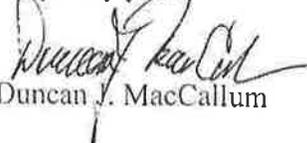
Dear Ms. Zendt and Mr. Parrott:

By now I expect you are probably aware that last Thursday, January 27, 2022, the Planning Board granted my motion for rehearing relative to that board's December 16, 2021 decision approving the above-referenced project. Presumably, the Planning Board will re-entertain the developers' application at its regular, February 17, 2022 meeting.

For the time being, at least, this turn of events would seem to render moot the pending appeal that I have filed with the Board of Adjustment on behalf of eleven citizen opponents of the subject project. If, at its February 17, 2022 meeting, the Planning Board reverses its prior decision and votes to deny site plan approval, there will no longer be any need for any appeal.

For the foregoing reasons, I would respectfully ask that the Board of Adjustment postpone any action on our appeal until after the Planning Board has conducted its rehearing.

Very truly yours


Duncan J. MacCallum

DJM/eap

cc. Michael D. Ramsdell, Esquire
Brian J. Bouchard, Esquire

EXHIBIT 6

DUNCAN J. MACCALLUM
ATTORNEY AT LAW

536 STATE STREET
PORTSMOUTH, NEW HAMPSHIRE 03801-4327
(603) 431-1230
TELECOPIER: (603) 431-1308

ALSO ADMITTED IN NY, PA, OHIO & MA

February 4, 2022

Peter Stith, Principal Planner
City of Portsmouth
One Junkins Avenue
Portsmouth, New Hampshire 03801

Re: Raynes Avenue Project

Dear Peter:

Responding to your two e-mail messages from yesterday and confirming our telephone conversation this morning, at this point I cannot voluntarily dismiss or withdraw my pending appeal of the Planning Board's December 16, 2021 decision to the Zoning Board of Adjustment, owing to circumstances relating to thorny questions of legal procedure.

I appreciate your point that the rehearing before the Planning Board is likely to result in a brand new appeal by one side or the other. Nonetheless, in order to protect my record for an eventual appeal to the courts, I feel that I must leave my present appeal in place.

For these reasons, would you please postpone the hearing on, rather than dismiss, my present appeal before the Board of Adjustment until after the Planning Board has rendered its decision following the rehearing, in keeping with the suggestion made in my letter of January 29, 2022 to Beverly Mesa Zendt and Arthur Parrott. If the Planning Board's decision generates a new appeal, as I expect it will, then the two appeals can be consolidated and heard together, as the issues between the two will be virtually identical.

Very truly yours,


Duncan J. MacCallum

DJM/eap
cc. Michael D. Ramsdell, Esquire
Brian J. Bouchard, Esquire

EXHIBIT 7

**THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD
Governor Hugh J. Gallen State Office Park**

Johnson Hall, Room 201
107 Pleasant Street
Concord, NH 03301
Telephone: (603) 271-1198
TDD Access: Relay NH 1-800-735-2964
Email: clerk@hab.nh.gov
Visit us at <https://hab.nh.gov>



**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 Intervenor's 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 Intervenor's, 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, 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 saw [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.

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Rockingham Superior Court
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CERTIORARI ORDER

Case Name: **North Mill Pond Holdings LLC, et al v City of Portsmouth, NH**
Case Number: **218-2022-CV-00093**

Date Action Filed: **February 09, 2022**

The Court has reviewed the Petition for Writ of Certiorari and makes the following order:

1. A Writ of Certiorari shall issue
2. Proceedings upon the decision appealed from are stayed.
3. The Planning Board shall deliver certified or sworn copies of all papers acted on by the Board to the Superior Court Clerk at Rockingham Superior Court.

So Ordered.

Date



Honorable Marguerite L. Wageling

February 14, 2022

Presiding Justice

**Clerk's Notice of Decision
Document Sent to Parties
on 02/15/2022**