

January 20, 2022

FOR BOARD MEMBERS AND PUBLIC

Planning Board Chairperson
City of Portsmouth Planning Board
1 Junkins Avenue
Portsmouth, New Hampshire 03801

RE: **MOTION FOR REHEARING**
Application for Site Plan Approval
Tax Map 106, Lot 54, 99 Bow Street

Dear Planning Board Members:

BowPorts EV, LLC (“BowPorts”), which is the record owner of 111 Bow Street, Unit 2, Portsmouth New Hampshire, and a direct abutter to Martingale LLC, Moves for Rehearing Regarding the Application for Site Plan Approval for Martingale LLC approved at the December 30, 2021 Planning Board meeting for the following reasons:

I. NEW Plan Submitted Only DAYS Before the Meeting Constitutes Denial of Due Process

There was a gross lack of adequate notice to (a) the Board, (b) the abutters, and (c) the public about the proposal that was actually considered and approved. The Applicant amended its plan and submitted it to the Board on December 22, 2021. It did not even have for consideration the final version of this NEW proposal.

This NEW proposal amended the deck size such that the Applicant’s representative could not even identify the total square footage of the deck as identified in this “new” plan. The same representative also could *not* answer direct questions from the Board about important issues that Board members themselves identified.

II. Board Rushed This Application and Potentially Was Out of Compliance with Law

A. One Meeting On Last Day of the Year

To our knowledge, the December 30, 2021 Planning Board meeting was the *first time* in City history that the Board met the night before New Year's Eve to vote on an Application for Approval.

This application – with a new version submitted on December 22, 2021, was approved after one (1) meeting, with nine (9) conditions, on the last day of the year.

One or more Board members asked for a site visit indicating that he would “like to see the area” in question. Yet, there was *no* follow-up regarding this. No communication about continuing the application until a site visit could occur.

B. Issue of Board Being Out of Compliance

At the immediately prior Planning Board meeting of December 16, 2021, an issue was raised about whether the Planning Board was out of compliance with the law because it had a legally unauthorized additional participating member. The Board did not deliberate publicly about this issue. To the contrary, it glossed over it and moved ahead.

We now understand that the Board was aware of this issue prior to and at the time of the December 30, 2021 meeting *and* did not (a) identify it or (b) address it. Instead, it just rushed this Application through.

If this representation about the Board’s non-compliance is accurate, the deliberation and approval is flawed.

Because it was raised, it is at least an issue that should be addressed publicly in the interest of the Board’s acting transparently and as an open form of government.

III. Board Relied Upon A Direct Factual Error

Trash disposal has been a huge problem at this location since the building was built. This Applicant has had their large trash barrels slammed up against 111 Bow Street -- the oldest historic building on Bow Street. More frequently than not, it has left this trash uncovered and overflowing. These barrels have damaged our wooden siding – something that the Historic District Commission requires us to maintain. This situation also has caused odor, seepage, noise, and rodent problems.

111 Bow Street has raised this issue with the City *multiple* times over the last eleven years. We specifically raised it during this Applicant’s last proposal to expand the deck in 2015. We used pictures and asked Historic District Commission members to do a site visit.

We have also raised it with the Building Department *and* the Health Department.

During the most recent Planning Board meeting we again included pictures of the trash problem. We explained that these pictures *were from 2015* and used during the 2015 objections to this deck expansion *and* explained that the problem has persisted since that time.

When the Applicant challenged the legitimacy of this trash problem, one Board member referenced that he personally observed it.

Yet, during deliberation the Chair of the Planning Board stated that the “trash issue” was not something that 111 Bow Street had previously raised with the City. This was directly and abjectly false. The vote to approve the Application, with its nine (9) conditions, followed. It is apparent, therefore, that this factual error directly impacted the result.

IV. Applicant Was Unable to Answer Numerous Questions From the Board

A. Pilings Hammered Into ? ? ? ?

As an abutter, we are concerned about the direct impact on our property from the construction process proposed. This Applicant identified that it plans to drive pilings deep into the ground to support the expanded deck. For this, they plan to use a barge with a large crane that has a huge “vibratory hammer” to drive the pilings into the ground under the water.

We are only a few feet away from where this is supposed to happen. We asked whether they have done a study to determine what the ground is like in this location. Specifically, is it ledge? If so, this could fracture and affect our building, impact the ecosystem which we know from the DES application includes endangered species, and weaken the ground all along Bow Street.

The developer's representative responded that it does *not* know what the ground is where it proposes driving these pilings. It has not done anything to assess this.

Obviously, an issue of concern, a Board member asked if the Applicant could screw the pilings into the ground. The Applicant responded, “I don’t know.”

The Board ignored this when it approved this project.

B. Signage for “Public Deck”

The Board then asked about signage for what is supposed to be a “public deck.” As one Board member explained, if a portion of this proposal is supposed to be a “public deck” there needs to be signage explaining this. Asked about this, the Applicant again said he “did not know” if there would be signage or where it would be.

Members then followed up with questions about whether the portion of the deck will actually be “public”. The responses made it clear that it will be accessed by a stairwell open and closed at the business’ discretion and the “public” deck area will have a gate that the business will be able to open and close when they want. They also will control how many people use it. This is clearly *not* a “public” deck.

C. Access for Disabled

Martingale LLC claimed that it would provide access for the disabled who park on Bow Street to the waterfront by allowing use of its elevator. FEDERAL LAW requires this because the Martingale is a place of public accommodation. This is *not* a concession or even anything additional that Martingale is offering. Yet, the Board cited it as an additional benefit the City is receiving.

It then ignored a great question from a Board member who asked if there is a safety issue created regarding evacuation if the elevator fails. About this, the Applicant's representative again responded that he "did not know."

V. Direct RESIDENTIAL Abutters Object

The seven units at 111 Bow Street Object to this application. Five of these seven units are residential. All will be adversely affected by the sound, noise, odor and light this deck will create.

It is undisputed that this proposal will increase the impact each of elements will have on abutting properties. This proposal means *more* customers which will generate *more* trash, noise, sound, light, and odor.

Indeed, for this reason the proposal includes "screening" for the neighboring properties. At the meeting, the Applicant mentioned something about *eliminating* the screening on one side. This *elimination* was not shown *anywhere* on the new version of its proposal!

Moreover, this proposed screening is woefully insufficient to mitigate the increased harm this project will cause. It is short. It is decorative. It is only directed toward making the dining experience for customers better. But will do nothing for abutting residential property owners who will be subjected to much greater adverse impact.

VI. NH DES Application Still Pending

The Portsmouth Conservation Commission has denied this proposed deck expansion *twice*.

The Applicant has repeatedly acknowledged that whether this proposal goes forward depends upon the NH DES consideration of its Dredge and Fill permit. It is agreed – and undisputed – that the NH DES is the agency with the expertise to address the issues this proposal raises. It also is undisputed that there are many unanswered questions, especially since the Applicant just amended its proposal *again*.

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Before the Planning Board proceeds further, it should receive the determination from NH DES so the Board can address any issues raised therein. Proceeding otherwise, and approving this application without even knowing the concerns that NH DES identifies, is a dereliction of the responsibility that the Planning Board owes to Portsmouth residents.

Please reconsider this Application.

Sincerely,

A handwritten signature in black ink, appearing to read "John P. Sherman", with a long horizontal stroke extending to the right.

John P. Sherman

cc: Client
Planning Board members – via email planning@cityofportsmouth.com
Nick Cracknell, City of Portsmouth (via email)
Peter Britz, City of Portsmouth (via email)
Marjan Frank and George Glidden (via email)
John Samonas (via email)
David Price, NH DES (via email)
Stefanie Giallongo, NH DES (via email)
Juliet Walker, City of Portsmouth (via email)