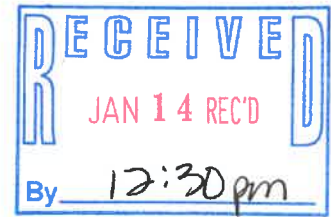


**DUNCAN J. MACCALLUM**

ATTORNEY AT LAW

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ALSO ADMITTED IN NY, PA, OHIO & MA



August 13, 2021

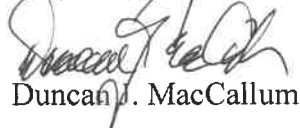
Beverly Mesa Zendt, Planning Director  
City of Portsmouth  
One Junkins Avenue  
Portsmouth, New Hampshire 03801

Re: Raynes Avenue Project

Dear Ms. Zendt:

Enclosed for filing are the original and fifteen copies of our Motion for Rehearing/  
Reconsideration in the above-referenced matter.

Very truly yours



Duncan J. MacCallum

DJM/eap

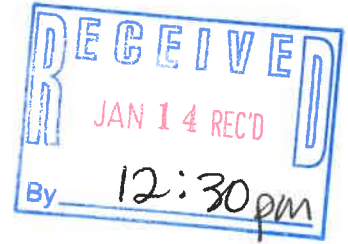
Enclosures

cc. Michael D. Ramsdell, Esquire  
Brian J. Bouchard, Esquire  
Robert A. Previti, Esquire

HAND DELIVERED TO ADDRESSEE ONLY

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.<sup>1</sup>

(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.

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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.



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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

  
\_\_\_\_\_  
Duncan J. MacCallum

# **ATTACHMENT A**



# TND ENGINEERING

TRAFFIC, TND, TRANSPORTATION AND CONSULTING

224 State Street  
PORTSMOUTH, NH 03801  
p. 603.479-7195  
Email: [Chellman@TNDEngineering.com](mailto:Chellman@TNDEngineering.com)

Mr. Robert P. Sullivan, Esq.  
City Attorney, City of Portsmouth  
1 Junkins Avenue  
Portsmouth, NH 03801

December 1, 2021

Re: Planning Board Members

Dear Bob:

As we discussed recently in your office, and I briefly reviewed with Trevor by telephone last week, it has recently come to my attention that the current makeup of the Planning Board, which includes an ex-officio member appointed by the City Manager, is apparently not in conformance with the enabling statutes.

You asked that I reduce some of my thoughts about, and research into, this matter to writing and in compliance with that request, I offer this letter.

Beginning with the City's Code, Section 1.303 A contains the relevant City guidance:<sup>1</sup>

**Section 1.303: PLANNING BOARD**

- A. Membership: The Planning Board of the City shall consist of nine (9) members and two (2) alternate members, specifically; (Adopted 1/23/95)
1. The City Manager, or the designee of the City Manager with the approval of the City Council, who shall be an ex-officio member;
  2. An administrative official of the City selected by the City Manager who shall be an ex-officio member;
  3. A member of the City Council selected by the Mayor with the approval of the Council, who shall be an ex-officio member;
  4. Six residents of the City appointed by the Mayor with the approval of the City Council.
  5. Two (2) alternates who shall be residents of the City appointed by the Mayor with the approval of the City Council. (Adopted 1/23/95)

**Figure 1: Section 1.303 of City Code**

<sup>1</sup> Rather than retyping reference materials, I will use image-copy inserts in this letter to reduce the likelihood of typographical errors.

Based on a review of City Minutes, the previous City Manager appointed a City employee to an ex-officio position on the Planning Board in September, 2018. While not cited in the Council minutes, since it was an informational item only, I assume this appointment was in accordance with 1.303 A: 2, above.

While you obviously have all of the statutes readily at hand, to make this letter stand-alone in case you find yourself reviewing it away from your desk, the relevant statute is 673:2 (I grayed out the section not used in Portsmouth):

### **Appointment and Terms of Local Land Use Board Members**

#### **Section 673:2**

##### **673:2 Planning Board. –**

I. (a) In cities, the planning board shall consist of 9 members:



(b) Alternatively, the local legislative body in a city with a city council-city manager form of government may establish a planning board with membership as provided in paragraph I-a.

I-a. In cities with a city council-city manager form of government, the planning board may consist of the following 9 members:

- (a) The city manager, or with the approval of the local legislative body the city manager's designee, who shall be an ex officio member;
- (b) A member of the city council selected by the council, who shall be an ex officio member; and
- (c) Seven persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.

**Figure 2: NH RSA 673:2**

It is immediately apparent that while the current statute provides for only two ex-officio members on the Planning Board, the Manager and a Councilor, the City's Code adds another appointed by the Manager.

I have not researched the origin of 1.303 of the City's Code as I think that is not particularly relevant to our current discussion. In fact, I think it likely that 1.303 was in conformance with earlier statutes or at least accepted practices in or about 1980. My reason for this thinking is gleaned in part from the City of Concord's past history with this specific topic, and its Ordinance #1396, bearing a date of 7/14/80 that contains almost the same language as Portsmouth's Code's Section 1.303. Concord's Ordinance #1396, superseded more than once since 1980 follows on the next page.

CITY OF CONCORD

In the year of our Lord one thousand nine hundred and  
AN ORDINANCE Amending Section 52.6 of the Administrative Code,  
relative to Planning Boards.

The City of Concord ordains as follows:

Section One: Amend Section 52.6 of The Municipal Code of Ordinances,  
Administrative Code, Planning Board by striking the whole thereof  
and substituting in its place the following new section:

52.6 Planning Board. The Planning Board shall consist  
of nine members, namely, the City Manager, one of the  
administrative officials of the city who shall be select-  
ed by the manager, and a member of the council who shall  
be selected by it, as members ex officio, and six (6)  
persons to be appointed by the Mayor, subject to con-  
firmation by the City Council. The Mayor shall also  
appoint, subject to confirmation by the City Council,  
three (3) alternate members. Whenever a regular member  
shall be absent the chairman shall designate an alternate  
if an alternate is present to act in the absent member's  
place.

The Planning Board shall perform all functions provided  
for by Chapter 36 of the New Hampshire Revised Statutes  
as amended and be subject to all provisions of said  
chapter.

Section Two: This ordinance shall take effect upon its passage.

Figure 3 City of Concord Ordinance #1396 from 1980

Concord revised its Ordinance #1396 in 1986, 2001 and again most recently  
earlier this year with its current version being Ordinance No. 3084, that is  
attached for reference.

Concord's current Ordinance tracks the current statutory provisions of RSA 673:2  
by providing for two ex-officio members, and seven members appointed by the  
Mayor and confirmed by the Council.

Like you, I am more focused on the statutory provisions than what other cities  
may or may not have enacted, but I found Concord's example to be informative.<sup>2</sup>

I am of course more focused on the provisions of land use regulations  
themselves than I am with enabling legislation, so when you were away on  
vacation last week, I took the opportunity to review this topic with two private

<sup>2</sup> The Cities of Manchester and Rochester have provisions similar to Concord's but neither provides for a Manager appointment of  
an ex-officio member.

attorneys I work with and also with the NH Municipal Association Counsel.<sup>3</sup>

In each instance, it was quickly apparent to these attorneys that Portsmouth's current Code is out of date and not in conformance with the current statutory scheme.

I would like to note with specific emphasis that my concerns are not in any way personal or related to the specific individuals currently or recently involved with this matter. My concerns are that this topic relates to the basic makeup of a Planning Board on which I serve myself and I strive to ensure compliance with pertinent requirements- I feel the City and the applicants before the Board deserve no less.

That thinking led me to consider the possible ramifications of not correcting what I believe was originally common practice but has now been revealed to be an outdated mistake that has only very recently been discovered by these discussions with you and others.

The Planning Board has many functions, but for this discussion we need to focus on its quasi-judicial functions, where interested parties are furnished notice, public hearings are held, and evidence is considered before a decision is reached. These quasi-judicial functions at least include the Board's review of subdivisions, site plans, and conditional use permits. These sorts of reviews occur very regularly, sometimes many times each month.

From my own review of this, it appears that at about the time of the enactment of Concord's Ordinance #1396, above, and possibly of Portsmouth's 1.303 (which may very well pre-date the Concord Ordinance), even the NH Supreme Court had a different opinion on the possible effects of one member's participation in a Board decision where that member may later be found to be disqualified.

In ***Totty V. Grantham Planning Board***, 120 NH 390 (1980), the Court reviewed a case where two of the five voting members on a subdivision application were abutters, and the Court held that those two members were therefore disqualified. However, the Court also held that since the other three members voting in the unanimous Board decision were "concededly qualified" and that since there "was no indication" the disqualified members participation determined the outcome of the vote, the vote was held to be valid.

Just four years later the Court demonstrated that we all can make mistakes, in ***Winslow v. Holderness Planning Board*** 125 NH 262 (1984), the Court stated that with respect to ***Totty*** that "[w]e now believe this to be a misstatement of the

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<sup>3</sup> Mr. Natch Greyes, Esq.

law".<sup>4</sup>

In the *Winslow* case, the matter of a member's disqualification and the implications of a Planning Board member are discussed at some length. Noting that when Boards act in a quasi-judicial manner, the Court cited as relevant the NH Constitution which "demands" that all judges be "as impartial as the law of humanity will admit".

Under the current makeup of the Portsmouth Planning Board, one member (the "extra ex-officio member discussed above) is appointed by, and reports to another member who is that member's employer or supervisor (the Manager).

I think it impossible to contemplate and satisfactorily reconcile all of the possible problems such a situation can present under the current regulatory frameworks.

The pressure on the employee to agree with their employer/supervisor is one obvious possibility. However, what if -for example- the employee happens to speak first during deliberations, could that result in an undue influence on the Manager simply because of the employer/employee relationship that exists outside the Board?

The Court in *Winslow* also noted it would "reach the same result" in applying the test for members of zoning boards of adjustment to meet the standards required of jurors.

Here, and as you agreed in your office earlier this week, we have a situation where the City's Code does not conform with the current statute. I submit it also does not conform with current policy and best practices as enumerated in case law and followed by other cities. There can be no valid argument for allowing the manager or anyone else to appoint an "extra" ex-officio member without that falling into the realm of an ultra vires action.

I now turn to a sense of urgency in this matter as we have a Planning Board meeting scheduled for later this month. If I, the NH Municipal Association's counsel and others I have reviewed this matter with are all correct, then this "extra" member is not qualified as a Board member.

Finally, and again in the *Winslow* case, the NH Court stated (citing the *Rollins* Court) that "mere participation by one disqualified member was sufficient to invalidate the tribunal's decision because it was impossible to estimate the influence one member might have on his associates (emphasis added)".

---

<sup>4</sup> This case also cites a much earlier case, *Rollins v. Connor* 74 NH 456 (1908) which also held that the participation in a "judicial action by a tribunal" by a disqualified member is voidable.



Again, please understand that this is not a matter focused on any individual person, but in a framework that has created a Planning Board membership scheme that does not conform to current Statutes.

If I am correct, then every quasi-judicial decision the Board reaches with such a member's participation runs the risk of being declared invalid. If I am incorrect, then the only risk is one less administrative official on the Board and the City's administrative officials have ample other opportunities to provide input to the planning processes in the City.

If you would care to discuss this further, I am at your service in that regard.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Rick C. Hellman", with a stylized, cursive script.

Chester "Rick" C. Hellman, P.E., L.L.S.

Email only copies to:  
Synthia Ravell (to print for Bob)  
Trevor McCourt, Esq.

## **ATTACHMENT B**

**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

December 29, 2021

Dexter Legg, Chairman  
Portsmouth Planning Board  
City of Portsmouth  
One Junkins Avenue  
Portsmouth, New Hampshire 03801

Re: Ineligibility of Raymond Pezzullo

Dear Mr. Legg:

This will constitute my formal request that Raymond Pezzullo be disqualified from sitting on the Planning Board at its upcoming December 30, 2021 meeting and that he in any event refrain from participating in the consideration of, or voting on, any of the applications that are to be entertained at that meeting.

The basis for my request is that Mr. Pezzullo is ineligible to sit on the Planning Board and was unlawfully appointed thereto, for in a city manager form of local government New Hampshire state law allows for the appointment of only two ex officio members to a planning board: the city manger (or his or her designee) and a member of the City Council. RSA 673:2. All other members of the planning board are to be appointed by the mayor and confirmed by the City Council. Id.

Mr. Pezzullo was neither designated by the city manager to sit on the Planning Board in her place nor chosen by the City Council to be its delegate to that Board (inasmuch as he is not a member of the City Council in the first place). Rather, he was purportedly appointed to the Planning Board as an additional ex officio member by the city manger, acting under color of section 1.303 of the City's Administrative Code. Section 1.303, however, clashes with the above-cited New Hampshire state statute and is therefore invalid. Ergo, Mr. Pezzullo is ineligible to sit on the Planning Board (or, at least, he is ineligible to sit as an ex officio member; he theoretically could still be appointed by the mayor and confirmed by the City Council), and he is presently holding his seat unlawfully.

You, of course, already have quite a bit of familiarity with this issue, inasmuch as it was publicly raised by Planning Board member Rick Chellman at the Planning Board's December 16,

2021 meeting and was the subject of some discussion between Mr. Chellman and yourself at that time. Further, at that meeting you also indicated that you were already aware of Mr. Chellman's letter of December 1, 2021 to City Attorney Bob Sullivan and that in fact you had already discussed it with the latter, even if you had not yet been provided with a copy. (In case you still have not received one, I enclose a copy of the letter herewith, as well as copies of its attachments.) To my knowledge, the December 16, 2021 meeting marked the first public disclosure of the fact that Mr. Pezzullo's eligibility to serve on the Planning Board was in question. But in any event, it seems clear that you yourself were already well aware of the issue.

As I'm also quite sure you're aware, the root of the reason why that issue has arisen is that there is a conflict between the relevant New Hampshire state statute, RSA 673:2, and one of the provisions of the City's Administrative Code, § 1.303. I deem it to be a proposition so obvious as to require no citation to legal authority, that if there is a conflict between a state statute and a local ordinance, the state statute prevails and the conflicting provisions of the local ordinance must yield.

RSA 673:2 establishes the framework for the planning board and prescribes the composition of its membership. In cities with a city manager form of government, there are to be nine regular members and, as already noted above, two of those members are to be ex officio members, consisting of (a) the city manager or his/her designee, and (b) a member of the City Council, chosen by the latter body. (There may also be alternates. See RSA 673:6.) The remaining seven regular members are to be appointed by the mayor and confirmed by the City Council. There is no provision in the statute for a third ex officio member.

RSA 673:2 states in pertinent part:

I. (a) In cities, the planning board shall consist of 9 members:

(1) The mayor of the city, or with the approval of the local legislative body the mayor's designee, who shall be an ex officio member;

(2) An administrative official of the city selected by the mayor, who shall be an ex officio member;

(3) A member of the city council selected by the council, who shall be an ex officio member; and

(4) Six persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.

(b) Alternatively, the local legislative body in a city with a city council-city manager form of government may establish a planning board with membership as provided in paragraph I-a.

I-a. In cities with a city council-city manager form of government, the planning board may consist of the following 9 members:

(a) The city manager, or with the approval of the local legislative body the city manager's designee, who shall be an ex officio member;

(b) A member of the city council selected by the council, who shall be an ex officio member; and

(c) Seven persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.

In neither RSA 673:2, I nor I-a is there any provision for a third ex officio member on the planning board. The portion of the statute providing for the number of planning board members is expressed in the mandatory term "shall": "In cities, the planning board shall consist of 9 members[.]" RSA 673:2, I(a) (quoted above) (emphasis added). Subsection I-a(c) of the statute provides that by charter or by local legislative action, the municipality may alter the method of appointment of the non-ex officio members, but the subsection does not augment the total number of members who may be appointed, either regular or ex officio.

Section 1.303 of the Portsmouth Administrative Code is both internally inconsistent and in conflict with this statutory scheme, and therefore that section is void to the extent of the conflict. Section 1.303 provides:

A. Membership: The Planning Board of the City shall consist of nine (9) members and two (2) alternate members, specifically;

1. The City Manager, or the designee of the City Manager with the approval of the City Council, who shall be an ex-officio member;
2. An administrative official of the City selected by the City Manager who shall be an ex-officio member;
3. A member of the City Council selected by the Mayor with the approval of the Council, who shall be an ex-officio member;
4. Six residents of the City appointed by the Mayor with the approval of the City Council.
5. Two (2) alternates who shall be residents of the City appointed by the Mayor with the approval of the City Council.

B. Term: All Planning Board members shall serve as such without compensation and the appointed members shall hold no other municipal office except ward official, election official and check-list supervisors. The term of each appointed member shall be three (3) years. The Mayor shall apportion appointments so that no more than three appointments occur annually.

Section 1.303 unlawfully provides for a planning board which includes three ex officio members, rather than two, contrary to the statutory scheme laid out in RSA 673:2. It also reduces the number of citizen board members appointed by the mayor to six members, rather than seven. Conversely, it increases the number of members who may be appointed by the city manager (including herself) from one to two. It also purports to authorize the city manager to appoint a member who holds another municipal office other than ward official, election official, or check-list supervisor, contrary to Section 1.303's own provisions.

Finally, it throws the terms of office of ex officio members into a state of confusion. According to what Mr. Chellman says in his letter to City Attorney Sullivan--and I have no reason to doubt it--Mr. Pezzullo was appointed to the Planning Board as an ex officio member by then-City Manager John Bohenko, acting under color of the above-quoted section 1.303 of the Administrative Code. Was Mr. Pezzullo appointed to a three-year term? As an ex officio

member, one would have expected his term of office to have expired with the expiration of the term of the official or other authority that appointed him, and former City Manager Bohenko retired two years ago. Was Mr. Pezzullo reappointed by our current city manager, Karen Conard, within these past two years since the time that she took office? If so, I doubt very much that he was confirmed by our current City Council, headed by Mayor Rick Becksted.

Absent some evidence that Mr. Pezzullo, an ex officio member, was reappointed by City Manager Conard and his reappointment confirmed by the City Council, it is clear that he is presently sitting on the Planning Board unlawfully, even under the terms of the City's own Administrative Code.

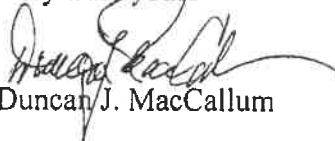
Finally, as Planning Board member Rick Chellman has ably pointed out in his letter of December 1, 2021 to City Attorney Bob Sullivan, the system laid out in section 1.303 of the Administrative Code, wherein the city manager appoints a Planning Board member selected from the City administrative staff, creates a situation of obvious conflict of interest on the part of the appointee (in this case Mr. Pezzullo). 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. The appointee is going to 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 practical effect, under this arrangement the city manager gets two votes: her own, and the vote of the ex officio member whom she has separately appointed from City administrative staff pursuant to section 1.303(A)(2). Any notion of independence of thought or action on the part of the appointee is a pipe dream, and in any event the arrangement does violence to the statutory scheme established by RSA 673:2, I and I-a.

Dexter Legg, Planning Board Chairman  
December 29, 2021  
Page 6

For all of the foregoing reasons, I ask that Mr. Pezzullo be disqualified from sitting as a Planning Board member at the upcoming December 30, 2021 meeting and at all future meetings.

Very truly yours



Duncan J. MacCallum

DJM/eap

Enclosures

cc. Robert P. Sullivan, Esquire (w/o enclosures)  
Karen Conard, City Manager  
Rick Becksted, Mayor  
Rick Chellman (w/o enclosures)

HAND DELIVERED



# **ATTACHMENT C**



For a thriving New England

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December 23, 2021

Chairman Dexter Legg and Planning Board Members  
City of Portsmouth Planning Board  
1 Junkins Avenue  
Portsmouth NH 03801

**Re: 1&31 Raynes Avenue Project, Conditional Use Permit Hearing**

Dear Chairman Legg and Planning Board Members,

We write to you with concerns about comments made at the Planning Board meeting on December 16, 2021 in which the Board considered a conditional use permit (CUP) to allow the proposed 1&31 Raynes Avenue project to build within the 100 foot wetlands buffer. At that meeting, Chairman Legg referred to comments made by CLF's Great Bay-Piscataqua Waterkeeper, Melissa Paly, at an April 15, 2021 hearing on a different project as justification to support and approve a CUP.

At the April 15 hearing referenced by Chairman Legg, Ms. Paly provided comments regarding a project at 105 Bartlett Street, which was also seeking a variance from the 100-foot buffer. The first part of those comments commended elements of the project related to stormwater management that would enhance water quality in North Mill Pond. However, the second part of Ms. Paly's comments addressed the importance of buffers and concerns about reducing the 100-foot wetlands buffer.<sup>1</sup> During deliberations, several Planning Board members focused solely on the first part of Ms. Paly's comments related to stormwater management yet overlooked her concerns about encroachment on the wetland buffer.

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<sup>1</sup> In her April 15 comments, Ms. Paly brought to the Board's attention a recent report called *Buffer Options on the Bay*, released by a consortium including the NH Department of Environmental Services, The Nature Conservancy, the Great Bay National Estuarine Research Reserve and others, that includes recommendations on buffer width to meet different objectives. Ms Paly stated:

One of the recommendations to really reduce runoff and stabilize banks is a minimum of 164 feet recommended in this report.... I'd like you to consider that a 100-foot buffer is a *minimum* to protect habitat, water quality and other things, so certainly granting a waiver will compromise the benefits that it's intended to produce.... There will be impacts as you chip away at that buffer.



At the December 16 hearing on the 1&31 Raynes Avenue project, Chairman Legg referred to Ms. Paly's April 15 comments, again focusing on her statements about stormwater management while ignoring those related to the importance of wetland buffers.<sup>2</sup> We want to clarify that (1) we have provided no public comment on the Raynes Avenue project, (2) any comments we provide on one project – which will always be based on site-specific characteristics – cannot fairly be invoked for, and applied to, *other* projects, and (3) the Chairman's comments ignored a critical element of the Waterkeeper's April 15 testimony about the dual importance of both stormwater management *and* buffers to improving water quality.

We respectfully request that any comments provided by CLF and/or its Waterkeeper program in one context not be applied to other projects for which they were not intended. Furthermore, we request that the Waterkeeper's comments be viewed fully rather than parsed to justify encroachments into critically important wetland buffers. Finally, we request that this letter be shared with both current and incoming members of the Planning Board who will, no doubt, continue deliberations on the Raynes Avenue project.

Sincerely,

/s/ Melissa Paly

Melissa Paly  
Great Bay-Piscataqua Waterkeeper

/s/ Tom Irwin

Tom Irwin  
CLF Vice President for New Hampshire

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<sup>2</sup> <https://www.cityofportsmouth.com/planportsmouth/planning-board>  
December 16, 2021 at 4:17