FEBRUARY 12, 2024
TO: THE HONORABLE MAYOR AND PORTSMOUTH CITY COUNCIL
RE: IN THE MATTER OF THE REMOVAL OF JAMES HEWITT FROM THE PLANNING BOARD

MEMORANDUM OF LAW IN SUPPORT OF REMOVAL

INTRODUCTION

The removal of planning board members from office is not a procedure to be used lightly. It is reserved for those planning board members who have betrayed the public trust. Planning board members serve in a unique capacity in our society – although they are volunteers and members of the community, they also serve as gatekeepers for how members of the community may make use of their private property. Their actions, viewed in that light, must balance the individual's right to make use of their property with the broader concerns of the rest of the community.

To that end, planning board members must act in furtherance of the public trust. Their actions and deliberations must occur in, and only within, the light of public meetings. To permit this discussion to occur in private, in email, and in a forum which is not inherently public undermines the trust all applicants must have in planning board members to make fair decisions.

That is not to say planning board members, as volunteers, cannot make mistakes. Emails can be disclosed, amends made, and the public brought up to speed given an individual violation of the law. However, repeated betrayal of the public trust, in the face of ongoing advice from legal counsel, reflects a fundamental inability to act in the furtherance of the public trust within the peculiar and unique role as a Planning Board member.

Mr. Hewitt's continued actions, taken together, reflect either a fundamental misunderstanding of his role as a member of the Planning Board or an active flaunting of the rules applicable to him. Although he was counseled against repeat offences, and he indicated his contrition, his unlawful behavior continues to an unsustainable extent. Even when offered a final chance to correct his behavior, he continues to flaunt the rules applicable to planning board members across the state.

This continued, pervasive pattern of behavior leaves removal from office as the only remedy. To do otherwise places each Planning Board decision in jeopardy and puts the taxpayers of Portsmouth at risk of defending indefensible decisions.

REMOVAL

NH RSA 673:13 provides for the removal of a land use board member by the appointing authority after a public hearing and upon a written finding of inefficiency, neglect

of duty, or malfeasance in office. The Mayor and City Council are the appointing authority for the Planning Board members. City Ordinance, Chapter 1, Article III, Section 1.303.

Malfeasance is defined as the general misuse of public office, or as wrongful conduct that affects, interrupts or interferes with the performance of official duties, or as the doing of an act which ought not to be done. Williams v. City of Dover, 130 N.H. 527, 529 (1988).

The purpose of the removal statute is not to punish land use board members, but to protect and preserve the integrity of planning board decisions and the applicants who appear before it. State v. Schroeder, 430 P.2d 304, 314 (Kan. 1967). Raltston v. Showalter, 370 P.2d 408, 412 (Kan. 1962). See State v. Jones, 407 P.2d 571, 572 (Utah 1965) (objective of removal from office statutes is to provide a method of removing from office a public official who betrays his trust in office).

Applicants are entitled to due process because their property rights are at stake. Winslow v. Town of Holderness Planning Board, 125 N.H. 262, 267(1984). Due Process is provided when the board members comply with the legal standards, and rules and regulations imposed upon them by our local ordinance, state law and by our State Constitution.

MALFEASANCE

Malfeasance in office is the general misuse of public office, wrongful conduct that affects, interrupts, or interferes with the performance of official duties, or the doing of an act which ought not to be done. Williams v. City of Dover, 130 N.H. 527, 529 (1988). Nothing in this definition requires that the conduct be criminal or intentional. Nor would one mere error, mistake, act of negligence or ignorance rise to the level of malfeasance in office justifying removal. However, conduct that is intentional, or continues after repeated advice, counsel, and training is not mere error, mistake, ignorance, or negligence. Rather, repeatedly disregarding advice, counsel, and training is wrongful conduct. This is because a single mistake may be remediated through corrective action, whereas a continual, pervasive course of conduct places all planning board decisions at risk and interferes with the ability of a planning board member to effectively perform his official duties.

This removal standard is far broader than the standard for the disqualification of a planning board member from a particular matter. Attorney Eggleton lists the potential causes for removal of a planning board member as follows: (a) inefficiency, (b) neglect of duty, or (c) malfeasance in office, which is correct. RSA 673:13. However, he then concludes that, because violating the juror standard is not specifically listed, it cannot be relied upon as a cause to remove a member of the Planning Board from office. This is an incorrect statement of the law.

Attorney Eggleton's arguments to the contrary are a misreading of the statute and the case law and ignore the broad definition of malfeasance provided by the New Hampshire Supreme Court in Williams, 130 N.H. at 529. It is firmly established that the New

Hampshire Supreme Court is the final arbiter of the interpretation and meaning of the laws in New Hampshire. Appeal of the Loc. Gov't Ctr., Inc., 165 N.H. 790, 804 (2014).

> In matters of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole. This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.

Id. (citing State Employees' Ass'n of New Hampshire v. State, 161 N.H. 730, 738-39 (2011)) (internal citations omitted). The City Council should defer to the definition used by the New Hampshire Supreme Court in Williams v. Dover, 130 N.H. at 529, in evaluating the claims of malfeasance before it.

Malfeasance in office is not defined as a specific act, but is a broader term used to describe a category of actions. As cited by the New Hampshire Supreme Court in Williams Black's Law Dictionary 862 (5th Ed. 1979), defines malfeasance as: "wrongful conduct which affects, interrupts or interferes with the performance of official duties". The Court also provided that malfeasance is, "the doing of an act which ought not to be done." Citing Quinn v. Concord, 108 N.H. 242, 247 (1967).

The Court expanded further, stating: "It is well-settled that the malfeasance, sufficient under our law to warrant plaintiff's removal from office, must have direct relation to and be connected with the performance of official duties … It does not include acts and conduct which, though amounting to a violation of the criminal laws of the state, have no connection with the discharge of official duties." Id. at 530.

As stated above, in matters of statutory interpretation the Court "will not consider what the legislature might have said or add language that the legislature did not see fit to include." Appeal of the Loc. Gov't Ctr., Inc., 165 N.H. at 804. There are no words in this statute and no case law interpreting this statute that adds knowledge or intent as an essential element of malfeasance.

To that end, Attorney Eggleton accuses the City's definition of malfeasance as "tortured". However, it is Attorney Eggleton's shoehorning of an element of scienter, or intent, as a requirement for malfeasance that is truly tortured. On his tour of various definitions of malfeasance, he finds only a law review article analyzing a removal statute for

clerks in Kentucky which could be twisted to his will. Even there, the Kentucky Supreme Court concedes "intent is not required" and that the act need only be willful. In this case, it is difficult to argue that Mr. Hewitt's repeated violations of the juror standard and the Right-to-Know law are not willful, when he was repeatedly advised by counsel that his actions were unlawful.

Therefore, for conduct to constitute malfeasance sufficient to warrant removal from office, there must be a finding of:

(A) one or more of the following:

(1) the general misuse of public office; or,

(2) wrongful conduct that affects, interrupts or interferes with the performance of official duties; or,

(3) the doing of an act which ought not to be done; **and**

(B) and this act must be directly related and connected to the performance of official duties.

LEGAL CONSTRAINTS ON CONDUCT OF PLANNING BOARD MEMBERS

Quasi-judicial role

Planning board members are entrusted to act in a "quasi-judicial" capacity. CBDA Dev., LLC v. Town of Thornton, 168 N.H. 715, 721 (2016); Winslow v. Town of Holderness Planning Board, 125 N.H. 262, 267(1984). Accordingly, all parties in interest appearing before a planning board are entitled to procedural due process. Id. One indispensable requirement of procedural due process is a fair and impartial public hearing. See Winslow, 125 N.H. at 267 ("Our State Constitution demands that all judges be 'as impartial as the lot of humanity will admit.' . . . This applies similarly to members of boards acting in a quasi-judicial capacity").

Juror Standard

To act fair and impartial, planning board members must comply with the "juror standard" in their deliberations on matters before them. RSA 673:14 and RSA 500-A:12. A planning board member must be as fair and impartial as any judge or juror in any trial.

> [I]t is an obvious principle of justice that all persons who act as judges should be impartial, without any interest of their own in the matter of controversy, and without any such connect(x)ion (sic) with the parties in interest, as would be likely, improperly to influence their judgment.

New Hampshire Milk Dealers' Ass'n v New Hampshire Milk Control Board, 107 N.H. 335, 338 (1966).

Any conduct that violates this juror standard and establishes that a planning board member has a "bias or prejudgment concerning issues of fact in a particular controversy" breaches the public trust. Id. at 339. In other words, if a planning board member violates the juror standard, they are violating the rules applicable to their position on the planning board and therefore subject any decision they make to legal challenge. As a result, such an act constitutes malfeasance because it is "the general misuse of public office," because it "affects, interrupts or interferes with the performance of official duties," and it is "the doing of an act which ought not to be done." Williams, 130 N.H. at 529.

Right-to-Know Law, RSA 91-A

The Planning Board is a public body as defined by RSA 91-A. As such, its business must be conducted in compliance with the law governing public bodies. That is, their meetings must be in public, the meetings must be noticed, and minutes must be taken. See generally, RSA 91-A.

RSA 91-A:2,I specifically defines a 'meeting' as a majority of a public body meeting "in person, or telephone or by electronic communication… such that all participating members are able to communicate with each other contemporaneously, …..for the purpose of **discussing OR acting** upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power." Id. (emphasis added).

Throughout Attorney Eggleton's legal memorandum, he asserts that a meeting of a public body only occurs if a quorum reaches a decision or votes. This is a contortion of the law that is contrary to the plain language of the statute and all controlling authority. The only reference to a meeting requiring a decision is in the context of "a chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters." 91-A:2, I. The emails sent by Mr. Hewitt cannot be fairly characterized as chance or social encounters.

Attorney Eggleton's interpretation of the definition of a meeting in the Right-to-Know law also ignores the treatise written by William L. Chapman, Shareholder at Orr and Reno, Open Government Guide, Access to Public Records and Meetings in New Hampshire, Sixth Edition, 2011. In this guide, Attorney Chapman writes, "[t]he Statute states that a "meeting" is for "purpose of **discussing or acting** upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power". (emphasis added). Attorney Chapman clearly understands that a meeting can occur whether or not a decision is made, or action is taken.

An email chain to the entire Planning Board or to a quorum of any public body such as the Conservation Commission risks the possibility that a quorum of the public body will respond and then engage with each other in a discussion of the matter coming before them outside of the public, noticed meeting. If such a discussion occurs, a meeting has been conducted in violation of the Right-to Know law requirements for meetings of public bodies. Such an off-the-record discussion also gives the appearance that the members of the public

body have prejudged the matter and are no longer "indifferent" in violation of the juror standard.

The purpose of the Right-to-Know law is "to ensure both the greatest possible access to the actions, discussions and records of all public bodies, and their accountability to the people". Discussions outside a public hearing clouds transparency and undermines the purpose of the Right-to-Know law. As discussed above, a one-off mistake may be remediated by making the communication public. However, pervasive discussion outside of the public hearing by a board member with the duty to act on quasi-judicial matters undermines trust in the public official and body. It leaves the public asking the question, "what else are they discussing and deciding in private?"

Furthermore, contrary to Attorney Eggleton's assertions to the contrary, there are sanctions for noncompliance with the Right-to-Know law. RSA 91-A:8 provides not only for the invalidation of the actions taken at an improper meeting, but also for court costs and attorney's fees.

Thus, continued violations of the provisions of the Right-to-Know law constitute "the general misuse of public office," or "wrongful conduct that affects, interrupts or interferes with the performance of official duties," and is "the doing of an act which ought not to be done." Williams, 130 N.H. at 529. This is malfeansance.

STANDARD FOR PREJUDGMENT AND BIAS

A planning board member may be disqualified for the same reasons that a juror may be disqualified from participating in a trial. RSA 673:14 provides that a member shall be disqualified,

> if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be ***disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.***
>
> The "juror standard" is governed by RSA 500–A:12 (1997). It requires disqualification if it appears that any juror is **not indifferent...**

Taylor v. Town of Wakefield, 158 N.H. 35, 38–39 (2008) (emphasis added) (internal citations omitted).

This does not preclude a juror or planning board member from having strong opinions regarding general matters of interest in the community. Rather, the test is whether such opinions interfere with their ability to judge the merits of an application impartially. State v. Afshar, 171 N.H. 381, 386 (2018) ("A juror is considered impartial if the juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented.") But

a prejudgment concerning issues of fact in a particular case is an opinion not based on the evidence presented and constitutes a cause for disqualification.

Nor does this juror standard preclude planning board members from basing their conclusions upon their own knowledge, experience, and observations, as well as upon their common sense. Dietz v. Town of Tuftonboro, 171 N.H. 614, 624 (2019) (quotations and internal citations omitted). In fact, there are some activities that planning board members may engage in that jurors may not. Planning board members are specifically "authorized to enter upon any land and make such examinations and surveys as are reasonably necessary...." RSA 674:1, IV. In addition, "[r]easons for disqualification do not include ... knowledge of the facts involved gained in the performance of the member's official duties." RSA 673:14, I (Supp.1991).

In contrast, the New Hampshire Supreme Court has held that "a planning board member prejudged a case before the planning board where he made comments in favor of a project at a public hearing several months before he became a member of the board". Winslow v. Holderness, 125 N.H. 262, 268, (1984) (citing, Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583 (D.C.Cir.1970) (a government official may not make speeches before a hearing because it gives the appearance that the case has been prejudged.)

The Court in City of Dover v. Kimball, 136 N.H. 441, 445-47 (1992), provided further guidance regarding the provision of RSA 673:14 which permits a planning board member to use knowledge of the facts gained in the performance of the member's duties. The Court explained that this provision does not preclude a planning board member from pointing out obvious inconsistencies in submitted documents and from making statements **to an applicant** explaining why such inconsistencies will preclude approval of the application.

Unlike in Kimball, Mr. Hewitt's communications regarding pending and future applications were made to quorums of public bodies, and the appropriate time and place for this kind of communication is at the public hearing. Planning Board members are encouraged to ask the applicant questions during the public hearing. This provides all parties in interest an opportunity to respond to the questions and counter any concerns presented. When such a dialogue occurs in the public hearing, it provides transparency to the process and due process to the applicant. It is also what our Right-to-Know law, RSA 91-A, requires.

Attorney Eggleton relies heavily upon the recent unpublished opinion of the Supreme Court, Andrews v. Kearsarge Lighting Precinct, No. 2021-543, Slip Op. (N.H. August 31, 2023) to support his argument that Mr. Hewitt's conduct did not violate the juror standard because such conduct has been found not to warrant disqualification from a vote on a particular matter. However, the facts of Andrews are easily distinguishable from the present case.

In Andrews, a member of the Board of Adjustment for the Kearsarge Lighting Precinct (located in Conway) was accused of bias when his son was a complainant against the proposed project in question, and when it was revealed that the member had

communicated both verbally and via email with his son regarding the proposed project. There was not, however, any evidence that the member had communicated with any or all of the Board of Adjustment, nor that he had communicated with a quorum of any other public body with jurisdiction over the project. Further, none of his communications revealed that he had any preconceived opinions regarding the project.

The present case is inapposite. Unlike in Andrews, Mr. Hewitt has not communicated generally with his son-in-law about a single pending case, he has engaged in a course of conduct of communicating outside the public hearing with quorums of both the Planning Board and other public bodies with jurisdiction over pending or future projects. He has done so with the goal of influencing the decision-making of those public bodies. At times he has presented information and documents within the public sphere, but of greater concern is his persistent pattern of providing information he has collected independently with his commentary and opinions to quorums of public bodies with jurisdiction over the matter. Much of the information he presented was not relevant to the decision at hand. These efforts amount to a collateral attack against proposed projects which violate applicants' procedural due process rights. Moreover, this pattern of behavior is contrary to repeatedly delivered legal advice and it amounts to malfeasance.

Attorney Eggleton also argues that Andrews supports the proposition that a planning board member can rely upon information outside the public record. That is simply not the holding of Andrews. That case relies upon the holdings in Biggs v. Town of Sandwich, 234 N.H. 421, 427 (1984) and Dietz v. Town of Tuftonboro, 171 N.H. 614, 618 (2019). Those cases provide that "ZBA members may base their conclusions upon their own knowledge, experience and observations, as well as upon their common sense." This knowledge which a member can rely upon is the members ***own knowledge***, not independent research outside the hearing transmitted to other members of public bodies. The order in Andrews does not cite to any outside information considered by member Wrobleski other than a general conversation with his son-in-law regarding "challenges facing the KLP".

The ability for a board member to rely upon his own knowledge, experience, observations and common sense cannot be construed to be a blanket invitation for members to conduct outside research on cases and then share that research with a quorum of the Planning Board or other public bodies outside the public record. Certainly, there is the opportunity to correct a mistake, but repeated violations of the juror standard and the Right-to-Know law, in the face of advice from legal counsel, constitutes malfeasance.

CONCLUSION

As a Planning Board member, Mr. Hewitt is required to conduct himself without prejudgment or bias, in conformity with the "juror-standard" as set out above, to be fair and impartial in deciding all applications before the Planning Board. In addition, as a member of a public body, Mr. Hewitt is required to conform his conduct to the provisions of the Right-to-Know Law, RSA 91-A, as discussed above. Repeated violations of these legal restrictions on a Planning Board member's conduct constitute wrongful conduct affecting the

performance of his official duties that ought not to be done and that substantially affect the public interest. In this context, the substantial public interest is the integrity of the Planning Board and their decisions.

As a Planning Board member Mr. Hewitt took an oath of office to "faithfully and impartially discharge and perform all the duties incumbent upon [him] as a Planning Board member according to the best of [his] abilities, agreeable to the rules and regulations of the Constitution and the laws of the State of New Hampshire." He has not done so.

Mr. Hewitt's continued course of conduct and acts constitute malfeasance in office for which he should be removed from the Planning Board.

Respectfully submitted,

/s/ Susan G. Morrell
Susan G. Morrell, NH Bar#1802
Portsmouth City Attorney

DATED: February 12, 2024

CERTIFICATE OF SERVICE

A true copy of the foregoing Memorandum of Law was delivered this day to counsel for Mr. Hewitt, Jeremy Eggleton, Esq.

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Susan G. Morrell