



SPECIAL CITY COUNCIL MEETING

Members of the public also have the option to join the meeting over Zoom, a unique meeting ID and password will be provided once you register. To register, click on the link below or copy and paste this into your web browser:
https://us06web.zoom.us/webinar/register/WN_1ZNJDFkXSJqybg7MWHysXA

5:00PM – ANTICIPATED NON-PUBLIC SESSION IS BEING HELD IN CONFERENCE ROOM A

1. CONSIDERATION OF LEGAL ADVICE IN ACCORDANCE WITH RSA 91-A:3, II (I)

AGENDA

DATE: MONDAY, FEBRUARY 12, 2024

TIME: 5:00 PM NON-PUBLIC SESSION / 6:00 PM PUBLIC SESSION

LOCATION: EILEEN DONDERO FOLEY COUNCIL CHAMBERS

SUBJECT: PUBLIC HEARING RE: REMOVAL OF JAMES HEWITT FROM THE PLANNING BOARD

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- I. CALL TO ORDER – Mayor McEachern
 - II. ROLL CALL
 - III. ANTICIPATED NON-PUBLIC SESSION - CONSIDERATION OF LEGAL ADVICE, RSA 91-A:3,II (I)
 - IV. RETURN TO PUBLIC SESSION - TO CONSIDER THE REMOVAL OF JAMES HEWITT FROM THE PLANNING BOARD
 - V. ADOPTION OF RULES FOR THE PROCEEDING - Presented by Attorney Peter J. Loughlin
 - VI. SWEARING IN OF ALL WITNESSES - City Clerk, Kelli Barnaby
 - VII. READING OF CHARGE - Mayor McEachern

- VIII. INTRODUCTION OF PARTIES FOR THE RECORD
- IX. INITIAL STATEMENTS BY COUNSEL, 15 minute limit
- X. PRESENTATION BY CITY ATTORNEY
- XI. PRESENTATION BY COUNSEL FOR MR. HEWITT
- XII. PUBLIC COMMENT SESSION - Limit of 3 minutes
- XIII. FINAL STATEMENTS BY COUNSEL, 30 minute limit
- XIV. CITY COUNCIL DELIBERATIONS
- XV. VOTE - FINDINGS OF FACT & ACTION
- XVI. ADJOURNMENT

KELLI L. BARNABY, MMC/CNHMC
CITY CLERK

Malfeasance in Office

Throughout Mr. Hewitt's term of membership on the Portsmouth Planning Board, beginning with his appointment on December 6, 2021, and continuing through to January 6, 2024, he was required to act in a "quasi-judicial capacity", like a judge or juror for any matter coming before the Planning Board. This is a standard of conduct imposed by law for land use board members pursuant to RSA 673:14 and RSA 500-A:12 (II) in order to provide due process to all applicants appearing before the Planning Board. During this time, Mr. Hewitt instead acted as an independent investigator, researcher, and advocate, thereby exhibiting his bias in certain matters. Mr. Hewitt also did so in communications to a quorum of the other Planning Board Members outside of the public hearing and record, in violation of the Right-to-Know Law, RSA 91-A. These acts continued after repeated attempts to counsel Mr. Hewitt and correct his conduct. These acts, taken as a whole, constitute Malfeasance in office.

It is particularly alleged that Mr. Hewitt did the following acts:

December 2021 (EXHIBIT 1)

Violation: On December 11, 2021, after being appointed to the Planning Board, but before his term began, Mr. Hewitt sent an email to the Appellants to a project at 105 Bartlett Street regarding plans the developer of a project at Raynes Avenue had to "build another monster in the North Mill Pond 100 ft wetlands buffer at Raynes Avenue." This project was scheduled to be presented to the Planning Board on December 16, 2021. The email demonstrated his bias against any projects on the North Mill Pond within the wetlands buffer regardless of whether they met the legal criteria for a Conditional Use Permit (CUP).

Notice/Corrective Action: On December 15, 2021, City Attorney Robert Sullivan advised Mr. Hewitt that his email of December 11, raised questions under the "juror-standard" as to his "impartiality regarding the Raynes Avenue project, any project within the North Mill Pond 100-foot wetlands buffer, or perhaps even developers in general." Attorney Sullivan explained the juror-standard and its importance to all land use board members in this email and offered to answer any questions Mr. Hewitt might have going forward.

February 2022 (EXHIBIT 2)

Violation 1: On February 13, 2022, Mr. Hewitt sent an email to the Environmental Planner/Sustainability Coordinator for the City of Portsmouth, Peter Britz, and copied the Planning Board Chairman, Rick Chellman, requesting information regarding the 1 Raynes Ave., the 31 Raynes Ave., and the 203 Maplewood Avenue projects and their New Hampshire Department of Environmental Services (NH DES) Permit Status and Property Contamination Status.

Notice/Corrective Action: On February 17, 2022, Mr. Hewitt was advised by City Attorney Robert Sullivan that conducting independent research into an application pending before the Planning Board was a potential violation of the "juror-standard" in that it created the impression of bias against the application before the public hearing, based upon facts not presented to the Board in the application or at the hearing.

On February 18, 2022, Mr. Hewitt sent an email to Attorney Sullivan indicating that he understood the counsel and would comply with the “juror-standard.”

Violation 2: On February 16, 2022, Mr. Hewitt sent an email to the Conservation Commission members regarding the 1 Raynes, 31 Raynes and 203 Maplewood Avenue projects and their NH DES Permit Status and Property Contamination Status.

Notice/Corrective Action: On February 18, 2022, Mr. Hewitt was advised that his email to the Conservation Commission encouraged the members of the Commission to deny the requests regarding these projects, creating potential bias on the Commission. This email created a potential for a violation of the Right-to-Know Law, RSA 91-A, because it was sent outside of a public meeting and the email requested that it be forwarded to a quorum of the Commission. This created a risk that a quorum of the Commission might engage in communications regarding the project outside of the public hearing.

This email also violated the Right-to-Know law by providing information to a quorum of a public body on a matter they were to deliberate outside of their public hearing.

On February 18, 2022, Mr. Hewitt apologized for this “rookie mistake.”

March 2022 (EXHIBIT 3)

Violation: On March 15, 2022, Mr. Hewitt emailed all the Planning Board Members additional and historical information identified through independent research related to a project under review by the Board.

Notice/Corrective Action: On March 16, 2022, Mr. Hewitt was advised by City Attorney Robert Sullivan that “when sitting in a quasi-judicial capacity the Planning Board should only be receiving evidence from three sources: the applicant, proponents of the application and from the planning staff. That evidence should only be presented at the public hearing. The Right-to-Know law prohibits the sequential communication which might occur if even one Planning Board member responded to an email from anyone addressed to the full Board.”

July 2022 (EXHIBIT 4)

Violation: On July 13, 2022, Mr. Hewitt submitted a citizen request for a Capital Improvement Project through the City’s on-line application portal. The application was not used for the purpose it was intended but was used instead to describe the project at 710 Middle Road as a “Monster DADU 4000 Warehouse” in what appeared to be an attempt to express his distaste for and objections to an approved project subject to development compliance review by City staff.

Mr. Hewitt had opposed this project as an abutter and had litigated the approval of the project.

On July 14 & 15, 2022, Mr. Hewitt submitted emails to Vincent Hayes, a member of the Planning Department staff, alerting Mr. Hayes to his perceived inadequacies of an approved plan noting the misapplication of the regulations by both the Planning staff and the Planning Board. In the emails, Mr. Hewitt claimed that the building lot coverage and open space calculations were incorrect and needed to be peer reviewed by a licensed engineer, corrected, and updated on a new

site plan. At the time of this email, the appeal periods for the project had passed and the issues were not appropriately raised in an email to staff.

These emails were copied to the Chairman, the Planning Director, and the Principal Planner consistent with other emails that he had sent to staff when acting in his capacity as a Planning Board member.

Notice/Corrective Action: In letters dated July 19 & 20, 2022, City Attorney Sullivan and Planning Board Chairman Chellman advised Mr. Hewitt that these emails constituted an attempt to use his authority as a Planning Board Member to influence staff in their official duties for personal motivations. This attempt to influence the development compliance review of a staff member and to impose additional conditions, requirements, and amendments outside of the procedural requirements established under RSA 674, the City's Site Plan Regulations, and the City's Zoning Ordinance was an unacceptable exercise of Mr. Hewitt's authority.

October and November 2023 (EXHIBIT 5)

Violation: On October 30, 2023, Mr. Hewitt sent an email to the Chair and all Planning Board members regarding the project approved for 375 Banfield Road on October 19, 2023, during the 30-day appeal period. This email provided the entire Board with information outside of the public record and was emailed to the entire Board in violation of the Right-to-Know law.

The email imbedded several links to news articles regarding an environmental claim filed against the City regarding the property at 375 Banfield Road and attached an Order from this litigation pending in Federal Court. The Planning Board had been advised by the City's Legal Department at the hearing for the project on October 19, 2023, that information regarding this litigation was not relevant to the Planning Board's decision-making process.

Notice/Corrective Action: On November 2, 2023, the Planning Board Chair, Rick Chellman, wrote to Mr. Hewitt in response to this email, and again counseled Mr. Hewitt to conform his actions to the legal restrictions imposed upon members of land use boards. Mr. Chellman wrote that "decisions of the planning board are subject to appeal for 30 days after a decision and it is **highly inappropriate** for a board member to send what is purported to be, or may even be, new information, new opinions or afterthoughts to the board-especially while the appeal period is open."

On November 9, 2023, City Attorney Morrell wrote to Mr. Hewitt regarding this email, identifying all the reasons that it was in violation of his "juror-standard" and in violation of the Right-to-Know law. Mr. Hewitt was advised to cease this conduct and comply with the legal requirements imposed upon land use boards.

December 27, 2023 & January 4, 2024 (EXHIBIT 6)

Violation: On December 27, 2023, Mr. Hewitt emailed the Site Plan Review Technical Advisory Committee (TAC), an advisory committee for the Planning Board and itself a public body, regarding a proposed project at 581 Lafayette Road that had been before the Planning Board for a preliminary non-binding discussion and that would be coming before the Planning Board for

Site Plan approval in the future. In the email Mr. Hewitt urged TAC to investigate certain encroachments on the plan and inserted links to 2011 NHDOT project plans. In addition, Mr. Hewitt questioned whether the City's parking requirements would meet the actual demand of the project and compared it to a project completed at West End Yards in Portsmouth and a project in Dover. Mr. Hewitt inserted a link to the Dover project in the email.

On January 4, 2024, Mr. Hewitt emailed TAC a second time regarding a proposed project at 581 Lafayette Road and reiterated his concerns regarding encroachments and parking spaces. Mr. Hewitt requested that TAC "require the applicant to produce parking demand data for a similar size apartment complex that indicates 65 parking spaces for 72 apartments/116 bedroom will be adequate" or "show where additional parking (50 +/- spaces) can be constructed."

Notice/Corrective Action: On January 10, 2024, Mr. Hewitt met with the Planning Board Chair, Rick Chellman, and Mayor Deaglan McEachern regarding these emails. During that meeting Mr. Hewitt acknowledged that the emails violated his legal obligations as a member of the Planning Board.

These emails demonstrate Mr. Hewitt's prejudgment of and bias against a project that will eventually be before the Planning Board sufficient to warrant his recusal from any deliberations or decisions regarding this project. This pre-judgment of and bias against this project is in violation of the "juror-standard" to remain impartial and base his decisions on the information provided at the public hearing and on the public record. A juror or judge would not sit on a matter that they had pre-judged based on evidence from sources outside the courtroom.

Conclusion:

The emails from January of 2024 to TAC demonstrate Mr. Hewitt's rejection of all the counseling and instruction provided to him over the course of two years regarding his legal obligations as a member of a land use board.

All the acts listed above, combined, after numerous efforts to counsel and correct his actions failed, evidence Mr. Hewitt's willful disregard of his legal obligations as a Planning Board Member and constitute his Malfeasance in Office.


Susan G. Morrell
City Attorney

ATTACHMENT A

MEMORANDUM

TO: THE HONORABLE MAYOR AND CITY COUNCIL

FR: SUSAN G. MORRELL, CITY ATTORNEY 

RE: REQUEST FOR PUBLIC HEARING PURSUANT TO RSA 673:13 FOR THE REMOVAL
OF MR. JAMES HEWITT FROM THE PLANNING BOARD

DATE: JANUARY 11, 2023

The Planning Board Chairman, members of the Planning and Sustainability Department, members of the Legal Department and others have repeatedly shared with me communications authored by Planning Board member, James Hewitt that raise concerns about Mr. Hewitt's ability to perform his duties as a Planning Board member. Attempts to educate Mr. Hewitt as to the legal standards expected and clarify expectations began in Dember of 2021, continued through 2022, and were again addressed in November of 2023. These efforts were outlined in a letter to Mr. Hewitt dated November 9, 2023. (Letter attached.)

Despite these efforts, Mr. Hewitt has not brought his communications into compliance with the legal standards by which Planning Board members must conduct themselves. Specifically, on January 2 & 4, 2024, Mr. Hewitt emailed the Technical Advisory Committee (TAC) regarding a project at 581 Lafayette Road that will eventually be brought before the Planning Board for consideration. (Emails attached.) These emails to City staff represent his continued inability to maintain impartiality, to limit his review to the record before him and are in violation of the legal standards imposed upon land-use board members by state statute to remain impartial, transparent, and to base their decisions upon the information presented to them at the public hearing on the project.

RSA 673:13 provides for the removal of land-use board members by the appointing authority after a public hearing and upon a written finding of inefficiency, neglect of duty, or malfeasance in office. Malfeasance in office 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). Mr. Hewitt's actions enumerated above support the request for the Council to schedule a public hearing to determine if Mr. Hewitt should be removed from the Planning Board.

(Sample motion - Move to Schedule a Public Hearing at the February 5, 2024, City Council meeting to determine if Mr. James Hewitt should be removed from the Planning Board pursuant to RSA 673:13)



CITY OF PORTSMOUTH

City Hall, 1 Junkins Avenue
Portsmouth, New Hampshire 03801
sgmorrell@cityofportsmouth.com
(603) 610-7204

Susan G. Morrell
City Attorney

November 9, 2023

Jim Hewitt
samjakemax@aol.com

RE: 375 Banfield Road Project

Dear Mr. Hewitt:

I am writing regarding your recent email dated October 30, 2023, addressed to "Chair Chellman and Planning Board members" concerning the 375 Banfield Road Project approved by the Planning Board on October 19, 2023. Your email is problematic for four reasons. First, you were specifically advised by legal counsel at the hearing not to consider or discuss the pending litigation against the City. Second, your email demonstrates a clear bias towards this project, as you are advocating for consideration by the Planning Board of irrelevant facts not properly before it. Third, by circulating this information to the entire Board, you have potentially contaminated the votes of your fellow Board members and communicated to a quorum of the Planning Board about a matter pending before the Board, in violation of the Right to Know law. Fourth, these actions exhibit an undeniable pattern of scorning legal advice and the counsel of the Planning Board Chair relative to issues of bias and the Right to Know law.

Deputy City Attorney McCourt specifically advised the Board in response to your questions at the October 19 Planning Board meeting that the pending environmental litigation is not relevant to the subdivision application and that any consideration of the environmental issues would be improper and outside the scope of the Planning Board's review. Any consideration of the environmental litigation endangers the integrity of the Planning Board's decision. Nevertheless, you have continued to disregard this clear legal advice.

You were provided this advice, not because it was some academic exercise, but because by conducting independent research into the application and considering items outside of the

record, you have acted contrary to the juror standard that you must uphold when acting in a quasi-judicial role. These actions demonstrate your clear bias pertaining to this project. Therefore, in the event this project returns to the Planning Board for any reason, or if a subsequent project for either new parcel comes before the Planning Board, it would be improper and illegal for you to participate in the discussion or vote.

Exacerbating this issue, your email was provided to the entire Board. Your email was sent to city staff but was addressed to and blind copied to the entire Planning Board. The email attached the recent Federal Court Order in Banfield Realty, LLC v. The City of Portsmouth, et. al., partially granting the City's Motion to Dismiss. In addition, your email embedded links to several articles that discussed the alleged environmental contamination of this property.

As stated above, this information is not relevant to the Banfield Road project. In addition, it was provided outside of the public hearing. Although the project was approved on October 19, it will be subject to re-hearing and appeals for thirty (30) days from its approval and is therefore a matter still before the Board. Not only is this a violation of the Right to Know law, by addressing this email to the entire Board, you have potentially biased the entire Board as it pertains to these parcels. See Winslow v. Town of Holderness Planning Board, 125 N.H. 262, 268 (1984). If this matter were to come back before the Board for any reason, this communication would need to be disclosed to all parties and all of the members of the board would need to disclose whether they could disregard this information prior to their vote. You would need to recuse yourself from any consideration of or vote because your email is evidence of your bias.

Although RSA 673:14, I permits Planning Board members to consider facts "gained in the performance of the member's official duties", the limitation on jurors to consider only those facts presented at the hearing, providing each side with the opportunity to address those facts, is as old as the judicial system itself. See, e.g. Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print"). If information gained outside of a Board member's duties is relied upon in their decision, this is grounds for disqualification.

Bias is cause for disqualification for any potential juror or one acting in a quasi-judicial capacity. The process for disqualification of a member is set forth in RSA 673:14. The process permits the Board to vote on whether to disqualify a member, although this vote is advisory and non-binding. However, failure of a Board member to disqualify themselves in the face of clear and

documented bias would undermine the integrity of the Board's actions and likely result in costly litigation against the City.

This is not the first time you have chosen to ignore the legal advice provided by the City Attorney's Office to you and to the Planning Board. This pattern of behavior has persisted throughout your term as a Planning Board member. This is evidenced by numerous letters and emails sent to you from former City Attorney, Robert Sullivan, going back as far as December of 2021. In the December 15, 2021, email, City Attorney Sullivan advised you that land use board members must comply with the juror standard when acting in a quasi-judicial capacity. The juror standard is mandated by RSA 673:14, which requires a land use board member to disqualify themselves from any matter, if they "would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law." RSA 673:14 and 500-A:12(II).

Concerns regarding your conduct as a Board member, potential bias, and circumvention of the Right to Know law are also documented in email correspondence dated in February of 2022, March of 2022, July of 2022, September of 2022, and October of 2022. While initially you were apologetic for unintended missteps, your continued conduct contrary to this advice is evidence of your refusal to comply with the laws governing the operations of the Planning Board and its members. Therefore, any recurrence of the illegal conduct discussed above or any similar conduct or other illegal actions on your part will lead to the initiation of your removal from the Planning Board pursuant to RSA 673:13 and an ethics complaint pursuant to the City's Ethic's Ordinance, Chapter I, Article 8, if the conduct warrants a complaint.

Sincerely,



Susan G. Morrell
City Attorney

cc: Karen Conard, City Manager
Trevor P. McCourt, Deputy City Attorney
Rick Chellman, Planning Board Chairman
Deaglan McEachern, Mayor



CITY OF PORTSMOUTH

City Hall, 1 Junkins Avenue
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sgmorrell@cityofportsmouth.com
(603) 610-7204

Susan G. Morrell
City Attorney

January 25, 2024

Via Email Only – jeggleton@orr-reno.com

Jeremy D. Eggleton, Esq.
Orr and Reno
One Eagle Square
PO Box 3550
Concord, NH 03302-3550

RE: James Hewitt Removal Hearing

Dear Attorney Eggleton:

This will act as formal notice for Mr. Hewitt that on January 16, 2024, the City Council voted to conduct a public hearing to hear evidence and determine whether to remove Mr. Hewitt from the City of Portsmouth Planning Board pursuant to RSA 673:13. The hearing is scheduled for February 12, 2024, at 7 pm, in the City Council Chambers at 1 Junkins Avenue, Portsmouth, NH. Mr. Hewitt will have an opportunity to question any witnesses who may provide evidence and to also present evidence and argument at this hearing. It is expected that Mr. Hewitt will appear in person for this hearing and that any witnesses will appear in person and be available for questioning.

Attached is the Memorandum prepared for the City Council, along with its attachments, that outline the basis for the request for a removal hearing. The basis for the request includes repeated conduct by Mr. Hewitt in violation of his legal obligations as a member of the Planning Board. A specific list of these actions is outlined in the attached document, along with the supporting documentation. It is my intention to present these documents to the Council in support of the request for Mr. Hewitt's removal.

I would like an opportunity to discuss the process and whether we can agree on a schedule for the exchange of documentation and submission of documents to the Council in advance of the hearing. I suggest that we exchange all documentation at least ten (10) days in advance of the hearing, along with a list of witnesses either party intends to call. That would be February 2, 2024. I suggest that all documentation be submitted to the Council seven (7) days in advance, along with a list of any witnesses either party intends to call. That would be February 5, 2024. We should also agree to a timeframe for submission of any Memorandums of Law.

Please contact me at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan G. Morrell". The signature is fluid and cursive, with the first name "Susan" and last name "Morrell" clearly legible.

Susan G. Morrell
City Attorney

SGM/smr
Attachments

EXHIBIT 1

Peter L. Britz

From: JAH <samjakemax@aol.com>
Sent: Saturday, December 11, 2021 12:44 PM
To: jehoward7@comcast.net; markbrighton1@gmail.com; jbealfoto@hotmail.com; kealrice1@icloud.com; cgindele2@gmail.com; bethpjefferson@gmail.com; wrcastle@comcast.net; margec88@hotmail.com; aprilweeks412@gmail.com; royhelsel@aol.com; mbrady@heine-na.com; famularoj@gmail.com; wierbonics@yahoo.com; agindele@gmail.com; philfavet@yahoo.com; nanb333@gmail.com; prized@comcast.net; lwb828@yahoo.com; linda@campaignfree.org; catej@comcast.net; ikdonarum@gmail.com; ml259@comcast.net; hewittliza@gmail.com; larrycataldo133@gmail.com; winterworks@hotmail.com
Cc: Peter L. Britz
Subject: December 16 Planning Board Meeting

Dear 105 Bartlett Appellants:

.As you may be aware, City Hall and the developer of Raynes Ave (DiLorenzo) have plans to build another monster in the North Mill Pond 100 ft wetlands buffer at Raynes Ave. See Planning Board agenda here:

[12-16-21 PB Packet.pdf \(cityofportsmouth.com\)](#)

The Raynes Ave project starts at page 54 of a 1,007 page (!!!!) packet. They are requesting a wetlands buffer violation Conditional Use Permit (CUP) similar what was granted then reversed at 105 Bartlett. It's deja vu all over again. Just build a project outside the 100 foot wetlands buffer

Over the summer, the Conservation Commission denied the developer's request to build in the 100 ft buffer twice in two separate meetings. At the last HDC meeting the applicant was instructed to go back to the drawing board based on what was presented on the link below:

[RaynesAve 1 HDC WS 120121.pdf \(cityofportsmouth.com\)](#)

Recall in 2014 , after months of meetings and citizen input, City Hall said the North End would be zoned to create a built environment to look similar to what is shown in the link below.

[FINAL North End Vision Plan 1-15-15.pdf \(cityofportsmouth.com\)](#)

What happened ??

Please come to the December 16 Planning Board meeting and tell them what you think about this project. Or you can email your comments to the Planning Board at planning@cityofportsmouth.com and plbritz@cityofportsmouth.com.

I know it is a crazy time of year and that is exactly why they schedule these HUGE decisions just before Christmas. Please make your opinion known !

Regards,

Jim Hewitt

3

Robert P. Sullivan

From: Robert P. Sullivan
Sent: Wednesday, December 15, 2021 4:03 PM
To: Jim Hewitt (samjakemax@aol.com)
Cc: Karen Conard; Peter L. Britz
Subject: Juror Standard for Planning Board Members

Dear Mr. Hewitt,

It does not appear that you have had any opportunity to review any training as of yet to assist you in the performance of your work as a newly appointed member of the Planning Board. With that in mind, I wish to bring your attention to what would probably be item number 1 in any discussion of the legal obligations of Planning Board members. It is the co-called juror standard. The juror standard flows from the idea that when the Planning Board sits in a quasi-judicial capacity, as it does with respect to any subdivision, site plan or conditional permit issue, the Board members essentially are in the role of being judges. Therefore, like judges in a courtroom, Planning Board members are expected to be neutral and to decide the cases before them based upon the evidence presented at the hearing as applied to the criteria contained in the City's ordinances and Planning Board regulations. An applicant who satisfies those legal criteria is entitled to approval. An applicant who fails to satisfy those legal criteria should be denied.

The juror standard is defined in statutory and case law as follows:

"No member of a ... planning board ... shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity 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." RSA 673:14.

The juror standard is described by the NH Supreme Court as follows: "If it appears that any juror is not indifferent, he shall be set aside on that trial." See Winslow v. Town of Holderness Planning Board, 125 N.H. 262 (1984) (applying the juror standard contained in RSA 500-A:12 (II) to planning board members acting in a quasi-judicial capacity).

This issue comes to the front as you begin your career as a Planning Board member due to an email dated December 11, 2021 which you wrote concerning an upcoming application on Raynes Avenue. The email reads as follows:

Dear 105 Bartlett Appellants:

As you may be aware, City Hall and the developer of Raynes Ave (DiLorenzo) have plans to build another monster in the North Mill Pond 100 ft wetlands buffer at Raynes Ave. See Planning Board agenda here:

[12-16-21_PB_Packet.pdf \(cityofportsmouth.com\)](#)

The Raynes Ave project starts at page 54 of a 1,007 page (!!!!) packet. They are requesting a wetlands buffer violation Conditional Use Permit (CUP) similar what was granted then reversed at 105 Bartlett. It's deja vu all over again. Just build a project outside the 100 foot wetlands buffer

Over the summer, the Conservation Commission denied the developer's request to build in the 100 ft buffer twice in two separate meetings. At the last HDC meeting the applicant was instructed to go back to the drawing board based on what was presented on the link below:

[RaynesAve_1_HDC_WS_120121.pdf \(cityofportsmouth.com\)](#)

Recall in 2014 , after months of meetings and citizen input, City Hall said the North End would be zoned to create a built environment to look similar to what is shown in the link below.

[FINAL_North_End_Vision_Plan_1-15-15.pdf \(cityofportsmouth.com\)](#)

What happened ??

Please come to the December 16 Planning Board meeting and tell them what you think about this project. Or you can email your comments to the Planning Board at planning@cityofportsmouth.com and plbritz@cityofportsmouth.com.

I know it is a crazy time of year and that is exactly why they schedule these HUGE decisions just before Christmas. Please make your opinion known !

Regards,

Jim Hewitt

As your review of the legal standard will indicate, your email of December 11, 2021 raises questions under the juror standard as to your impartiality when it comes to the Raynes Avenue project, any project within the North Mill Pond 100-foot wetlands buffer, or perhaps even developers in general.

The issue of whether or not you have a bias which prevents you from sitting on any particular Planning Board case under the juror standard is decided, in the first instance, by yourself. Whatever decision you make in any particular case, however, becomes part of the record in that case subject to later review.

I am advising that from this point onward you keep the juror standard in mind as you go about your Planning Board work in matters of a quasi-judicial nature. Moreover, at any time that you believe that a reasonable person might think you have contravened the juror standard, you should recuse yourself from the case at hand.

Please call at any time to discuss City Planning Board issues of concern to you.

Robert P. Sullivan, City Attorney
City of Portsmouth

1 Junkins Avenue
Portsmouth, NH 03801

(603) 610-7204 (Direct Dial)
(603) 427-1577 (Fax)

rpsullivan@cityofportsmouth.com

City Hall Hours: Monday, 8:00 a.m. - 6:00 p.m.; Tuesday - Thursday, 8:00 a.m. - 4:30 p.m. and Friday, 8:00 a.m. - 1:00 p.m. (NOTE: If a holiday falls on a Monday, City Hall will be open until 6:00 p.m. on Tuesday).

The information in this message may be legally privileged and confidential. It is intended only for the use of the named individual. If you receive this communication in error, please notify me and delete the communication without making any copy or distributing it.

EXHIBIT 2

Robert P. Sullivan

From: Robert P. Sullivan
Sent: Thursday, February 17, 2022 10:25 AM
To: Peter L. Britz; JAH
Cc: chellman@tndengineering.com; Trevor McCourt; Beverly M. Zendt
Subject: RE: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Mr Hewitt,

This is another jury standard issue. Although Planning Board members are allowed to rely on their knowledge of the community in making decisions, those members are still required to avoid bias prior to a hearing and to make decisions based on the evidence presented to them at the hearing. Like a judge in a court. Therefore, a PB member should not conduct any independent research into an application. To do so is an invitation to create a bias. Whatever the PB member finds is likely to influence that member to favor or disfavor the application before the hearing. That would be the development of a bias and therefore it would be a violation of the jury standard. At its most basic level, a PB member's duty when acting in a quasi-judicial role is to apply the facts presented to the Board in the application and at the hearing to the objective criteria contained in the ordinance and regulations. When that is done the approval or denial of the application should suggest itself.

RPS

Robert P. Sullivan, City Attorney
City of Portsmouth
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Portsmouth, NH 03801

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(603) 427-1577 (Fax)

rpsullivan@cityofportsmouth.com

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From: Peter L. Britz
Sent: Monday, February 14, 2022 2:01 PM
To: JAH <samjakemax@aol.com>**Cc:** chellman@tndengineering.com; Robert P. Sullivan <rpsullivan@cityofportsmouth.com>; Trevor McCourt <tmccourt@cityofportsmouth.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>

Subject: RE: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Hello Mr. Hewitt:

I am forwarding your request below to the legal department for their review and copying Planning Director Mesa Zendt.

Best regards,

Peter

Bob,

Please see the email below. I thought this best to start in the legal department. If you have questions or need additional information please let me know.

Best regards,

Peter

Peter Britz
Environmental Planner/Sustainability Coordinator
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801
(603)610-7215
plbritz@cityofportsmouth.com

From: JAH [<mailto:samjakemax@aol.com>]

Sent: Sunday, February 13, 2022 4:48 PM

To: Peter L. Britz

Cc: chellman@tndengineering.com

Subject: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Dear Mr. Britz:

Could you please send to me (as ,pdfs) copies of any written correspondence, emails, telephone conservation summary memos , meeting minutes, etc. regarding the NHDES application and permit status for Alteration of Terrain, Shoreland Protection, and Wetlands Permits for the subject site ?

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Also, any water quality sampling results for NHDES monitoring sites on the property with ID numbers PM8753, PM 8760, PM 8760 and GBCW-18.

Kindly reply by 12 pm on February 16, 2022.

Thank you

Regards,

Jim Hewitt

Robert P. Sullivan

From: JAH <samjakemax@aol.com>
Sent: Friday, February 18, 2022 7:06 PM
To: Robert P. Sullivan; Peter L. Britz
Cc: chellman@tndengineering.com; Trevor McCourt; Beverly M. Zendt
Subject: Re: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Dear Atty Sullivan:

Understood. Recently it takes a few whacks to get new information to register in my post-Covid 19 addled brain. Is it possible to obtain answers to my questions for community knowledge that complies with jury standard requirements ?

Thank you.

Regards,

Jim Hewitt

-----Original Message-----

From: Robert P. Sullivan <rpsullivan@cityofportsmouth.com>
To: Peter L. Britz <plbritz@cityofportsmouth.com>; JAH <samjakemax@aol.com>
Cc: chellman@tndengineering.com <chellman@tndengineering.com>; Trevor McCourt <tmccourt@cityofportsmouth.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>
Sent: Thu, Feb 17, 2022 10:25 am
Subject: RE: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Mr Hewitt,

This is another jury standard issue. Although Planning Board members are allowed to rely on their knowledge of the community in making decisions, those members are still required to avoid bias prior to a hearing and to make decisions based on the evidence presented to them at the hearing. Like a judge in a court. Therefore, a PB member should not conduct any independent research into an application. To do so is an invitation to create a bias. Whatever the PB member finds is likely to influence that member to favor or disfavor the application before the hearing. That would be the development of a bias and therefore it would be a violation of the jury standard. At its most basic level, a PB member's duty when acting in a in a quasi- judicial role is to apply the facts presented to the Board in the application and at the hearing to the objective criteria contained in the ordinance and regulations. When that is done the approval or denial of the application should suggest itself.

RPS

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

(603) 610-7204 (Direct Dial)
(603) 427-1577 (Fax)

rpsullivan@cityofportsmouth.com

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Peter Britz
Environmental Planner/Sustainability Coordinator
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801
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plbritz@cityofportsmouth.com

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Kindly reply by 12 pm on February 16, 2022.

Thank you

Regards,

Jim Hewitt

Robert P. Sullivan

From: Robert P. Sullivan
Sent: Tuesday, February 22, 2022 10:38 AM
To: JAH; Peter L. Britz
Cc: chellman@tndengineering.com; Trevor McCourt; Beverly M. Zendt
Subject: RE: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Mr. Hewitt,

You have asked a complex question and I do not immediately know the answer. I will discuss it with Planning staff and see what we can come up with for a response.

RPS

.mouth
1 Junkins Avenue
Portsmouth, NH 03801

(603) 610-7204 (Direct Dial)
(603) 427-1577 (Fax)

rpsullivan@cityofportsmouth.com

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Cc: chellman@tndengineering.com; Trevor McCourt <tmccourt@cityofportsmouth.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>
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Thank you.

Regards,

Jim Hewitt

-----Original Message-----

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To: Peter L. Britz <plbritz@cityofportsmouth.com>; JAH <samjakemax@aol.com>

Cc: chellman@tndengineering.com <chellman@tndengineering.com>; Trevor McCourt <tmccourt@cityofportsmouth.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>

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From: Peter L. Britz

Sent: Monday, February 14, 2022 2:01 PM

To: JAH <samjakemax@aol.com>**Cc:** chellman@tndengineering.com; Robert P. Sullivan <rpsullivan@cityofportsmouth.com>; Trevor McCourt <tmccourt@cityofportsmouth.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>

Subject: RE: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

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Best regards,
Peter

Bob,
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.....

Peter Britz
Environmental Planner/Sustainability Coordinator
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801
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From: JAH [<mailto:samjakemax@aol.com>]
Sent: Sunday, February 13, 2022 4:48 PM
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Cc: chellman@tndengineering.com
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Kindly reply by 12 pm on February 16, 2022.

Thank you

Regards,

Jim Hewitt

Robert P. Sullivan

From: Robert P. Sullivan
Sent: Tuesday, February 22, 2022 12:04 PM
To: Peter L. Britz; JAH
Cc: Beverly M. Zendt
Subject: RE: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Mr Hewitt,

Like Peter Britz, I, too, appreciate your response. It shows a good attitude. Keep in mind that as a Planning Board member you have as much support as you require from City Hall staff. In my case, please call or write anytime about any question.

RPS

Robert P. Sullivan, City Attorney
City of Portsmouth
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From: Peter L. Britz
Sent: Tuesday, February 22, 2022 9:34 AM
To: JAH <samjakemax@aol.com>
Cc: Barbara McMillan <bdormmcm@gmail.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>; Robert P. Sullivan <rpsullivan@cityofportsmouth.com>; Ted <thaddeusjj@gmail.com>; Abigail Gindele <agindele@gmail.com>; chellman@tndengineering.com
Subject: RE: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Thank you:
I appreciate your response.
Best,

Peter

From: JAH [<mailto:samjakemax@aol.com>]

Sent: Friday, February 18, 2022 2:17 PM

To: Peter L. Britz

Cc: Barbara McMillan; Beverly M. Zendt; Robert P. Sullivan; Ted; Abigail Gindele; chellman@tndengineering.com

Subject: Re: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Dear Mr. Britz:

I apologize. My inexperience is to blame for this rookie mistake.

Regards,

Jim Hewitt

On Friday, February 18, 2022, 08:38:14 AM PST, Peter L. Britz <plbritz@cityofportsmouth.com> wrote:

Dear Mr. Hewitt:

I am in receipt of your email to three Conservation Commission members and find it troubling. As a member of the Portsmouth Planning Board, the Conservation Commission is advisory to you and other members of the Planning Board. The Conservation Commission like the Planning Board should review applications according to the jury standard. Sending emails to the Conservation Commission, outside the context of a meeting, undermines the transparency of the process for both the Conservation Commission and Planning Board. By directing the Conservation Commission on how to act you appear to be working behind the scenes to achieve an outcome. I strongly urge you to save your comments to other board members for public meetings so that we can keep the process open and accessible for all.

I understand you are new to the Planning Board and we have not had board trainings, which is in the works, so if you have questions or would like additional information please feel free to reach out to me or other staff copied on this email.

Best regards,

Peter

.....
Peter Britz

Environmental Planner/Sustainability Coordinator

City of Portsmouth

1 Junkins Avenue

Portsmouth, NH 03801

(603)610-7215

plbritz@cityofportsmouth.com

From: Barbara McMillan [<mailto:bdormmcm@gmail.com>]

Sent: Thursday, February 17, 2022 2:54 PM

To: Peter L. Britz

Subject: Fwd: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Hi Peter! Due to quorum concerns etc., I wasn't sure what I should do with this email, so checking in with you.

Thanks!

Barb

----- Forwarded message -----

From: JAH <samjakemax@aol.com>

Date: Wed, Feb 16, 2022, 4:47 PM

Subject: Fwd: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

To: bdormmcm@gmail.com <bdormmcm@gmail.com>, thaddeusjj@gmail.com <thaddeusjj@gmail.com>, agindele@gmail.com <agindele@gmail.com>

Dear Portsmouth Conservation Commission:

FYI on the below and attached. In the future, if City Hall allows projects to be approved on contaminated property with no idea about the potential adverse effects on human health and the environment, I hope the Conservation Commission will assume that role so Portsmouth fulfils its obligation as an "Eco-Municipality". City Hall was also equally dismissive on the need for any NHDES permits. prior to or as a condition of approval. (i.e, Wetlands, Shoreland Protection and Alteration of Terrain) see attached.

Regards,

Jim Hewitt

P.S. Kindly forward this e-mail to ConCom members and alternates that I missed

-----Original Message-----

From: JAH <samjakemax@aol.com>

To: plbritz@cityofportsmouth.com <plbritz@cityofportsmouth.com>

Cc: chellman@tndengineering.com <chellman@tndengineering.com>

Sent: Sun, Feb 13, 2022 4:47 pm

Subject: 1 Raynes Ave, 31 Raynes Ave and 203 Maplewood Ave Project - NHDES Permit Status and Property Contamination Status

Dear Mr. Britz:

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Kindly reply by 12 pm on February 16, 2022.

Thank you

Regards,

Jim Hewitt

EXHIBIT 3

RE: Supplemental Information for the March 17, 2022 Planning Board Packet

Beverly M. Zendt

To: JAH
CC: chellman@tndengineering.com ; Stefanie L. Casella
Sent On: Tuesday, March 15, 2022 8:18:25 AM
Archived On: Tuesday, March 15, 2022 8:19:22 AM
Identification Code: eml:87fac8eb-98b1-4297-9cea-e09f1a02bb89-2147414809
Attachments: [image001.png \(547 b\)](#)
[image002.png \(431 b\)](#)
[image003.png \(513 b\)](#)

Good morning – since these are all published documents – we can just forward these to the PB. They do not provide any information that is not already available to the public.

Best Regards,

Beverly Mesa-Zendt AICP

Director | Planning Department

City of Portsmouth

1 Junkins Avenue

Portsmouth, NH 03801

.....
 **(603) 610-7216**

 Bmz@cityofportsmouth.com

 [Planning Department | City of Portsmouth](#)

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From: JAH [mailto:samjakemax@aol.com]

Sent: Monday, March 14, 2022 7:40 PM

To: Beverly M. Zendt <bmzendt@cityofportsmouth.com>

Cc: chellman@tndengineering.com

Subject: Supplemental Information for the March 17, 2022 Planning Board Packet

Hi Beverly:

Could you please add an addendum to the March 17, 2022 Planning Board packet with the following West End Yards information

A) Phase I West End Yards Action Sheets, March 21, 2019 & September, 26, 2019.

[03-21-2019_PB_AS.pdf \(cityofportsmouth.com\)](#)

https://files.cityofportsmouth.com/agendas/2019/pb/03-21-2019_PB_AS.pdf

[REGULAR MEETING \(cityofportsmouth.com\)](#)

https://files.cityofportsmouth.com/agendas/2019/pb/09-26-19_PB_AS.pdf

B) Phase II West End Yards (Construct additional parking) November 9, 2021 Site Technical Advisory Committee (TAC)

[11.9.2021 Site Review Technical Advisory Committee Work Session - YouTube](#)

<https://www.youtube.com/watch?v=8NdRFHewrEA>

At minute 42:00, Fuss & O'Neil presents the project and explains the need to expand parking from September 26, 2019 project approved 529 spaces to proposed 624 spaces

Thank you

Jim Hewitt

Trevor McCourt

From: JAH <samjakemax@aol.com>
Sent: Tuesday, March 15, 2022 8:43 PM
To: chellman@tndengineering.com
Cc: Stefanie L. Casella; Beverly M. Zendt
Subject: Re: Supplemental Information for the March 17, 2022 Planning Board Packet

Dear Chair Chellman and Planning Board members:

As suggested below, please see supplemental information in the links at the bottom of the email string regarding approval conditions of West End Yards Phase I (approved on September 26, 2019) and West End Yards Phase II. (Request to construct an additional 95 Parking Spaces)

Regards,

Jim Hewitt

-----Original Message-----

From: Beverly M. Zendt <bmzendt@cityofportsmouth.com>
To: JAH <samjakemax@aol.com>
Cc: chellman@tndengineering.com <chellman@tndengineering.com>; Stefanie L. Casella <SLCasella@cityofportsmouth.com>
Sent: Tue, Mar 15, 2022 8:18 am
Subject: RE: Supplemental Information for the March 17, 2022 Planning Board Packet

Good morning – since these are all published documents – we can just forward these to the PB. They do not provide any information that is not already available to the public.

Best Regards,

Beverly Mesa-Zendt AICP
Director | Planning Department
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

.....
 (603) 610-7216

 Bmz@cityofportsmouth.com

 [Planning Department | City of Portsmouth](#)

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At minute 42:00, Fuss & O'Neil presents the project and explains the need to expand parking from September 26, 2019 project approved 529 spaces to proposed 624 spaces

Thank you

Jim Hewitt

Robert P. Sullivan

From: JAH <samjakemax@aol.com>
Sent: Wednesday, March 16, 2022 10:26 AM
To: Robert P. Sullivan
Cc: rick chellman; Karen Conard; Beverly M. Zendt
Subject: Re: Quasi Judicial Capacity / Right to Know Law

Mr. Sullivan

I believe the email string will show Ms. Mesa Zendt authorized the distribution of the email.

Regards,

Jim Hewitt

On Wednesday, March 16, 2022, 10:16:49 AM EDT, Robert P. Sullivan <rpsullivan@cityofportsmouth.com> wrote:

Jim,

A Planning Board member has commented on the fact that you have apparently recently sent an email to the full Board with respect to a matter in which the Board will be receiving evidence in its quasi judicial capacity. The issues which this raises are as follows:

1. When sitting in a quasi judicial capacity the Planning Board should only be receiving evidence from three sources. The Applicant. Opponents of the application. The Planning staff.
2. Evidence coming into the Planning Board in that capacity should only come through or at public proceedings.
3. The RTK prohibits the sequential communication which would occur if even one Planning Board member responded to an email from anyone addressed to the full Board.

These concerns arise from either the concept of quasi judicial in which Planning Board members sit as judges, or from RSA 91-A the Right to Know law (RTK).

As your experience on the Planning Board increases, it is not unlikely that further questions might arise. I am available at your convenience to respond to them.

RPS

Robert P. Sullivan, City Attorney

City of Portsmouth

1 Junkins Avenue

Portsmouth, NH 03801

(603) 610-7204 (Direct Dial)

(603) 427-1577 (Fax)

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Re: Quasi Judicial Capacity / Right to Know Law

Beverly M. Zendt

To: JAH ; Robert P. Sullivan
CC: rick chellman ; Karen Conard ; Stefanie L. Casella
Sent On: Wednesday, March 16, 2022 10:50:32 AM
Archived On: Wednesday, March 16, 2022 10:51:03 AM
Identification Code: eml:87fac8eb-98b1-4297-9cea-e09f1a02bb89-2147406498

Mr. Hewitt,

I believe I indicated that we would send the links out but maybe I was not clear enough. I had not had a chance to review these links. Nevertheless, we have been very clear on this point when this issue came up in January and we maintain our position - that any request for information to be distributed to all members - should go through the Planning Department.

I will reinforce this again with the full Board.

If you are unclear about how to proceed - please reach out. If there are questions - related to the question before the PB - we always share those with the applicant so that they can be ready to respond.

In the future, when we have an amended site plan - I will include an analysis of any impacts or changes to the original approval that should be considered as part of the amendment. In this case, I see none.

Best regards,

Beverly Mesa-Zendt

From: JAH <samjakemax@aol.com>
Sent: Wednesday, March 16, 2022 10:25 AM
To: Robert P. Sullivan
Cc: rick chellman; Karen Conard; Beverly M. Zendt
Subject: Re: Quasi Judicial Capacity / Right to Know Law

Mr. Sullivan

I believe the email string will show Ms. Mesa Zendt authorized the distribution of the email.

Regards,

Jim Hewitt

On Wednesday, March 16, 2022, 10:16:49 AM EDT, Robert P. Sullivan <rpsullivan@cityofportsmouth.com> wrote:

Jim,

A Planning Board member has commented on the fact that you have apparently recently sent an email to the full Board with respect to a matter in which the Board will be receiving evidence in its quasi judicial capacity. The issues which this raises are as follows:

1. When sitting in a quasi judicial capacity the Planning Board should only be receiving evidence from three sources. The Applicant. Opponents of the application. The Planning staff.
2. Evidence coming into the Planning Board in that capacity should only come through or at public proceedings.
3. The RTK prohibits the sequential communication which would occur if even one Planning Board member responded to an email from anyone addressed to the full Board.

These concerns arise from either the concept of quasi judicial in which Planning Board members sit as judges, or from RSA 91-A the Right to Know law (RTK).

As your experience on the Planning Board increases, it is not unlikely that further questions might arise. I am available at your convenience to respond to them.

RPS

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

**(603) 610-7204 (Direct Dial)
(603) 427-1577 (Fax)**

rpsullivan@cityofportsmouth.com

City Hall Hours: Monday, 8:00 a.m. - 6:00 p.m.; Tuesday - Thursday, 8:00 a.m. - 4:30 p.m. and Friday, 8:00 a.m. - 1:00 p.m. (NOTE: If a holiday falls on a Monday, City Hall will be open until 6:00 p.m. on Tuesday).

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Robert P. Sullivan

From: Robert P. Sullivan
Sent: Thursday, September 22, 2022 4:26 PM
To: JAH
Cc: chellman@tndengineering.com; akparrott@comcast.net; Susan G. Morrell; Trevor McCourt; Beverly M. Zendt
Subject: RE: Quasi Judicial Capacity / Right to Know Law

Jim,

Your question is more involved and my answer would be more nuanced than can be handled by email. I suggest a face to face discussion. The discussion should include Beverly Zendt. Beyond her, it could be between you and I; the Chair you and I or the full Board. It might even be desirable to do that in public session on television as an educational experience for all. However, If no one else has a strong preference, I am suggesting the you, Beverly and I talk.

RPS

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

(603) 610-7204 (Direct Dial)
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The information in this message may be legally privileged and confidential. It is intended only for the use of the named individual. If you receive this communication in error, please notify me and delete the communication without making any copy or distributing it.

From: JAH [mailto:samjakemax@aol.com]
Sent: Wednesday, September 21, 2022 7:54 PM
To: Robert P. Sullivan <rpsullivan@cityofportsmouth.com>
Cc: chellman@tndengineering.com; akparrott@comcast.net; Trevor McCourt <tmccourt@cityofportsmouth.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>
Subject: Re: Quasi Judicial Capacity / Right to Know Law

Bob:

I understand from your March 16 email below that members of land use boards that operate under the quasi-judicial capacity are to formulate their decisions based on factual information provided by the following three sources only:

- 1) The applicant / proponents
- 2) Aggrieved abutters / opponents
- 3) Plans and other documents from Planning Department staff

I understand the manner in which information is provided to land use boards is analogous to how a juror receives evidence in a court of law. Opinions or "hearsay" that would introduce bias are prohibited and are to be discounted.

Given the above, I am perplexed as to why the Planning Department is allowed to introduce bias to Planning Board with its recommendation to approve every project on the agenda. How can a Planning Board member evaluate the merits of a project impartially when the Planning Department recommends that every project be approved? I also understand the Planning Department does not provide the Zoning Board of Adjustment with recommendations.

Can you explain why the Planning Department is allowed to introduce bias by providing its opinion (approve everything) to the Planning Board and not to the Zoning Board of Adjustment?

Thank you

Regards,

Jim Hewitt

----- Forwarded Message -----

From: Robert P. Sullivan <rpsullivan@cityofportsmouth.com>

To: samjakemax@aol.com <samjakemax@aol.com>

Cc: rick chellman <chellman@tndengineering.com>; Karen Conard <kconard@cityofportsmouth.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>

Sent: Wednesday, March 16, 2022 at 10:16:49 AM EDT

Subject: Quasi Judicial Capacity / Right to Know Law

Jim,

A Planning Board member has commented on the fact that you have apparently recently sent an email to the full Board with respect to a matter in which the Board will be receiving evidence in its quasi judicial capacity. The issues which this raises are as follows:

1. When sitting in a quasi judicial capacity the Planning Board should only be receiving evidence from three sources. The Applicant. Opponents of the application. The Planning staff.
2. Evidence coming into the Planning Board in that capacity should only come through or at public proceedings.
3. The RTK prohibits the sequential communication which would occur if even one Planning Board member responded to an email from anyone addressed to the full Board.

These concerns arise from either the concept of quasi judicial in which Planning Board members sit as judges, or from RSA 91-A the Right to Know law (RTK).

As your experience on the Planning Board increases, it is not unlikely that further questions might arise. I am available at your convenience to respond to them.

RPS

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

(603) 610-7204 (Direct Dial)
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EXHIBIT 4


Capital Improvement Plan (CIP) -- Citizen Request Form · Add to a project

 **Expiration Date**
Active
Request Changes
(</#/explore/request-changes/65758>)
⋮

CIP-22-4

 **Details**
Submitted on Jul 11, 2022 at 4:21 pm

 **Attachments**
0 files

 **Activity Feed**
Latest activity on Aug 14, 2023

 **Applicant**
James Hewitt

 0

 **Location**
--

Timeline

Add New ▾

Project Request Submitted to Appropriate Department
In Progress 

Planning Department Review
Review 

Details

Submitter's Information

Edit

Name

James A Hewitt

Address

726 Middle Road

Email Address

samjakemax@aol.com

Are you submitting on behalf of a Committee?

Project Information

Edit

Project Location

710 Middle Road

Project Type

Other

If you selected "Other" above, please describe the project type

Monster DADU 4,000 Warehouse

Project Description

Monster DADU Warehouse

Project Justification (check all that apply)

Edit

Identified in a Planning Document or Study

If you checked above, please identify the document or study

Trevor McCourt

From: JAH <samjakemax@aol.com>
Sent: Friday, July 15, 2022 4:29 PM
To: Vincent J. Hayes;Beverly M. Zendt
Cc: chellman@tndengineering.com;Nicholas J. Cracknell;Trevor McCourt
Subject: Re: 710 Middle Road DADU Approval Conditions
Attachments: 710 Middle Zoning Requirements 7.15.2022.pdf

Hi Vincent:

I apologize if the information below was a little confusing. The attached should help clarify.

Regards,

Jim Hewitt

-----Original Message-----

From: JAH <samjakemax@aol.com>
To: vjhayes@cityofportsmouth.com <vjhayes@cityofportsmouth.com>; bmzendt@cityofportsmouth.com <bmzendt@cityofportsmouth.com>
Cc: chellman@tndengineering.com <chellman@tndengineering.com>; njcracknell@cityofportsmouth.com <njcracknell@cityofportsmouth.com>; tmccourt@cityofportsmouth.com <tmccourt@cityofportsmouth.com>
Sent: Thu, Jul 14, 2022 5:20 pm
Subject: Re: 710 Middle Road DADU Approval Conditions

Hi Vincent:

The reason a survey plan with the 710 Middle Road lot area (that is stamped by a licensed land surveyor in New Hampshire) is needed is because the Harveys pushed the Open Space and Building Lot coverage zoning requirements to the ragged edge. The Building Lot Coverage was apparently met by 0.1 percent. (20 % maximum, 19.9 % proposed). 0.1 percent of the lot area on this site is only 20 square feet, or a 4ft by 5 ft area. These calculations therefore need to be conducted meticulously and ideally peer reviewed by a licensed engineer.

Now the minimum open space requirement appears to have been misapplied by both the applicant and the Portsmouth Planning Department. When the Portsmouth Zoning Ordinance requires at least 40% of the property to be open space, and this project only provides 39.9% open space, that does not satisfy the requirement. There needs to be 40.1 % open space as a minimum. See note 2 of Site Notes in the attached plan

So, in addition to this new survey plan, new lot coverage and open space calculations need to be performed and new site plans prepared that satisfy the following:

- 1) The heated first floor laundry room needs to be eliminated and shown as unheated storage space
- 2) Water and sewer service need to originate from the 710 Middle Road structure

Regards,

Jim Hewitt

-----Original Message-----

From: Vincent J. Hayes <vjhayes@cityofportsmouth.com>
To: JAH <samjakemax@aol.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>
Cc: chellman@tndengineering.com <chellman@tndengineering.com>

Sent: Tue, Jul 12, 2022 8:45 am
Subject: RE: 710 Middle Road DADU Approval Conditions

Good morning,

Yes, the system is designed to prevent the workflow from proceeding until all requisite conditions of approval are satisfied. There is a "Condition Precedent" step in the workflow, which must be cleared in order for a building permit to be issued. Similarly, there is a "Condition Subsequent" step in the workflow, which must be cleared in order for the Conditional Use Permit to be issued.

Best,
Vincent

From: JAH [mailto:samjakemax@aol.com]
Sent: Monday, July 11, 2022 6:37 PM
To: Vincent J. Hayes <vjhayes@cityofportsmouth.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>
Cc: chellman@tndengineering.com; Trevor McCourt <tmccourt@cityofportsmouth.com>
Subject: Re: 710 Middle Road DADU Approval Conditions

Thank you.

Will this site post when the 5 conditions of the June 23, 2021 letter have been satisfied? I note only conditions 1 and 2 need to be satisfied prior to issuing a building permit.

Regards,

Jim Hewitt

-----Original Message-----

From: Vincent J. Hayes <vjhayes@cityofportsmouth.com>
To: Beverly M. Zendt <bmzendt@cityofportsmouth.com>; JAH <samjakemax@aol.com>
Cc: chellman@tndengineering.com <chellman@tndengineering.com>
Sent: Mon, Jul 11, 2022 5:48 pm
Subject: RE: 710 Middle Road DADU Approval Conditions

Hi Jim,

Below, please find a link to the Viewpoint Cloud online permitting software. At the top right of the interface, you will see a "Sign Up" option. This is where you can create your account and search for and view building and land use permits.

<https://portsmouthnh.viewpointcloud.com/>

I hope this is helpful! Please let me know if you have any questions.




Best,
Vincent

From: Beverly M. Zendt
Sent: Monday, July 11, 2022 11:46 AM
To: JAH <samjakemax@aol.com>; Vincent J. Hayes <vjhayes@cityofportsmouth.com>
Cc: chellman@tndengineering.com; Trevor McCourt <tmccourt@cityofportsmouth.com>
Subject: RE: 710 Middle Road DADU Approval Conditions

Jim - I think you have to set it up yourself but I think if you have trouble - let us know.

Best Regards,

Beverly Mesa-Zendt AICP
Director | Planning Department
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

 (603) 610-7216
 Bmz@cityofportsmouth.com
 [Planning Department | City of Portsmouth](#)

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From: JAH [<mailto:samjakemax@aol.com>]
Sent: Monday, July 11, 2022 11:45 AM
To: Vincent J. Hayes <vjhayes@cityofportsmouth.com>; Beverly M. Zendt <bmzendt@cityofportsmouth.com>
Cc: chellman@tndengineering.com; Trevor McCourt <tmccourt@cityofportsmouth.com>
Subject: Re: 710 Middle Road DADU Approval Conditions

Thank you.

Vincent, please set me up Viewpoint account.

Thank you

Regards,

Jim Hewitt


On Monday, July 11, 2022, 11:40:55 AM EDT, Beverly M. Zendt <bmzendt@cityofportsmouth.com> wrote:

Jim -- also - staff reminded me that if you have an account in Viewpoint that you can track projects.

Vincent can help with that.

Best Regards,

Beverly Mesa-Zendt AICP
Director | Planning Department
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

 (603) 610-7216
 Bmz@cityofportsmouth.com
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From: Beverly M. Zendt
Sent: Monday, July 11, 2022 8:48 AM

To: 'JAH' <samjakemax@aol.com>; Vincent J. Hayes <vjhayes@cityofportsmouth.com>
Cc: chellman@tndengineering.com; Trevor McCourt <tmccourt@cityofportsmouth.com>
Subject: RE: 710 Middle Road DADU Approval Conditions

Good morning Jim –

The applicant has not proceeded to building permit at this time.

If you are requesting documentation as a Planning Board member, we would prefer to treat your request as we do others and share the information with all the Planning Board members.

If you are requesting this information as a member of the public we would typically suggest that you come in and review the file on the property.

Please be assured that Vincent is a professional and takes his job seriously. He coordinates with other planning staff, legal, building and inspections, and public works to track project development and ensure it is compliant with our regulations and the approved stipulations.

Best Regards,

Beverly Mesa-Zendt AICP
Director | Planning Department
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

☎ (603) 610-7216

✉ Bmz@cityofportsmouth.com

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From: JAH [<mailto:samjakemax@aol.com>]
Sent: Thursday, July 7, 2022 6:06 PM
To: Vincent J. Hayes <vjhayes@cityofportsmouth.com>
Cc: chellman@tndengineering.com; Beverly M. Zendt <bmzendt@cityofportsmouth.com>
Subject: Re: 710 Middle Road DADU Approval Conditions

Hi Vincent:

Please confirm all the conditions on the attached letter have been satisfied and forward to me a copy of the stamped survey plan.

Regards,

Jim Hewitt

-----Original Message-----

From: Beverly M. Zendt <bmzendt@cityofportsmouth.com>
To: JAH <samjakemax@aol.com>
Cc: chellman@tndengineering.com <chellman@tndengineering.com>; Vincent J. Hayes <vjhayes@cityofportsmouth.com>
Sent: Tue, Jun 28, 2022 8:32 am
Subject: RE: 710 Middle Road DADU

Good morning,

I have confirmed with Trevor that we do stop the clock on the approval timeline while the decision is in litigation. For my part – it seems that the clock would restart when the court’s decision has been rendered and the appeal period has lapsed.

Best Regards,

Beverly Mesa-Zendt AICP

Director | Planning Department
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

.....
☎ (603) 610-7216

✉ Bmz@cityofportsmouth.com

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From: JAH [<mailto:samjakemax@aol.com>]

Sent: Monday, June 27, 2022 8:07 PM

To: Beverly M. Zendt <bmzendt@cityofportsmouth.com>

Cc: chellman@tndengineering.com; Vincent J. Hayes <vjhayes@cityofportsmouth.com>

Subject: Re: 710 Middle Road DADU

Hi Beverly:

Attached is the action sheet for 710 Middle Road. I understood the detailed survey plan in item # 3 was to be prepared and stamped by a land surveyor licensed to practice in the State of New Hampshire. If the court action delayed the Planning Board approval renewal date from June 17, 2022 to some future date, I am curious to know what that future date is.

Thank you

Regards,

Jim Hewitt

-----Original Message-----

From: Beverly M. Zendt <bmzendt@cityofportsmouth.com>

To: JAH <samjakemax@aol.com>

Cc: chellman@tndengineering.com <chellman@tndengineering.com>; Vincent J. Hayes <vjhayes@cityofportsmouth.com>

Sent: Fri, Jun 24, 2022 10:22 am

Subject: RE: 710 Middle Road DADU

Good morning Jim – that is true for every land use approval.

I have not had time to verify but it seems a hard thing and counter-intuitive - that if you are taken to court and prevail that you would lose your entitlement because of the delay. Nevertheless- I will confirm.

Best Regards,

Beverly Mesa-Zendt AICP

Director | Planning Department
City of Portsmouth
1 Junkins Avenue

Portsmouth, NH 03801

(603) 610-7216

Bmz@cityofportsmouth.com

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From: JAH [<mailto:samjakemax@aol.com>]

Sent: Friday, June 24, 2022 10:01 AM

To: Beverly M. Zendt <bmzendt@cityofportsmouth.com>

Cc: chellman@tndengineering.com; Vincent J. Hayes <vjhayes@cityofportsmouth.com>

Subject: Re: 710 Middle Road DADU

OK. Thanks. To confirm, the Planning Dept will verify all Planning Board approval conditions precedent will be satisfied prior to a building permit being issued. Did you find out whether an extension is required?

Thanks

Jim Hewitt

On Friday, June 24, 2022, 07:58:36 AM EDT, Beverly M. Zendt <bmzendt@cityofportsmouth.com> wrote:

Good morning –

I don't see that they have moved forward yet. When they put in for a building permit – Vincent verifies that they have met all conditions precedent.

Best Regards,

Beverly Mesa-Zendt AICP

Director | Planning Department

City of Portsmouth

1 Junkins Avenue

Portsmouth, NH 03801

(603) 610-7216

Bmz@cityofportsmouth.com

[Planning Department | City of Portsmouth](#)

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From: JAH [<mailto:samjakemax@aol.com>]

Sent: Thursday, June 23, 2022 4:55 PM

To: Beverly M. Zendt <bmzendt@cityofportsmouth.com>

Cc: chellman@tndengineering.com

Subject: Re: 710 Middle Road DADU

OK. What about compliance with all post-approval conditions?

Regards,

Jim Hewitt

On Thursday, June 23, 2022, 04:53:03 PM EDT, Beverly M. Zendt <bmzendt@cityofportsmouth.com> wrote:

No- I believe litigation stays the timeline – but I can confirm.

Best Regards,

Beverly Mesa-Zendt AICP
Director | Planning Department
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

☎ (603) 610-7216

✉ Bmz@cityofportsmouth.com

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From: JAH [<mailto:samjakemax@aol.com>]
Sent: Thursday, June 23, 2022 4:39 PM
To: Beverly M. Zendt <bmzendt@cityofportsmouth.com>
Cc: chellman@tndengineering.com
Subject: 710 Middle Road DADU

Hi Beverly

Does the DADU approved on June 17, 2021 at 710 Middle Road need an extension from the Planning Board since it was approved over a year ago and no work has started ? Have all post-approval conditions been met ?

Regards,

Jim Hewitt

SITE NOTES: 710 MIDDLE ROAD DADU

1. THE INTENT OF THIS PLAN IS SHOW THE PROPOSED CONSTRUCTION OF A PROPOSED GARAGE WITH SECOND FLOOR APARTMENT. PROJECT TO BE SERVED BY PUBLIC WATER, SEPTIC, ELECTRIC, AND GAS.

2. ZONING: SINGLE RESIDENCE B
- LOT AREA MINIMUM = 43,360 S.F.
 - LOT FRONTAGE MINIMUM = 100'
 - MAX. BUILDING COVERAGE = 20%
 - MIN. OPEN SPACE = 40%
 - BUILDING HEIGHT = 35'
 - BUILDING SETBACKS (MINIMUM):
 - FRONT = 30'
 - SIDE = 10'
 - REAR = 30'

EXISTING	PROPOSED
20,409 SF	
95.01'	
11.6%	19.9%
28.9%	39.9%
27.61'	27.16'
	124.92'
	28.51'(WEST)
	25.99'(EAST)
	33.81'

WRONG → 15,000 S.F.

WRONG → 711'?

MINIMUM → 5.4 INCHES SHORTER THAN MAIN HOUSE

MEETS BY 0.176

MEETS BY 0.176

== THEREFORE

3. THIS PLAN SET HAS BEEN PREPARED BY JONES & BEACH ENGINEERS, INC., FOR MUNICIPAL AND STATE APPROVALS AND FOR CONSTRUCTION BASED ON DATA OBTAINED FROM ON-SITE FIELD SURVEY AND EXISTING MUNICIPAL RECORDS. THROUGHOUT THE CONSTRUCTION PROCESS, THE CONTRACTOR SHALL INFORM THE ENGINEER IMMEDIATELY OF ANY FIELD DISCREPANCY FROM DATA AS SHOWN ON THE DESIGN PLANS, INCLUDING ANY UNFORESEEN CONDITIONS, SUBSURFACE OR OTHERWISE, FOR EVALUATION AND RECOMMENDATIONS. ANY CONTRADICTION BETWEEN ITEMS ON THIS PLAN/PLAN SET, OR BETWEEN THE PLANS AND ON-SITE CONDITIONS, MUST BE RESOLVED BEFORE RELATED CONSTRUCTION HAS BEEN INITIATED.

4. ALL CONSTRUCTION SHALL CONFORM TO CITY STANDARDS AND REGULATIONS, AND NHDOT STANDARD SPECIFICATIONS FOR ROAD AND BRIDGE CONSTRUCTION, WHICHEVER IS MORE STRINGENT.
5. PRIOR TO THE START OF CONSTRUCTION, THE CONTRACTOR SHALL COORDINATE WITH THE ENGINEER, ARCHITECT AND/OR OWNER, IN ORDER TO OBTAIN AND/OR PAY ALL THE NECESSARY LOCAL PERMITS, FEES AND BONDS.
6. ALL SIGNAGE AND PAVEMENT MARKINGS SHALL BE IN ACCORDANCE WITH THE LATEST EDITION OF THE MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (M.U.T.C.D.) AND NHDOT STANDARDS AND SPECIFICATIONS (NON-REFLECTORIZED PAVEMENT MARKINGS), UNLESS OTHERWISE NOTED.
7. ALL CONSTRUCTION ACTIVITIES SHALL CONFORM TO LABOR OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) RULES AND REGULATIONS.
8. LANDOWNERS ARE RESPONSIBLE FOR COMPLYING WITH ALL APPLICABLE LOCAL, STATE AND FEDERAL WETLAND REGULATIONS, INCLUDING PERMITTING REQUIRED UNDER THESE REGULATIONS.

Robert P. Sullivan

From: Rick Chellman <chellman@tndengineering.com>
Sent: Wednesday, July 20, 2022 7:37 AM
To: JAH
Cc: Beverly M. Zendt; Robert P. Sullivan
Subject: Planning Board
Attachments: PastedGraphic-3.tiff; ATT00001.htm; Hewitt letter July 20, 2022.pdf; ATT00002.htm; City Letter to James Hewitt 7-19-22.pdf; ATT00003.htm

Jim,

Once you have had the time to digest the attached, I will welcome the opportunity to discuss them and the related matters with you.

[Rick Chellman, P.E., L.L.S.](#)



CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire
(603) 431-2000

James Hewitt
726 Middle Road
Portsmouth, New Hampshire

July 19, 2022

Mr. Hewitt,

This letter is in reference to your repeated efforts to engage City staff on a project for which you have a personal interest, namely, the Accessory Dwelling Unit project located at 710 Middle Road, recently the subject of an unsuccessful challenge brought by you against the City of Portsmouth Planning Board in Superior Court.

On July 13, 2022, you submitted a citizen request for a Capital Improvement Project through the City's on-line application portal. The application, which generates a workflow for staff, was not used for the purpose it was intended but was used instead to describe the project at 710 Middle Road as a "Monster DADU 4000 Warehouse" in what appears to be an attempt to express your distaste and objections for an approved project subject to development compliance review.

Of greatest concern are your emails, submitted on July 14, 2022 and July 15, 2022, to Vincent Hayes, which came after several attempts by staff to redirect you to more acceptable ways of monitoring this project of personal concern. In these emails, you alerted Mr. Hayes to the inadequacies of an approved plan noting the misapplication of the regulations by both the Planning staff and the Planning Board. You claimed that the building lot coverage and open space calculations were incorrect and needed to be peer reviewed by a licensed engineer, corrected, and updated on a new site plan.

In these emails, you copied the Chairman, the Planning Director, and the Principal Planner consistent with other emails that you have sent to staff when acting in your capacity as a Planning Board member. Mr. Hayes, of course, would view an email from a Planning Board member in a different light than an email from a citizen who is unconnected to the City.

As a Planning Board member, your recent actions may be construed as malfeasance and are directly connected to the performance of your official duties. Your emails constitute an attempt to use your authority to influence staff in their official duties for your personal motivations. This attempt to influence the development compliance review of a staff member and to impose additional conditions, requirements, and amendments outside of the procedural requirements established under RSA 674, the City's Site Plan Regulations, and the City's Zoning Ordinance is an unacceptable exercise of your authority.

Letter to Planning Board Member James Hewitt

Please be advised of the following:

- Citizen correspondence related to public information requests shall be directed to the City Attorney's office.
- Cease all correspondence with Mr. Hayes as it relates to the project located at 710 Middle Road.
- The City will take this matter under advisement and will determine if further action is warranted which may include proceedings under RSA 673:13.

Respectfully submitted,



Robert Sullivan, City Attorney


Beverly Mesa-Zendt, Planning Director

Rick Chellman

224 State Street
PORTSMOUTH, NH 03801
p. 603.479-7195
Email: Chellman@TNDEngineering.com

Mr. Jim Hewitt
VIA EMAIL ONLY: samjakemax@aol.com

July 20, 2022

Jim,

I appreciate your passion generally and your personal involvement in the 710 Middle Road matter as an abutter is noted. However, I think you need to realize that your recent series of emails to Vincent Hayes in my opinion have led you outside the bounds of propriety with communications that are inappropriate for a Planning Board member.

These emails do not cast your position as a Board member in the light it should be cast, and have caused the need for me write to you.

To explain, you and anyone else have the rights to request to see the file on a most matters and to have copies of items in that file. At times, and somewhat depending on the scope of the request, this may require a formal right to know request (RSA 91-A). As Planning Board members, we also need access to materials and routinely are provided with those materials by staff through less formal processes.

However, what you have done recently with Mr. Hayes, in my opinion, goes beyond what would be considered acceptable for a general public request, and in some cases at least approached an unacceptable instruction to a city employee (Mr. Hayes) to follow a certain course of action that you feel is appropriate or necessary.

On July 7 some of this began when you wrote "please confirm all the conditions on the attached letter have been satisfied and forward to me a copy of the stamped survey plan". I fail to see how to interpret this sentence as other than an instruction, which-coming from a Planning Board member-is likely to at least cause more concern on the part of the employee than such a communication from a member of the public.

For that example, I think you could have achieved your desired result with a more simple request asking if the building permit had been issued, and asking for a copy of the survey if one had been filed. Better yet, you could have asked to see the file at city hall and simply seen for yourself.

Indeed, after that note on July 7, the Planning Director asked you:
If you are requesting documentation as a Planning Board member, we would prefer to treat your request as we do

others and share the information with all the Planning Board members.

If you are requesting this information as a member of the public we would typically suggest that you come in and review the file on the property.

I am not aware of you responding directly to the Planning Director's requests, but since your emails to Mr. Hayes continued and included me, the Principal Planner and a member of the City Attorney's legal department, it seems logical to, again, infer that your intent has been to act as a Planning Board member.

Your most recent email to Mr. Hayes on July 14, however, causes me more concern, because you again instruct him on how he is to satisfy some of the conditions of the June 17, 2021 approval- even including the suggestion of a need for outside peer review. In this same email you also bring up a new matter regarding your opinions with respect to the open space requirements.

As a Board member, you are of course entitled to propose peer review of a project in the form of general discussion or a formal motion at a public meeting, and members of the public can suggest the same at public meetings, but instructing Mr. Hayes in such matters in an email strikes me as very inappropriate.

Concerningly, raising a new matter such as how the open space requirement may, in your opinion, "have been misapplied" is also inappropriate because the appeal period for such a suggestion has long lapsed. Since you litigated this matter as an abutter, that would likely have been the appropriate venue to raise such a concern and if it was a part of that litigation, then it has been settled by that process. In either case, to raise it now to Mr. Hayes is simply wrong.

Related to all of this, even if this were not focused on a matter you have privately litigated, the Harveys (or whoever the current landowner(s) may be) have important rights as well. The entire process of land use regulation has to balance those private rights and the public responsibilities in a consistent and rigorous manner. I am especially concerned when I see anything that starts to stray from that consistency and rigor. It should also be noted that essentially all of this also must take place in the open public forum.

As an abutter, recent litigant, and Planning Board member it seems to me that you need to be especially careful- even more careful than a general member of the public- regarding anything to do with this property.

It may be true that in some respects members of the public are more free to express opinions than are Planning Board members. In any case, Planning

Jim Hewitt, July 20, 2022

Board members owe a certain degree of decorum and respect to landowners, their agents and to city staff- as they are entitled to the same levels of decorum and respect in turn.

In the future, please direct all communications from you as a Board member regarding Board matters directly to me.

If you have questions about any of this, I will be happy to help as best I can, and I know the legal department can certainly do so as well. If you feel constrained by your position on the Board, I am happy to discuss that with you as well.

While I was preparing this letter to you, the city was also preparing the attached, and I urge you to carefully read it and to understand that these are serious matters that are being evaluated seriously. The work we do as Board members need not always be difficult, but aspects of it absolutely require the consistency, rigor and decorum I have discussed above.

I look forward to continuing to work with you on the Board, but I ask that in future you exercise much greater care with your communications, as I have described- this is critically important to you, to the City and to all of you fellow Board members.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Hewitt". The signature is stylized with a large, sweeping initial "J" and "H".

EXHIBIT 5

Susan G. Morrell

From: Karen S. Conard
Sent: Monday, October 30, 2023 9:12 PM
To: Susan G. Morrell; Trevor McCourt
Cc: Suzanne M. Woodland
Subject: Fwd: 375 Banfield Road
Attachments: Banfield Road LLC v. Copeland et al.pdf

FYI

Get [Outlook for iOS](#)

From: JAH <samjakemax@aol.com>
Sent: Monday, October 30, 2023 8:20:22 PM
To: Peter M. Stith <pmstith@cityofportsmouth.com>; Kimberli Kienia <kkienia@cityofportsmouth.com>
Subject: 375 Banfield Road

Dear Chair Chellman and Planning Board members:

I just wanted to follow up with some information that I hope will help explain my somewhat zealous response to this project on October 19. As you recall, I felt the application was incomplete as the Planning Board was not provided all the information it needed to make an informed decision on behalf of the People of Portsmouth. See below and attached.

Regards,

Jim Hewitt

[New Hampshire Property Contamination Case Gets Mixed Ruling \(bloomberglaw.com\)](#)

[Why a property owner is suing Portsmouth over 'contamination' of site - NH Business Review \(nhbr.com\)](#)

[Banfield Realty sues Portsmouth NH claiming land is too polluted \(seacoastonline.com\)](#)

[Portsmouth Land Buyer Sues Sellers, Realtor, City Claiming Contamination Info Hidden - InDepthNH.orgInDepthNH.org](#)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Banfield Realty LLC,
Plaintiff

v.

Case No. 22-cv-0573-SM
Opinion No. 2023 DNH 128

William E. Copeland; Jack Copeland;
Joseph P. Copeland; Roeseland
Holdings 5, LLC; James W. Copeland;
Country Motor Sales; Mountjoy &
Carlisle, LLC d/b/a Olde Port
Properties; George M. Carlisle;
Jeffrey Mountjoy; Wayne Semprini;
City of Portsmouth, New Hampshire;
and Portsmouth Housing Authority,
Defendants

O R D E R

This suit arises out of the sale of property located at 375 Banfield Road, Portsmouth, New Hampshire. Plaintiff, Banfield Realty, bought the property on February 5, 2020. Shortly after purchasing, Banfield discovered significant environmental contamination. It promptly filed suit, asserting claims under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") and state law theories of recovery, including claims based on negligence and negligence per se. Defendants City of Portsmouth ("Portsmouth") and Portsmouth Housing Authority ("PHA") have moved to dismiss all claims against them pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff objects.

Standard of Review

When considering a motion to dismiss, the court accepts all well-pleaded facts alleged in the complaint as true, disregarding legal labels and conclusions, and resolving reasonable inferences in the plaintiff's favor. See Galvin v. U.S. Bank, N.A., 852 F.3d 146, 155 (1st Cir. 2017). To avoid dismissal, the complaint must allege sufficient facts to support a plausible claim for relief. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). To satisfy the "plausibility standard," the factual allegations in the complaint, along with reasonable inferences drawn from those allegations, must show more than a mere possibility of liability - that is, "a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). See also Lyman v. Baker, 954 F.3d 351, 359-60 (1st Cir. 2020) ("For the purposes of our 12(b)(6) review, we isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements.") (cleaned up).

In other words, the complaint must include well-pled (i.e., non-conclusory, non-speculative) factual allegations with respect to each of the essential elements of a viable claim which, if assumed to be true, would allow the court to draw the reasonable and plausible inference that the plaintiff is

entitled to the relief sought. See Tasker v. DHL Retirement Savings Plan, 621 F.3d 34, 38-39 (1st Cir. 2010).

Background

Accepting the amended complaint's factual allegations as true - as the court must at this juncture - the relevant background is as follows. The dispute concerns property located at 375 Banfield Road, Portsmouth, New Hampshire ("the Property"), acquired by Banfield Realty from William E. Copeland, Jack Copeland, Kevin Copeland, Joseph P. Copeland, and Roeseland Holdings (the "Seller Defendants") on February 5, 2020, for \$1.2 million.

Before the February, 2020, sale, the Property had been owned by the Copeland family for nearly 60 years. Over those 60 years, the Copelands used the Property as a solid waste landfill, automobile repair shop, car-crushing facility, and salvage yard. As a result, the Property had a history of environmental issues, including contamination, that triggered the New Hampshire Department of Environmental Conservation's involvement in remediation. When the Property was sold to Banfield Realty, the Seller Defendants represented that the contamination had been entirely remediated. Contrary to those representations, however, the Seller Defendants knew that

building materials and automotive parts were buried on the Property, and they were aware of the continued presence of contaminants including heavy metals, polychlorinated biphenyls (PCBs), and asbestos in the Property's soil.

After purchasing, Banfield Realty claims to have discovered that the Property was "contaminated from multiple sources and releases, dating back several decades." Am. Compl. ¶ 27. Two of those sources, Banfield contends, were the City of Portsmouth, and the PHA. It says that, on June 2, 2009, William E. Copeland (as executor of Virginia Copeland's estate) submitted a Registration Form for Landfills Not Operated After July 9, 1981, to the New Hampshire Department of Environmental Services ("DES"), in which it reported that, during the 1960s, "building and construction waste was disposed of on the site, as part of the City of Portsmouth's urban renewal." Id. at ¶ 28. Plaintiff further alleges that both the City of Portsmouth and the PHA were involved in Portsmouth's urban development, as the PHA was created in 1953, and "many of its early projects involved the urban renewal of Portsmouth." Id. at ¶ 29.

Plaintiff's amended complaint references a Limited Subsurface Investigation Report prepared by Ransom Environmental Consultants, Inc., for the DES dated November 8, 2008 (the

"Ransom Report").¹ According to the Ransom Report, arsenic, lead, selenium, PCBs, asbestos, and other hazardous substances were found on the Property, as well as "buried building materials (including burned and partially burned wood, metal, plaster and paint fragments, flooring, etc.)." Pl.'s Obj. to Portsmouth Mot. to Dismiss, Exh. A. Samples taken from the buried building and construction materials included detectable asbestos.

Banfield Realty alleges that it has incurred significant costs related to the contamination, and "anticipates that DES

¹ Generally, a court must decide a motion to dismiss exclusively upon the allegations set forth in the complaint and the documents specifically attached, or convert the motion into one for summary judgment. See Fed. R. Civ. P. 12(2). There is, however, an exception to that general rule, as "[a] district court may also consider 'documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice.'" Giragosian v. Ryan, 547 F.3d 59, 65 (1st Cir. 2008) (quoting In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 20 (1st Cir. 2003)) (alterations in original).

Plaintiff argues that the court may consider the findings of the Ransom Report without converting this motion into one for summary judgment because the Report is referenced in their amended complaint (see Am. Compl. ¶ 34), and because the Ransom Report is a public record, available on the NH DES's website. Neither Portsmouth nor PHA object to the court's consideration of the Report (although both parties take issue with plaintiff's characterization of the Report's findings). The Ransom Report is sufficiently referenced in the amended complaint to merit consideration in adjudicating defendants' motions.

and [the U.S. Environmental Protection Agency] will require substantial remediation efforts to be implemented," which will impose further costs and expenses on it. Id. at ¶ 46.

Discussion

Banfield asserts seven claims against Portsmouth and PHA. It seeks recovery of costs and declaratory relief related to future costs under CERCLA, 42 U.S.C. § 9601, et. seq.; contribution and declaratory relief for future costs under New Hampshire Rev. Stat. Ann. 147-B; contribution under New Hampshire Rev. Stat. Ann. 507:7-g; and damages due to defendants' negligence per se and negligence.

1. CERCLA and NH RSA 147-B

CERCLA "establishes a complex statutory scheme for responding to certain environmental hazards." Territory of Guam v. U.S., 141 S. Ct. 1608, 1611 (2021) (citations omitted). It was "designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." Burlington No. and Sante Fe Ry. Co. v. U.S., 556 U.S. 599, 602 (2009) (internal quotations omitted). CERCLA "imposes strict liability for the costs of cleanup on a party found to be an owner or operator, past operator, transporter, or arranger." U.S. v.

General Electric. Co., 670 F.3d 377, 382 (1st Cir. 2012)
(quoting U.S. v. Davis, 261 F.3d 1, 29 (1st Cir. 2001)).²

Four elements are "necessary for a prima facie case in a private-party lawsuit under CERCLA:

1. The defendant must fall within one of four categories of covered persons. 42 U.S.C. § 9607(a).
2. There must have been a 'release or threatened release' of a hazardous substance from defendant's facility. 42 U.S.C. § 9607(a)(4); § 9601(14), (22).
3. The release or threatened release must 'cause[] the incurrence of response costs' by the plaintiff. 42 U.S.C. § 9607(a)(4).
4. The plaintiff's costs must be 'necessary costs of response ... consistent with the national contingency plan.' 42 U.S.C. § 9607(a)(4)(B); § 9601(23)-(25).

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989), decision clarified sub nom. In re Dedham Water Co., 901 F.2d 3 (1st Cir. 1990), (citations omitted).

² "RSA 147-B:10, like CERCLA, gives a person who has incurred environmental response costs a right to contribution against a facility's prior owners and operators." EnergyNorth Nat. Gas, Inc. v. UGI Utilities, Inc., No. CIV. 00-500-B, 2003 WL 1700494, at *2 (D.N.H. Mar. 28, 2003) (citation omitted). Portsmouth's and PHA's arguments in support of their motions to dismiss plaintiff's N.H. RSA 147-B claims are identical to their arguments concerning CERCLA.

Portsmouth and PHA argue that plaintiff's CERCLA claims should be dismissed for two reasons. First, they say, the amended complaint fails to establish the second element of a CERCLA claim: that the "building and construction waste" disposed of was a "hazardous substance." Second, they argue that the amended complaint fails to sufficiently allege that Portsmouth or PHA fall within the four categories of covered persons under the statute.

(a) "Hazardous" Substance

CERCLA defines a "hazardous substance" "by incorporation of certain lists of substances, wastes, and pollutants identified in a number of other environmental statutes," including the Clean Water Act, the Solid Waste Disposal Act, the Clean Air Act, and the Toxic Substances Control Act. Com. of Mass. v. Blackstone Valley Elec. Co., 67 F.3d 981, 984 (1st Cir. 1995) (citing 42 U.S.C. § 9601(14)). Pursuant to 42 U.S.C. § 9602(a), the EPA Administrator is required to "promulgate and revise regulations designating as additional 'hazardous substances' any substances which, 'when released into the environment may present substantial danger to the public health or welfare or the environment'." Id. Accordingly, the "EPA has codified a consolidated list of hazardous substances subsuming all of the

statutory lists incorporated by CERCLA.” Id. See also 40 C.F.R. § 302.4.

Portsmouth and PHA argue that Banfield’s amended complaint fails to identify what the building and construction waste consisted of, beyond that it was “building and construction waste.” That allegation, they say, is plainly insufficient to meet CERCLA’s definition of a “hazardous substance,” given that not all building and construction waste is also “hazardous.” In response, Banfield relies on the Ransom Report’s finding that arsenic, lead, selenium, PCBs, asbestos, and other designated hazardous substances were found on the Property, and, specifically, its finding that “asbestos was detected in 3 of 17 waste bulk building material samples. . .” Pl.’s Obj. to Portsmouth Mot. to Dismiss, Exh. A. Banfield points out that all of those substances are “hazardous” under federal law.

The amended complaint alleges that Portsmouth and/or PHA disposed of construction waste and debris on the Property in the 1960s, and that later testing disclosed multiple substances listed by the EPA as “hazardous substances,” 40 C.F.R. § 302.4, in that construction waste, including asbestos. While meagre, the amended complaint’s allegations, together with the

information in the Ransom Report, are sufficient to withstand Portsmouth's and PHA's motion to dismiss at this early stage.

(b) Covered Person

Portsmouth and PHA next argue that Banfield fails to allege facts sufficient to support a finding that they committed any acts required for liability under CERCLA. Specifically, they contend that Banfield's allegations concerning Portsmouth's and/or PHA's involvement in the urban renewal of the city are insufficient to support a finding that Portsmouth and/or PHA "contracted, agreed, or arranged" for disposal of hazardous materials.

Portsmouth and PHA are not wrong in arguing that the allegations related to contracting, agreeing, or arranging for the disposal of hazardous construction materials are sparse. The amended complaint alleges that:

28. . . . on June 2, 2009, Defendant William E. Copeland, as Executor of the Estate of Virginia Copeland, submitted a Registration Form for Landfills Not Operated After July 9, 1981 to DES, reporting that, during the 1960s, building and construction waste was disposed of on the site, as part of the City of Portsmouth's urban renewal.

29. According to the Portsmouth Housing Authority's website, the City created the Housing Authority in 1953, and many of its early projects involved the urban renewal of Portsmouth. Historical

documents, including City Annual Reports, indicate involvement of both the City and the Housing Authority in the urban development of Portsmouth.

Banfield's allegations are broad and unspecific, but sufficient (albeit barely) to avoid dismissal at this point.

"Within the CERCLA scheme, arranger liability was intended to deter and, if necessary, to sanction parties seeking to evade liability by 'contracting away' responsibility." United States v. Gen. Elec. Co., 670 F.3d 377, 382 (1st Cir. 2012). Pursuant to Section 9607(a)(3), CERCLA liability attaches if an entity enters "into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance." Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 610 (2009). While plaintiff does not directly allege that Portsmouth or PHA disposed of building and construction waste on the Property, plaintiff does allege that building and construction waste from Portsmouth's urban renewal (waste that contained hazardous materials) was dumped on the Property. It is not unreasonable to infer, based on that allegation, that the waste was dumped in accordance with an agreement between Portsmouth/PHA (or its contractors and the Copelands. On that thin basis, Banfield has sufficiently – albeit barely – alleged that Portsmouth and PHA are liable as arrangers under Section 9607(a)(3).

Portsmouth's and PHA's motions to dismiss plaintiff's CERCLA and NH RSA 147-B claims against them are denied.³

2. Negligence

To state a claim for negligence under New Hampshire law, a plaintiff must allege facts that show the defendant owed a duty, breached that duty, and that the breach caused the plaintiff harm. Yager v. Clauson, 169 N.H. 1, 5 (2016). "Whether a duty exists in a particular case is a question of law." Webber v. Deck, 433 F. Supp. 3d 237, 248 (D.N.H. 2020) (quoting Riso v. Dwyer, 168 N.H. 652, 654 (2016)).

In support of its negligence claim against Portsmouth and PHA, Banfield alleges that Portsmouth and PHA owed Banfield Realty a duty to "ensure that . . . businesses and activities [were] conducted on the Property in a manner so as to prevent

³ Portsmouth and PHA have also moved to dismiss plaintiff's claims for declaratory relief under CERCLA and N.H. Rev. Stat. Ann. 147-B, arguing that, because plaintiff has not stated a claim under either statute, there is no "active controversy." Because the court has determined that plaintiff has stated claims, that argument is unavailing.

For similar reasons, Portsmouth and PHA's motions to dismiss plaintiff's claim for contribution under N.H. Rev. Stat. Ann. 507:7-g are denied.

the release of contaminants into and onto the Property,” and that they breached that duty “by causing and/or allowing the release and disposal of contaminants into and onto the Property.” Compl. ¶¶ 81-82. Portsmouth and PHA argue that plaintiff’s negligence claim must be dismissed because, at the time of the alleged breach (purportedly in the 1960s), they did not owe a duty to Banfield Realty (which did not exist until January 27, 2020). PHA and Portsmouth further argue that the amended complaint fails to sufficiently allege facts that would support a finding that PHA and/or Portsmouth breached any common law negligence duty owed to Banfield.

Banfield does not directly address defendants’ argument, and instead counters that Portsmouth and PHA owed Banfield a common law duty to avoid the intentional entry onto the Property, which extends to the duty to remove things placed on the Property (and, to the extent that the Property’s prior owners consented to Portsmouth’s and PHA’s entry into the land, that consent was terminated when plaintiff purchased the Property). Plaintiff’s argument is not persuasive.

The imposition of a legal duty results from weighing certain policy considerations and determining that the plaintiff's interests are entitled to legal protection against

defendant's conduct. See Cui v. Chief, Barrington Police Dept., 155 N.H. 447, 449 (2007) ("The determination of legal duty focuses upon the policy issues that define the scope of the relationship between the parties. The relevant inquiry, therefore, is whether the plaintiff's interests are entitled to legal protection from the defendant's conduct, or at the defendant's hands, against the invasion which has in fact occurred. The existence of a duty depends upon what risks, if any, are reasonably foreseeable under the particular circumstances.") (quotations, brackets, and citations omitted).

The facts alleged by the plaintiff are somewhat unusual in that the Property was purportedly contaminated (at least in part) by Portsmouth's and PHA's disposal of hazardous debris with the prior owner's permission. Banfield cites no legal authority directly on point, and the general research has not identified any precedent analyzing facts substantially similar to those presented here.⁴

⁴ Lewis v. General Elec. Co., 254 F. Supp. 2d 205 (D. Mass. 2003), is somewhat aligned. In Lewis, property owners sued General Electric, claiming negligence and trespass arising from its disposal of fill dirt containing PCBs on the plaintiffs' residential property. Defendant moved for summary judgment on the plaintiffs' negligence claims, arguing, inter alia, that the deposit of the contaminated fill occurred prior to the plaintiffs' ownership, and the claims were not assigned to the plaintiffs as the current owners. Id. at 214. The court denied defendant's motion for summary judgment, noting that a

Courts have, however, examined whether a landowner owes a duty to subsequent owners in the context of environmental contamination. The majority of those courts have concluded that such a duty does not exist under common law. See, e.g., Wilson Auto Enterps., Inc. v. Mobil Oil Corp., 778 F. Supp. 101, 104 (D.R.I. 1991); John Boyd Co. v. Boston Gas Co., 775 F. Supp. 435, 438 (D. Mass. 1991) (“landowner owes no common law duty to subsequent owners with respect to the manner in which the land had been maintained prior to sale”); Hydro-Manufacturing, Inc. v. Kayser-Roth Corp., 640 A.2d 950 (R.I. 1994) (former landowner cannot be liable for contamination of property under theories of negligence, strict liability, or nuisance). Cf., Rolan v. Atl. Richfield Co., No. 1:16-CV-357-TLS, 2017 WL 3191791, at *17

tortfeasor should not be able to “escape liability by the happenstance of a property sale.” Id. at 215.

While the facts in Lewis are facially similar, they are distinguishable in two critical ways. First, in Lewis, the prior owners were unaware that the fill dirt GE was providing contained PCBs. Here, Portsmouth and PHA are alleged to have discarded construction and building debris with permission of the prior owners. Second, as the Lewis court summarized, “GE did little to supervise either what was used as fill or where it went. [GE’s] indifference persisted over the decades despite knowledge that the fill contained trash and PCBs, and despite growing knowledge, and eventually virtual certainty, that PCBs were hazardous.” 254 F. Supp. 2d at 208. Here, Banfield Realty does not allege that PHA or Portsmouth were at all aware that the construction and building debris deposited on the Property contained hazardous materials.

(N.D. Ind. July 26, 2017) (prior landowner owes no duty to tenants of residential housing complex when no relationship existed between prior owner and tenants; it was not foreseeable that the land would be converted to residential housing at the time prior owner was operating a factory on the land; and "public policy does not weigh in favor of holding Defendant . . . to a duty to future, unknown possessors of its own land.")

Those courts have generally reasoned:

The imposition of such a duty would be unreasonable because such future owners may not be known or even contemplated at the time the landowner creates or maintains a condition on his or her property. Moreover, such a duty would unreasonably interfere with a landowner's right of ownership; the right to do so with his or her property as desired without liability so long as he or she does not interfere with the interests of others.

Sanyo N. Am. Corp. v. Avco Corp., No. 1:06-CV-0405 LJM WTL, 2008 WL 2691095, at *5 (S.D. Ind. July 3, 2008) (quoting Wickens v. Shell Oil Co., No. 1:05-cv-645-SEB-JPG, 2006 WL 3254544, at *5 (S.D. Ind. Nov. 9, 2006)). See also Wellesley Hills Realty Tr. v. Mobil Oil Corp., 747 F. Supp. 93, 100 (D. Mass. 1990) (same).

Portsmouth cites Read v. Corning Inc., 351 F. Supp. 3d 342 (W.D.N.Y. 2018), which is helpful. In Read, plaintiffs filed suit against Corning asserting claims arising out of Corning's disposal of fill that contained hazardous substances, including

arsenic, cadmium, and lead. At the time the fill was deposited, the properties were owned by a predecessor-in-interest of Corning; several years later, the properties were acquired by plaintiffs. Plaintiffs alleged that Corning was negligent "in permitting the release of contaminants on the subject property, in failing to warn the plaintiffs about the dangers resulting therefrom, and in failing to remediate the contamination." Id. at 356. The court granted Corning's motion to dismiss the claim, noting that there was "no indication from the complaint that the disposal of those materials, at that time, was unlawful or unauthorized," and the complaint did not allege:

that at the time Corning deposited the fill . . . it knew or should have known that the fill contained hazardous chemicals. There are also no allegations that, at that time, Corning owed a duty to plaintiffs, which is not surprising, since plaintiffs did not purchase their properties until years later.

Id.

Given the allegations in the amended complaint, it would be a substantial stretch to conclude that, by dumping building and construction waste on privately-owned property, with the permission of the Property's prior owners, Portsmouth and PHA somehow breached a common law duty owed to Banfield Realty, a subsequent owner of the Property some forty years later (and an entity which did not exist at the time of the disposal). If the

common law declines to impose a duty on prior owners of property to refrain from activity that may harm the Property with respect to the interests of future owners, the imposition of such a duty upon third parties who dispose of materials on the Property with permission of the prior owners, would also be highly improbable. The amended complaint fails to delineate a relationship between Portsmouth/PHA and Banfield Realty that might make it reasonably foreseeable that Portsmouth's or PHA's disposal of construction and building debris in the 1960s (again, with permission) would ultimately harm Banfield Realty, an entity that did not exist until several decades later.⁵

PHA's and Portsmouth's motions to dismiss Banfield Realty's common law negligence claim against them is granted.

3. Negligence Per Se

For similar reasons, plaintiff's negligence per se claim against Portsmouth and PHA fails as a matter of law.

⁵ It bears mention that Banfield Realty is not without a remedy under federal and state law: both CERCLA and New Hampshire's statutory environmental law provide a potential remedy under circumstances like those described in this case.

Banfield alleges that, pursuant to New Hampshire Rev. Stat. Ann. 147-A:9 and 147-B:10, Portsmouth and PHA had a duty to avoid disposal of hazardous materials into the environment, and breached that duty in violation of statutory duties and obligations when they caused contaminants to be released onto the Property. Banfield notes that the operative question is whether it could have maintained actions against Portsmouth and PHA under the common law, not whether defendant owed a common law duty of care, and contends that it could have maintained actions under common law theories of nuisance and trespass. Banfield misconstrues the applicable law and its argument is unpersuasive.

Under New Hampshire law, the "doctrine of negligence per se . . . provides that where a cause of action does exist at common law, the standard of conduct to which a defendant will be held may be defined as that required by statute, rather than as the usual reasonable person standard." Marquay v. Eno, 139 N.H. 708, 713 (1995). The New Hampshire Supreme Court has stated that, when considering a negligence per se claim, courts must:

first inquire whether the plaintiff could maintain an action at common law. See Morris, The Role of Criminal Statutes in Negligence Actions, 49 Colum. L. Rev. 21, 21-22 (1949); Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317, 329-31 (1914); see also Linden, Tort Liability for Criminal Nonfeasance, 44 Canadian B. Rev. 25, 27, 41 (1966);

Fricke, The Juridical Nature of the Action Upon the Statute, 76 Law Q. Rev. 240, 265 (1960). Put another way, did the defendant owe a common law duty of due care to the plaintiff? If no common law duty exists, the plaintiff cannot maintain a negligence action, even though the defendant has violated a statutory duty.

Id. at 714. The court continued:

As a general rule, a person has no affirmative duty to aid or protect another. See Walls v. Oxford Management Co., 137 N.H. 653, 656 (1993). Such a duty may arise, however, if a special relationship exists. See, e.g., Murdock v. City of Keene, 137 N.H. 70, 72 (1993). "The relation of the parties determines whether any duty to use due care is imposed by law upon one party for the benefit of another. If there is no relationship, there is no duty." Guitarini v. Company, 98 N.H. 118, 119, (1953).

Id. See also Town of Londonderry v. Mesiti Dev., Inc., 168 N.H. 377, 384 (2015) ("Implicitly recognizing that a viable negligence claim requires the existence of a duty owed by the defendant to the plaintiff, see Lahm v. Farrington, 166 N.H. 146, 149 (2014), we explained in Marquay that the inquiry into 'whether the plaintiff could maintain an action at common law' is an inquiry into whether 'the defendant owe[d] a common law duty of care to the plaintiff.'" (quoting Marquay, 139 N.H. at 714).


As discussed supra, plaintiff has not sufficiently alleged the existence of a relationship between Portsmouth/PHA and Banfield Realty that would result in the imposition of a duty

upon Portsmouth/PHA. Because no duty exists, plaintiff's negligence per se claim fails. See Pruden v. CitiMortgage, Inc., No. 12-CV-452-LM, 2014 WL 2142155, at *19 (D.N.H. May 23, 2014) ("Negligence per se may establish the nature of a duty, but cannot establish the existence of a duty."). Accordingly, PHA's and Portsmouth's motion to dismiss plaintiff's negligence per se claim against them is granted.

Conclusion

For the foregoing reasons, as well as those set forth in Portsmouth's memoranda (documents no. 60-1 and 82) and PHA's memoranda (documents no. 65-1 and 86), Portsmouth's and PHA's motions to dismiss (document nos. 60 and 65) are **GRANTED** in part, and **DENIED** in part, as described herein.

SO ORDERED.



Steven J. McAuliffe
United States District Judge

October 13, 2023

cc: Counsel of record

Rick Chellman

224 State Street
PORTSMOUTH, NH 03801
p. 603.479-7195
Email: Chellman@TNDEngineering.com

Mr. Jim Hewitt
VIA EMAIL ONLY: samjakemax@aol.com

November 2, 2023

Jim,

As was the case when I wrote to you last year, and as remains so today, I appreciate your passion as a Planning Board member.

That noted, your recent email of October 30 sent to me, the entire board and apparently others causes me concern and confusion. For reasons I will address below, I am not going to refer to any specific application, but to the general principles by which all applications and processes should be governed.

The designation of an application as “complete” under State statutes means no less and no more than that the application is “sufficient to invoke jurisdiction” and “that sufficient information is included or submitted **to allow the board to proceed with consideration** to make an informed decision (emphasis added).”¹

Any claim that an application is somehow deficient and incomplete unless it contains “all the information needed make an informed decision on behalf of the People of Portsmouth” as you wrote is of course your individual opinion. While that opinion may in some abstract sense be laudable, that opinion is not in conformance with the laws under which we as planning board members must operate.

If, by that statement, you were implying some neglect of responsibility to the people of Portsmouth by me or other board members who disagreed with you, then you were more deeply wrong and were being needlessly bellicose.

If you are dissatisfied with what is discussed or decided during a meeting, such dissatisfaction is simply an occasional part of being one of nine members on a board. You and I have both been on the minority side of board votes deciding matters, but such is the nature of the board process- we all have to live with it when it occurs.

I am confused by what your intent may have been intended with other parts of your email. As we have been instructed, certain matters are preempted by State and Federal law. Preempted matters-no matter how interesting they may otherwise seem- are not properly planning board matters.

¹ RSA 674:4

State law is specific about this and whether such matters may come into play for a completed application, which you raise as your concern:

An application **shall not be considered incomplete** solely because it is dependent upon the submission of an application to or the issuance of permits or approvals from other state or federal governmental bodies (emphasis added).²

With respect to specific applications (and why I will not engage in specifics on an application here), I must insist that you be more careful. Applications must only be considered and discussed during the formal processes of public review. Moreover, decisions of the planning board are subject to appeal for 30 days after a decision and it is **highly inappropriate** for a board member to send what is purported to be, or may even be, new information, new opinions or afterthoughts to the board- especially while the appeal period is open.

In future, if you have questions about an application, the rules, our regulations or the relevant laws, please raise them during the meeting.

Please be more careful, respectful and cognizant of your position, the relevant laws and the sometimes differing positions of your fellow board members. I would greatly prefer to spend my time addressing the master plan and other issues that are important and more pressing matters for the board and the people of Portsmouth.

Sincerely,

A handwritten signature in black ink, appearing to read "Rick", with a stylized flourish extending to the right.

² RSA 676:4

Synthia Ravell

From: Synthia Ravell
Sent: Thursday, November 9, 2023 2:22 PM
To: Jim Hewitt (samjakemax@aol.com)
Cc: Mayor; Karen S. Conard; Susan G. Morrell; Trevor McCourt; Rick Chellman (chellman@tndengineering.com)
Subject: 375 Banfield Road Project
Attachments: Letter to Jim Hewitt 11-9-2023.pdf

Mr. Hewitt,

Attached please find for your review a letter from City Attorney Susan Morrell regarding the above-referenced matter.

Thank you,

Synthia M. Ravell

**Legal Administrator II
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801**

**(603) 610-7204 (Direct Dial)
(603) 427-1577 (Fax)**

City Hall Hours: Monday, 8:00 a.m. – 6:00 p.m.; Tuesday – Thursday, 8:00 a.m. – 4:30 p.m.; and Friday, 8:00 a.m. – 1:00 p.m.
(NOTE: If a holiday falls on a Monday, City Hall will be open until 6:00 p.m. on Tuesday)

The information in this message may be legally privileged and confidential. It is intended only for the use of the named individual. If you receive this communication in error, please notify me and delete the communication without making any copy or distributing it.



CITY OF PORTSMOUTH

City Hall, 1 Junkins Avenue
Portsmouth, New Hampshire 03801
sgmorrell@cityofportsmouth.com
(603) 610-7204

Susan G. Morrell
City Attorney

November 9, 2023

Jim Hewitt
samjakemax@aol.com

RE: 375 Banfield Road Project

Dear Mr. Hewitt:

I am writing regarding your recent email dated October 30, 2023, addressed to "Chair Chellman and Planning Board members" concerning the 375 Banfield Road Project approved by the Planning Board on October 19, 2023. Your email is problematic for four reasons. First, you were specifically advised by legal counsel at the hearing not to consider or discuss the pending litigation against the City. Second, your email demonstrates a clear bias towards this project, as you are advocating for consideration by the Planning Board of irrelevant facts not properly before it. Third, by circulating this information to the entire Board, you have potentially contaminated the votes of your fellow Board members and communicated to a quorum of the Planning Board about a matter pending before the Board, in violation of the Right to Know law. Fourth, these actions exhibit an undeniable pattern of scorning legal advice and the counsel of the Planning Board Chair relative to issues of bias and the Right to Know law.

Deputy City Attorney McCourt specifically advised the Board in response to your questions at the October 19 Planning Board meeting that the pending environmental litigation is not relevant to the subdivision application and that any consideration of the environmental issues would be improper and outside the scope of the Planning Board's review. Any consideration of the environmental litigation endangers the integrity of the Planning Board's decision. Nevertheless, you have continued to disregard this clear legal advice.

You were provided this advice, not because it was some academic exercise, but because by conducting independent research into the application and considering items outside of the

record, you have acted contrary to the juror standard that you must uphold when acting in a quasi-judicial role. These actions demonstrate your clear bias pertaining to this project. Therefore, in the event this project returns to the Planning Board for any reason, or if a subsequent project for either new parcel comes before the Planning Board, it would be improper and illegal for you to participate in the discussion or vote.

Exacerbating this issue, your email was provided to the entire Board. Your email was sent to city staff but was addressed to and blind copied to the entire Planning Board. The email attached the recent Federal Court Order in Banfield Realty, LLC v. The City of Portsmouth, et. al., partially granting the City's Motion to Dismiss. In addition, your email embedded links to several articles that discussed the alleged environmental contamination of this property.

As stated above, this information is not relevant to the Banfield Road project. In addition, it was provided outside of the public hearing. Although the project was approved on October 19, it will be subject to re-hearing and appeals for thirty (30) days from its approval and is therefore a matter still before the Board. Not only is this a violation of the Right to Know law, by addressing this email to the entire Board, you have potentially biased the entire Board as it pertains to these parcels. See Winslow v. Town of Holderness Planning Board, 125 N.H. 262, 268 (1984). If this matter were to come back before the Board for any reason, this communication would need to be disclosed to all parties and all of the members of the board would need to disclose whether they could disregard this information prior to their vote. You would need to recuse yourself from any consideration of or vote because your email is evidence of your bias.

Although RSA 673:14, I permits Planning Board members to consider facts "gained in the performance of the member's official duties", the limitation on jurors to consider only those facts presented at the hearing, providing each side with the opportunity to address those facts, is as old as the judicial system itself. See, e.g. Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print"). If information gained outside of a Board member's duties is relied upon in their decision, this is grounds for disqualification.

Bias is cause for disqualification for any potential juror or one acting in a quasi-judicial capacity. The process for disqualification of a member is set forth in RSA 673:14. The process permits the Board to vote on whether to disqualify a member, although this vote is advisory and non-binding. However, failure of a Board member to disqualify themselves in the face of clear and

documented bias would undermine the integrity of the Board's actions and likely result in costly litigation against the City.

This is not the first time you have chosen to ignore the legal advice provided by the City Attorney's Office to you and to the Planning Board. This pattern of behavior has persisted throughout your term as a Planning Board member. This is evidenced by numerous letters and emails sent to you from former City Attorney, Robert Sullivan, going back as far as December of 2021. In the December 15, 2021, email, City Attorney Sullivan advised you that land use board members must comply with the juror standard when acting in a quasi-judicial capacity. The juror standard is mandated by RSA 673:14, which requires a land use board member to disqualify themselves from any matter, if they "would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law." RSA 673:14 and 500-A:12(II).

Concerns regarding your conduct as a Board member, potential bias, and circumvention of the Right to Know law are also documented in email correspondence dated in February of 2022, March of 2022, July of 2022, September of 2022, and October of 2022. While initially you were apologetic for unintended missteps, your continued conduct contrary to this advice is evidence of your refusal to comply with the laws governing the operations of the Planning Board and its members. Therefore, any recurrence of the illegal conduct discussed above or any similar conduct or other illegal actions on your part will lead to the initiation of your removal from the Planning Board pursuant to RSA 673:13 and an ethics complaint pursuant to the City's Ethic's Ordinance, Chapter I, Article 8, if the conduct warrants a complaint.

Sincerely,



Susan G. Morrell
City Attorney

cc: Karen Conard, City Manager
Trevor P. McCourt, Deputy City Attorney
Rick Chellman, Planning Board Chairman
Deaglan McEachern, Mayor

EXHIBIT 6

Susan G. Morrell

From: Peter M. Stith
Sent: Friday, January 5, 2024 7:57 AM
To: Susan G. Morrell; Trevor McCourt; Rick Chellman
Cc: Peter L. Britz; Karen S. Conard
Subject: Fw: 581 Lafayette Road
Attachments: 581 Lafayette Rd Parking.pdf; LU22-07 Parking Needs Analysis 2022-05-19 (7).pdf

FYI

Peter Stith, AICP
Planning Manager
Planning & Sustainability Department
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801
603.610.4188
www.cityofportsmouth.com

From: JAH <samjakemax@aol.com>
Sent: Thursday, January 4, 2024 9:46 PM
To: Peter L. Britz <plbritz@cityofportsmouth.com>; Peter M. Stith <pmstith@cityofportsmouth.com>; Dave J. Desfosses <djdesfosses@cityofportsmouth.com>; Zachary M. Cronin <zmcronin@cityofportsmouth.com>; Shanti R. Wolph <srwolph@cityofportsmouth.com>; Eric B. Eby <ebeby@cityofportsmouth.com>; Patrick R. Howe <prhowe@cityofportsmouth.com>; Kimberli Kienia <kkienia@cityofportsmouth.com>; Kate E. Homet <kehomet@cityofportsmouth.com>; GOV Mike Maloney <maloneym@portsmouthnhpd.gov>
Cc: Trevor McCourt <tmccourt@cityofportsmouth.com>
Subject: 581 Lafayette Road

Dear Site Plan Review Technical Advisory Committee:

I noted at the January 2, 2024 TAC meeting that the applicant of the subject site had not addressed the encroachments noted in paragraph 1 below. I understand there are two ways to address these encroachments, as follows:

- A) Remove all the applicant's proposed and existing improvements from the abutting property to be in compliance with Portsmouth Site Plan regulations
- B) The applicant and the abutting landowner agree to formalize these encroachments with legal agreement that is recorded at the Rockingham County Registry of Deeds. Since there is no assurance an agreement will be reached, this encroachment agreement needs to be produced prior to TAC approval.

City legal staff may be able to provide additional assistance on the options to legally resolve this encroachment issue.

There are 29 parking spaces that do not meet Portsmouth's parking space dimensional requirements because a portion of the parking space is located off the applicant's property. Therefore, at a minimum, these spaces cannot be used in the overall parking supply total.

I also noted the City was not provided any information that demonstrates the site will have adequate parking. As explained in the attached May 19, 2022 report for West End Yards, Portsmouth current multi-family parking requirements woefully underestimate actual parking demand. As some of you may recall, for the 250 apartment complex at West End Yards, Portsmouth regulations required 287 spaces and the report concluded the project needed 409 spaces. Luckily, West End Yards had room to construct an additional 122 spaces.

I suggest TAC require the applicant to produce parking demand data for a similar size apartment complex that indicates 65 parking spaces for 72 apartments / 116 bedroom will be adequate. If not, then the site plans should show where additional parking (50 +/- spaces) can be constructed should the 65 spaces not be enough.

Regards,

Jim Hewitt

----- Forwarded Message -----

From: JAH <samjakemax@aol.com>

To: Peter L. Britz <plbritz@cityofportsmouth.com>; Peter M. Stith <pmstith@cityofportsmouth.com>; Dave Desfosses <djdesfosses@cityofportsmouth.com>; Zachary M. Cronin <zmcronin@cityofportsmouth.com>; srwolph@cityofportsmouth.com <srwolph@cityofportsmouth.com>; Eric B. Eby <ebeby@cityofportsmouth.com>; prhowe@cityofportsmouth.com <prhowe@cityofportsmouth.com>

Sent: Wednesday, December 27, 2023 at 09:37:43 PM EST

Subject: 581 Lafayette Road

Dear Site Plan Review Technical Advisory Committee:

I wish to make you aware of some concerns I have regarding the subject site, as follows:

1) I note the applicant has pavement, curb, light poles and irrigation equipment on his abutter's property to the west. See sheet C1. Typically, all existing and proposed site improvements need to be on the applicant's property. Note #10 says these encroachments are identified on the 2011 NHDOT project plans. Links to these plans are below.

[Repro Desk. \(nh.gov\)](https://gis.dot.nh.gov/plan/13455A.POP.pdf)

<https://gis.dot.nh.gov/plan/13455A.POP.pdf>

The noted encroachments are not identified on these plans. I suggest TAC require the applicant to produce recorded easement documents that make these off-site encroachments legal.

2) The proposed project will have 72 apartments and 116 bedrooms. See attached. The applicant has stated publicly this apartment complex is designed for working adults in the restaurant / hospitality industry. Therefore, it is reasonable to assume there will be a minimum of one adult per bedroom. Portsmouth multi-family parking requirements will require this project to have 65 parking

spaces. In order for 65 parking spaces to meet actual demand, it assumes 45% of the residents will not own cars (51 residents).

For comparison, the May, 2022 West End Yards Parking Study, (based on actual demand), concluded at their 250-apartment complex, a 2-bedroom apartment needed 2 parking spaces per unit and 1 bedroom / studio required 1.25 space per unit. Using these standards, the 581 Lafayette project would need 110 spaces to meet demand.

In Dover, the same project in its downtown would require 119 spaces. See link below.

<https://ecode360.com/33400535>

I suggest TAC require the applicant to produce parking demand data for a similar size apartment complex that indicates 65 parking spaces for 72 apartments / 116 bedroom will be adequate.

Regards,

Jim Hewitt

ARTICLE IV
§ 153-14-D(1)(c)

POWER, NH REGS
CENTRAL BUSINESS DISTRICT (REDUCED PARKING ZONE)

1.25 SPACES / UNIT + 0.4 / UNIT

$72(1.25) + 0.4(72) = 90 + 29 = 119$ SPACES

Apartment Types - Unit Mix & Locations

level	number of bedrooms per apartment			Total
	S	1	2	
5	5	5	2 4 BR	15
4	3	9	3 6 BR	19
3	3	10	3 6 BR	20
2	5	5	2 4 BR	18
total	16-1 BR	29 1-BR	10 2 BR	72

Level	A	B	TOTAL
5	8	7	15
4	8	11	19
3	9	11	20
2	11	7	18
total	36	36	72

116 BR

TOTAL APARTMENTS
A
TOTAL BEDROOMS

65 APARTMENT
PARKING SPACES
REQUIRED

≈ 11 PARKING SPACES
PER 20 BEDROOMS

WEST YARDS DEMAND STANDARD: 1 BR = 1.25 SPACES
 $(16 + 29) \times 1.25 + 27(2.0) = 110$ SPACES
2 BR = 2.0 SPACES

SHEET C4
12-19-23



FUSS & O'NEILL

May 19, 2022

Beverly Mesa-Zendt
Planning Director
City of Portsmouth
1 Junkins Ave, 3rd Floor
Portsmouth, NH 03801

RE: LU 22-7; Cate Street Development, LLC
Residential Parking Need Analysis;
West End Yards Development Site
Site Plan Review Application and Boundary Line Adjustment
Fuss & O'Neill Reference No. 20180317.B10

Dear Ms. Mesa Zendt:

As requested at the March 17, 2022 Planning Board Meeting, the following is a brief analysis of parking need being witnessed by Torrington Properties at the West End Yards Apartment site.

The leasing office of Torrington Properties for West End Yards is seeing the following trends from tenants signing leases:

- Studio Leases; Units <500 sq.ft.
 - These would be most in line with Units<500-sq.ft. on the Parking Tables per 10.1112.30
 - Tenants want 1 parking space.
 - There are some exceptions but the vast majority want 1 space
 - 10.1112.30 requires 0.5 spaces per unit
 - The Required Parking by 10.1112.30 is deficient when compared to what the actual market is demanding.

- One Bedroom Units; Units 500-750 sq.ft.
 - The tenants leasing these units are requiring at least 1 space.
 - In some cases, the tenants are requesting 2 spaces, particularly in the case of couples.
 - 10.1112.30 requires 1 spaces per unit
 - The Required Parking by 10.1112.30 is deficient when compared to what the actual market is demanding.

- Two bedroom Units; Units >750 sq.ft.
 - The tenants leasing these units are requiring 1 to 2 spaces.

5 Fletcher Street
Suite 1
Kennebunk, ME
04043
t 207.363.0669
800.286.2469
f 860.533.5143

www.fando.com

California
Connecticut
Maine
Massachusetts
New Hampshire
Rhode Island
Vermont

- 10.1112.30 requires 1.3 spaces per unit
- The Required Parking by 10.1112.30 seems to be closer to need when compared to what the actual market is demanding.

The following table represents what Torrington Properties is experiencing on a per unit basis in Apartment Building A and B. The comparison is based upon the final approved parking lot make up. In this case the parking lot allocates 359 spaces to Apartment Buildings A & B.

Table 1; Actual Per Unit Parking Demand

Building	# of Units	# of Designated Spaces	Ratio (spaces / unit)
A	132	190	1.44
B	118	169	1.43

Another useful comparison is parking versus bedrooms. This comparison speaks to what Torrington Properties is experiencing with the smaller studio and one bedroom units; they are indeed requiring 1 space each or more. This also helps to illustrate that the 1 bedroom units are experiencing a demand by tenants for more than 1 space in some cases. Refer to Table 2 below.

Table 2; Actual Per Bedroom Parking Demand

Building	# of Bedrooms	# of Designated Spaces	Ratio (spaces / unit)
A	172	189	1.10
B	139	169	1.22

We hope that the above analysis of parking need is helpful to The City Staff and Planning Board for use in understanding the need for parking at West End Yards' Apartment Buildings and in reviewing other multi-family housing projects in the future.

If you have any questions or concerns, please do not hesitate to contact me at (207) 363-0669 x2314 or by email (rlundborn@fando.com).

Sincerely,



Rick Lundborn, PE
Senior Project Manager

/BH

c: Cate Street Development, LLC
August Consulting, PLLC
Bosen & Associates

EXHIBIT 7

Susan G. Morrell

From: Mayor
Sent: Thursday, January 11, 2024 6:18 PM
To: Rick Chellman; JAH
Cc: Susan G. Morrell
Subject: Re: Request for James Hewitt to Resign from the Planning Board

Jim,

As Chairman Chellman points out you were provided two options during our meeting based on legal recommendation to me.

Through the work of Chairman Chellman and City Attorney Morrell, a third option was created.

I am disappointed you did not entertain that option.

A memo from the City Attorney will now appear on the packet for our review.

Enjoy your evening,
Deaglan

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From: Rick Chellman <chellman@tndengineering.com>
Sent: Thursday, January 11, 2024 1:21 PM
To: JAH <samjakemax@aol.com>
Cc: Mayor <mayor@cityofportsmouth.com>; Susan G. Morrell <sgmorrell@cityofportsmouth.com>
Subject: Re: Request for James Hewitt to Resign from the Planning Board

Jim,

I am disappointed and disheartened to see this letter from you. The letter does not conform to any of our discussions, and I will not lend any credence to it by any other references to it.

At the 1/9 meeting, two options were explained to you regarding your position as a planning board member; those two options both will result in a termination of that position. Since that time, I have worked very hard for a third option that will allow you to continue your service on the planning board with the simple written acknowledgment of your past transgressions, and I have explained that to you a few times since.

At the moment, all three options remain available to you, but it seems apparent to me that you are not seeking an amicable resolution with the simple written acknowledgment of what you said to the Mayor and to me at Monday's meeting.

As I understand it, the letter portion of that third option will remain available for your review and consideration this afternoon. After that, it is also my understanding that a public hearing will be scheduled pursuant to RSA 673:13 as we have repeatedly discussed.

I am at my wits end on this- I have tried very diligently to find a way to keep you on the board, but you seem to desire otherwise for reasons I cannot fathom.

It's your decision.

Rick Chellman, Chair

On Jan 11, 2024, at 12:13 PM, JAH <samjakemax@aol.com> wrote:

Dear Mayor:

Attached please find a letter for your review.

Regards,

Jim Hewitt

<1.11.2024 Hewitt to McEachern .pdf>

January 11, 2024

Mayor Deaglan McEachern
Portsmouth City Hall
1 Junkins Ave
Portsmouth, NH 03801

Subject: Request for James Hewitt to Resign from the Planning Board

Dear Mayor McEachern:

At our meeting in your office on January 9, 2024 with Rick Chellman, you requested that I resign from the planning board. At that time, I respectfully asked the City to provide me with a document that itemizes the reasons and evidence justifying the City's request for my resignation. This letter will serve to formalize this request.

Thank you.

Regards,


James A. Hewitt

cc: Rick Chellman, Planning Board Chair
Susan Morell, City Attorney

EXHIBIT 8

Hewitt: Special Treatment for Special People

Editor Published December 18, 2023

Last updated: 2023/12/18 at 2:16 PM

Isn't that how it goes in Portsmouth?

I see the City has wasted no time removing the COAST bus stop in Market Square and replacing it with four 15-minute parking spaces. Recall these spaces are replacements for the ones to be removed on High Street by the One Congress project.

Portsmouth, “the Eco-Municipality”, claims to be all about dismantling the car culture and encouraging climate action like mass transit use, unless it interferes with stuffing more cash into the pockets of those that have acquired most favored resident status.

So, COAST mass transit riders, if you're wondering what happened to your Market Square stop, the environmental hypocrites on the City Council have made their rich friend richer and thrown you under the bus.

James A. Hewitt

Portsmouth, NH



Hewitt: Special Treatment for Special People (Part II)

Editor Published January 2, 2024

Last updated: 2024/01/02 at 8:25 AM

To the Editor:

Isn't that how it goes in Portsmouth? In 2023 I see the City continued its 30-year-old corporate welfare program for its pals at the PDA Golf Course by supplying them with 15 million gallons of free water. The questionable details of this deal can be found in the links below where the reader will note this freebie went from 9 million gallons in 1993 to 15 million gallons in 1998.

Wonder why the 66% bump? The oblivious saps on the Portsmouth water system are left to pick up the PDA's water tab, which in 2022 came to \$254,900.00.

But wait, there's more.

When the PDA exceeds its 15-million-gallon handout, Portsmouth bills the extra water using the residential water rate (\$5.70 / 748 gallons) rather than the applicable irrigation rate (\$13.28 / 748 gallons). With this bonus feature, in 2022 when the golf course used 20,439,000 gallons, the PDA was able to pocket an additional \$52,700.00.

[Municipal-WWDisposalServicesAgr.pdf \(cityofportsmouth.com\)](#) page 11

[Municipal-Amd1toWWDIsposalandWaterServiceAgr.pdf \(cityofportsmouth.com\)](#) page 5

So, Portsmouth water system customers, next time you're on water restrictions and being environmentally responsible watching your lawn turn brown, know that City Hall's pauper friends out on the PDA links have their spigots wide open keeping every blade of grass just the right shade of Dartmouth green.

James A. Hewitt

Portsmouth, NH

FEBRUARY 12, 2024 SPECIAL CITY COUNCIL MEETING

PRESENTATION BY COUNSEL FOR MR. HEWITT

PLEASE CLICK LINK BELOW FOR ATTACHMENTS:

<https://files.cityofportsmouth.com/agendas/2024/City+Council/Hewitt+Docs+-+combined.pdf>