THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

In re Application of Stone Creek Realty, LLC, CPI Management, LLC, and Boston & Maine Corporation regarding the property located at

53 Green Street

OBJECTION TO STONE CREEK REALTY'S
MOTION TO RECONSIDER ZBA's DECISION
ON APPELLANTS' MOTION FOR REHEARING

The appellants in the above-referenced matter hereby object to Stone Creek Realty's Motion to Reconsider ZBA's Decision on Appellants' Motion for Rehearing. As grounds for their objection, the appellants state the following:

I. ZBA Member Rossi had sufficiently familiarized himself with the record to be entitled to vote.

The developers have correctly stated the standard by which it is to be determined whether a ZBA member who did not participate in the Board's original decision on a land use application may vote on the disappointed party's motion for rehearing: The new ZBA member may vote on the motion for rehearing if he has familiarized himself with the record to a sufficient extent that he is able to understand the issue(s). Auger v. Town of Strafford, 156 N.H. 64, 68-69, 931 A.2d 1213, 1217-18 (2007); Appeal

of Seacoast Anti-Pollution League, 125 N.H. 708, 715-16, 490 A.2d 1329, 1335-36 (1984); Appeal of Alton School District, 140 N.H. 303, 313-14, 666 A.2d 937, 944 (1995). See also New Hampshire Municipal Association's February 2008 advisory, quoted by the developers in their motion.

Contrary to the developers' contention, however, ZBA member Thomas Rossi did indeed meet this standard. His remarks at the December 21, 2021 meeting of this Board amply demonstrated that he had familiarized himself with the record to a sufficient extent that he well understood the issues, and accordingly the developers' present motion for reconsideration must be denied. Though they have correctly stated the legal standard, the developers have reached the wrong conclusion on the facts.

Initially, it must be noted that the developers' present motion is a prime example of the proverbial tempest in a teapot. If ZBA member Rossi had not familiarized himself with the record to a sufficient extent to meet with the developers' liking as of the time that he voted to grant the appellants' motion for rehearing at this Board's December 21, 2021 meeting, the appellants are willing to lay steep odds that he will have done so by the time that this Board entertains the developers' motion for reconsideration at its upcoming, January 18, 2022 meeting. Therefore, the issue will soon be moot.

Far more importantly, it is clear from Mr. Rossi's brief remarks at the December 21, 2021 hearing that he was well

familiar with the issues. On his own initiative, he noted that his review of the record had revealed to him that the zoning map had been drafted in such a fashion that the 100' wetlands buffer zone was specifically excluded from the overlay district. Further, it was clear that he appreciated the significance of that fact: How can the Zoning Ordinance's provisions relating to overlay districts be deemed to take precedence over the conflicting provisions of the wetlands protection sections of the Zoning Ordinance, if the overlay district does not even encompass, nor even overlap, the wetlands buffer zone? This was a non-obvious circumstance that only a close reading of the zoning map would have divulged, and which he obviously conducted. It is clear that he understood the issues, and his remarks further suggested that he believed that that particular aspect of this Board's October 19, 2021 decision--allowing the overlay district to trump the 100' wetlands buffer--may have been erroneous. The latter circumstance, too, is justification for a rehearing.

It is apparently the developers' position that Mr. Rossi was required to watch the entire, two-hour YouTube video recording of the hearing on the citizen opponents' appeal at this Board's October 19, 2021 meeting in order for him to be sufficiently familiar with the proceedings to participate in the consideration of, and to vote on, the appellants' motion for rehearing. However, this has never been required. In the past, it has been commonplace for members of this Board who may have been absent

from meetings at which particular applications were originally entertained, to vote on motions for rehearing thereon based solely on their review of the meeting minutes of those earlier meetings. Longtime ZBA Chairman Charles LeBlanc, for one, had no qualms about relying on the written meeting minutes of earlier meetings from which he had been absent, in order to familiarize himself with the events that had transpired at those meetings and to familiarize himself with the issues, and he did note hesitate to vote on motions for rehearing of this Board's decisions of those meetings. Watching the entire video of a prior hearing, especially a lengthy one, has never been required.

II. A tie vote on a motion for rehearing is treated as a granting of that motion under the Board of Adjustment's Rules and Regulations.

The developers' complaint that this Board erred in granting a rehearing on the basis of a 3-3 tie vote is meritless. Regardless of whatever may be required in the case of the granting or a denial of a variance, a special exception, or an appeal, the rule governing motions for rehearing is clear: a tie vote on the motion is treated as a granting of that motion, as long as there were at least three affirmative votes in favor of the motion. Part VI, Rule 5, of the Zoning Board of Adjustment Rules provides:

> Granting a request for a rehearing of a Variance or Special Exception requires a majority vote of members present and voting or in the case of a tie vote three (3) affirmative votes shall be required.

In this case, there was a 3-3 tie vote on both the motion to deny the appellants' request for rehearing and the motion to grant it, and the motion to grant it garnered three affirmative votes. Therefore, the motion for rehearing is to be granted.

The developers' attempt to rewrite the unambiguous language of this rule through legalistic acrobatics is unavailing. First of all, Rules VI(5) and -(6) are the only rules in the Zoning Board of Adjustment Rules and Regulations which address, or even mention, the subjects of tie votes and motions for rehearing. It is merely logical that in the absence of any language which carves out an exception for administrative appeals, the same rules of procedure should apply to motions for rehearing on appeals and motions for rehearing on the granting or denial of variances and special exceptions. Secondly, it would be a profound leap of logic to suppose, as the developers argue, that the draftmen of this rule (presumably, members of the Planning Department) intentionally meant to exclude administrative appeals from the above procedure (i.e., that a tie vote on a motion for rehearing results in a granting of that motion) by failing to specifically mention them. True, Rule VI(5) specifically mentions only variances and special exceptions; but on the other hand, variances and special exceptions make up the bulk of this Board's business. By contrast, administrative appeals from Planning Department members' decisions are relatively infrequent;

and, at least until recently, appeals of Planning Board decisions to the Board of Adjustment have been exceptionally rare.

For all of these reasons, it would be illogical to assume that by their mere silence on the issue the drafters of the ZBA's Rules and Regulations meant to intentionally exclude administrative appeals of Planning Board decisions from the rule's provisions regarding tie votes on motions for rehearing. It is significant that Principal Planner Peter Stith, who is probably as authoritative a source as any on the subject, raised the issue on his own initiative during the December 21, 2021 hearing and volunteered that Rule VI(5) does, indeed, apply to motions for rehearing on appeals from Planning Board decisions.

The developers' reliance on the principles of statutory construction are similarly unavailing and inapposite, for the process for drafting New Hampshire state statutes is far more rigorous, detailed, and comprehensive than that for drafting local rules of land use board procedure. In the typical case a legislative bill, once it is introduced, is referred to committee for study and public input and for "wordsmithing" of the language. On any important bill (and quite a few of the relatively unimportant ones) there will be at least one public hearing, and there will also be legislative debate on its language and content (or at least the opportunity for same) before it is passed. By contrast, the drafting of local rules of land use board procedure is typically done entirely by the Planning Department,

perhaps with substantive input from the land use board itself, and in the ordinary case the board simply approves the final package of rules with little or no debate. Far less time, effort, and effort goes into the drafting such rules than in the drafting of state statutes.

For that reason, it would be a mistake to infer that by omitting reference to administrative appeals from Rule VI(5), the Planning Department and the other relevant local bodies specifically intended to exclude such appeals from the rule that a tie vote on a motion for rehearing results in the granting of that motion. More likely, its omission was a mere oversight on the part of the draftsmen in the Planning Department, or perhaps they never even gave the matter any thought. In any event, there is no logical basis for differentiating motions for rehearing on administrative appeals and motions for rehearing on the granting or denial of variances and special exceptions. They should all be treated the same, and the language of Rule VI(5) itself suggests as much. The fact that Principal Planner Peter Stith agrees with this interpretation, and in fact volunteered it on his own initiative at the December 21, 2021 meeting, constitutes considerable support for that interpretation. The developers' motion is meritless.

III. "Unlawful or Unreasonable" is the Wrong Standard.

In their motion for reconsideration the developers next argue that this Board could not have granted, and was obligated

to deny, the appellants' motion for rehearing because there was no showing by the appellants or finding by this Board that its prior decision was "unlawful or unreasonable". At the land use board level, however, "unlawful or unreasonable" is the wrong test. The "unlawful or unreasonable" standard is the one which is to be observed by the Superior Court when entertaining an appeal of a land use board's decision. The standard which the ZBA employs when it entertains an appeal of the decision of a code official or another land use board is much lower.

It is to be borne in mind that the fundamental, underlying, philosophical purpose of motions for rehearing is to give the land use board one last chance to correct its own mistakes before burdening the courts' dockets with appeals. 15 Peter J. Loughlin, New Hampshire Practice: Land Use Planning and Zoning § 21.19 (4th ed. 2010). It is for that reason that motions for rehearing are mandatory before taking an appeal to the Superior Court. Id. If the complaining party fails to file a timely motion for rehearing in the ZBA and to have it acted-upon before taking his appeal to the Superior Court, the court will lack jurisdiction, and his appeal will be dismissed. Id. In light of this underlying purpose, if follows that if, on reconsideration, a board believes that it previously committed an error which might have affected the outcome, no matter how slight, a rehearing should be granted. Id. "Unlawful or unreasonable" is simply not the test.

IV. New Grounds and New Evidence

In addition to the reasons mentioned in the discussion above, new and additional grounds exist for the appellants' request for rehearing, of which the appellants were not aware and could not reasonably have been aware as of the time that they originally filed their motion for rehearing. Those grounds are: (1) On its own initiative, the Conservation Law Foundation, a well-known and reputable nonprofit organization dedicated to preservation of the environment in New Hampshire, has issued a letter dated December 23, 2021 asserting that the Planning Board, and particularly its then-chairman, completely misconstrued the remarks of one of its (the CLF's) representatives when she spoke at a public hearing concerning one of the adjoining, related projects that is being proposed by these same developers for construction on the North Mill Pond, and that the chairman and the Planning Board used that erroneous interpretation as one of the bases for granting approval to both the other project and the one at 53 Green Street which is the subject of the present appeal.[1] (2) An ineligible member of the Planning Board participated in the decision to grant site plan approval to the developers of the subject project at 53 Green Street and voted to grant such approval. Under the teachings of the New Hampshire Supreme Court's decision in Winslow v. Town of Holderness Planning Bd., 125 N.H.

1. A copy of the letter is appended hereto as Attachment A.

262, 480 A.2d 114 (1984), the Planning Board's decision is therefore void.[2]

A. Misinterpretation of CLF's Presentation

A copy of the Conservation Law Foundation's letter of December 23, 2021 to the Planning Board's then-chairman and members, signed by two of that organization's officers, is appended hereto as Attachment A and is self-explanatory. In that letter, the CLF observed that one of the letter's authors, Melissa Paly, had appeared and spoken at the Portsmouth Planning Board's April 15, 2021 hearing on the 105 Bartlett Street project, in order to favor the Planning Board with her opinion and expertise. In her presentation, she had praised the developers' stormwater run-off plan but otherwise condemned the notion of encroaching upon the 100' wetlands buffer. In their letter the authors complain that during the ensuing deliberations, then-Chairman Dexter Legg and certain other members of the Planning Board had cherry-picked Ms.

2. The culprit member's ineligibility to sit on the Planning Board was first brought to the public's attention by another member of the Planning Board itself, Rick Chellman, at that board's December 16, 2021 meeting, after the appellants had already filed their motion for rehearing in this matter and before they were otherwise aware of the issue. Mr. Chellman had written a letter to City Attorney Robert Sullivan on December 1, 2021, challenging the subject member's eligibility to sit and laying out in detail the legal basis for the challenge. For his part, upon learning of these circumstances the appellants' undersigned counsel himself wrote a letter to the Planning Board chairman on December 29, 2021, formally requesting that the member refrain from participating in any further Planning Board proceedings and similarly outlining in detail the reasons why that member was ineligible. (The request was ignored.) Copies of both the undersigned counsel's letter and Planning Board member Chellman's letter are collectively appended hereto as Attachment B.

Paly's remarks concerning the stormwater run-off treatment program and used those remarks as part of their basis for granting approval to the developers' project, while simultaneously ignoring her warnings concerning the 100' wetlands buffer, and they granted a wetlands conditional use permit which allowed substantial encroachment into that buffer. While giving credit where credit was due for the stormwater run-off treatment aspect of the developers' plan, Ms. Paly had opposed that plan overall.

In their letter, the CLF officials proceed to complain that in a subsequent, December 16, 2021 meeting of the Planning Board, Chairman Legg had once again gerrymandered Ms. Paly's remarks from the April 15, 2021 meeting and used them as a basis for granting approval to an entirely different project, the Raynes Avenue project. Setting aside the fact that it was inappropriate to use her comments concerning one project to justify approval of another, inasmuch as her opinions on any given project "will always be based on site-specific characteristics," the CLF officials complained that "the Chairman's comments ignored a critical element of [Ms. Paly's] April 15 testimony about the dual importance of both stormwater management and buffers to improving water quality." (See Attachment A hereto (emphasis in original).) "Furthermore, we request that [Ms. Paly's] comments be viewed fully rather than parsed to justify encroachments into critically important wetland buffers." (Id.)

In conjunction with the 53 Green Street project, the same essential group of developers similarly bragged about their stormwater treatment plan while downplaying the negative effect that their project would have on the 100' wetlands buffer. Their misuse of the information imparted to the Planning Board by the Conversation Law Foundation's expert serves as additional justification for a rehearing. The subject letter from the CLF is dated December 23, 2021 and thus was dispatched after the Board of Adjustment's last meeting, on December 21, 2021, and therefore there is obviously no way that the appellants could have been aware of it before that meeting. It plainly qualifies as newly-discovered evidence, unavailable to them at the time that they filed their motion for rehearing, and justifies a granting of that rehearing.

B. Ineligible Planning Board Member

A rehearing is also justified by the fact that an ineligible Planning Board member, Raymond Pezzullo, participated in the hearing on the 53 Green Street project and voted to approve it. Under the teachings of Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984), the Planning Board's decision approving that project is void by virtue of the participation of the ineligible member. In brief, Portsmouth's present method of selecting and seating Planning Board members conflicts with New Hampshire's statutory scheme, and Mr. Pezzullo was appointed and confirmed unlawfully.

The issue of Mr. Pezzullo's lack of eligibility to sit on the Planning Board was actually raised initially by another member of the Planning Board itself, Rick Chellman. On December 1, 2021, Mr. Chellman wrote a letter to City Attorney Bob Sullivan, drawing into question Mr. Pezzullo's eligibility, laying out the reasons why he believed that the latter was ineligible to serve, and citing the New Hampshire state statutes that control the issue. See RSA 673:2. The issue was not first brought to the public's attention until the time of the Planning Board's December 16, 2021 meeting--long after the appellants had filed their motion for rehearing in the instant matter--and even then the disclosure was rather cryptic. It consisted of only a brief, on-the-record colloquy between Mr. Chellman and then-Chairman Dexter Legg. However, it at least came to light that Mr. Chellman had sent a letter to City Attorney Sullivan and that there was some question as to whether one then-unnamed Planning Board member was eligible to sit.

Further inquiry by the appellants' undersigned counsel, his curiosity having been piqued, revealed that there was indeed a conflict between RSA 673:2 and the provisions of the City's Administrative Code, that Mr. Chellman was correct, and that Mr. Pezzullo had been improperly appointed to the Planning Board and was ineligible to participate and vote. Accordingly, on December 29, 2021 the appellants' counsel wrote a letter of his own to the Planning Board's then-chairman, formally requesting that Mr.

Pezzullo refrain from voting on any of the applications that were then pending before the Planning Board and that he otherwise refrain from participating in any further Planning Board proceedings. (Copies of the undersigned's letter, and Mr. Chellman's, are collectively appended hereto as Attachment B.)

Once again, both letters are fairly self-explanatory. Briefly summarizing their contents: [a] There is a conflict between RSA 673:2 and section 1.303 of the City's Administrative Code, relating to the composition of the Planning Board and the method of appointment of its members. [b] RSA 673:2 provides that in cities having a city manager form of government, there shall be nine regular members of the Planning Board (not counting alternates), two of whom are to be ex officio members and the other seven of whom are to be appointed by the mayor and confirmed by the City Council. [c] Of the two ex officio members, (i) one is to be the city manager or, if she chooses, someone whom she appoints to serve in her place, and (ii) the other is to be a member of the City Council, whom the City Council itself selects. [d] In conflict with this statutory scheme, section 1.303 of the City's Administrative Code provides that a third member of the Planning Board is to be an ex officio member, appointed by the city manager from the City's administrative staff, increasing the number of ex officio members to three and reducing the number of regular members appointed by the mayor from seven, as required by the statute, to six. RSA 673:2 does

not permit a third ex officio member. [e] By virtue of the foregoing, the procedure laid out in Portsmouth's Administrative Code for selecting and seating Planning Board members is illegal, being in conflict of a state statute, and Mr. Pezzullo was appointed unlawfully. [f] Further, the appointment of a member of the Planning Board by the city manager from the administrative staff creates an inherent conflict of interest, for the city manager is the member's "boss" and he is beholden to her for his job, and so he is unlikely to exercise independent judgment and vote in a manner which displeases her. In practical effect, under section 1.303 of the City's Administrative Code the city manager gets two votes on the Planning Board, whereas the members appointed by the mayor and confirmed by the City Council get only one. [g] Finally, Mr. Pezzullo was appointed to the Planning Board by former City Manager John Bohenko, and as an ex officio member his term of office expired when his "appointing authority," City Manager Bohenko, retired and ceased to be the city manager, which was two years ago. Mr. Pezzullo was never reappointed by the current city manager or confirmed by the City Council following Mr. Bohenko's retirement. For that reason, also, Mr. Pezzullo is holding his seat on the Planning Board unlawfully, even under the City's own administrative scheme, and he illegally participated in the vote to approve the subject project.

All of the foregoing are new and additional grounds for vacating the Planning Board's decision, and moreover they all constitute newly-discovered evidence which was unknown to the appellants at the time that their motion for rehearing was filed. For these reasons, also, a rehearing is justified.

For all of the foregoing reasons, Stone Creek Realty's Motion to Reconsider ZBA's Decision on Appellants' Motion for Rehearing should be denied, and a rehearing on the appellants' appeal should be conducted.

/s/ Duncan J. MacCallum

Duncan J. MacCallum
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Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned, Duncan J. MacCallum, Attorney for Appellants in the within proceeding, hereby certifies that on this 12th day of January, 2022, the foregoing Objection to Stone Creek Realty's Motion to Reconsider ZBA's Decision on Appellants' Motion for Rehearing was served upon the applicants both via e-mail and by forwarding true and correct copies of same by first class mail, postage prepaid, to each of the following counsel of record:

Michael D. Ramsdell, Esquire
Brian J. Bouchard, Esquire
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/s/ Duncan J. MacCallum
Duncan J. MacCallum

ATTACHMENT A

clf
conservation law foundation

For a thriving New England

CLF New Hampshire
27 North Main Street
Concord, NH 03301
P: 603.225.3060
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December 23, 2021

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

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

Dear Chairman Legg and Planning Board Members,

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

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

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

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

clf

conservation law foundation

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

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

Sincerely,

/s Melissa Paly
Melissa Paly
Great Bay-Piscataqua Waterkeeper

/s Tom Irwin
Tom Irwin
CLF Vice President for New Hampshire

[2] https://www.cityofportsmouth.com/planportsmouth/planning-board
December 16, 2021 at 4:17

ATTACHMENT B

DUNCAN J. MACCALLUM
ATTORNEY AT LAW

536 STATE STREET
PORTSMOUTH, NEW HAMPSHIRE 03801-4327
(603) 431-1230
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ALSO ADMITTED IN NY, PA, OHIO & MA

December 29, 2021

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

Re: Ineligibility of Raymond Pezzullo

Dear Mr. Legg:

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

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

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

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

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

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

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

RSA 673:2 states in pertinent part:

> I. (a) In cities, the planning board shall consist of 9 members:
>
> (1) The mayor of the city, or with the approval of the local legislative body the mayor's designee, who shall be an ex officio member;
>
> (2) An administrative official of the city selected by the mayor, who shall be an ex officio member;
>
> (3) A member of the city council selected by the council, who shall be an ex officio member; and

> (4) Six persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.
>
> (b) Alternatively, the local legislative body in a city with a city council-city manager form of government may establish a planning board with membership as provided in paragraph I-a.
>
> I-a. In cities with a city council-city manager form of government, the planning board may consist of the following 9 members:
>
> (a) The city manager, or with the approval of the local legislative body the city manager's designee, who shall be an ex officio member;
>
> (b) A member of the city council selected by the council, who shall be an ex officio member; and
>
> (c) Seven persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.

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

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

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

1. The City Manager, or the designee of the City Manager with the approval of the City Council, who shall be an ex-officio member;

2. An administrative official of the City selected by the City Manager who shall be an ex-officio member;

3. A member of the City Council selected by the Mayor with the approval of the Council, who shall be an ex-officio member;

4. Six residents of the City appointed by the Mayor with the approval of the City Council.

5. Two (2) alternates who shall be residents of the City appointed by the Mayor with the approval of the City Council.

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

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

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

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

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

Finally, as Planning Board member Rick Chellman has ably pointed out in his letter of December 1, 2021 to City Attorney Bob Sullivan, the system laid out in section 1.303 of the Administrative Code, wherein the city manager appoints a Planning Board member selected from the City administrative staff, creates a situation of obvious conflict of interest on the part of the appointee (in this case Mr. Pezzullo). As a member of the city administration, the appointee is a city employee and thus is beholden to the city manager for his job; she has the power of hiring and firing over the former. The appointee is going to be loath to publicly express an opinion that is contrary to the opinion, stance, or wishes of the city manager, and he is not likely to vote against an application or measure that she supports. Almost invariably, he will vote in favor of whatever she votes for, and he will vote against whatever she votes against.

In practical effect, under this arrangement the city manager gets two votes: her own, and the vote of the ex officio member whom she has separately appointed from City administrative staff pursuant to section 1.303(A)(2). Any notion of independence of thought or action on the part of the appointee is a pipe dream, and in any event the arrangement does violence to the statutory scheme established by RSA 673:2, I and I-a.

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

Very truly yours

Duncan J. MacCallum

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

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City Attorney, City of Portsmouth
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Portsmouth, NH 03801

December 1, 2021

Re: Planning Board Members

Dear Bob:

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

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

Beginning with the City's Code, Section 1.303 A contains the relevant City guidance:[1]

Section 1.303: PLANNING BOARD

A. Membership: The Planning Board of the City shall consist of nine (9) members and two (2) alternate members, specifically; (Adopted 1/23/95)

1. The City Manager, or the designee of the City Manager with the approval of the City Council, who shall be an ex-officio member;
2. An administrative official of the City selected by the City Manager who shall be an ex-officio member;
3. A member of the City Council selected by the Mayor with the approval of the Council, who shall be an ex-officio member;
4. Six residents of the City appointed by the Mayor with the approval of the City Council.
5. Two (2) alternates who shall be residents of the City appointed by the Mayor with the approval of the City Council. (Adopted 1/23/95)

Figure 1: Section 1.303 of City Code

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

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

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

Appointment and Terms of Local Land Use Board Members

Section 673:2

673:2 Planning Board. –

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

[redacted]

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

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

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

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

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

Figure 2: NH RSA 673:2

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

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

CITY OF CONCORD

In the year of our Lord one thousand nine hundred and

AN ORDINANCE Amending Section 32.6 of the Administrative Code, relative to Planning Boards.

The City of Concord ordains as follows:

Section One: Amend Section 32.6 of the Municipal Code of Ordinances, Administrative Code, Planning Board by striking the whole thereof and substituting in its place the following new section:

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

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

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

Figure 3 City of Concord Ordinance #1396 from 1980

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

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

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

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

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

attorneys I work with and also with the NH Municipal Association Counsel.[3]

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

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

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

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

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

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

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

[3] Mr. Natch Greyes, Esq.

law".[4]

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully Submitted,

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

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