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

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

Stone Creek Realty, LLC's ("Stone Creek") briefly replies to Appellants' arguments in their Objection to Stone Creek's Motion to Reconsider as follows:

1. **Stone Creek's federal and state rights to due process were violated when ZBA member Thomas Rossi participated in the vote on the Motion for Rehearing.**

As noted by the NHMA in the advisory cited by both Appellants and Stone Creek, a board member who misses a hearing becomes eligible to participate in future decisions on the same matter only if "***the member has studied the record well enough to become familiar with all the evidence.*** *The member can review minutes or recordings of the hearing that the member missed and read the exhibits introduced that night.*"[i] Here, Rossi's remarks leave no doubt that he was unfamiliar with *all the evidence.*

Contrary to Appellants' contention, this issue is not moot. It is of no consequence that Rossi could review the record and participate at a rehearing. The violation occurred during the Board's consideration of the motion for rehearing and that violation cannot be cured through Rossi's participation the rehearing where all matters will be heard a new. Absent Rossi's improper participation, a rehearing would not occur.

2. **The ZBA misapplied its own rules when it determined that a 3-3 tie vote on the Motion for Rehearing resulted in the motion being granted.**

The ZBA is not free to disregard its procedural rules regarding the difference between, on the one hand, a motion for rehearing of a Planning Board appeal or an appeal from a decision from an administrative officer pursuant to RSA 676:5, I, and on the other hand, a request for a

rehearing on a variance of special exception. Nor is a common-sense rule of statutory construction beyond the understanding of ZBA members, and if so, the ZBA should consult the City Attorney.

For the reasons stated in the Motion for Reconsideration, even if Rossi's vote had been lawful, and it was not, the 3-3 vote resulted in a denial of the Motion for Rehearing because a reversal of a decision of the Planning Board, or a Code Official, requires a majority vote.

3. A rehearing may be granted only upon a finding or error.

RSA 677:2 provides that persons impacted by a ZBA's decision may move for a rehearing within 30 days. RSA 677:3 provides the standard: "[a] motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that *the decision or order complained of is unlawful or unreasonable*." The three members of the ZBA who voted in favor of a rehearing did not find that the Board's original decision was unlawful or unreasonable.

Even if the standard urged by Appellants (i.e., that the ZBA may grant a rehearing upon any finding of error that may have influenced the outcome), was correct, and it is not, the standard was not met here. The motion in favor of a rehearing was "to provide an opportunity to introduce relevant information that may or may not have been heard, or may or may not have been available in the first hearing."[ii] At no point was there a finding or even a contention that the ZBA had erred. Additionally, Appellants had not argued that they had new information for the ZBA to consider. The fact that Member MacDonald's motion was predicated on *potential* new evidence, which Appellants did not raise in their request for rehearing but raise now—weeks after the public meeting on rehearing—raises serious concerns of RSA 91-A violations and other malfeasance. The grant of a rehearing without a finding of error was unlawful.

3. Even if there was an error in the composition of the Planning Board, its decision is not void because there is no claim of bias.

Appellants' reliance on *Winslow v. Town of Holderness Planning Bd.*[iii] is misplaced. Appellants claim that there was an error in composition of the Planning Board solely because there was one too many ex officio members serving on the Board. There is no claim that any of the ex officio members was biased. Assuming the veracity of Appellants' claim, the Planning Board's decision is not void because the only basis upon which the New Hampshire Supreme Court has ever found a land use board's decision to be void is because a member was biased.

The New Hampshire Supreme Court addressed this very issue in an Order dated March 9, 2020.[1] In another Portsmouth case, *Brighton v. Portsmouth*, the Supreme Court held that even if it was error to allow two non-resident ex officio members of the Planning Board to vote on a developer's plan, the error was harmless because their votes did not make a difference in the vote count. The Supreme Court rejected the same argument raised here, that *Winslow* demanded that the Planning Board's decision was void, because there was no claim that the ex officio members were biased. The Supreme Court plainly stated that absent a finding of bias, the "'State constitutional mandate for judicial impartiality,' in the board's quasi-judicial action was not implicated by the non-resident members' participation."

Here, the Planning Board approved the Wetlands CUP by a vote of 7 to 2 and approved the site plan by a vote of 8 to 1. Even if Appellants are correct about an error in the composition of the Planning Board, the error is harmless and does not void the Planning Board's decisions.

4. The Conservation Law Foundation letter does not mention this development or any proceeding regarding this development.

Most importantly, pursuant to RSA 676:5, III, the ZBA lacks subject matter jurisdiction

[1] A copy of the Order appears at the end of this pleading.

to hear an appeal of the Planning Board's grant of a conditional use permit. Since the CLF's letter relates only to the conditional use permit, it is not properly before the ZBA. Additionally, the CLF letter mentions two Planning Board proceedings, neither of which involve this development at 53 Green Street. Consistent with the CLF letter not referring to 53 Green Street, the Planning Board minutes of the proceeding in this matter do not include any reference to the CLF or its opinions. The CLF letter, which was not before the ZBA when it considered Appellants' motion for rehearing, does not provide a basis to grant a rehearing.

WHEREFORE, Intervenor Stone Creek Realty, LLC respectfully requests that the Portsmouth Zoning Board of Adjustment:

A. Grant the Motion to Reconsider ZBA's Decision on Appellants' Motion for Rehearing; and

B. Reverse the decision to grant a rehearing.

Respectfully submitted,
Stone Creek Realty, LLC
By its counsel,

Dated: January 18, 2022

By */s/ Michael D. Ramsdell*

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CERTIFICATE OF SERVICE

On January 18, 2022, this Reply to Appellants' Objection to Motion to Reconsider ZBA's Decision on Appellants' Motion for Rehearing was forwarded via email to City Attorney Robert P. Sullivan and Duncan J. MacCallum, Esq.

By: _/s/ Michael D. Ramsdell_____
Michael D. Ramsdell

[i] The February 2008 NHMA advisory may be found at: https://www.nhmunicipal.org/town-city-article/zoning-board-adjustment-decisions-quorums-voting-and-fairness.

[ii] *See* December 21, 2021 ZBA Meeting, at 1:00:20.

[iii] 125 N.H. 262 (1984).

Mark Brighton & a.
v.
City of Portsmouth.

Case No. 2019-0344.

Supreme Court of New Hampshire.

March 9, 2020.

Appeal from the Superior Court Schulman, J.

ORDER

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

Plaintiffs Carolyn Bray and Patience Horton appeal an order of the Superior Court (Schulman, J.) in favor of the defendant, the City of Portsmouth, and the intervenors, the Portsmouth Housing Authority and PHA Housing Development, Ltd. (collectively the defendants), dismissing their appeal from a decision by the City of Portsmouth Planning Board (board). They contend that the trial court erred by holding that: (1) they failed to challenge the eligibility of two members of the board at the earliest possible time; (2) allowing two ex officio board members who did not reside in the city to vote was a harmless error; (3) the non-resident board members' participation in the board's decision did not render all subsequent board votes on the defendants' plan invalid and voidable; (4) ex officio board members were not required to be residents of the city; and (5) the non-resident members' participation on the board could not be challenged because they were "de facto" board members, in unobstructed possession of their seats on the board and discharged those duties in full view of the public, see State v. Doyle, 156 N.H. 306, 310 (2007).

Our review of a trial court's decision in an appeal of a municipal planning board's decision is deferential; we will uphold the trial court's decision on appeal unless it is unsupported by the evidence or legally erroneous. Rochester City Council v. Rochester Zoning Bd. of Adjustment, 171 N.H. 271, 275 (2018); see Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167, 170 (2003) (stating same standard of review applies to trial court orders concerning decisions by planning boards and zoning boards of appeal). We do not inquire whether we would find as the trial court found, but rather whether the evidence before the court reasonably supports its findings. Vigeant v. Town of Hudson, 151 N.H. 747, 750 (2005). As the appealing parties, the plaintiffs have the burden of demonstrating that the trial court committed reversible error. See Gallo v. Traina, 166 N.H. 737, 740 (2014).

Under the particular facts of this case, we assume, without deciding, that the trial court erred in finding that the plaintiffs failed to raise the non-residency of two board members at the earliest possible time. However, we conclude that, even if the non-resident members were ineligible to be ex officio board members, see RSA 672:5 (2016); RSA 673:1, I (2016), their votes were harmless. They voted on only the board's acceptance of the plan and granting of a conditional use permit reducing the number of parking spaces required; they did not vote on the plan's final approval. Furthermore, the plaintiffs acknowledged to the trial court that, if the two non-resident members' votes were stricken, a majority of the board still voted in favor of accepting the plan and granting the conditional use permit. The non-resident members' votes were harmless because a sufficient number of the remaining board members voted in favor.

The plaintiffs rely upon Winslow v. Holderness Planning Board, 125 N.H. 262 (1984), to argue that the non-residents' participation "was sufficient to invalidate the [board's] decision because it was impossible to estimate the influence one member might have on his associates." Id. at 268. However, in Winslow, the board member was disqualified due to bias. Id. at 267.

In the case at hand, the plaintiffs do not appeal the trial court's finding that the non-resident members were not biased. See Webster v. Town of Candia, 146 N.H. 430, 441-42 (2001) (stating that it is the plaintiff's burden to rebut presumption that planning board members are unbiased). Nor do the plaintiffs contend that the disputed board members' non-resident status somehow affected other board members. Thus, the "State constitutional mandate for judicial impartiality," Winslow, 125 N.H. at 268, in the board's quasi-judicial action was not implicated by the non-resident members' participation.

In light of this conclusion, we need not address the plaintiffs' other arguments.

Affirmed.

Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.