

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 MOTION TO RECONSIDER ZBA’S DECISION ON APPELLANTS’ MOTION FOR REHEARING

Stone Creek Realty, LLC’s (“Stone Creek”) moves for the Portsmouth Zoning Board of Adjustment (“ZBA”) to reconsider its decision granting Appellants’ Motion for Rehearing of the ZBA’s October 19, 2021 decision on Appellants’ appeal of the Portsmouth Planning Board’s approval of Stone Creek’s Proposed Development at 53 Green Street for the following reasons:

- 1. ZBA member Thomas Rossi was not eligible to participate in the vote on the Motion for Rehearing because he had not familiarized himself with the record in the case, in particular the hearing on Appellants’ appeal before the ZBA.**
- 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.**

I. The ZBA may reconsider its decision on the Motion for Rehearing.

The New Hampshire Supreme Court has “recognized the inherent authority of local land use boards ‘to reverse themselves at any time prior to final decision if the interests of justice so require.’”ⁱ In *74 Cox St.*, the Supreme Court explained the premise for such authority: “because the statutory scheme established in RSA chapter 677 is based upon the principle that a local board should have the first opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing the appeal.”ⁱⁱ The Supreme Court further summarized the legislative grant of authority for a ZBA to reconsider its own decision on a motion for rehearing as follows: “[g]iven that understanding of the principle underlying RSA chapter 677, we see no basis for concluding that the legislature intended for ZBAs not to have the power to reconsider their own decisions, and potentially correct their own errors, during the time period allotted by statute for parties to appeal those same decisions.”ⁱⁱⁱ

The foregoing cases demonstrate that it is beyond dispute that the ZBA may reconsider its decision on the Motion for Rehearing before commencing the rehearing.

II. A ZBA member who was not present for a hearing is not eligible to participate in a vote on a motion for rehearing unless the ZBA member has familiarized himself with the hearing record.

New Hampshire law is not complicated regarding the eligibility of a ZBA member who was not present for a hearing to vote on a subsequent motion for rehearing. Unless witness credibility is at issue, a ZBA member who was not present for the hearing at which the challenged decision was made is eligible if the member has familiarized himself with the record of the hearing that is under consideration for rehearing.^{iv} Thus, the paramount question is plain and unambiguous: *Has the ZBA member who was not present for the hearing at which the decision was made familiarized himself with the record so as to understand the issues.* If yes, the ZBA member may participate and vote on the request for rehearing. If the answer is no, the ZBA member must recuse himself from voting on the request for rehearing because he lacks sufficient familiarity with the hearings from which a rehearing has been sought.

The New Hampshire Municipal Association explained this legal tenet to municipalities in the following February 2008 advisory:^v

Q. Suppose a board of adjustment has an application for a use variance for a major project. The applicant and abutters have extensive presentations. If a public hearing extends for several meetings, and a member misses part of the public hearing, does the member have to abstain from voting in the case?

A. In most cases, no. *The board member may participate in deliberations and vote on the application as long as 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.* In the recent case of *Auger v. Town of Strafford*, (Opinion issued August 23, 2007), the New Hampshire Supreme Court examined this rule of administrative law and explained that personal attendance at the public hearing is absolutely necessary only where the issue of witness credibility is critical. This is rare in a land use case because expert testimony can be adequately

evaluated from a written record. *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 716 (1984). Needless to say, board members should not make this a routine practice.

Q. What should happen if members who voted on the application itself have been replaced by the time the board considers a motion for rehearing? Can new members vote on whether to grant a rehearing?

A. Yes, that would be a permissible option, if the new members familiarized themselves with the record. In *Appeal of Alton School District*, 140 N.H. 303, 313-14 (1995), an appeal from the decision of a state agency, the Supreme Court upheld a decision in which one three-member panel made the initial decision, and a different three-member panel voted to deny the motion for reconsideration. Of course, this would not be necessary if at least three of those who made the original decision are still members and are present to vote on whether to grant a rehearing. Only a majority vote is required to grant or deny a rehearing.

This legal tenet not only is common sense, but also is required by the due process clauses of Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.^{vi}

Here, new ZBA member Thomas Rossi did not familiarize himself with the record, in particular the video recordings of the prior hearings of the appeal, before voting on the motion for rehearing. At approximately 53:30 of the video of the public meeting on whether to grant Appellant's request for rehearing, a discussion occurs among ZBA members in response to a question posed by Rossi. Ultimately, Rossi states: "[w]hat you're telling me is that I should just go back and watch the video." During an exchange about a contested issue during the appeal hearing, which zoning ordinance provisions control on the issue of the extent of the North Overlay District zoning boundary, Rossi asks: "[w]hy would the overlay district prevail in this particular spot[.]" After discussion about the length of time the ZBA spent analyzing the issue, Rossi asked for the "Reader's Digest version" of "why [the map issue] does not constitute an error that justifies a rehearing[.]"

The foregoing exchanges demonstrate that Rossi was unfamiliar with the record, in particular the hearing that was the subject of the motion for rehearing. Rossi's participation in the vote on the motion for rehearing without having familiarized himself with the record of the hearing on the merits of the appeal is procedurally improper and violates Stone Creek's state and federal constitutional rights to due process. The ZBA should disqualify Rossi's vote. As a result of Rossi's vote being disqualified, the Motion for Rehearing would be denied by a 3-2 vote of the eligible voting ZBA members.

III. The ZBA incorrectly applied its rules and the law when it determined that a 3-3 vote on the motion for rehearing resulting in granting the motion.

As explained in the preceding section of this motion, ZBA member Rossi's participation in the vote on Appellants' Motion for Rehearing was unlawful and a violation of Stone Creek's constitutional due process rights. However, even if Rossi's participation had been lawful, and it was not, the ZBA made an error of law when it decided that the 3-3 tie vote resulted in a rehearing.

Before the ZBA voted on the motions to grant or deny Appellants' appeal, the City Attorney properly advised the ZBA to treat Appellants' appeal like an appeal from a decision from an administrative officer pursuant to RSA 676:5, I.^{vii} The City Attorney provided similar legal advice to the ZBA on at least one other recent occasion.^{viii} The ZBA's Rules and Regulations ("ZBA Rules") provide that "[a]n affirmative vote by four (4) members present is necessary to ... [r]everse a decision of the Code Official."^{ix} Consistent with New Hampshire law, the ZBA Rules, and as explained by the City Attorney, when both motions resulted in 3-3 votes, the decision of the Planning Board remained effective.^x

Upon consideration of Appellants' Motion for Rehearing, the ZBA made an error of law when it determined that only three votes were necessary to grant a rehearing on an appeal to

reverse the decision of an administrative officer, or here, the Planning Board. Section VI, 4 of the ZBA Rules treats the granting of a variance, the granting of a special exception, and the reversal of a decision of a Code Official equally in that each requires an affirmative vote of four ZBA members. The same is not true, however, regarding a request for rehearing. Variances and special exceptions are treated differently than reversals of a Code Official.

Immediately after including reversal of a Code Official's decision with variances and special exceptions in requiring four affirmative votes, the ZBA Rules move on to requests for hearing as follows:

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.^{x1}

A request for rehearing on a motion to reverse a decision of a Code Official is not included with variances and special exceptions in the provision that provides that a rehearing is granted if there is a tie vote with three affirmative votes. Instead, a request for rehearing on a reversal of a Code Official's decision is excluded from this section VI, 5 of the ZBA Rules.

New Hampshire law includes a very basic, well-recognized rule of statutory construction, *expressio unius est exclusio alterius*, which means that the mention of one thing excludes another.^{xii} Thus, the inclusion of variances and special exceptions and the exclusion of reversal of a Code Official's decision, means that such a request for reversal is not subject to the rule regarding three votes in the case of a tie vote results in a rehearing. In fact, the New Hampshire Supreme Court has stated that “[t]he force of the maxim [*expressio unius est exclusio alterius*] is strengthened where a thing is provided in one part of the statute and omitted in another.”^{xiii} Accordingly, the fact that reversal of a Code Official's decision is included in the immediately preceding section of the ZBA Rules and excluded from the section on rehearing applications

reinforces that the “tie vote” provision does not apply to a request for rehearing of a motion to reverse a decision of a Code Official, in this instance, the Planning Board.^{xiv} Rather, the “tie vote” means that the Appellants’ Motion for Rehearing did not pass and was therefore denied.

For the foregoing reasons, even if ZBA member Rossi’s vote had been lawful, and it was not, the ZBA erred when it found that the resulting 3-3 tie vote on Appellants’ Motion for Rehearing resulted in granting the motion. A reversal of a decision of the Planning Board, or a Code Official, requires a majority vote. The 3-3 tie vote lawfully resulted in a denial of the Motion for Rehearing.

IV. The ZBA further erred in granting Appellants’ request for rehearing without finding that the ZBA had erred in its original decision.

The ZBA’s motion to grant Appellants’ request for rehearing was itself infirm and violative of New Hampshire law. RSA 677 is clear: a zoning board of adjustment may grant a request for rehearing only upon finding that the decision complained of was “unlawful or unreasonable.” *See* RSA 677:3. The ZBA did not make such a finding in this case. Instead, ZBA member MacDonald moved to grant Appellants’ request for rehearing, “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.” *See* December 21, 2021 ZBA Meeting, at 1:00:20. ZBA member Lee seconded the motion without additional commentary. Most importantly, at no point did MacDonald or Lee contend that the ZBA had erred. Additionally, Appellants had not argued that they had new information for the ZBA to consider.

The Acting Chair admonished MacDonald’s motion as being improper and reminded the Board of the limited question before them. Yet, even after being admonished, three members voted in favor of MacDonald’s motion. MacDonald’s motion is so contrary to established law

that it is difficult to view either it or the support of it as any other than a brazen political act eschewing respect for the law and one antithetical to the quasi-judicial function of the ZBA.

The ZBA should reverse its decision to grant a rehearing because the ZBA did not find that its original decision was “unlawful or unreasonable” as required by RSA 677:3.

V. In the event the ZBA denies the instant Motion to Reconsider the ZBA’s Decision on Appellants’ Motion for Rehearing, Stone Creek reasserts and incorporates by reference all arguments previously asserted in its Motion to Dismiss Appellants’ Appeal and its Objection to Appellants’ Motion for Rehearing.

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

- A. Grant the instant 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: December 29, 2021

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CERTIFICATE OF SERVICE

On December 29, 2021, this 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 *N.H. Alpha of SAE Trust v. Town of Hanover*, 172 N.H. 72, 77 (2019) (quoting *74 Cox Street, LLC v. City of Nashua*, 156 N.H. 228, 231 (2007)).

ⁱⁱ *74 Cox St.*, 172 N.H. at 77.

ⁱⁱⁱ *Id.*

^{iv} *See Auger v. Town of Strafford*, 156 N.H. 64, 68-69 (2007); *Petition of Grimm*, 138 N.H. 42, 46-47 (1993); *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 716 (1984).

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

^{vi} *See Petition of Grimm*, 138 N.H. at 46.

^{vii} The Planning Board is regarded as a “Code Official” because RSA 676:5, II(a) defines “administrative official” as “any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.”

^{viii} *See Exhibit A to Stone Creek’s Objection to Appellant’s Motion for Rehearing, Memorandum to ZBA from City Attorney dated July 14, 2021.*

^{ix} ZBA Rules, Section VI, 4(c).

^x ZBA Rules, Section VI, 4(c); *see also Neil v. Biggers*, 409 U.S. 188, 192 (1972); *PK’s Landscaping, Inc. v. N.E. Telephone Co.*, 128 N.H. 753, 758 (1986) (lower court decision affirmed where Supreme Court judges evenly divided on appeal); *Bethlehem v. Robie*, 111 N.H. 186, 187 (2001) (2-2 ZBA vote where 3 votes are necessary to approve a building permit results in denial of the permit).

^{xi} ZBA Rules, Section VI, 5.

^{xii} *See In re Campaign for Ratepayers’ Rights*, 162 N.H. 245, 250 (2011); *St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 11–12, 676 A.2d 98 (1996); *Gentry v. Warden, N.H. Correctional Facility*, 163 N.H. 280, 282 (2012).

^{xiii} *Id.* (quoting 2A N. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:23, at 417 (7th ed. 2007)).

^{xiv} *See Gentry*, 163 N.H. at 282.