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 OBJECTION TO APPELLANTS' MOTION FOR REHEARING

The Portsmouth Zoning Board of Adjustment ("ZBA") should deny 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 Realty, LLC's (Stone Creek") Proposed Development at 53 Green Street for the following reasons:

1. **The fact that the ZBA voted 3-3 is not a legally permissible basis to grant a hearing. As a matter of law, a rehearing can be granted only upon a demonstration that the decision was unlawful or unreasonable. *See* RSA 677:2. A 3-3 vote is neither unlawful nor unreasonable.**

2. **The rejection of Appellants' arguments by three ZBA members after proper consideration was not unlawful or unreasonable.**

I. It would be an error of law for the ZBA to grant a rehearing based on the fact that the ZBA voted 3-3 to deny the Appellants' appeal.

RSA 677:3 states the standard for a ZBA to grant a motion for rehearing. To grant a motion for rehearing, the ZBA must find that its original decision was "unlawful or unreasonable. RSA 677:3; *Town of Plaistow Board of Selectmen v. Town of Plaistow Board of Adjustment*, 146 N.H. 263, 266 (2001).

Here, Appellants do not, because they cannot, argue that the fact of a 3-3 vote by the ZBA renders its decision unlawful or unreasonable. Instead, Appellants argue only that the ZBA "should conduct another hearing before a full panel, so that the tie can be broken and so that a definitive decision can be issued on the appellants' appeal." Appellants' Motion for Rehearing ¶ 1. However desirous Appellants, or even the ZBA, may be of a decision by a "full panel," that is not a lawful basis for granting a motion for rehearing. A rehearing may be lawfully granted only

upon a finding that the ZBA's prior decision was unlawful or unreasonable. RSA 677:3; *Town of Plaistow Board of Selectmen*, 146 N.H. at 266.

The City Attorney advised the ZBA to treat Appellants' appeal like an appeal from a decision from an administrative officer pursuant to RSA 676:5, I. The City Attorney has provided similar legal advice to the ZBA on at least one other recent occasion. *See* Exhibit A, Memorandum to ZBA from City Attorney dated July 14, 2021. 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." ZBA Rules, Section VI, 4(c). Consistent with the ZBA Rules and as explained by the City Attorney, the 3-3 vote results in the decision of the Planning Board remaining effective. *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).

The 3-3 decision was a product of a quorum of the ZBA. *See* ZBA Rules, Section VI, 3 (four ZBA members necessary for a quorum). The tie vote is not unlawful or unreasonable. RSA 677:3; *Town of Plaistow Board of Selectmen*, 146 N.H. at 266. Therefore, the 3-3 vote does not provide a legal basis for the ZBA to grant a rehearing. *See* RSA 677:3.

II. The rejection of Appellants' arguments by three ZBA members after proper consideration was not unlawful or unreasonable.

A. Despite Appellants' persistence, the ZBA lacks jurisdiction to review the Planning Board's decision on the wetlands CUP.

The decision not to exercise jurisdiction over Appellants' claim about the Planning Board's grant of a Wetlands CUP was not unlawful or unreasonable. Pursuant to RSA 674:21,

conditional use permits are innovative land use controls. Pursuant to RSA 676:5, III the ZBA lacks jurisdiction over count II of Appellants' Appeal because the Planning Board's decision on an innovative land use control, including a conditional use permit, is appealable only to the superior court.

It is universally recognized in New Hampshire that conditional use permits are innovative land use controls pursuant to RSA 674:21, and if a municipality affords the Planning Board authority over administration of conditional use permits, any appeal of the Planning Board's decision must be taken to the superior court. For example, the New Hampshire Municipal Association ("NHMA") informs its members that an appeal from a planning board decision on a conditional use permit must go to the superior court, not the zoning board of adjustment:

> Ordinarily, when a planning board issues a decision that involves interpretation of a zoning ordinance, the decision should be appealed to the municipality's zoning board of adjustment. However, if the planning board is given the responsibility of administering an innovative land use control, the board's decisions on applications for conditional use permits should be appealed directly to the superior court instead of first going to the ZBA. RSA 676:5, III.

Many other municipalities including, Concord, Manchester, Durham, and Gilford, include a similar statement in their zoning ordinances.

The decision not to exercise jurisdiction over Appellants' claim about the Planning Board's grant of a Wetlands CUP was not unlawful or unreasonable.

B. The ZBA did not ignore expert testimony when three members rejected Appellants' argument that Ordinance section 10.5A43.43 applies to the Proposed Development.

Appellants' argument that the ZBA ignored expert testimony when three members rejected the argument that Ordinance section 10.10.5A43.43 applies to the Proposed Development is factually incorrect. Appellants represent that Planning Board member Rick Chellman is a registered professional engineer and land surveyor with substantial professional

experience. Stone Creek takes no position on Mr. Chellman's professional credentials as an engineer or land surveyor. The flaw in Appellants' argument is that the matter in question is not one suited to the expertise of a professional engineering or surveyor. The question posed to the ZBA is which Ordinance sections govern the Proposed Development. The question is one of law, not engineering or surveying expertise. *Accurate Transp., Inc. v. Town of Derry*, 168 N.H. 108, 112 (2015) ("The interpretation and application of a statute or ordinance is a question of law.").

Consistent with RSA 676:5,III and RSA 674:33,I(a)(1), it is a function of the ZBA, when acting in a quasi-judicial capacity, to interpret the City's Ordinance. *Rochester City Council v. Rochester Zoning Bd. of Adjustment*, 171 N.H. 271, 275 (2018) (recognizing that ZBA's province includes ordinance interpretation). Ordinance interpretation, similar to statutory interpretation, is a uniquely judicial function and not one that lends itself to expert opinion. *Feins v. Town of Wilmot*, 154 N.H. 715, 719 (2007) (holding that the interpretation of a zoning ordinance is a question of law). It is well established in the legal community that experts, regardless of their qualification, cannot usurp the authority of the adjudicative body to read, interpret, and apply the law, which in this case is the City's Ordinance. *See e.g.*, *United States v. Mikutowicz*, 365 F.3d 65, 73 (1st Cir. 2004) ("[E]xpert testimony proffered solely to establish the meaning of a law is presumptively improper."); *Bartlett v. Mutual Pharm. Co.*, 742 F. Supp. 2d 182, 188 (D.N.H. 2010) (finding that "[n]o defense experts may testify about the meaning or applicability of the law."); *Dietz v. Town of Tuftonboro*, 171 N.H. 614, 619 (2019) ("[W]e are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole."); *Fisher v. Halliburton*, No. H-05-1731, 2009 U.S. Dist. LEXIS

118486, at *14 (S.D. Tex. Dec. 21, 2009) ("[E]xperts cannot assert what law governs an issue or what the applicable law means because that is a function of the court.").

As embodied in the New Hampshire Rules of Evidence, expert testimony serves particular purposes: "to understand the evidence or to determine a fact in issue." N.H. R. Evid. 702. It is the ZBA's function to determine the law that applies to a matter. Here, the testimony Appellants urge upon the ZBA would not have assisted the ZBA in understanding the Proposed Development or in determining a contested fact. Rather, Appellants claim that the ZBA improperly rejected Mr. Chellman's testimony on the law that applies to the Proposed Development. Because Mr. Chellman's testimony was not a proper matter for expert testimony, the ZBA was absolutely free to reject it even if it had been correct, and it did not correctly analyze the law. The City Attorney advised Mr. Chellman that his analysis was wrong.

For the foregoing reasons, the ZBA did not reject expert testimony when it determined that Ordinance section 10.10.5A43.43 does not govern the Proposed Development. The legal determination was not unlawful or unreasonable.

C. The determination that Ordinance section 10.5A43.43 did not control the Proposed Development's building height or building footprint was not unlawful or unreasonable.

Stone Creek provided the ZBA with the following summary of the analysis of the reasons why Ordinance sections 10.5A46.10 and 10.5A46.20 govern the Proposed Development at 53 Green Street, which is located in the North End Incentive Overlay District:

> Section 10.611 states the rules for overlay districts:
>
> Overlay districts apply special rules to manage land use in specific areas that may be portions of a single zoning district or that may overlap two or more zoning districts. The rules for overlay districts supplement the regulations contained in other sections of this Ordinance. **Except as specifically provided otherwise in the regulations for an overlay district, all regulations of the underlying zoning district shall apply. Where there is**

a conflict between the regulations of an overlay district and those of the underlying district, the overlay district regulations control.

Thus, the rules for the overlay districts "trump" (to use Appellants' word) the rules for an underlying zoning district in the event of a conflict.

Section 10.5A46 states that in the Incentive Overlay Districts "certain specified **development standards may be modified** as set forth in Section 10.5A46.10 ... **if the development provides community space** in accordance with section 10.5A46.20."

Section 15-13 defines **"development"** as "Any man-made alteration of land, **a lot, a building or other structure whether horizontal, vertical,** surface or subsurface."

Section 10.5A46.10 provides that the building footprint may be increased to 30,000 sf and the building height may be increased by 1 story.

Section 10.5A.46.20 provides the "Requirements to Receive Incentives to the Development Standards."

Sections 10.5A46.21 and 10.5A46.22 state the requirements. **Most importantly, the difference between 10.5A46.21 and 10.5A46.22 is that:**

10.5A46.21 states the requirements **"For a lot located adjacent to, or within 100 feet of, North Mill Pond."**

10.5A46.22 states the requirements **"For a lot that is more than 100 feet from North Mill Pond."**

The critical point is the recognition that **the development standards apply to lots located adjacent to, or within 100 feet of, North Mill Pond.**

That recognition means that it cannot reasonably be argued that the development standards of the North Overlay District required to be met to achieve the incentives in 10.5A46.10 do not extend to lots adjacent to or within 100 feet of North Mill Pond. The plain language provides that as long as the development is in the overlay district, if it involves a lot that extends adjacent to, or within 100 feet of North Mill Pond, the development is eligible for the building height and footprint incentives set forth in 10.5A46.10.

It also cannot gainfully be argued that the zoning map itself controls. The zoning map became part of the zoning ordinance in April 2014. It was

amended in August 2015 and July 2016. None of the amendments since that time have impacted the North Overlay District.

The amendments to sections 10.5A46.21 and 10.5A46.22 became part of the zoning ordinance in August 2018.

It is a basic rule of statutory (or ordinance) construction that when a later ordinance is passed, the governmental body is presumed to be aware of the existing ordinances. Thus, **the fact that the requirements for incentives for a lot adjacent to or within 100 feet of North Mill Pond were amended after zoning map B already was part of the ordinance means that it controls in a conflict between the two.**

8/20/18 Zoning Amendment

Amend Section 10.5A46.20 – **Requirements to Receive Incentives to the Development Standards to clarify 10.5A46.21 public greenway requirements for lots within 100 feet of the North Mill Pond or Piscataqua River.**

The intent of the 2018 Zoning Amendment was to provide public access to the North Mill Pond via the greenway/open space and to have the buildings step down towards the water. This development achieves both of those goals and the Planning Board properly applied the Zoning Ordinance.

Both the City Attorney and the City Planner Walker agreed with Stone Creek's legal analysis.

Again, Appellants persist with arguments that misread and misinterpret the Ordinance. In addition to the analysis set forth above, Appellants misread or misinterpret section 10.141. Appellants would have the ZBA believe that section 10.141 provides that "in the event of a conflict between *two or more of the various provisions of the Zoning Ordinance, the more restrictive provision shall control.* Motion for Rehearing, p. 3. Appellants are wrong. Section 10.141 does not address conflicts within the Zoning Ordinance.

Section 10.141 consists of only two sentences, the first stating: "[t]he provisions of this Ordinance shall be held to be minimum requirements for the promotion of the public safety, health, convenience, comfort, prosperity and general welfare." This sentence does not address conflicts of any kind. The second sentence of section 10.141 states: *"[w]henever a provision of*

this Ordinance is more restrictive or imposes a higher standard or requirement upon the **use** or dimensions of a **lot**, **building** or **structure** *than is imposed or required by another ordinance, regulation, rule or permit,* the provision of this Ordinance shall govern." The italicized portions of section 10.141 plainly provide that it addresses conflicts between *a provision of the Zoning Ordinance* and the requirements of *another ordinance, regulation, rule or permit.* Section 10.141 does not address conflicts in various provisions of the Zoning Ordinance. Appellants' argument misunderstands or misinterprets section 10.141.

Appellants' argument regarding section 10.511 is equally misplaced. Section 10.511 states: "[w]hen *this Article* specifies two requirements for the same dimension (for example, maximum **building height** stated both in feet and in stories, or minimum **side yard** stated both in feet and as a percentage of **building height**), the more restrictive requirement shall apply unless explicitly stated otherwise." "This Article" refers only to "Article 5, Dimensional and Intensity Standards." None of the standards at issue regarding the Proposed Development are contained in Article 5. The building height and footprint standards at issue appear in "Article 5A Character-Based Zoning." Thus, the "conflict" provision in Article 5 is completely irrelevant to the Proposed Development.

Ordinance section 10.611 unequivocally provides that overlay districts provide special rules to manage land in specific areas, and where there is a conflict between the overlay district's regulations and an underlying district's regulations, the regulations of the overlay district control. Section 10.5A46 states that in the Incentive Overlay Districts "certain specified development standards may be modified as set forth in Section 10.5A46.10 ... if the development provides community space in accordance with section 10.5A46.20." Section 15-13 defines "development" as "[a]ny man-made alteration of land, a lot, a building or other structure whether

horizontal, vertical, surface or subsurface." Section 10.5A46.10 provides that the building footprint may be increased to 30,000 sf and the building height may be increased by 1 story. Section 10.5A.46.20 provides the "Requirements to Receive Incentives to the Development Standards." Sections 10.5A46.21 and 10.5A46.22 state the requirements. Most importantly, the difference between 10.5A46.21 and 10.5A46.22 is that: 10.5A46.21 states the requirements "For a lot located adjacent to, or within 100 feet of, North Mill Pond." 10.5A46.22 states the requirements "For a lot that is more than 100 feet from North Mill Pond." The critical point is the recognition that the development standards apply to lots located adjacent to, or within 100 feet of, North Mill Pond.

Accordingly, there is no conflict among the Ordinance provisions. The specifications of the Overlay District control and the Appellants' argument about how more restrictive provisions control is simply unsupported by a plain reading of the Ordinance. Three members of the ZBA properly rejected Appellants' misunderstanding or misinterpretation of multiple sections of the Zoning Ordinance. The rejection was not unlawful or unreasonable.

III. ZBA member James Lee must be disqualified from participation in the ZBA's consideration of the motion for rehearing.

As it must, the ZBA applies the New Hampshire juror standard for assessing disqualification. ZBA Rules, Section VI, 10; RSA 673:14, I ("No member of a zoning board of adjustment … 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 would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.") A juror is not allowed to sit on a case "[i]f it appears that [she or he] is not indifferent."). RSA 500-A:12, II.

On October 29, 2021, the Portsmouth Herald published a letter to the editor submitted by one of the Appellants, James Hewitt. Hewitt identified himself as "Campaign Coordinator for

Portsmouth Citizens' Alliance." The "About Us" page of Portsmouth Citizens' Alliance's website states that it is "[f]or city government that should be efficient, ethical and farsighted."[1] The same webpage also states as follows:

> "This advertisement has been paid for by Jim Lee and has not been authorized by any candidate."
> Jim Lee, Secretary
> Portsmouth Citizens Alliance.
>
> jamesleetn@gmail.com

Thus, ZBA member James Lee is an officer, the Secretary, and a financier of the same citizens action group of which Appellant James Hewitt is Campaign Coordinator.

The New Hampshire Constitution Part I, Article 35 standard that all judges be "as impartial as the lot of humanity will admit[,]" applies to ZBA members. *Winslow v. Town of Holderness*, 125 N.H. 262, 267 (1984). When the ZBA acts in a quasi-judicial capacity, a ZBA member, like a juror, is disqualified from participation if he is "not indifferent" to the outcome of the proceeding. *Winslow*, 125 N.H. at 268. No judge would allow a juror to sit on a case in which one of the parties is Campaign Coordinator of an organization in which the juror is not only a member, but also the organization's Secretary. Neither should a ZBA member participate in a case under similar circumstances.

ZBA member Lee's relationship with one of the Appellants renders him partial and biased to the outcome of this proceeding. ZBA member Lee should disqualify himself from consideration of Appellants' Motion for Rehearing.

WHEREFORE, Intervenor Stone Creek Realty, LLC respectfully requests that the Portsmouth Zoning Board of Adjustment deny Appellants' Motion for Rehearing.

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[1] The website may be found at https://portsmouthcitizensalliance.com/about-us/.

Respectfully submitted,

Stone Creek Realty, LLC

By its counsel,

Dated: December 1, 2021

By /s/ Michael D. Ramsdell
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CERTIFICATE OF SERVICE

On December 1, 2021, this Objection to 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