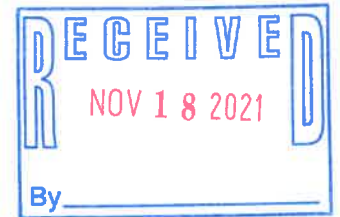


THE STATE OF NEW HAMPSHIRE

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

MOTION FOR REHEARING

The appellants in the above-referenced matter respectfully move this Board to conduct a rehearing on their appeal of the Planning Board's decision of July 15, 2021, relating to the property at 53 Green Street. As grounds in support of their motion, the appellants state the following:

1. The hearing that was conducted before this Board of Adjustment on October 19, 2021 in the above-captioned matter resulted in a tie vote. Obviously, therefore, there was reasonable difference of opinion on the merits of the appeal. This Board 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.

2. The three members of this Board who voted to uphold the Planning Board's decision erred in failing to observe and apply section 10.5A43.43 of the Portsmouth Zoning Ordinance, which re-

quires that a conditional use permit be obtained if one is going to erect a building having a footprint exceeding 20,000 sq. ft. in the CD5 zoning district. It is undisputed that the developers' plan calls for a building having a footprint of 29,660 sq. ft., more or less, and so it is over the 20,000 sq. ft. limit by nearly 50%. Therefore, a conditional use permit was required. The Planning Board clearly erred in granting site plan approval to the developers' project without issuing a conditional use permit and without requiring the developers to apply for one, and this Board erred by refusing to reverse the Planning Board's decision.

3. The three members of this Board who voted to uphold the Planning Board's decision erred in concluding that sections 10.5A46.10 and 10.5A46.20 of the Zoning Ordinance, relating to overlay districts, prevailed over section 10.5A43.43 and authorized the developers to erect a new building having a footprint of up to 30,000 sq. ft. without obtaining a conditional use permit. Section 10.5A43.43 is the one that applies, requiring the applicants to obtain a conditional use permit to erect a building having a footprint exceeding 20,000 sq. ft., and that section took precedence over sections 10.5A46.10 and 10.5A46.20, instead of the other way around.

4. In concluding that sections 10.5A46.10 and 10.5A46.20 of the Zoning Ordinance were the ones that were applicable, the threesome ignored two of the guiding, overriding principles of

the Zoning Ordinance, embodied in sections 10.141 and 10.511 thereof, which provide 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. Therefore, section 10.5A43.43, which is the more restrictive in requiring the applicant to obtain a conditional use permit in order to erect a building having a footprint exceeding 20,000 sq. ft., as opposed to being allowed to erect a building with a footprint of up to 30,000 sq. ft. as a matter of right, is the one that controls.

5. Similarly, the three members of this Board who voted to uphold the Planning Board's decision erred in applying that same reasoning to the extra story on the building to which the developers claimed to be entitled. (I.e., they erred in concluding that sections 10.5A46.10 and -.20 of the Zoning Ordinance, relating to overlay districts, trumped the sections which limited buildings situated within 100' of the North Mill Pond to two stories.) Sections 10.5A21.10 and -.20 of the Zoning Ordinance, taken in concert with Map 10.5A21B, which is incorporated into those sections by reference, negate the entitlement to extra stories if the subject structure or portion thereof is being erected within 100' of the mean high water line. Those sections make it absolutely clear that if the structure or portion thereof is being erected within 100' of the mean high water line, it shall have no more than two stories. The provisions of sections 10.5A21.10 and -.20 being in conflict with sections 10.-

5A46.10 and .20 and being more restrictive than the latter in imposing a higher standard, prevail over the latter provisions. The three board members who voted to uphold the Planning Board's decision erred in concluding that the developers are entitled to erect a building (or portions thereof) having more than two stories in height at that location.

6. In this instance, the fact that the more restrictive provisions prevailed and that the developers were limited to two stories on their proposed building is buttressed by the Zoning Ordinance's strong public policy in favor of wetlands protection. See Zoning Ordinance §§ 10.1011, 10.1014.21. That policy prohibits all construction of new buildings and impervious surfaces within 100' of, inter alia, the North Mill Pond, unless the applicant can meet the highly restrictive criteria set forth in Zoning Ordinance § 10.1017.50 for the issuance of a wetlands conditional use permit. See Zoning Ordinance §§ 10.1013.40(c); 10.1014.23(2); 10.1016.10, -.20 (establishing a buffer zone of 100' around the perimeter of the North Mill Pond and forbidding the construction of new buildings or the installation of impervious surfaces within that zone unless a wetlands conditional use permit is applied-for and approved). The existence of this strong public policy (viz., of wetlands protection) leads ineluctably to the conclusion that sections 10.5A46.10 & -.20 of the ordinance, granting developers an extra story whenever their plan provides for community space and other enumerated benefits, must

give way to sections 10.5A21.10 & -.20, which impose a flat prohibition against buildings or portions thereof having more than two stories if constructed within 100' of the North Mill Pond.

7. The three members of this Board who voted to uphold the Planning Board's decision wrongly disregarded the expert testimony of Rick Chellman, himself a member of the Planning Board and a registered professional engineer who is licensed in 48 states; who is also licensed as a land surveyor in two (including New Hampshire); who has authored or co-authored nearly a dozen articles which have been published in professional journals and other scholarly works concerning those subjects; and who has testified as an expert witness on those topics in federal court and in the state courts of more than a half-dozen different states (including New Hampshire). Having no stake or interest in the developers' application or in the outcome of this appeal, other than vindication of the Zoning Ordinance, Mr. Chellman on his own initiative protested the Planning Board's vote (which was done over his dissent) to grant site plan approval to the subject project and to issue a wetlands conditional use permit, and he pointed out that section 10.5A43.43 of the ordinance is, indeed, the provision which controls, just as the appellants have insisted here. In New Hampshire it is well-established that a land use board is not free to ignore expert testimony. Condos East Corp. v. Town of Conway, 132 N.H. 431, 438, 566 1136, 1141 (1989). Mr. Chellman's credentials dwarfed those of the members

of the Planning Department who disagreed with his analysis, and his judgment should have been accepted. Three of the members of this Board erred in disregarding his opinion and refusing to adopt his interpretation.

8. This Board erred in refusing to entertain the appellants' appeal of that part of the Planning Board's decision in which it granted a wetlands conditional use permit to the applicants. It is crystal clear that the developer-applicants' plan did not comply with all of the requirements for the issuance of such a permit, as set forth in section 10.1017.50 of the Zoning Ordinance, for their plan was not "the alternative with the least adverse impact to" the wetlands buffer and the North Mill Pond, § 10.1017.50(5), and there was "[an] alternative location outside the wetland buffer that [was] feasible and reasonable for the [developers'] proposed use." § 10.1017.50(2).

For all of the foregoing reasons, the appellants respectfully request a rehearing on their appeal.



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CERTIFICATE OF SERVICE

The undersigned, Duncan J. MacCallum, Attorney for Appellants in the within proceeding, hereby certifies that on this 18th day of November, 2021, the foregoing 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:

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