



The Law Office of Scott E. Hogan

Phone: 603-969-1183

P.O. Box 57
Lyndeborough, New Hampshire 03082

hoganlaw@comcast.net

MOTION FOR REHEARING PURSUANT TO RSA 677:2

TO: Portsmouth Zoning Board of Adjustment (Zoning Board, Board, or ZBA)
FROM: Working Stiff Properties LLC ("WSP"), owner of real property located at 92-94 Pleasant Street
BY: Scott E. Hogan, Esq.
RE: ZBA Decision of March 18, 2025 re-approving the request of **PNF Trust of 2013, for property located at 84 Pleasant Street and 266, 270, 278 State Street**, regarding its variance request for additional height¹
DATE: April 17, 2025

COMPULSORY SECOND MOTION FOR REHEARING

On March 18, 2025 this Board re-approved the request of **PNF Trust of 2013, for property located at 84 Pleasant Street and 266, 270, 278 State Street**, regarding its variance request for additional height, as referenced above.

New Hampshire caselaw is clear regarding a party's obligation to file a second Motion for Rehearing after its initial Motion has been denied, "when the bases for aggrievement change

1

Following the Board's original November 19, 2024 decision on the Applicant's various variance requests, the Applicant's request for Variance 2(b) is, and has been the only remaining issue following from that decision. That request being for a fourth story addition at 50 feet in height to the Church street elevation where 3 full stories and a short fourth are allowed with 45 feet maximum height permitted.

following a ZBA's decision on rehearing". A new Motion for Rehearing raising such issues is required before an appeal challenging those new bases may be made. (see e.g. Dziama v. City of Portsmouth, 140 N.H. 542, 545 (1995); McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171, 174 (2005); Weiss v. Town of Sunapee, No. 2022-0309 (N.H. Aug. 23, 2023).

Per the New Hampshire Supreme Court:

"Whether the plaintiffs were required to file a second motion for rehearing to perfect their appeal to superior court is controlled by statute. McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171, 174 (2005).

RSA 677:3, I (2016). Thus, in order to perfect an appeal to the superior court, the statute requires that the appellant first move for rehearing with the ZBA within 30 days after the ZBA's decision. See RSA 677:2 (2016). That requirement, once met, vests the superior court with subject matter jurisdiction over the appeal. However, in such an appeal, "no ground not set forth in the application" for rehearing "shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds." RSA 677:3, I. By this plain language, the appellant is thereby limited in its appeal to the grounds set forth in the motion for rehearing unless good cause is shown why the court should allow additional grounds.

As we explained in Dziama v. City of Portsmouth, when the bases for aggrievement change following a ZBA's decision on rehearing, a new motion for rehearing raising such new issues is required before an appeal to the superior court challenging those new bases may be made. Dziama v. City of Portsmouth, 140 N.H. 542, 545 (1995). Otherwise, the court is limited to consideration of the errors alleged in the first rehearing motion. Id. Thus, in the absence of a second motion for rehearing allowing the ZBA the first opportunity to pass upon any alleged errors in its decision, the plaintiff has not preserved the new issues for appellate review. Id." Weiss v. Town of Sunapee, No. 2022-0309 (N.H. Aug. 23, 2023). (Emphasis added).

Thus WSP is obligated to file this second Motion for Rehearing, to preserve its rights to ultimately seek review of its initial issues, and the new, distinct issues presented by the Board's recent process and its March 18, 2025 re-approval, as discussed below.

MARCH 18, 2025 ZONING BOARD HEARING

New Issues:

- The configuration of voting members between the Board's original approval of variance relief requested by PNF Trust of 2013, and the Board's March 18, 2025 decision reaffirming the original approvals of 2b of the application, and specifically the new testimony and evidence from the Applicant and others, the new deliberations/bases/ and the ultimate different votes of Board members, based on those new issues presented by the Applicant and others during the 3-18-25 hearing.
- (e.g., When deliberating the hardship requirement at the 3-18-25 hearing one member noted their prior vote to approve, "but now" the configuration of the Applicant's configuration of its desired 17 units is larger. (The Applicant's desire for the 17 units is what motivates its request for the subject height variance).
- At the 3-18-25 hearing, the Applicant stated that it desired to 'recreate' the former, non-existent Times Building, *while acknowledging that it could comply with the Zoning Ordinance height requirement*. The Applicant described their "Times Building" issues, and their desire to "sync story heights" and elevators, etc., and without their requested design with extra height, they might not achieve their 17 units, as it would "bring the feasibility of the entire project in question". Additional

statements during the public hearing confirmed “No, it’s not necessary”, but “necessary to have the 17 units”, and the Applicant’s “desire” to “have the floors line up”.

- At the 3-18-25 hearing Board members discussed the current design and configuration of the 17 units motivating the request for additional height at 84 Pleasant Street, and also acknowledged that the additional height at 84 Pleasant Street isn’t necessary.
- After the 3-18-25 public hearing closed, the Board’s own deliberations included statements questioning whether the relief was necessary, specifically regarding hardship, and whether desiring to “recreate” the former nonexistent Times Building was a “Special Condition” of the property, and otherwise acknowledging that the Times Building could be ‘recreated’ without the need for relief for additional height. Member statements included, “I’m struggling with what is real hardship”, and “While they don’t need it, it lets them have 17 units”. “Not a hardship in my book.” “I voted {previously} to approve but now the configuration of the 17 units is larger”. “I don’t see hardship. They can recreate the Times Building without it”.

NEW ISSUE: PORTSMOUTH’S SEVEN MEMBER ZONING BOARD

New Hampshire law is clear that every municipal Zoning Board SHALL consist of five members:

“673:3 Zoning Board of Adjustment and Building Code Board of Appeals. –

I. The zoning board of adjustment shall consist of 5 members. The members of the board shall either be elected in the manner prescribed by RSA 669, or appointed in a manner prescribed by the local legislative

body. Each member of the board shall be a resident of the municipality in order to be appointed or elected.”

On March 18, 2025, three members of the Board voted to deny the request for additional height.

However, the City of Portsmouth Zoning Ordinance Section 10.230 (Zoning Board of Adjustment) has an ‘asterisk footnote’ on “Zoning Board of Adjustment” that states:

“By Act of the Legislature, the Portsmouth Zoning Board of Adjustment consists of 7 members and 2 alternates.”

The Ordinance does not provide any legal citation or reference for that proposition.

Given that, under-signed counsel contacted state reference librarians to determine the source of the un-cited authority in the Portsmouth Zoning Ordinance that allows the City’s Zoning Board seven members, when the law allows only five for other municipalities. The result of their research revealed a 1953 Act of the Legislature, specific to Portsmouth, as follows:

CHAPTER 342.

AN ACT RELATIVE TO THE BOARD OF ADJUSTMENT IN THE CITY OF PORTSMOUTH.

Be it enacted by the Senate and House of Representatives in General Court convened:

1. **City of Portsmouth.** The board of adjustment for zoning regulations in the city of Portsmouth shall consist of seven members. The term of office of each member shall be five years, provided that the two additional members of the board provided for by this section shall originally be appointed one to serve for one year and one to serve for three years. The two additional members as provided for herein shall be appointed as the members of the present board are appointed.

2. **Application of Laws.** Parts of section 57 of chapter 51 of the Revised Laws as are inconsistent with the provision of this act are superseded in so far as the board of the city of Portsmouth are concerned. Nothing herein shall be deemed to affect in any way the appointment or term of office of the members of the Portsmouth board of adjustment in office at the time this act takes effect.

3. **Takes Effect.** This act shall take effect upon its passage.
[Approved May 1, 1953.]

The Zoning Board's seven member configuration must comply with the original legislative authority granted above, including the original terms of appointment for additional members, and terms, since that time. This issue must also be considered by the Board in the context of new issues comprising the basis of this Second Motion for Rehearing.

CONCLUSION

For all the reasons stated above, this Second Motion for Rehearing is compulsory for WSP to pursue their right of appeal, and good cause has been shown, thus WSP respectfully

requests the Board to grant this Second Motion for Rehearing. The Applicant has not met its burden on each of the five mandatory variance requirements, and there is a fundamental question about the rare configuration and terms of the Board, and compliance with the specific authority given to it for such. The prior WSP Motion and its submissions and testimony to this Board are hereby incorporated by reference in this Second Motion for Rehearing.

Respectfully submitted,

Working Stiff Properties LLC

By its attorney,
THE LAW OFFICE OF SCOTT E. HOGAN

/s/ Scott E. Hogan

Scott E. Hogan, Esq.
P.O. Box 57
Lyndeborough, NH 03082
603-969-1183
hoganlaw@comcast.net
NH Bar ID#: 10542

CC:
Client
Trevor P. McCourt, Assistant City Attorney