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April 20, 2023

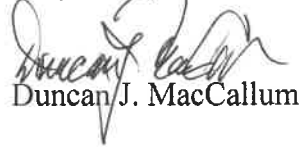
Peter Britz, Planning Director
City of Portsmouth
One Junkins Avenue
Portsmouth, New Hampshire 03801

Re: One Raynes Avenue

Dear Peter:

Enclosed is the appellants' Motion for Rehearing in connection with the above-reference project.

Very truly yours



Duncan J. MacCallum

DJM/eap

Enclosure

cc. Courtney H. G. Herz, Esquire
Brian Bouchard,, Esquire

HAND DELIVERED TO ADDRESSEE ONLY



THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

**In re Application of North Mill Pond Holdings, LLC,
One Raynes Ave, LLC, 31 Raynes Ave, LLC, and
203 Maplewood Ave, LLC, regarding the properties
located at 1 Raynes Avenue, 203 Maplewood Avenue,
and 31 Raynes Avenue, and known familiarly as**

The Raynes Avenue Project

MOTION FOR REHEARING

The appellants, James A. Beal, Fintan (“Finn”) Connell, Joseph R. Famularo, Jr., Philippe Favet, Charlotte Gindele, Julia Gindele, Linda Griebisch, Catherine L. (“Kate”) Harris, Roy W. Helsel, Elizabeth Jefferson, and Donna Pantelakos, respectfully move that this Board reconsider its decision of March 21, 2023 in connection with the above-referenced application, in which the Board declined to find that it had jurisdiction over the appellants’ appeal of the December 16, 2021 decision of the Portsmouth Planning Board, and that this Zoning Board of Adjustment conduct a rehearing thereon, on the grounds that this Board’s decision of March 21, 2023 was infected with procedural error and was erroneous on its merits. As facts in support of their motion, the appellants state the following:

1. One of the members of this Board, David Rheaume, improperly participated in the March 21, 2023 hearing and improperly participated in this Board’s vote to decline to find jurisdiction, doing so in circumstances in which he had a clear and obvious conflict of interest which

disqualified him from participating in the proceedings. Mr. Rheume's wife, Elizabeth Moreau, is both a Portsmouth city councilor and an ex officio member of the Planning Board. Not only did she participate in the Planning Board's December 16, 2021 proceedings and in its decision of that date to grant the applicants a wetlands conditional use permit, a parking conditional use permit, and site plan approval, all of which are the subjects of the appellants' complaints before this Board and before the Superior Court, but she was also one of the members of the latter Planning Board who voted in favor of granting all three of those forms of relief and, in fact, spoke in favor of it at the Planning Board hearing.

2. By virtue of the foregoing, Mr. Rheume was in a position of clear and obvious conflict for interest and was disqualified from sitting on the appellants' appeal and participating in this Board's decision thereon. Mr. Rheume, like the rest of the members of this Board and, more generally, the members of all other land use boards, is governed by the "juror standard." Although Mr. Rheume protested that the issue before this Board at the March 21, 2023 hearing was different from what the issues are in the usual case, and although he felt that he could segregate those issues in his mind and render an impartial decision on the issue of whether this Board has appellate jurisdiction over the issues raised in the appellants' appeal, the simple fact of the matter is that a vote to decline to exercise jurisdiction had the practical effect of upholding both the Planning Board's December 16, 2021 and his wife's vote in support thereof.

3. Although Mr. Rheume went through the charade of asking the other members of this Board for their input, seeking what amounted to a "vote of confidence" to validate his contention that he could remain impartial, this exercise was insufficient to vitiate the conflict of interest or to render his participation legitimate. Mr. Rheume stated at the very outset that he wished to participate in the hearing and that he believed that he could be impartial, and by asking for the

aforementioned “vote of confidence” he put the other members of the Board in an awkward and compromising position. Mr. Rheume and the other members of the ZBA work with one another on an ongoing basis and naturally have developed a certain rapport with one another and have established working, interpersonal relationships and mutual cooperation. Thus, the only way that the other members of the Board could object to his participation in the hearing and vote against his doing so was by potentially offending him and/or by impliedly impugning his judgment and his professed ability to be impartial, potentially damaging those interpersonal relationships. Despite this, two of the members of this Board were perspicacious enough to recognize the obviousness of the situation and voted “no” in the vote of confidence, anyway; and a third member, though ultimately giving his blessing to Mr. Rheume’s participation, was perceptive enough to raise concerns over the “appearance of impropriety” standard. See N.H. Supreme Ct. R. 38, Canon 1, R. 1.2 (judicial canons of ethics) (a judge should recuse himself in circumstances where, though he is personally convinced that he can remain unbiased and impartial, those circumstances are such that a detached, objective observer might view it differently and might reasonably question his impartiality).

4. The appellants also consider it to be highly unlikely that in the year and 3-4 months since the Planning Board’s December 16, 2021 decision was issued and the appellants took their appeal thereof, Mr. Rheume and his wife Ms. Moreau have not discussed the Planning Board’s December 16, 2021 decision between themselves, and even discussed the appellants’ appeal, whether during dinner table conversation or otherwise.

5. By virtue of all of the foregoing circumstances, Mr. Rheume improperly and illegally participated in the March 21, 2023 hearing on the appellants’ appeal before this Board and in the ensuing vote to decline to find that this Board had jurisdiction over the issues raised therein.

6. Further, the appellants, in the person of their undersigned counsel, immediately voiced their objection to Mr. Rheaume's participation in the proceedings at the very earliest opportunity, doing so just as soon as their counsel took the podium to speak, only moments after Mr. Rheaume had announced his decision not to recuse himself following the "vote of confidence" by the other members. Their undersigned counsel explicitly stated at the outset that Mr. Rheaume should have recused himself and that, further, "I do not consider it to be a close case." (Viz., that the fact that Mr. Rheaume should have recused himself was obvious.)

7. Finally, Mr. Rheaume was no mere, passive participant in the ensuing hearing and vote. He was active in the questioning of the parties' respective counsel, and he made forceful, substantive arguments in favor of a finding that this Board had no jurisdiction over the issues raised in the appellants' appeal. The practical effect of this was to support his wife's vote in favor of the Planning Board's December 16, 2021 decision granting the applicants two conditional use permits and site plan approval. Another effect of same was to deprive the appellants of one tier of appeal in a forum which they preferred, a forum whose members are actually familiar with the property which is the subject of the developers' application and with that property's setting, and who are reasonably familiar with the local Zoning Ordinance's provisions--unlike a Superior Court judge, who may or may not be familiar with that property, with its setting and surroundings, or with Portsmouth's Zoning Ordinance.

8. For all of these reasons, the proceedings were infected with procedural error from the very outset. Given his marital relationship with Ms. Moreau, Mr. Rheaume was required to recuse himself, and he participated in the proceedings unlawfully.

9. Under the teachings of the New Hampshire Supreme Court's decision in the familiar case of Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984), Mr.

Rheume's participation in this Board's proceedings and decision of March 21, 2023 in the above-captioned matter renders that decision absolutely void, and this Board is required to conduct a rehearing. In the Winslow case, the court ruled that the participation of an ineligible member in a land use board's deliberations and vote voids its decision entirely, and this is so even though there may have been more than enough members voting in favor of the decision even after disregarding the ineligible member's vote. In the Winslow case, the court ruled that the participation of a single ineligible member in a land use board's decision invalidates the entire decision because "it [is] impossible to estimate the influence one member might have on his associates". 125 N.H. at 268, 480 A.2d at 117. Therefore, even though in this instance this Board's vote to render a finding of no jurisdiction over the appellants' appeal was unanimous, its finding and decision are absolutely void, and a rehearing is required.

10. Other errors in the proceedings included the following:

11. This Board erred in finding that it lacked jurisdiction to void the Planning Board's decision of December 16, 2021 because of the unlawful participation and vote by an ineligible member, Raymond Pezzullo, in the Planning Board's decision of that date. It is to be remembered that except for a small handful of narrow exceptions (such as the granting or denial of conditional use permits), the ZBA's appellate review of Planning Board decisions is de novo. Ouellette v. Town of Kingston, 157 N.H. 604, 608-12, 956 A.2d 286, 290-93 (2008); 15 Peter J. Loughlin, New Hampshire Practice: Land Use Planning & Zoning § 33.02 n.10 (4th ed. 2010 & Supp. 2020). The Zoning Board of Adjustment has plenary appellate authority over all administrative decisions pertaining to zoning. It may overturn decisions and orders of the Planning Board, the Historic District Commission, Conservation Commission, the building inspector, the code enforcement officer, and even the city manager, if the order or decision in question relates

to zoning. Pursuant to its power of de novo review, it may on its own initiative correct any irregularity error or misapplication of the provisions of the Zoning Ordinance, and it may void any approval or determination which is in conflict with one of its own prior decisions (as was done by this Board in the case of the 105 Bartlett Street project), even if the error or conflict is not brought to its attention by one of the parties. It would be incongruous in the utmost if, pursuant to its power of de novo review, this Zoning Board of Adjustment could regularly overturn decisions of all other land use boards and administrative officials for misinterpretation and/or misapplication of the Ordinance's provisions, but could not entertain the question of whether a putative land use board member who regularly interprets and applies those provisions was lawfully appointed to such a board and was sitting on it legally. It would be even more incongruous if the ZBA could not overturn a land use board decision that was illegally made because an ineligible member helped make it.

12. For the reasons amply set forth in the appellants' appeal document (but which this Board did not reach on the merits), Mr. Pezzullo was not properly or lawfully appointed as a member of the Portsmouth Planning Board, for he was appointed pursuant to a provision in Portsmouth's local Administrative Code which directly conflicts with a New Hampshire state statute. Therefore, the pertinent provision of the local Administrative Code is void, and he was ineligible to sit on that board. Moreover, as the appellants pointed out in their original appeal document, the manner of appointing the ex officio member to the Planning Board seat formerly held by Mr. Pezzullo (who has now resigned from that board) creates an obvious conflict of interest, in that as a practical matter it effectively gives the city manager two votes on that board, whereas the members properly appointed by the mayor and confirmed by the City Council each only have one. The ex officio member appointed by the city manager is a city employee, who is

beholden to the city manager for his or her job. The city manager has the power of hiring and firing over him or her, and therefore the appointee is unlikely to exercise independent judgment and, in particular, is highly unlikely to vote in a manner which is likely to displease the city manager or is at variance with the city manager's vote.

13. As the appellants have already pointed out in connection with the disability of ZBA member David Rheume to serve with respect to this particular application, the participation of an ineligible or unlawfully appointed member to the Planning Board or other land use board renders that board's decision absolutely void under the New Hampshire Supreme Court's holding in Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984). This Board of Adjustment should have overturned the Planning Board's decision of December 16, 2021 because of Mr. Pezzullo's unlawful involvement, and it has jurisdiction to entertain the appellants' appeal now.

14. This Board erred in failing to accept jurisdiction over the appellants' appeal of the Planning Board's decision to grant site plan approval, particularly in connection with the developers' parking plan. Sections 10.1112.30, -.40, and -.50 of the Zoning Ordinance set forth the minimum requirements for both on-site and other off-street parking. It was and is undisputed that given the huge number of residential units which the applicants' buildings would comprise, the total number total of on-site parking spaces would be grossly inadequate to meet the Zoning Ordinance's requirements, and that the other off-street parking spaces would be inadequate to make up the difference. Section 10.1112.40 of the Zoning Ordinance provides for the establishment of "reserve parking areas". It states:

When Section 10.1112.30 requires the provision of 20 or more **off-street parking** spaces, the Planning Board may approve the construc-

tion of fewer **off-street parking** spaces than required, subject to the following:

- 10.1112.41 A “Reserve Parking Area” shall be designated that is sufficient to accommodate the difference between the number of spaces required and the lesser number actually provided.
- 10.1112.42 The site plan shall clearly delineate the Reserve Parking Area and shall demonstrate that it is sufficient to accommodate the additional parking spaces in accordance with the requirements of this Section.
- 10.1112.43 The Reserve Parking Area shall be landscaped with grass, ground covers and/or other plant materials, but shall not be counted toward any minimum **open space** requirement.
- 10.1112.44 The Reserve Parking Area shall not be used as snow storage area and shall not contain any **structure** or mechanical equipment.

15. The applicants’ plan did not meet these requirements. In lieu of the lack of a “reserve parking area,” the applicants proposed to make up the difference by providing valet parking. However, their plan for valet parking was unsupported by documentation and plainly inadequate, and it left many unanswered questions. Chief among these was that in the event that the property or properties were sold to some third party in the future, it was never settled who was going to be responsible for paying for valet parking in perpetuity and who was going to be responsible for enforcing the stipulation that such valet parking be provided. The developers’ plan being lacking in adequate documentation, it was also clear how many off-site valet parking spaces had been reserved, and for how long. This Board had jurisdiction to address these questions, and it should have done so.

16. Another unanswered question (though not mentioned by the appellants until now) relates to the fact that one or more of the sites composing the applicants’ project is believed to be

contaminated with hazardous waste, and the New Hampshire Department of Environmental Services has not yet evaluated them with a comprehensive public risk assessment. Whether these sites are safe for human occupation is an open question. It is the appellants view, shared by least one or more members of this Board, that the developers' application was rushed through to approval in the Planning Board, and site plan approval should not have been given until that assessment was done and these questions were answered.

WHEREFORE, the appellants respectfully pray that the Board conduct a rehearing on the question(s) committed to it by the Superior Court of Rockingham County, namely, whether this Board has jurisdiction to entertain any of the issues raised by the appellants in their appeal of the December 16, 2021 decision of the Portsmouth Planning Board.



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Attorney for Appellants

Dated: April 20, 2023

STATE OF NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

**In re Application of North Mill Pond Holdings, LLC;
One Raynes Ave, LLC; 31 Raynes Ave, LLC; and 203 Maplewood Ave, LLC,
regarding the properties located at 1 Raynes Avenue, 203 Maplewood Avenue,
and 31 Raynes Avenue, and known familiarly as The Raynes Avenue Project**

OBJECTION TO MOTION FOR REHEARING

The Appellants' Motion for Rehearing should be denied for two reasons. First, the Appellants are incorrect when they argue that Board Member David Rheame should have recused himself. Second, the Board properly determined that it lacks jurisdiction over the issues appealed—and Appellants' Motion offers no compelling argument to the contrary.

Mr. Rheame Was Not Required to Recuse Himself

As Mr. Rheame properly noted prior to the Board's consideration of the instant appeal, the issue before the Board on March 21, 2023, was not the correctness of any decision of the Planning Board, but rather whether the issues brought on appeal were properly before the Board (as dictated by statute). Appellants' only articulated reason for arguing that Mr. Rheame should have recused himself is that his wife was a member of the Planning Board that issued the decision being appealed. However, the Board was not considering the *propriety* of the Planning Board's actions. Mr. Rheame noted at the meeting that, if the Board were undertaking a substantive consideration of the appeal, he would recuse himself. But, given that the only issue before the Board was whether the Board had jurisdiction over the issues raised in the appeal, Mr. Rheame's familial relationship with a Planning Board member is of no moment.

New Hampshire law provides clearly that Mr. Rheame needed only to have recused himself if he "would be disqualified for any cause to act as a juror upon the trial of the same

matter in any action at law.” RSA 673:14, I.¹ Jurors, in turn, are ineligible to sit in trial of a matter if they are “not indifferent.” RSA 500-A:12, II; see also Taylor v. Town of Wakefield, 158 N.H. 35, 39 (2008) (explaining that the statute does not even require the automatic recusal of employees [or relatives] of *parties* in a case; rather recusal is necessary only if the jurors are “not indifferent”). Here, not only is Mr. Rheume not even a relative of a party, Appellants have offered no “evidence” that his relationship with a Planning Board member should result in recusal on the procedural issue considered by the Board other than to speculate that the couple may have discussed this particular matter “during dinner table conversation or otherwise.” Motion at ¶4. Such unsupported speculation certainly does not establish that Mr. Rheume is “not indifferent.”

The Winslow case does not support Appellants’ position. Rather, in that case, the planning board member at issue, prior to becoming a member of the board, had spoken at a planning board meeting in favor of the very project that was at issue. Winslow v. Holderness Planning Bd., 125 N.H. 262, 265 (1984). In fact, *each party* in that case acknowledged that the member should have been disqualified because it was undisputed that he “had prejudged the facts of the case before joining the board.” Id. at 267. Here, by contrast, there is no evidence that Mr. Rheume had prejudged even the substantive issues raised by Appellants’ appeal, let alone the jurisdictional issue that had nothing to do with the Planning Board’s actions and concerned only the jurisdiction of the Board as established by statute.

Appellants additionally complain that Mr. Rheume requested that the Board take an advisory vote as to whether he should recuse himself. See Motion at ¶3. Yet, that is exactly the procedure dictated by statute. RSA 673:14, II (“When uncertainty arises as to the application of

¹ Appellants do not argue that the other portion of the statute (concerning members with a “direct or pecuniary interest in the outcome which differs from the interest of other citizens”) applies to Mr. Rheume.

paragraph I to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.”).

Appellants are grasping at straws in their argument that Mr. Rheume should have recused himself, and the Board should not grant a rehearing based on such a deficient argument.

The Board Properly Determined that it Lacked Jurisdiction Over the Appeal

RSA 676:5, III, articulates which decisions of planning boards must be appealed to the Zoning Board of Adjustment:

If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination ***which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided,*** however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board’s decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.

(emphasis supplied). Contrary to comments made during the March 21, 2023 hearing, the Board does not have general jurisdiction over all site plans approved by the Planning Board. To the contrary, this Board is vested with appellate jurisdiction *only when* the issue being appealed from the Planning Board involved a determination based upon the terms of the Zoning Ordinance or the interpretation of the Zoning Ordinance. See id. All other appeals from the Planning Board are taken directly to the Superior Court. RSA 677:15, I. The only issue before this Board on

March 21 was whether any of the questions raised by Appellants' appeal were of the type required by RSA 676:5, III to be appealed to the Zoning Board of Adjustment (i.e., those questions that involved interpretation of the Zoning Ordinance, and other than certain innovative land use controls). The Board correctly determined that none of the issues raised by Appellants did so.

While the Appellants raised six issues in their Appeal, and the Board voted separately on each of those issues, Appellants' Motion for Rehearing only alleges that two of those votes were in error (plus an additional issue that they acknowledge they had "not mentioned ... until now" (Motion for Rehearing at ¶16)). The Motion for Rehearing does not claim that the Board erred when it concluded that it lacked jurisdiction over the issues raised in paragraphs 8 through 10 of Appellants' January 14, 2022, Appeal of Decision of Portsmouth Planning Board (the "Appeal") (regarding Wetlands Conditional Use Permits), paragraph 11 of the Appeal (regarding the Historic District Commission), paragraph 12 of the Appeal (regarding the Conservation Law Foundation), and paragraph 13 (regarding the Conservation Commission). As detailed below, the Appellants are incorrect when they argue that the Board incorrectly determined that it lacked jurisdiction over the Appellants' other arguments as well.

First, the Board correctly determined that the issue raised in paragraphs 1 through 7 of the Appeal, related to whether an ineligible person participated in the Planning Board's deliberations and votes, was not appealable to the Board. The composition of the Planning Board is a matter of state law and Portsmouth's Administrative Code, and is not governed in any way by the Zoning Ordinance. This fact is reinforced by the fact that the portion of Appellants' Motion for Rehearing dealing with this issue does not cite a single provision of the Zoning Ordinance.

Motion for Rehearing at ¶¶11-13. The Board properly determined that it lacked jurisdiction over Appellants' arguments on this issue.

Next, the Motion for Rehearing challenges the Board's decision that the parking issues raised in paragraph 11 of the Appeal were not within the Board's jurisdiction. The *full* text of the Appeal related to parking stated:

More generally, there were many other unanswered questions which came to light during the December 16, 2021 hearing, and the Planning Board should have waited until they were resolved. For example, it was never settled who was going to be responsible for paying for valet parking in perpetuity and who was going to be responsible for enforcing the stipulation that such value parking be provided, as the existing on-site parking provided-for by the developers' plan was and is admittedly inadequate.

Appeal at ¶11. The Appeal cited no provision of the Zoning Ordinance that required such "unanswered questions" to be answered and, indeed there is none. Nor did Appellants' attorney cite any provision of the Zoning Ordinance during his presentation to the Board on March 21, 2023. Now, *for the first time*, in the Motion for Rehearing, Appellants cite a section of the Zoning Ordinance concerning "reserve parking areas." See Motion for Rehearing at ¶14. As an initial matter, even the Ordinance section cited by the Motion for Rehearing (Section 10.1112.40) is completely incongruent with what Appellants appealed back in January 2022. Section 10.112.40 regulates "reserve parking areas" when fewer than the required off-street parking spaces are provided. It does not require information about who will pay for valet parking or who will enforce a stipulation regarding valet parking, which were the only issues raised by the Appeal. Appellants cannot rewrite their Appeal a year and a half after it was filed.

More fundamentally, however, questions about Section 10.112.40 are beyond this Board's purview. The applicants sought and obtained a Conditional Use Permit from the Planning Board pursuant to Section 10.1112.14 to allow a project to have fewer than the

minimum number of off-street parking spaces otherwise required. As RSA 676:5, III makes plain (and as Appellants have admitted), this Board does not have jurisdiction over appeals related to Conditional Use Permits over which the Planning Board has exclusive jurisdiction. In short, to the extent the Ordinance's parking provisions were appealed at all, the applicable provisions relate to Conditional Use Permits, which are not appealable to this Board.

Finally, the Appeal raises the brand-new argument that the Appellants "believe[]" the site may be contaminated with hazardous waste and they are unsure whether it is "safe for human occupation." Appeal at ¶16. Not only is this an issue never before raised, but Appellants do not even make an effort to connect their argument to the Zoning Ordinance. Thus, even if the issue were properly preserved, it is not one that is appealable to this Board. It certainly does not provide any proper justification for a rehearing of the Appeal.

WHEREFORE, the Applicants respectfully request that the Portsmouth Zoning Board of Adjustment deny Appellants' Motion for Rehearing.

Respectfully submitted,

**North Mill Pond Holdings, LLC;
One Raynes Ave, LLC;
31 Raynes Ave, LLC, and
203 Maplewood Ave., LLC**

By their counsel,

Sheehan Phinney Bass & Green, PA

Dated: May 31, 2023

By: /s/ Brian J. Bouchard
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CERTIFICATE OF SERVICE

I certify that on the above-referenced date, the foregoing was forwarded via email to Assistant City Attorney Trevor McCourt and Attorney Duncan MacCallum.

By: /s/ Brian J. Bouchard
Brian J. Bouchard