

# CITY OF PORTSMOUTH

## LEGAL DEPARTMENT

### MEMORANDUM

DATE: July 20, 2021  
TO: ZONING BOARD OF ADJUSTMENT  
FROM: ROBERT P. SULLIVAN, CITY ATTORNEY *RPS*  
RE: APPEAL OF DECISION OF PORTSMOUTH PLANNING BOARD  
105 BARTLETT STREET

---

This memorandum is intended to supplement an earlier memorandum dated July 14, 2021 to the Board regarding the captioned matter. That earlier memorandum essentially concluded that as a matter of procedure the BOA should handle this appeal of a Planning Board decision as though it were an appeal from the decision of an administrative officer. Subsequent to the receipt of that memorandum, the Board has sought some additional guidance in implementing that recommendation. This memorandum is that guidance.

The problem which has generated the request of the Board for additional guidance is the extreme complexity and the technical nature of the documents which have been filed with the Board by both the appealing party in this case and the Intervenor. The Intervenor's pleading, for example, is 18 pages long with legal citations which must run into the hundreds. Legal writings of this nature are, frankly, beyond the reasonable expectation of a volunteer citizen administrative board to handle, especially during the course of an agenda containing numerous other items of business.

With the foregoing in mind, it is my suggestion that at the hearing of the case, the Board of Adjustment focus entirely on the authority granted to it by statute to hear the appeal. Specifically, RSA 676:5 III provides the Board in this case to hear an appeal from the Planning Board when that Board has made:

"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 ... ."

It is my recommendation that the Board focus entirely on the foregoing language and not attempt to address any issues raised by the filings in the case which exceed the scope of that language. Therefore, the Board should not attempt to determine such items as the validity of the conditional use permit provisions of the ordinance (appeal item IX); whether the project was the product of unlawful spot zoning (appeal item VIII); the jurisdiction of the Board (Intervenor's

item I), or whether the Board is the proper forum to seek an invalidation of an innovative land use control ordinance (Intervenor's item D). Rather, the Board should limit its consideration to items which specifically fall within the statutory language written above.

If the Board takes this recommended action, then it will lead to the automatic resolution of many of the complex legal questions raised in the filings of the parties. To the extent that any of those issues are not resolved by actions of the Board, the technical, legal issues will move to a more appropriate forum for their resolution, the court system.

cc: Juliet T.H. Walker, Planning Director  
Duncan MacCallum, Esq.  
Michael Ramsdell, Esq.